IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

CICA (Civil) No.16 /2013
Cause No. FAM 180/2011

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

BETWEEN

NAOMI LYN BARAUD

Petitioner/Appellant

and

STEFAN CHRISTOPHE DION BARAUD

Respondent

Ms Francesca Dowse of Samson & McGrath appeared for the Petitioner/Appellant, Naomi Lyn Baraud

Mr Nicholas Cusworth QC instructed by Karin M. Thompson appeared for the Respondent, Stefan Christophe Dion Baraud

Hearing: 26 July 2013
Judgment: 26 July 2013
Reasons for Judgment released: 21 October 2014

REASONS FOR JUDGMENT

Sir John Chadwick, President:

1 This is an appeal from the order made on 6 June 2013 by Justice Williams in ancillary relief proceedings brought by Naomi Lyn Baraud (to whom I shall refer as "the mother") against Stefan Christophe Dion Baraud ("the father"). The judge dismissed the mother's application to remove the two children of the marriage (who were then aged five and four years) permanently from the jurisdiction of the Cayman Islands Courts. The mother appealed; pursuant to an order made by Justice Williams on 21 June 2013. Her appeal

came on for hearing before this Court on 27 July 2013. At the conclusion of that hearing this Court indicated that it would dismiss the appeal; for reasons that it would put in writing and deliver in due course.

2 The father and the mother were married on 22 December 2008. The father is a Caymanian national: at the date of the marriage he was aged 33 years or thereabouts. The mother is a United States national; at the date of the marriage she was aged 24 years or thereabouts. At the date of the marriage they had one child, a boy – to whom I shall refer as C (as did the judge) - who had been born on 14 May 2007. Very shortly after the marriage, on 26 December 2008, a second child, a girl – to whom I shall refer as K - was born to them. Both children were born in the Cayman Islands; and have since resided here.

3 On 11 August 2011 the mother filed a petition for divorce. At an *ex parte* hearing on 12 August 2011 Justice Henderson made an order giving interim care and control of the children to the mother. At an *inter partes* hearing on 18 August 2011 Justice Quin confirmed the order for interim care and control; he ordered that the Cayman Islands be deemed to be the country of residence of the children for the purposes of the Hague Convention for the Prevention of the Abduction of Children; and he directed, by consent, that the children be not removed by either party from the jurisdiction of the Cayman Islands' Courts without the written consent of the other party or an order of the Court. On 22 September 2011 an interim order was made that the father pay spousal and child maintenance. The father decided not to contest the petition for divorce; which was formally proved on 28 September 2011.

4 It was in those circumstances that the mother applied, by application dated 28 September 2011, for leave to remove both children permanently from this jurisdiction. Her intention was that, from the summer of 2013 (after the end of the school year) she and the children should relocate to Florida. That application was opposed by the father; on the grounds that removal of the children from the Cayman Islands would not be in the best interests of the children.

5 The application came on for hearing before Justice Williams over four days in December 2012. At the conclusion of that hearing he gave the parties the opportunity to submit written closing submissions. Those were received on 21 and 24 December 2012. As I

have said, the judge dismissed the application. He did so for reasons set out in a written judgment dated 10 April 2013.

The grounds of appeal

6 The mother appealed to this Court by notice dated 27 June 2013 and subsequently amended on or about 3 July 2013. She relied on six principal grounds:

(1) That the judge failed adequately or sufficiently to conduct the balancing exercise when reaching his conclusion as to what course of action would best reflect the welfare and best interests of the children.

(2) That, in conducting the balancing exercise, the judge placed disproportionate and overwhelming weight on the detriment to the father and the adverse impact of the permanent removal of the children on his relationship with them.

(3) That the judge failed to give any or any sufficient weight to the children's immediate, short, medium and long term financial needs. Particulars of the matters relied upon in support of that ground were set out under six sub-paragraphs, to which I shall need to refer later in this judgment.

(4) That the judge failed to give any or any sufficient weight to the father's historic conduct during the proceedings. Again, particulars of the matters relied upon in support of that ground were set out under sub-paragraphs, to which I shall need to refer.

(5) That the judge placed overly optimistic and unsupported weight on the future conduct of the father's family in the light of their historic conduct.

(6) That the judge failed to attribute sufficient weight to the psychological and emotional impact of the refusal of her application on the petitioner; and the detrimental impact which this would have on her ability to care for the children.

It is said that, in those respects, the judge erred in fact and in law.

The judge's approach to his task

7 At paragraph 63 of his judgment, the judge directed himself that these were "pending proceedings" for the purposes of the Children Law (2012 Revision); and that, accordingly, in determining the application the relevant statutory provision to which he was required to have regard was section 19 of the Guardianship and Custody of Children Law 1996. The judge set out the terms of that section:

> "Where in any proceeding before any court the custody or upbringing of a child is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right in common law possessed by the father, in respect of such custody, upbringing, administration or application as appear (*sic*) to that of the mother, or claim of the mother's appear to that of the father."

8 The judge then explained (at paragraph 64 of his judgment) that it was submitted on behalf of the mother that this was "a classic primary care/relocation case"; and that the court should follow the approach in *Payne v Payne* [2001] EWCA Civ 166; and should not follow the later decision of the Court of Appeal of England and Wales in *K v K (Relocation: Shared Care Arrangements)* [2011] EWCA Civ 793.

9 In *Payne v Payne* (*supra)* Lord Justice Thorpe had said this:

> "[26] In summary a review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions: (a) the welfare of the child is the paramount consideration; and (b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.
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> . . .
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> [32] Thus in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability."

Lord Justice Thorpe went on to suggest a disciplined approach to the findings a judge will need to make in cases of this nature. He said this:

> "[40] However there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption then there would be an obvious risk of the breach of the respondent's rights not only under Article 8 but also his rights under Article 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:
>
> > (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
> >
> > (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the

> child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
> (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
> (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.
>
> [41] In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor."

10 The judge referred (at paragraphs 65 to 77) to decisions of the Cayman Islands Courts in relocation cases: in particular, to the decisions of Justice Henderson in *Martinez v Arch* [2003 CILR note 20] and Justice Quin in *MB v JB (99/2009).* In the latter case Justice Quin had set out the passages from *Payne v Payne* (*supra*) to which I have already referred. Justice Quin also referred to – and set out passages from - the judgment of Mr Justice Mostyn in *Re AR* [2010] EWHC 1346 (Fam). The judge concluded (at paragraph 77 of his judgment) that:

> "77 It is evident that Quin J was guided by the relevant questions set out in ***Payne,*** the dicta of Mostyn J in ***Re AR,*** the paramountcy principle in the welfare checklist when considering the exercise of his duty under section 19 of the Guardianship and Custody of Children Law 1996. It appears that Quin J, although considering the concerns of Mostyn J in ***Re AR,*** still adopted the approach in previous local case authorities and applied the discipline enunciated by Thorpe LJ in ***Payne "***

11 The judge then went on to consider whether, in the light of subsequent decisions of the Court of Appeal of England and Wales, he, too, should follow the approach indicated by the "discipline" which Lord Justice Thorpe had suggested in *Payne.* He said this (at paragraph 78 of his judgment):

> "78 The seeds of disquiet concerning a rigid approach to the applicability of the guidance in Payne sown in decisions such as ***Re AR*** have again started to take root in some recent decisions; decisions which have been made after Quin J's ruling in ***MB v JB***. Mr Cusworth QC [counsel for the father] in his closing submissions contends that the previously divergent lines of authority have resolved themselves, as evidenced by the approach of Munby LJ in ***Re F (Child: International Relocation)*** [2012 EWCA 1364"

12 The judge cited extensively from the judgment of Lord Justice Munby in *Re F* (a judgment with which the other members of the Court, Lord Justice Pill and Lord Justice Toulson had agreed). It is, I think, unnecessary for me to set out the whole of his citation

again in this judgment. It is enough to refer to the following paragraphs in the judgment in *Re F*:

> "[29] The starting point now must be *K v K*. Its central message is conveyed, succinctly and accurately, in the headnote in the Law Report:
>
> > 'That the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations however powerful and reasonable they might be; that guidance given by the Court of Appeal as to factors to be weighed in search of the welfare paramountcy and which directed the exercise of the welfare discretion was valuable in so far as it helped judges to identify which factors were likely to be the most important and the weight which should generally be attached to them and promoted consistency in decision-making; but that (per Moore-Bick and Black LJJ), since the circumstances in which such decisions had to be made varied infinitely and the judge in each case had to be free to decide whatever was in the best interests of the child, such guidance should not be applied rigidly as if it contained principles from which no departure were permitted'.
>
> I need quote only what Thorpe LJ said (paragraph [39]):
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> > '. . . the only principle to be extracted from *Payne v Payne* is the paramountcy principle. All the rest, whether in paragraphs 40 and 41 of my judgment or in paragraphs 85 and 86 of the President's judgment is guidance as to factors to be weighed in search of the welfare paramountcy.'
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> . . .
>
> [37] In *K v K* there was a shared residence order. The mother sought to relocate to her country of origin. The importance of *K v K* for present purposes is its emphasis that even where the applicant is a primary carer there is no presumption in favour of the applicant. That, after all, was hardly new. As was pointed out in *K v K* both Thorpe LJ and the President had made this clear in *Payne v Payne*. As Black LJ said (paragraph [143]):
>
> > '… the effect of the guidance must not be overstated. Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe LJ said so in terms in *Payne* and it is not appropriate, therefore, to isolate other sentences from his judgment, such as the final sentence of paragraph 26 ('Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children') for re-elevation to a status akin to that of a determinative presumption.'
>
> There can be no presumptions in a case governed by section 1 of the Children Act 1989. From beginning to end the child's welfare is paramount, and the evaluation of where the child's best interests truly lie is to be determined having regard to the 'welfare checklist' in section 1(3).
>
> . . .

