

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FAMILY DIVISION**

3
4 **Cause No: FAM 39/2015**
5

6 **BETWEEN:**

7 **KQ**

8
9 **PETITIONER**

10
11 **AND:**

12 **PQ**

13
14 **RESPONDENT**

15
16
17 **Appearances:**

**Ms. Sheridan Brooks of Brooks & Brooks for
the Petitioner**

**Ms. Lynne McDonough of Samson & McGrath
for the Respondent**

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23 **Before:**

Hon. Justice Robin McMillan (Actg.)

24 **Heard:**

28th October 2015

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27 **Preamble**

28 *This Judgment is distributed with the strict understanding that, in any report of it, the anonymity of*
29 *the parties and the children must be strictly preserved, that is, no party or child may be identified*
30 *by name, school, location, or by family members.*

JUDGMENT

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4 1. This is a final hearing in respect of the children residence issues arising from the
5 parties' ongoing divorce proceedings. The Petitioner and Respondent were married on
6 7 September 2002 in Alberta, Canada. They have two children together namely, Q1
7 (D.O.B. 18 April 2004) and Q2 (D.O.B. 29 March 2006). The parties have lived and
8 worked in the Cayman Islands for 9 years. Both parties have applied for Permanent
9 Residency ("PR").

10
11 2. This matter first came before the Court by way of Summons issued by the Petitioner on
12 10 March 2015 seeking a temporary residence order and ouster order. An Affidavit, in
13 support of this application, was filed by the Petitioner on 11 March 2015. An Affidavit
14 in Response was filed by the Respondent on 17 March 2015. The Petitioner filed a
15 third Affidavit on 23 March 2015. The parties attended Court and, on 30 March 2015,
16 an Order was made by Williams J., requesting a Court Welfare Officer's Report to be
17 completed by 13 April 2015.

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19 3. On 13 April 2015, the parties attended Court and an Order was made by Williams J.,
20 directing a full written Court Welfare Officer's Report on or before 22 June 2015.

21
22 4. The parties attended Court on 2 July 2015 when, *inter alia*, an Order was made by
23 Williams J., listing the matter for 30 September 2015. A further Affidavit in respect of
24 the children issues was filed by the Respondent on 11 May 2015.



- 1 5. A full Report was filed on 19 June 2015 by the Welfare Officer Ms. Jasmine Powell.
2 The Welfare Officer recommends an Order for what she describes as Joint Physical
3 Custody, bearing in mind that the children chose the same living arrangement, which is
4 alternate weeks with each parent. This was followed by a further Report to similar
5 effect dated 27 October 2015, requested by McMillan J., (Actg.).
6
7 6. The Petitioner does not agree with this proposal and seeks a sole residence order with
8 overnight access accorded to the Respondent every second weekend. The Respondent
9 however agrees fully with the recommendations made by the Welfare Officer.
10
11 7. The parties signed and agreed to a Parenting Agreement on 6 April 2015.
12
13 8. The parties are in agreement that both parents should play a significant role in their
14 children's lives. However, there is simply a disagreement about where the children
15 should reside.
16
17 9. The Court is asked to make an order relating to the issue of children arrangements and
18 to determine the residence of the children on a final basis.



THE ISSUE OF RESIDENCE

10. At the present time the parties continue to occupy the matrimonial home at Crystal Harbour West, notwithstanding certain tensions.

11. At the hearing of this matter oral evidence was provided by Ms. Jasmine Powell, Social Worker, and by the Petitioner and the Respondent. In my view, the evidence did not have any significant material impact in terms of either altering or expanding upon the information previously made available to the Court.

12. In summary, the Petitioner places emphasis on his concerns, which are that the Respondent has had a history of alcoholism and she has a tendency to relapse. The Petitioner submits that, should a joint residence order be made, the Respondent's condition, as he describes it, has potentially adverse consequences for the care and welfare of the children.

13. The Respondent, on the other hand, has drawn attention to the fact that she has not been engaged in drinking alcohol for some time, is dealing with her challenges in this regard with appropriate help and, should a joint residence order be made, she would be fully able to take care of the children in her own future separate home here, yet to be acquired.



1 **THE SOCIAL WORKER'S REPORTS**

2
3 14. The Welfare Report of Ms. Powell was dated 13 April 2015. Interviews took place
4 with both parents and with the children. I find that this Report was compiled in a
5 sensible and professional manner.

6
7 15. This Report concludes with the following Social Work Assessment:

8
9 *"Social Work Assessment"*

10 *The literature reviewed informed that, according to the law, any disputes*
11 *about the care of children must be resolved in the best interest of the child.*
12 *'Best interest' includes the child's right to have a meaningful relationship*
13 *with both parents and to be protected from harm.*

14 *It appeared that [KQ & PQ] have been successful in their efforts to*
15 *protect their children from the details of their parental conflict and*
16 *reasons for divorce. It was noted that both parents welcomed this worker*
17 *at the door on the initial visit and conducted their own brief 'interview' of*
18 *this worker, as they questioned this worker's planned approach in talking*
19 *with the children and how much information would be discussed with*
20 *them. They were relieved when they were asked to share what was already*
21 *discussed with the children and were assured that efforts would be made to*
22 *protect and respect their concerns. They conceded that the children are*
23 *aware that they are being divorced and that the matter is in Court but the*
24 *reasons and details have not been discussed with them.*

25 *In light of this, caution was exercised in discussing and evaluating the*
26 *impact and effect of [The Respondent's] alleged intoxication in the*
27 *presence of the children. This assessment was mainly done by engaging*
28 *the children in discussion and recollection of their trip to Colorado in*
29 *February when it is alleged that [the Respondent] "continued to become*
30 *intoxicated in front of their children, the most recent time being February*
31 *19, 2015". The children had no recollection or memory of their mother*
32 *appearing to be 'different' or strange after she returned from shopping*
33 *during the trip.*



1 The children were observed in the presence of their parents on both home
2 visits. It was noted that they related and responded, happily, comfortably
3 and openly in the presence of their parents. On the first occasion they were
4 very apprehensive. Q2 sat with her mother while Q1 remained in the
5 middle receiving assurance and comfort from both parents as they reached
6 out to him at intervals encouraging him to cooperate, listen and that it
7 would be ok. On the second occasion, Q2 sat with her father while Q1 sat
8 comfortable in his same position in the middle snuggled up with a large
9 cushion. He was observed as cuddling closer to his mother on two
10 occasions and she affectionately ruffled his hair and in another instance
11 he drew close to his dad as he spoke to him directly of his preference of a
12 'caring plan'.

13 The children were observed as sharing an opened loving and caring
14 relationship with both parents. This was noted in their responses in an
15 interview in the company of their parents. They express themselves clearly
16 as they related their opinion