> [40] Following a careful analysis of the authorities, Black LJ continued in this important passage (paragraphs [141]-[142]):
>
>> '[141] The first point that is quite clear is that … the principle – the only authentic principle – that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.
>>
>> [142] Whilst this is the only truly inescapable principle in the jurisprudence, that does not mean that everything else – the valuable guidance – can be ignored. It must be heeded … but as guidance not as rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable.'
>
> [41] She continued (paragraph [144]):
>
>> '*Payne* therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case. I do not see Hedley J's decision in *Re Y* as representative of a different line of authority from *Payne*, applicable where the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the framework of which *Payne* is part. It exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case.'
>
> . . .
>
> [43] As I read his judgment, Moore-Bick LJ, with whom Black LJ explicitly agreed on this part of the case, was of the same view as her: see in particular paragraph [86] where he said:
>
>> 'Guidance of the kind provided in *Payne v Payne* is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child.'"
>
> [44] On this point, therefore, the correct approach is that of the majority, that is to say Moore-Bick LJ and Black LJ.
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> . . .
>
> [61] The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regard to the 'welfare checklist', though of course also having regard, where relevant and helpful, to such guidance as may have been given by this court."

13 After setting out those passages in the judgment of Lord Justice Munby in *Re F* (*supra)* – which, themselves, contain extensive citation from the judgments of Lord Justice Moore-

Bick and Lady Justice Black in the earlier decision of the Court of Appeal in *K v K* (*supra*) – the judge said this (at paragraphs 85 and 86 of his judgment):

> "85 The clear message being sent out by Munby LJ is that the child's welfare is the paramount principle to be applied in applications to permanently relocate. To do this the Court should consider all the factors, whether they were or were not contained in the guidance in ***Payne v Payne***, in reaching a decisions as to what is in the child's best interests. The decision appears to be advocating a single approach to all relocation cases, in which the Payne factors may apply to all cases, albeit with varying weight. Due to the very recent nature of this decision it may be too early, in the absence of what would be a most welcome ruling from the Supreme Court, to conclusively state that there exists in England and Wales an unquestionable single analytical framework for all relocation disputes. Munby LJ was rightly stressing that each case is different and that the court must not seek to categorise the case in the manner sought by Ms Dowse [counsel for the mother].
>
> 86 I am satisfied that Munby LJ's approach, in a judgment in which he summarized the entire jurisprudence, is timely and shows the right way forward."

14 The judge then set out five principles which, in his view, could be derived from the authorities to which he had referred. He said this (at paragraphs 88 to 92 of his judgment):

> "88 The first and overriding principle must be that the child's welfare is paramount, it takes precedent over any other consideration.
>
> 89 The next principle is that the Court should have regard to the guidance handed down in case law when considering what factors are to be weighed when determining what is in the child's best interests. It is important to note that the guidance should no longer be confined by labels given to the category of care. This means that a judge may consider the Payne guidance, to an extent that he may determine to be relevant to the particular facts of the case, even in what may be termed a shared care case. Attorneys and judges should avoid detailed classification in relocation cases and hearing should not get bogged down in taxonomical arguments or preliminary skirmishes as to what characterization should be applied to the case by virtue of the time spent with each parent or other aspects of the care arrangements.
>
> 90 When the Court considers the guidance the following questions, in a case such as this involving an application made by the mother, should ordinarily be raised and addressed:
>
> (i) Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
>
> (ii) Is the father's opposition motivated by a genuine concern for the future of the child's welfare or is it driven by some ulterior motive?
>
> (iii) What would be the extent of the detriment to the father and his future relationship with the child were the application granted?

(iv) To what extent would the detriment to the father if the application were granted be offset by extension of the child's relationship with the maternal family and, if applicable, homeland?

(v) Is the mother's application realistic and founded on practical proposals well researched and investigated?

(vi) What would be the impact on the mother of a refusal of her realistic proposal? The weight placed on this will increase if the child resides with the mother.

91 Another principle arises from the fact the circumstances in each case vary infinitely and therefore the Court should not be unduly fettered in its approach when deciding whatever is in the best interests of the child. The Court should regard the guidance, which can promote consistency, as helpful in determining the best interests of the child but not feel that it has to be applied rigidly.

92 Finally, there is no legal principle, or even legal or evidential presumption, in favour of an application to relocate by a primary carer."

And he concluded:

"93 In the matter before me, as in all such cases, there is no presumption in favour of the applicant mother. I will have to consider and weigh up all of the factors contained in the evidence before me. When reviewing the evidence I will have to consider the principles to which I have alluded above. As I consider each part of the evidence, apply the principles and consider guidance which has been given, I have in mind that the overreaching matter for determination is what is in the best interests of [the children]. In applying the paramountcy principle I have regard to the factors mentioned in the welfare checklist."

The findings made by the judge

15 In a section of his judgment headed "The Mother and Father's Financial Position and the Mother's Immigration Status" (paragraphs 95 to 124), the judge made the following findings:

(1) That the mother's concern as to her ability to remain and work in the Cayman Islands was not well founded: it was very likely that she would be able to extend the Residency and Employment Right Certificate ("RERC") which had been granted to her as the wife of a Caymanian. The judge said this (at paragraph 101):

> "101 I am satisfied that the mother would, if she pursued an application and diligently, especially as it would have the support of the father, be able to remain in the jurisdiction and would not be restricted in the employment market for immigration reasons".

(2) That the mother was being unduly pessimistic about her employment prospects in the Cayman Islands (paragraphs 102 to 105).

(3) That the mother had been struggling financially paragraph 106; and that;

> "106 . . . her financial difficulties had primarily come about due to the fact that the father has failed to fully comply with a court maintenance order, especially at a time when the mother has a low income from her employment".

(4) That the non-payment of the children's school fees had been "a long standing issue causing great concern to the mother" (paragraph 107); but that, in the course of the hearing, the outstanding arrears had been paid by the paternal grandfather (paragraph 108) The judge was satisfied that, for the future the children's school fees would be met. He said this (at paragraph 109):

> "109 At the hearing, the paternal grandmother made it clear that she would ensure that hereafter school fees were paid, by taking on the responsibility to pay them. Although the payment of such fees is primarily the responsibility of the parents, I have no good reason to question the veracity of the paternal grandmother's statement. I am satisfied that the fees will be paid by the paternal side of the family and that the children will be able to remain in private school here."

(5) That at the time that the application to relocate was made (in September 2011) the family's finances had been in a healthier state than they were at the time of the hearing (paragraphs 110). In particular, (i) the father had been ordered to pay interim child/spousal maintenance of CI$5,692 per month and (ii) there had been a sum of around CI$180,000 in a deposit account operated by the father. But, as the judge put it (*ibid*):

> "110 . . . matrimonial assets had been and were being devoured up by the manner in which the parties chose to litigate the breakdown of their marriage. Regrettably the bulk of the contents in the deposit account, which has now been exhausted, has not benefitted the parties and the children but gone towards legal fees amassed over many months."

And, after commenting adversely on the father's unilateral decision to reduce the amount of the interim spousal/child maintenance (notwithstanding that an application to vary the order which he had made to the court had been dismissed by Justice Henderson) and his late appreciation - "no doubt influenced by his recognition that the mother's case for permission to relocate was being firmly put that she could not remain here due to financial difficulties compounded by his failure to comply with the court order – of the need to clear the arrears by obtaining a bank loan (paragraphs 111 to 113), he said this (at paragraph 117):

> "117 I accept that the father's financial position has become a precarious one during the course of these proceedings. At the outset of proceedings the father had a realizable asset upon which he could draw on to support his family. As time has passed, and large sums have been realized to pay both attorneys, that financial security appears to have been seriously diminished. . . ."

(6) That the reasons for the father's non-compliance with the interim spousal /child maintenance order:

> "had been brought on by a diminishing of the parties' realisable assets and his reduced salary" (paragraph 120);

and that:

> "despite the obvious effect that the downturn in the economy has had on the husband's businesses and income, both parents need to take some responsibility for the financial predicament this family now appears to now be in" (paragraph (121).

It is plain that the judge took the view that the parties' financial position was attributable, in no small part, to the manner in which they had chosen to conduct litigation against each other.

(7) That it could not be suggested with any force that the mother's wish to relocate to Florida was motivated by the ability to take up immediate better employment (that is to say, better than that she had in the Cayman Islands) for financial or career development reasons (paragraph 123). The judge had explained (at paragraph 122) that she had been earning approximately CI$700 to CI$1,000 in the Cayman Islands; and that her own evidence was that she would not hold a particularly well paid job in Florida (US$960 per month before tax during school term time or when the children were with the father). At paragraph 124 he referred to the mother's intention to combine paid employment with part time study. He said this:

> "124 . . . The mother wishes to study to gain the requisite qualifications to enable her to become a pharmacist. Pharmacy is a career the mother states she has an interest in due to family members, but entry into which she does not appear to have comprehensively researched. I have concerns about her ability to study to the level required for such a qualification, whilst having sole care of the children and whilst holding down a potentially tiring part-time care job in Florida. . . ."

He expressed that view in the light of the mother's previous inability to complete a law studies course in the Cayman Islands. As he put it:

> "124 . . . She does not have any interest in building on that year of study and I am left with a concern as to whether she is suited to such study."

16 In a section of his judgment headed "The Impact on the Mother if the Application to Relocate is Refused" (paragraphs 125 to 150), the judge made the following findings:

(1) That it was clear that the mother wished to relocate to Florida not only because she felt that would be in the children's best interests, but also because for quite some time she has no longer wished to reside in the Cayman Islands (paragraph 125). The

judge recognized that the potential impact on the mother if her application to relocate was refused was an important factor when considering what was in the best interests of the children (paragraph 126). He set out, in some detail (at paragraphs 127 to 132), the mother's evidence as to what she felt the impact on her of a refusal would be. The judge observed (at paragraph 133) that her statements made it plain that she was very unhappy with her current situation; and noted that it was accepted by Mr Cusworth QC, counsel for the father, that she was genuinely unhappy residing in the Cayman Islands. At paragraph 134 the judge stated that he was satisfied:

> "134 . . . that the mother's application is genuine to the extent that it is not motivated by some selfish desire to exclude the father from the children's life.. I am sure that she would try to facilitate court ordered access if she were given leave to relocate. . . ."

(2) That, nevertheless, the mother's wish to relocate was motivated, in part, by the fact that she would like to live some distance away from the father; and by the fact that she felt that she would be happier if living independently in Florida "where the children could develop a meaningful relationship with the maternal family". But he observed (*ibid*):

> "134 . . . the mother does not seem to fully recognize the detrimental effect of separating these young children from the father and his family who, as evidenced by the observations in the Court Welfare Officer's report, are an integral part of their lives."

(3) That the mother was not as isolated as she had portrayed in her written evidence; which he had set out in paragraphs 138 and 139 of his judgment. He said this (at paragraph 140):

> "During the oral evidence it became clear that she does have a social life, albeit one tailored by the children living with her and her limited finances."

The judge referred (in paragraph 140 and in paragraph 141) to the evidence which led him to that conclusion.

(4) That the mother's expressed concern that the father wished her to remain in the Cayman Islands "so that he can continue to control her" (paragraph 142) was not well founded. The judge said (at paragraph 142) that he was "unable to find that the father now wishes to oversee the mother in the way that she states." And he noted (paragraph 146) that the mother had accepted that the father was responsible for the children's care and control when they were with him. The judge accepted (*ibid*) that the father's opposition to the removal application was motivated by his genuine

concerns about the welfare of the children and not by a wish to control the mother. He said this:

> "146 . . . He [the father] understandably feels that the separation would affect his close bond with his children and in turn their significant relationship with his family. He also has genuine concerns how the mother would be able to meet the children's needs if her proposals for what will happen are put in place. He feels that the children are settled in Cayman which has been their home throughout their lives and are receiving a good education."

(5) That the mother would be greatly distressed if she were to have to remain in the Cayman Islands (paragraph 149). The judge went on to say this:

> "149 . . . This is a factor that I must take into account when considering the order and how it may have effect on the welfare of the children, which is paramount.
>
> 150. Although not required for the Court to determine that the mother would be very unhappy about remaining in the jurisdiction, there is a lack of helpful medical evidence in support of her contention that remaining will have a serious detrimental effect to her physical and possibly her mental health. I note that the mother states that she has been seeing a counsellor to assist her with '*this unbearable situation*'. I have also read the mother's exhibit at 'NLB47'concerning the effect of loneliness extracted from the psychologytoday.com website, of course this does not amount to expert evidence. I am sure that the mother will be greatly distressed if she is unable to move, but I am unable to determine on the limited evidence before me the effect refusal may have on her health. I note that despite the inevitable strain of these overly protracted financial and children related proceedings that her health has been stable and her condition, if anything, has improved over the last two years. She feels she has more energy and as a consequence been better able to care for the children. I note that a '*need for independence*' was the reason given by the mother for her leaving home aged eighteen. It may be that the greater independence from the father, although not to the level the mother wishes, resulting from the parties' separation has been a positive factor."

17 In the next section of his judgment – headed "The Mother's View about the Benefits for the Children of a Relocation to Florida and the Mother's Plans if she relocates (paragraphs 151 to 180) – the judge made the following findings of fact:

(1) That Wellington, the town in Florida to which the mother wished to relocate, would be a suitable area for the children to grow up "as it appears to be a safe family environment with all the amenities that one might expect in Florida" (paragraph 153).

(2) That, if relocation to Florida took place, the children's needs regarding the provision of a suitable 'roof over their head' would be met in the short term by a property

(controlled by the mother's aunt) in which the mother would be allowed to reside rent free (paragraph 156).

(3) That he was unable to determine how well the children's long term housing needs would be met in Florida (paragraph 157). The judge went on to say (*ibid*) that the mother and children's housing needs, albeit not providing a separate bedroom for each of the children, would be met in the Cayman Islands, "as the father has made an open offer in the ancillary relief proceedings that she and the children would remain in the former matrimonial home during the children's minority or her earlier remarriage"

(4) That there was nothing before the court to support the mother's expressed concern that the children's immediate educational needs would not be met at the private Montessori school which they were currently attending (paragraph 159). Further, that her concern that, by reason of the father's failure or inability to pay school fees, the children would have to attend a public school if they remained in the Cayman Islands, was not well grounded (paragraph 161). After referring to the evidence of the paternal grandmother – who had confirmed that, for so long as she could afford to do so, she would pay the children's school fees and that "I will never let them be deprived of attending school because fees are due" - he said this (*ibid*):

> "161 . . . I found the grandmother to be a convincing witness and one who throughout the proceedings genuinely wished to do all she could to ensure that the children's needs are met. . . . I am satisfied that if the children are to remain in the jurisdiction that the paternal grandparents will assist financially to ensure that the children remain in private school."

(5) That he could not be certain that the children would be able to attend a private school in Florida (paragraph 162). He went on to say this (*ibid*):

> "162 . . . It is clear that the maternal family does not have the available financial resources to assist the mother with private school fees. The mother is not in a position to say with any degree of certainty which public school the children would be able to attend, and I am not able to make an informed determination as to whether those schools would be better than those which they currently attend or will move onto in the Cayman Islands."

and he added (at paragraph 164)

> "164 . . . I am concerned that, if the children were to relocate at this time, they would be leaving good quality private education in the Cayman Islands for uncertain schooling in Florida, probably in a public school."

(6) That, although he accepted that (finances permitting) there would be a diversity of extracurricular activities in which the children could become involved in Florida

which were not available in the Cayman Islands, he was not satisfied that the children's stimulation from extracurricular activities could not be met in the Cayman Islands (paragraph 166).

(7) That he was not satisfied that the mother would inevitably have significant practical and emotional support from family and friends if she were to relocate (paragraph 167). He observed that the maternal grandmother, and other maternal family relatives, were not as significant figures in the children's lives as the paternal grandparents (paragraph 168). He expressed concern (at paragraph 173) that:

> "173. . . .if there is a relocation, even with support from the maternal family, the level of which is uncertain, the increased interaction with them will not outweigh the harm to the children that may come from a separation from the father and his family . . ."

(8) That, in the context of the mother's contention that the children would benefit from her continued education if she were able to relocate in Florida, (i) there was uncertainty as to whether she was well suited to continued education, especially at a time when she would have to work as well as provide sole care for the children (paragraph 174) and (ii) he was not satisfied that the mother's education plans were certain or had been well thought out or were other than unrealistic (paragraph 175).

(9) That the mother recognized the importance of the children having access with their father if she were to relocate; and would assist with reasonable access arrangements for the paternal grandparents (who had properties in Florida) (paragraph 176).

(10) That, in the context of the mother's proposals for the father to have access to the children in Florida if she were to relocate there, he was not satisfied that the father, for financial as well as employment reasons, would be able to travel to Florida as frequently as the mother suggested (paragraph 180). He went on to say (*ibid*) this:

> "Although I am satisfied that the mother would do her best to facilitate access, due to the close bond of the children with the father and his family, the move, albeit with access, would still be detrimental to their relationship with the father."

The judge said that he was fortified in that view by some of the observations of the Court Welfare Officer.

The Court Welfare Officer's Report

18 The observations of the Court Welfare Officer were contained in a written report dated 3 July 2012. The judge expressed regret (at paragraph 181 of his judgment) that the report was not as helpful as he would have wished; and for reasons which he set out (in

paragraphs 182 and 183) did not find the conclusions of the Court Welfare Officer to be of great assistance to him in determining the application to relocate. But he rejected the invitation of counsel for the mother to disregard the report in its entirety (paragraph 185); as he said (*ibid*):

> "185 . . . although not particularly helped by her recommendations, some of Ms Bodden's factual observations are telling. Mr Cusworth QC rightly draws the Court's attention to the effect of the parental conflict on C in particular. Ms Bodden also presented insightful and vivid evidence in relation to the important and close bond that exists between C and his father."

He set out some of that evidence at paragraphs 186 to 188.

19 The Court Welfare Officer had made the following observations at page 9 of her welfare report (set out at paragraph 186 of the judgment):

> "(i) . . . it appears (C) is taking the separation the hardest and is exhibiting signs of anxiety. He was a bit shy but able to open up to this worker. He stated that he does not want to move to Florida and would like to remain with his dad.
>
> (ii). . . he (C) was not confused and he consistently responded he wants to remain in Cayman with his father and visit his mother.
>
> (iii) He also stated that if mom stays in Cayman he would still like to stay with his daddy and visit with mommy."

20 In the light of the Court Welfare Officer's report, and her oral evidence, the judge said this (at paragraphs 189 and 190):

> "189 C [the elder child] is only five years of age, that makes it difficult ascertaining his wishes and feelings pursuant to the welfare check list. K is too young. Any views expressed by C must be considered in the light of his age and understanding. It does appear that C is aware that there is a possibility that they may be relocating to Florida with his mother, whilst his father remains in the Cayman Islands. It is clear from the observations of the Court Welfare Officer that this is unsettling to him. Of course, the consequences of the deteriorating relationship between the parents since the separation and their inability on occasion to handle their emotions in front of the children appropriately will have also had a significant unsettling impact on primarily C.
>
> 190 What is needed in the children's lives is a reasonable routine involving both parents, I fear this may not be established if the mother relocates. It is clear that C has a close bond with his father and that he would be detrimentally affected by a relocation resulting in a separation from him and the paternal grandparents. Although I must be careful not to place too much weight on his expressed wishes and feelings due to his age, I should still have them in mind, especially when there is surrounding evidence indicating that he is currently unsettled."

The judge's reasons for the conclusion which he reached

21 At paragraph 191 of his judgment the judge turned to consider the relevant parts of what he described as "the check list" found at section 3(3) of the Children Law (2012 Revision). He said this:

> "191 . . .
>
> (a) I have addressed the ascertainable wishes and feelings of the children, but primarily of C in paragraphs 182, 183 and 185 above. When I do so, I am acutely conscious of C's very young age, but am assisted by the observations of the Court Welfare Officer.
>
>> [It maybe that the paragraph numbers to which the judge refers are taken from an earlier draft. It is, I think, reasonably clear that the judge intended to refer (*inter alia)* to paragraph 186 of his final judgment, which does, specifically address C's expressed wishes]
>
> (b) Physical, emotional and educational needs. I am satisfied that C and K's physical, emotional and educational needs are being met at this time. I make this finding despite having had concerns about the parties' financial positions, arrears of maintenance pending suit which I am told is to be discharged and recent arrears of school fees. The children are at good schools. Both parents have a loving relationship with the children and meet their physical need when under their respective care. Although the children spend less time with the father than with the mother and some that time involves the parental grandparents, I believe the quality of time that he spends with them is more significant than the quantity. When considering C and K's emotional needs, I have considered whether there would be an impact on the mother's sense of well-being and whether that would be transmitted to the children.
>
> (c) The likely effect of any change in circumstances. If leave were granted there would be a change of country for the children to one they have a degree of familiarity with, but have not lived in. They would have to move into an unfamiliar home. They would be living full time with the mother and there would be a detrimental change in the quantum and circumstances in which they would see the father and the paternal grandparents. These are a large number of changes which, if not necessary, would not be in the children's best interests.
>
> (d) Age, sex background and any characteristics the Court considers relevant: C is 5 and K is 4. C is doing well at school. Both children have dual nationality, Caymanian and US.
>
> (e) Any harm the children have suffered or at risk of suffering: I have expressed my concerns about the communication difficulties between the parties. I have also highlighted, with reference to the welfare report, the effect of the uncertainty on particularly C as a result of the application. The parties must sensitively handle the outcome of the decision today, shielding the children from their resultant emotions.
>
> (f) How capable are each of the parents in meeting the children's needs: In my ruling of November 2011 I made it clear that both parents were capable of meeting the children's needs. I still retain this view. They have both made a significant contribution to the welfare of the children since they separated. They both have played an important role in the children's lives at this unsettled time. It is in the children's best interests that the parents retain this significant role in their lives.
>
> (g) Range of powers available to the Court: I have considered whether increased access to the father during school holidays would compensate the children's loss of

> regular time with the father. I have balanced this with whether it is in the best interests of the children by weighing up all of the relevant considerations for and against a move to Florida."

22 The judge went on (at paragraph 192 of his judgment) to conclude that:

> "Having carefully considered all the evidence, the guidance from the case authorities and the welfare checklist I have come to the conclusion that the welfare of C and K is met by the mother's application being refused. The children are settled into a way of life in the Cayman Islands in which they see a great deal of both parents and in which they are settled at school. A move to Florida would involve a major disruption and significant loss. The children are comfortable with the arrangements that the parents have commendably out in place for their care. There would be a detrimental impact on their time and relationship with the father if they did move to Florida and direct and indirect access would not be sufficient."

Accordingly, he refused the application to remove the children permanently to Florida.

The mother's contentions on this appeal

23 I have set out, earlier in this judgment, the six principal grounds relied upon by the mother in her grounds of appeal. Those were expanded in written submissions, dated 12 July 2013 which were filed on her behalf in advance of the hearing; and developed in oral submissions made at the hearing. I will address each of those grounds in turn. But, first, it is necessary – in the light of those submissions - to say something as to the nature of the task in which the judge was engaged; and the approach which this Court should adopt on this appeal.

24 It is submitted on behalf of the mother that the decision to be made in child relocation cases is not "discretionary". In support of that submission reliance is placed on observations of Mr Justice Mostyn in *Re TC and JC (Children: Relocation)* [2013] EHDC 292. The decision in that case was handed down in February 2013; and so was not before the judge at the time of the hearing in December 2012. The judge does not refer to the decision in his judgment (handed down on 10 April 2013). It must, I think, be assumed that it was not brought to his attention between the hearing and the delivery of judgment.

25 After referring (at paragraph [10] of his judgment in *Re TC and JC*) to the judgment of Lord Justice Munby in *Re F* [2012] EWCA Civ 1364 – in which, as he said, "the entire jurisprudence was recently summarized, and the modern principles enunciated" - Mr

Justice Mostyn went on to summarise (at paragraph [11]) the governing principles that could be derived from the authorities. He said this:

> 11 . . .
>
> (i) The only authentic principle to be applied when determining an application to relocate a child permanently overseas is that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be.
>
> (ii) The guidance given by the Court of Appeal as to the factors to be weighed in search of the welfare paramountcy, and which directs the exercise of the welfare discretion, is valuable. Such guidance helps the judge to identify which factors are likely to be the most important and the weight which should generally be attached to them, and, incidentally, promotes consistency in decision-making.
>
> (iii) The guidance is not confined to classic primary carer applications and may be utilised in other kinds of relocation cases if the judge thinks it helpful and appropriate to do so.
>
> (iv) The guidance suggests that the following questions be asked and answered (assuming that the applicant is the mother):
>
> (a) Is the mother’s application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
>
> (b) Is the mother’s application realistically founded on practical proposals both well researched and investigated?
>
> (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
>
> (d) Is the father’s opposition motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?
>
> (e) What would be the extent of the detriment to him and his future relationship with the child were the application granted?
>
> (f) To what extent would that detriment be offset by extension of the child’s relationships with the maternal family and homeland?
>
> (v) Since the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be free to decide whatever is in the best interests of the child, such guidance should not be applied rigidly as if it contains principles from which no departure is permitted.
>
> (vi) There is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements which seem to favour applications to relocate made by primary carers are no more than a reflection of the reality of the human condition and the parent-child relationship.
>
> (vii) The hearing must not get mired in taxonomical arguments or preliminary skirmishes as to what label should be applied to the case by virtue of either the time spent with each of the parents or other aspects of the care arrangements.”

It is not, I think, suggested that that summary of the governing principles differed in any material respect from the principles which the judge, in the present case, derived from his

own examination of the same authorities. It can be seen, from the passages in his judgment which I have already set out, that the judge did have in mind, throughout that judgment, that the welfare of the children was paramount; and that all other considerations, however powerful and reasonable they might be, must yield to that principle. It can be seen, also, that the judge did identify and address each of the questions set out under paragraph [11](iv) of the judgment in *Re TC and JC*. Those questions are, of course, derived from the judgments of the Court of Appeal of England and Wales in *Payne v Payne* and *Re F* (*supra*).

26 The passages in the judgment in *Re TC and JC* on which the mother seeks to rely are those at paragraphs [14] to [16], where Mr Justice Mostyn considered the judgment of the Supreme Court of New Zealand in *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1; [2010] NZFLR 884, He said this:

> "[14] The majority judgment was by Blanchard, Tipping and McGrath JJ, and given by Tipping J. In it there are, to my mind, some highly acute observations demonstrating the fallacy of the suggestion that there is, or should be, some kind of presumption in favour of an application to relocate. They stated:
>
> > '[23] At the highest level of generality the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. Put in that way, it is difficult to see how any presumptive weight can properly be given to either side of those competing but necessarily abstract contentions. To do so would risk begging the very question involved in what is necessarily a fact-specific inquiry.
> >
> > [24] Everything will depend on an individualised assessment of how the competing contentions should be resolved in the particular circumstances affecting the particular children. If, on an examination of the particular facts of a relocation case, it is found that the present arrangements for the children are settled and working well, that factor will obviously carry weight in the evaluative exercise. All other relevant matters must, of course, be taken into account and given appropriate weight in determining what serves the child's welfare and best interests, as s 4(5) puts it. The key point is that there is no statutory presumption or policy pointing one way or the other. All this seems to us to follow from ss 4 and 5 of the Act as a matter of conventional statutory interpretation.'
>
> [15] Later, at para 34, they referred to 'some of the writings [which] seem to lament the unpredictability of decisions in relocation cases and also the width of the 'discretion' given to Judges in deciding such cases'. This is a common theme in discussions about this subject, and for that matter, about related family law topics. But they explain, convincingly to my mind, that the function of the judge in making

decisions about the future care of a child is not really 'discretionary' at all, at least not in the sense of a judge making a decision from a range of legitimate solutions none of which can be said to be wrong. Rather, as they explained earlier at para 32:

> 'But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court.'

[16] So, when addressing the alleged vices of unpredictability and the width of 'discretion' they stated at para 35:

> 'These and other concerns … are inherent in the exercise in which judges administering ss 4 and 5 of the Act are involved. Lack of predictability, particularly in difficult or marginal cases, is inevitable and the so-called wide discretion given to judges is the corollary of the need for individualised attention to be given to each case. As we have seen, the court is not in fact exercising a discretion; it is making an assessment and decision based on an evaluation of the evidence. It is trite but perhaps necessary to say that judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessments which the courts must make. The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme."

Mr Justice Mostyn went on to observe, at paragraph [18] of his judgment in *Re TC and JC,* that those observations "all capture here precisely my function here . . . My determination will involve a factual evaluation and a value judgment." He said this:

> "[18] . . . I will ask myself and answer as best I can the questions in paragraph 11(iv) above but their answers will not be determinative or even necessarily tendentious (in the true sense of that word). They will merely be aids to my determination of the ultimate single question, which is, of course: what is in the best interests of these children?"

27 The approach of an appellate court to issues involving a factual evaluation and a value judgment was explained by Lord Justice Mance in *Todd v Adam & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293, [129]. He said this:

> "[129] . . . Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellant court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from

> primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence…"

That passage was cited by Lord Justice Clarke, with approval, in *Assicurazioni General SpA v Arab Insurance Group* [2003] 1 WLR 577, 580-581.

28 Guidance as to the proper approach to be adopted by an appellate court is found, also, in the well-known observations of Lord Hoffmann (with whom the other members of the House of Lords agreed) in *Piglowska v. Piglowski* [1999] UKHL 27; [1999] 1 WLR 1360; [1999] Fam Law 617. He said this:

> "In *G. v. G. (Minors: Custody Appeal)* [1985] 1 WLR 647, 651-652, this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith L.J. in *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All E.R. 343, 345, which concerned an order for maintenance for a divorced wife:
>
> > 'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'
>
> This passage has been cited and approved many times but some of its implications need to be explained. First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Ltd.* [1997] RPC 1
>
> > 'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'
>
> The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by

> the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. . . . An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself. . . .
>
> Thirdly, the exercise of the discretion under section 24 [of the United Kingdom Matrimonial Causes Act 1973] in accordance with section 25 requires the court to weigh up a large number of different considerations. The Act does not, as I have said, lay down any hierarchy. It is one of the functions of the Court of Appeal, in appropriate cases, to lay down general guidelines on the relative weights to be given to various factors in different circumstances. . . . These guidelines, not expressly stated by Parliament, are derived by the courts from values about family life which it considers would be widely accepted in the community. But there are many cases which involve value judgments on which there are no such generally held views. The present case is a good example. Which should be given priority? The wife's desire to continue to live in the matrimonial home where she can conveniently carry on her business and accommodate her sons, or the husband's desire to return to England and establish himself here securely with his new family? In answering that question, what weight should be given to the history of the marriage and the respective contributions of the parties to the family assets? These are value judgments on which reasonable people may differ. . . .
>
> Fourthly, there is the principal of proportionality between the amount at stake and the legal resources of the parties and the community which it is appropriate to spend on resolving the dispute."

Although Lord Hoffmann referred in those paragraphs to "the exercise of judicial discretion", it is plain that his observations are directed both to the evaluation of primary facts – which is not an exercise of discretion – and to the making of a value judgment after weighing the factors which fall to be taken into consideration in matrimonial cases. In my view there is no doubt that – whether or not the task of weighing competing factors in order to reach a value judgment is (in the light of the observations of the Supreme Court of New Zealand in *Kacem v Bashir* and of Mr Justice Mostyn in *Re TC and JC*) now properly to be described as an exercise of discretion – an appellate court must respect the conclusion reached by the judge to whom statute has entrusted that task and should not interfere unless satisfied that he has made a value judgment which falls outside the bounds within which reasonable disagreement is possible.

29 I should add two further observations. First, the judge's task may involve the determination of primary facts (where those are in dispute): that is to say he may need to determine what has happened in the past. But it may also involve the determination, on the basis of primary facts, as to what is likely to happen in the future. The present case

provides examples. The judge needed to determine how the father and his family had treated the mother in the past; but he needed, also, to form a view as to how they would treat the mother in the future if she remained in the Cayman Islands. The judge needed to determine what the mother's employment (and remuneration from employment) had been in the past; but he needed, also, to form a view as to her employment prospects in the future. Determination of what is likely to happen in the future cannot properly be described as the determination of primary fact: it is impossible (save with the benefit of hindsight) to say that such determination is "right" or "wrong": the most that can be said is that it does, or does not, fall within the bounds within which reasonable disagreement is possible. It, like "the ultimate single question" (to adopt the phrase used by Mr Justice Mostyn) – which course of action is in the best interests of the children - involves a value judgment.

30 Second, it is important to keep in mind that the future scenarios with which the judge was faced were (i) that in which the mother and the children all relocated to Florida and (ii) that in which the mother and the children all remained in the Cayman Islands. It was against those alternate future scenarios that the judge needed to determine whether the best interests of the children lay in permitting or refusing permanent relocation. The judge was not faced with a scenario in which the mother would, herself, relocate to Florida, leaving both the children in the Cayman Islands with the father; or with a scenario in which the mother would relocate to Florida with one of the children, leaving the other child in the Cayman Islands with the father. Those were not future scenarios against which the judge needed to determine whether the best interests of the children lay in permitting or refusing permanent relocation.

31 With those considerations in mind, I turn to address the grounds relied upon by the mother in her grounds of appeal:

Ground 1: That the judge failed adequately or sufficiently to conduct the balancing exercise when reaching his conclusion as to what course of action would best reflect the welfare and best interests of the children.

32 It is said on behalf of the mother that this ground is linked to all the other grounds upon which she relies which (in the words of her counsel) "encompass all of the wrong, inconsistent and over simplistic findings peppered throughout the judgment". It is said that, at paragraph 191 of his judgment, the judge makes statements which are true of all

relocation cases "but few which actually demonstrate a balancing exercise being undertaken and applied to the facts of this case". In particular, it is said that, at paragraph 191(b) of his judgment, the judge concludes that the children's physical, educational and emotional need are met, having made findings which (it is said) are inconsistent with this. The findings are the subject of challenge under the remaining grounds. It is said that the judge failed to draw correlations between many of his findings and the on-going detriment to the welfare of the children; and that, in the balancing exercise, he did not attach the appropriate weight to each factor. "Ultimately", it is said, "his approach resulted in a Judgment which is unrealistic in the circumstances of the case and is wrong": "the basis upon which [he] justifies the refusal is misconceived": and "this failure undermines the structure of his judgment.

33 It seems to me that this ground adds little or nothing to the other grounds advanced. It is not in dispute that the judge needed to make findings of the facts relevant to his assessment as to whether permanent relocation of these children to Florida would be in their – and I emphasise "their" – best interests. There is nothing said, under Ground 1, which identifies facts on which the judge failed to make findings of fact which he needed to make for the purpose of that assessment; and nothing which identifies facts on which it is said that the findings which the judge did make were wrong. To my mind the ground contains no more than a generalised assertion that, because the judge's assessment as to whether permanent relocation of these children to FIorida would be in their best interests did not lead him to the conclusion for which the mother contends, he must have carried out that assessment in a manner which was flawed. I do not find a generalised assertion of that nature persuasive or helpful.

Ground 2: That, in conducting the balancing exercise, the judge placed disproportionate and overwhelming weight on the detriment to the father and the adverse impact of the permanent removal of the children on his relationship with them.

34 It is said that, at paragraph 90 of his judgment, the judge identified the exercise which he needed to undertake "yet approached it from the wrong starting point". I have already set out paragraph 90 of the judgment; but it may be convenient if I do so again. The judge said this:

> "90 When the Court considers the guidance the following questions, in a case such as this involving an application made by the mother, should ordinarily be raised and addressed:

(i) Is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?

(ii) Is the father's opposition motivated by a genuine concern for the future of the child's welfare or is it driven by some ulterior motive?

(iii) What would be the extent of the detriment to the father and his future relationship with the child were the application granted?

(iv) To what extent would the detriment to the father if the application were granted be offset by extension of the child's relationship with the maternal family and, if applicable, homeland?

(v) Is the mother's application realistic and founded on practical proposals well researched and investigated?

(vi) What would be the impact on the mother of a refusal of her realistic proposal? The weight placed on this will increase if the child resides with the mother."

There is, I think, no criticism of the judge's summary of the questions which he needed to address; and, in particular, no criticism of the judge's view that, amongst the matters on which he needed to make findings of fact was the extent of the detriment to the future relationship between the father and the two children if the children relocated permanently to Florida.

35 It is said, correctly, that the judge observed (at paragraph 190 of his judgment) that "What is needed in the children's lives is a reasonable routine involving both parents." That observation appears to me plainly correct: I do not understand it to be controversial. The judge went on to say (*ibid*) that he feared that this "reasonable relationship" might not be established if the mother relocated (with the children). He went on to say that "It is clear that C has a close bond with his father and that he would be detrimentally affected by a relocation resulting in a separation from him and the paternal grandparents". On a true analysis the second of those findings was not a finding of primary fact: it was a finding as to what, on the findings of fact which the judge had made, was likely to be the future position if permanent relocation took place. He gave reasons for that conclusion. The mother challenges that conclusion; submitting that the judge did not attribute the correct weight to her proposals for access in Florida and in Cayman on weekends and school holidays. But she accepts that it is undeniable that the father's relationship with the children will change if she and the children are in Florida because he will see them less. In my view, the judge was plainly entitled to reach the conclusions which he did as to the likely outcome – in relation to the future relationship between the children, their father and paternal grandparents, and as to the detrimental

effect on the children (or, at the least, on C) of the change in that relationship – of permanent relocation to Florida. I reject the mother's challenge to those conclusions.

36 It is said on behalf of the mother that the judge placed "disproportionate and overwhelming weight" on his conclusions as to the detrimental effect on the children of a change in their relationship with their father and paternal grandparents. This, it is said is "the overarching defect" in his approach: the detrimental effect on the children of a change in that relationship was "not a basis alone to refuse the application". But, as it seems to me, it is impossible on a fair reading of the judgment as a whole, to conclude that the judge thought that it was; or that it was, in effect, a starting point which the mother needed to displace.

37 As I have said, I am satisfied that the judge was entitled to reach the conclusions which he did as to the likely outcome in relation to the future relationship between the children, their father and paternal grandparents. Having reached those conclusions - and as to the detrimental effect on the children (or, at the least, on C) of the change in that relationship in the event of permanent relocation to Florida - the judge was bound to take them into account in his assessment as to whether permanent relocation of these children to Florida would be in the best interests of the children; and to give them due –but not undue – weight in that context. That, as it seems to me, is what he did.

Ground 3: That the judge failed to give any or any sufficient weight to the children's immediate, short, medium and long term financial needs.

38 As I have said, particulars of the matters relied upon in support of this ground were set out under six sub-paragraphs. In addressing those grounds it is important to keep in mind that the judge needed to ask himself not only whether the children's financial needs would be met if permission to relocate permanently were refused but also whether those needs would be met (or would be more likely to be met, or met to a greater extent) if relocation took place. If the children's financial needs would be met – or not met (or not fully met) – whether or not permanent relocation took place, the "financial needs" factor was of little relevance to the assessment whether permanent relocation of the children to Florida was in their best interests.

Ground 3(i): That the judge failed to give any weight to the father's consistent failure and/or inability to make spousal and child maintenance payments in accordance with the Order of 22 September 2011 against having made a finding that the mother and the children's minimum financial needs were CI$5,692 per month.

39 The judge addressed the father's past failure to make spousal and child maintenance payments in accordance with the order of 22 September 2011 at paragraphs 110 to 121 of his judgment. I have set out passages from those paragraphs in which he did so. At paragraph 119 he observed that:

> "119 I must be careful not to seek to make punitive orders affecting the children due to the father's non-compliance with financial orders. The financial insecurity of the mother and the reasons for father's non-compliance with the order are important factors, amongst a number of others, to be taken into account. However, my discontent with the non-compliance with financial orders must not cloud my exercise of discretion which is to make the children's needs and interests paramount. I must determine whether the mother would be financially more stable and better able to meet the children's needs in Florida and, if so, whether this benefit is one of the factors outweighing the detriment caused to the children's relationship which would be caused if they permitted to relocate."

Save that what the judge described as "my exercise of discretion" might be better described as "my assessment" or "my value judgment" as to what decision as to relocation best served the needs and interests of the children, I have no doubt that, in making those observations, the judge was correct. The judge was right to ask himself (as he did) whether the father's past failure to comply with orders for the payment of spousal and child maintenance cast doubt on his willingness or ability to comply with such orders in the future; but the underlying question was whether the financial security of the children was likely to be improved by their relocation to Florida.

Ground 3(ii): That the judge failed to conduct any or sufficient analysis of the father's inability to meet the children's future financial needs after the conclusion of the proceedings.

40 It is said that, having noted (at paragraph 106 of his judgment) that the mother had been struggling financially – and that her short term financial difficulties had primarily come about due to the fact that the father had failed to comply with the existing spousal and child maintenance order at a time when she had a low income from her employment – the judge should have gone on to consider how the financial needs of the children would be met in the medium and long term; and that he could not have properly assessed what was in the children's best interests without conducting that analysis.

41 The judge observed, at paragraph 122 of his judgment, that he was not in a position to determine, at that stage, what financial ancillary relief orders would be made in the future: as he said, the outcome of the hearing of the application for permission to relocate might well affect the nature of that order. But he observed (*ibid*) that:

> "122 . . . Despite the lower cost of living in Florida and the provision of housing by her aunt to the mother, she will still have to rely upon maintenance from the father. Her uncertainty as to the regularity would be the same whether it be in Florida or Cayman. . . ."

That, as it seems to me, was a correct analysis of the position. If the mother remained in the Cayman Islands, with the children, she would (on the basis of what she was then earning) have to rely on financial support from the father: the level of that support would be determined by what the court ordered by way of future spousal and child maintenance. If she relocated to Florida with the children she would continue to rely on financial support from the father; subject to the possibility that she could earn more in Florida than she could earn in the Cayman Islands, as the judge pointed out when he said (*ibid*):

> "122. . . . If the mother were seeking better paid employment in Florida then this could offset any shortfall in maintenance".

In those circumstances, the judge did not need to conduct "any or sufficient analysis of the father's inability to meet the children's future financial needs after the conclusion of the proceedings" in order to assess whether the children's best interests were served by permanent relocation to Florida unless and until he were persuaded that there was a real possibility that, by relocating to Florida, the mother would become financially independent of the father. He did not accept that there were grounds upon which he could take that view.

Ground 3(iii): That the judge failed to conduct analysis of and draw a correlation between the principle of and level of child maintenance arrears and the detriment to and welfare of the children.

42 The judge explained (at paragraph 112 of his judgment) that, during the hearing, "it had become clear that the father finally recognised the importance of the need to clear the arrears of maintenance; and that he had approached the bank in order to see if he could obtain funds for that purpose. The judge said this (*ibid*):

> 112 It appears that following negotiations which took place between him and the Bank on days during the hearing, the father had reached the stage of successfully arranging borrowing with Scotiabank."

There was no material before this Court to suggest that the judge was not entitled to take the view that the arrears of maintenance were not about to be discharged. But the judge, himself was plainly not confident that the loan which had been sought from the bank would be forthcoming. He said this, at paragraph 114 of his judgment:

> "114. I am still left with an unanswered question of how the father is now able to raise a loan to pay off the arrears at this time, when in August 2012 he had told the Court that he had no borrowing capacity."

On the basis that the judge could – and did - take the view that the arrears were about to be discharged, there was no reason for him to "conduct analysis of and draw a correlation between the principle of and level of child maintenance arrears and the detriment to and welfare of the children". But, in any event, arrears then currently outstanding were of no relevance to the question whether the interests of the children were best served by permanent relocation to Florida. An order permitting, or refusing, relocation would make no difference to the father's obligation to pay the arrears; or to the mother's right (or ability) to enforce payment. There is no substance in the submission that, if the judge had appreciated that the arrears would not be discharged (save as a result of enforcement action by the mother against the father's assets), he would have reached a different conclusion on the question whether the interests of the children would be best served by permitting, or refusing, permanent relocation to Florida.

> *Ground 3(iv): That the judge improperly and unsupported by the evidence placed reliance on the paternal grandmother to pay perpetually the children's private school fees.*

43 The judge acknowledged (at paragraph 107 of his judgment) that non-payment of school fees "had been a long standing-issue causing great concern to the mother"; and that it was not until the hearing before him that the outstanding arrears (of school fees) had been paid by the paternal grandfather. The judge heard evidence from the paternal grandmother, to which he referred at paragraph 109 of his judgment. She told him that she would ensure that, for the future, she would ensure that school fees were paid, by taking on the responsibility to pay them. The judge saw no good reason to question the veracity of that statement; and expressed himself satisfied that the school fees would be paid by "the paternal side of the family". He had the advantage – which this Court does not have – of seeing and hearing the evidence of the paternal grandmother. There is no basis upon which this Court could take the view that he was not entitled to take the view that she was both sincere and responsible when she told him that she would ensure that the school fees were paid. It is said that he should not have accepted that the paternal grandmother would pay those fees in perpetuity; but, to my mind, there is no substance in that criticism. Plainly, the grandmother's assurance that she would ensure that the school fees were paid was subject to her continuing ability to do so. The judge

appreciated that; and was entitled to take the view – as, plainly, he did – that, nevertheless, he could rely on that assurance be in a position.

Ground 3(v): That the judge made a speculative finding unsupported by the evidence that the mother would likely find more and better employment opportunities in the future to enable her to meet the needs of the children.

44 The judge addressed the mother's prospects of employment in the Cayman Islands at paragraphs 103 to 105 of his judgment. He found, as a fact, that offers had been made to her by the paternal grandmother – whom he described as "the head of arguably the Cayman Island's largest employment agency" – to assist in finding employment. He found that there was evidence of interviews for better paid and more stable employment opportunities being offered (paragraph 104 of his judgment). He found that the mother did not, on the evidence before him, seek to take up such opportunities in a purposeful way. There is no foundation for the mother's contention that the judge "made a speculative finding unsupported by the evidence" that she would likely find more and better employment opportunities in the Cayman Islands. Plainly, there was evidence, to which the judge referred, on which he could properly make such a finding.

Ground 3(vi): That the judge failed sufficiently to conduct analysis of and draw a correlation between the mother's inability to educate herself in the Cayman Islands and her ability to meet the long term needs of the children against the evidence that she cannot rely on the father financially.

45 At paragraph 124 of his judgment, the judge had had said that the mother wished to study to gain the requisite qualifications to become a pharmacist; and he expressed doubts as to her ability to study to the level required for such a qualification. At paragraph 174 of his judgment he referred to the mother's wish "to study business and nutrition and develop that into a career in pharmacy". It is said that the judge misunderstood the evidence; in that the mother's wish was to become "a pharmacy sales representative, a career quite different and considerably more flexible than a pharmacist". There was little or no evidence of the mother's intention – or ability – to study in the Cayman Islands for a future career in pharmacy, business or nutrition.

46 The need to "conduct analysis of and draw a correlation between the mother's inability to educate herself in the Cayman Islands and her ability to meet the long term needs of the children" arose only if there was the mother was advancing a case that further education in the Cayman Islands would enable her to meet the long term needs of the children in

the Cayman Islands. But that was not her case. She was advancing a case that further education in Florida would enable her to meet the children's long term needs in Florida. Accordingly, the mother's evidence was directed towards the opportunities for such study in Florida. In that context, the judge's conclusion, at paragraph 175 of his judgment, was that there was no supporting evidence to support a contention that the mother had been accepted onto a course to study business and nutrition; that there was insufficient evidence to support a conclusion as to the days that would be required for study or how that requirement could be accommodated with the need to work and care for the children; that, on the limited material before him, he could not be satisfied that the mother's education plans were certain or had been well thought out; and that those plans appeared unrealistic "having regard to her working whist having full time care of the children".

47 In my view the criticism that the judge was in error in failing to conduct analysis of and draw a correlation between the mother's inability to educate herself in the Cayman Islands and her ability to meet the long term needs of the children is ill-founded. There was no reason – on the case advanced on behalf of the mother – why the judge needed to embark on that exercise; and no evidence upon which he could do so.

Ground 4: That the judge failed to give any or any sufficient weight to the father's historic conduct during the proceedings.

48 Again, particulars (or purported particulars) of the matters relied upon in support of that ground were set out under several sub-paragraphs. I put it in that way because I find it difficult to see how the matters relied upon under sub-paragraphs (ii) and (iii) can be said to be particulars of "the father's historic conduct during the proceedings" in any ordinary meaning of those words.

> *Ground 4(i): That the judge failed to conduct analysis of and draw a correlation between the [father's breaches of Court Orders during the currency of the proceedings] and the detrimental impact on the mother and the welfare of the children.*

49 I find it difficult to understand the basis for this contention. As I have said, the judge plainly did address the father's failure to comply with the order for payment of spousal and child maintenance made by the court in September 2011 and with the other orders to which he referred at paragraph 111: paragraphs 110 to 113 of his judgment. The judge recognised that the father's failure to comply with that order was a primary cause of the

mother's financial difficulties (paragraph 106). He referred, in the judgment under appeal, to comments which he had made in an earlier judgment in what he described as "the cost allowance hearing":

> "The husband is consistently failing to comply with a maintenance pending suit order, with the consequence that the wife and children have income coming into the household well below the level determined by the Court as necessary to meet their reasonable needs . . ."

To the extent that this ground is intended to add anything to the ground advanced as Ground 3(i), I reject it as unnecessary and superfluous. If it is intended as a challenge to the judge's approach (at paragraph 119 of his judgment) – in declining to allow his discontent with the father's failure to comply with financial orders to be reflected in a punitive order against the father in relation to permanent relocation of the children – I reject it as misconceived.

50 It is said that the judge ought to have given weight to the father's failure to return the children on time after access periods; and ought to have recognized the detrimental impact of this conduct on both the mother and the children. These are matters which the judge did address at paragraph 43 of his judgment. He said this:

> "43. The mother states that the children are dropped back from access by the father late, hungry, barefoot, unbuckled in the car. She says that access handovers can be contentious with the father speaking to her inappropriately and in a domineering fashion. On the evidence before me, I am satisfied that they may be brought back with bare feet, which is really not a matter of concern in this type of environment. The father accepts that on occasion he does return late, although not seeking to minimize the importance of strict adherence to contact orders and the stress it may cause to the mother, this would not be a primary reason for giving leave to relocate. However if the parents are unable to co-operate with arrangements concerning the children and/or have heated exchanges in their presence, these are among a number of factors that I take into account when considering whether it is in the children's best interests to relocate. I am unable to find on the evidence before me, including from the Court Welfare Officer, that the children are not well cared for when with the father."

It is plain that the judge recognized that, if access arrangements were working so badly that the failure to co-operate – and altercations between the parents in the presence of the children – were having a detrimental impact on the children, that was a factor to be taken into account in considering whether it was in the best interests of the children to relocate permanently. It is plain, also, that he did not think that that was the position in this case. There is no material before this Court which would enable this Court to hold that he was wrong to take that view.

Ground 4(ii): the judge wrongly and improperly attributed overwhelming weight to the father's access times with the children against a finding that they spent a considerable portion of this being cared for by the paternal family.

51 The judge recognized that "a significant part of the access visits with the father take place at either of the paternal grandparents' [separate] homes". This, he said, meant that the father had the assistance of the paternal grandparents with the care of the children (paragraph 47 of his judgment). He said this (at paragraph 49):

> "49 On the one hand the paternal grandparents' involvement means that the father is taking less responsibility for the care of the children when they are with him, compared to the mother when they are with her. On the other hand, it shows what an important role the grandparents play in the lives of the children. This role would obviously diminish if an order to leave the jurisdiction were granted."

52 The mother's criticism is that the judge overlooked the fact that the "quality time" which the father, himself, actually spent with the children was limited; his access time was shared with the paternal grandparents. This, it is said, means that much of the father's access time is not, in fact, time with the father, but time with the paternal grandparents. But it is plain that the judge appreciated this. His view was that permanent relocation would have a detrimental impact on the children's relationship with both the father and his parents: a relationship which, it was common ground, had importance and value to the children. So it was necessary to identify some countervailing factor or factors which outweighed that. It is not, in my view, correct to assert – as her counsel does assert on behalf of the mother – that the judge "attributed overwhelming weight to the father's access times with the children". That is not a fair analysis of the judge's approach.

Ground 4(iii): That the judge erroneously and unreasonably assumed that the father's mid trial suggestion that a commercial loan from Scotia Bank would be successfully approved to enable the father to extinguish CI$49,116 of spousal and child maintenance arrears

53 In the course of addressing Ground 3(iii) I have noted that the judge explained (at paragraph 112 of his judgment) that it had become clear, during the hearing before him in December 2012, that the father had recognised the importance of the need to clear the arrears of maintenance; that he had approached the bank in order to see if he could obtain funds for that purpose. I observed that there was no material before this Court to suggest that the judge was not entitled to take the view that the arrears of maintenance had not been discharged. I pointed out that the judge, himself, was not confident that the loan which had been sought from the bank would be forthcoming.

54 It is said, under the ground of appeal that I am now addressing, that (in fact) the loan had not been approved at the time of the hearing, and has subsequently been denied. So, it is said, the judge "erroneously made a finding that was wrong in fact and proceeded with the case on the basis that the arrears would be cleared off forthwith" This, it is said, was plainly wrong.

55 In my view the judge cannot be criticized for acting on information given to him by counsel for the father. But, more pertinently, for the reasons that I have already explained (when addressing Ground 3(iii)), on a proper analysis arrears then currently outstanding were of no relevance to the question whether the interests of the children were best served by permanent relocation to Florida. There is no substance in the submission that, if the judge had appreciated that the arrears would not be discharged (save as a result of enforcement action by the mother against the father's assets), he would have reached a different conclusion on the question whether the interests of the children would be best served by permitting, or refusing, permanent relocation to Florida. The court had powers to enforce the maintenance orders which it had made against such assets as the father may have had (after payment of the costs of these proceedings): permitting permanent relocation of the children to Florida as a means of compelling payment was not amongst those powers.

Ground 4(iv): That the judge wrongly and unsupported by the evidence failed to conclude that the father's behaviour toward the mother was persistently controlling.

56 The judge referred to the mother's evidence of the father's allegedly controlling behavior at paragraphs 139 and 142 of his judgment. At paragraph 143 he said that he was unable to find that the father wished to oversee the mother in the way that she alleged. He said this:

> "143 . . . I have noted at previous hearings that in the past the father has acted in ways that have sought to restrict the mother's actions in relation to the children. This is partly by expressing his views to her concerning her care or also by making or changing arrangements for extra-curricular activities which his family is able to afford. I also noted that the mother was anxious that the father follow the child care routines which she felt were right for the children. I also have regard to inappropriate written exchanges between the parties."

He then set out passages from an *ex tempore* ruling which he had given on 16 December 2011, in which he explained to both parties the need to respect the parenting skills of the other. He went on to say this:

> "146 I am satisfied that the mother has accepted that the father is responsible for the children's care and control when they are with him. The father has also given the mother greater freedom in this regard. Unfortunately, it is not as great as I had hoped, for the independence has been curtailed to the level of maintenance being paid by the father. That said, I am satisfied that the father's opposition to the removal application is motivated by his genuine concerns about the welfare of the children and not by a wish to control the mother. . . ."

57 It is said on behalf of the mother that, despite the Court having made a Protection Order in December 2011, the father continued to harass and pester her, ultimately controlling her in every aspect of her life. It was said that the evidence available to the judge during the hearing was that the father tried to control the sale of her car and her insurance; that he pressed her unrealistically for a financial contribution towards school fees; that he disclosed her telephone number without her permission; that he suggested that she attend certain social functions; and that he attended at her home whenever he felt like it. Nevertheless, the judge – having heard and seen the parties give evidence at the trial – made the finding that he did. Plainly he did not accept the mother's evidence in relation to the father's alleged exercise of control over her. There is no basis upon which this Court – which has not had the advantage of hearing and seeing the witnesses – can hold that the judge was wrong to take the view that he did in relation to this issue.

Ground 5; That the judge placed overly optimistic and unsupported weight on the future conduct of the father's family in the light of their historic conduct.

58 The judge addressed the relationships between the paternal grandparents and the mother at paragraphs 50 to 55 of his judgment. At paragraph 50 he observed that he had gained the impression that the paternal grandparents – and, in particular, the paternal grandmother – had been supportive of the mother in the past. He rejected the submission, made on behalf of the mother, that the paternal grandfather came across as a person with no warmth towards the mother: he said that he did not share the mother's view that his evidence gave the court little confidence or hope for the mother's future relationship with the father's family. At paragraphs 51 and 52 he observed that, in the course of these proceedings, the grandmother's conduct towards the mother had been insensitive in some respects. Nevertheless, he rejected the "negative view" expressed by counsel, in her closing submissions on behalf of the mother, as to the genuineness of the paternal grandmother's expressed concern for the mother. He said this:

> "53 . . . I am satisfied that prior to the great unease brought about by the breakdown in the parent's relationship, by the initiation of these drawn out proceedings, by her

> concern about the children leaving and by her wish to support her son throughout the ordeal, she was close to and gave support to the mother.
>
> 54 The ties between the mother and the paternal grandmother have been naturally strained during the course of these proceedings. . . .
>
> 55 Having had the benefit of seeing the grandparents in Court, I am satisfied that they would, as best they could and dependent on the mother's reciprocation, be supportive of the mother if she were to remain in the jurisdiction. I am satisfied, after the inevitable tension caused by this application and the ongoing divorce proceedings has come to an end, that the paternal grandmother in particular will seek to include the mother in and not isolate her from the support of the paternal family."

59 It is said on behalf of the mother that the judge failed to give sufficient weight to the paternal grandmother's negative conduct towards her during the course of the proceedings; that he was wrong – and "overly optimistic" - to make a finding "that this would change against the backdrop of the history". But the judge made that finding with the advantage of having seen and heard the paternal grandmother give her evidence. There is no basis on which this Court can hold that that he was wrong to take the view that he did.

Ground 6: That the judge failed to attribute sufficient weight to the psychological and emotional impact of the refusal of her application on the mother; and the detrimental impact which this would have on her ability to care for the children.

60 The judge recognized, at paragraph 126 of his judgment, "the importance of the potential impact on the mother unsuccessfully seeking to relocate is an important factor when considering what may be in the best interest of the children". As he said (*ibid*):

> "126 . . . When considering the impact on the mother if her application to relocate is refused I have carefully considered the factors mentioned by her as well as specific representations concerning the effect. . ."

That was, he said, an important issue to be addressed; and he went on to address that issue in some detail in paragraphs 127 to 149 of his judgment. He concluded, at paragraph 149, that "having reviewed the evidence I am satisfied that the mother will be greatly distressed if she were to have to remain in the Cayman Islands"; and reminded himself, again, that that was a factor which he must take into account "when considering the order and how it may have affect on the welfare of the children, which is paramount."

61 At paragraph 150 of his judgment - in a passage which I have already set out; but which, for convenience, I set out again – the judge addressed the mother's contention that remaining in the Cayman Islands would have a serious detrimental effect on her physical, and possibly her mental, health. He said this:

> "150. . . . there is a lack of helpful medical evidence in support of her contention that remaining will have a serious detrimental effect to her physical and possibly her mental health. I note that the mother states that she has been seeing a counsellor to assist her with '*this unbearable situation*'. I have also read the mother's exhibit at 'NLB47'concerning the effect of loneliness extracted from the psychologytoday.com website, of course this does not amount to expert evidence. I am sure that the mother will be greatly distressed if she is unable to move, but I am unable to determine on the limited evidence before me the effect refusal may have on her health. I note that despite the inevitable strain of these overly protracted financial and children related proceedings that her health has been stable and her condition, if anything, has improved over the last two years. She feels she has more energy and as a consequence been better able to care for the children. . . ."

62 It is said on the mother's behalf that the judge failed to give any or sufficient weight to the psychological impact on the mother of the refusal of the application, her health and "any impact this may in turn have on her ability to care for the children as their main carer". But this submission overlooks the judge's finding that, in the absence of medical evidence to support the mother's contention that remaining in the Cayman Islands would have a serious detrimental effect on her physical or mental health, he was unable to determine the effect that a refusal would have on her physical or mental health. It would have been wrong for him to speculate on an issue which, plainly, demanded an expert opinion; and he cannot be criticized for declining to do so.

63 It is said, in the mother's written submissions before this Court, that, as a result of the refusal, the mother's mental and physical health has worsened to the point whereby she is now under the care of a doctor in Miami; that she is unable to deal with the decision; and that, in consequence, she has lost her employment in the Cayman Islands. It is said that her distress has now reached a point "whereby it cannot be ignored and must influence her ability to care for the children". There is nothing to suggest that those matters were, or could have been, before the judge. The assertions are unsupported by evidence and are untested: this Court cannot act upon them.

Conclusion

64 As the Supreme Court of New Zealand observe in *Kacem v Bashir* (*supra,* [23] the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. The present was such a

case. The judge concluded, for reasons which he gave in a full, careful and fair judgment, that the interests of the children in stability, continuity and (in particular) in the preservation of their relationships with their father and paternal grandparents would be served by refusing the mother's application for permission to relocate the children permanently to Florida; and would be affected detrimentally by granting such permission. He concluded that there were no factors which persuaded him that the advantages to the children of permitting relocation (if any) were such that their interests would be better served by taking that course. I considered with care the grounds advanced on this appeal in support of the contrary view; and I was not persuaded that the judge was wrong to take the view that he did. It was in those circumstances that, at the conclusion of the appeal hearing, I agreed with the other members of the Court that the appeal should be dismissed.

Postscript

65 I share the judge's concern as to the circumstances in which the father's resources – which could have been used to provide maintenance for the mother and the children – appear to have been almost wholly consumed in legal fees. As both Lord Hoffmann and Lord Hobhouse of Woodborough pointed out in *Piglowska* (*supra*), it is important not to lose sight of the principle of proportionality. The father and the mother need to ask themselves whether it is really in the best interests of the children to dissipate the limited resources available to them in protracted litigation.

66 This appeal was brought with the leave of the judge. I should not be taken to criticize the judge for his decision to grant leave: it may be that he thought that there was a perceived tension between observations in *Payne* – which had been consistently applied by the courts in this jurisdiction – and the more recent guidance given by the Court of Appeal in *Re F* which required consideration or resolution by this Court. But if there were a need for this Court to address a point of principle, it was unfortunate that that need arose in a case where litigation costs – which the parties could ill-afford – had already had an effect

on the father's ability to meet maintenance orders which had been made against him. In my view, judges should be slow to grant leave to appeal in cases of this nature.

Chadwick P

I agree.

Mottley JA

I have read the draft of the President and agree with his conclusion and reasons therefor.

Forte JA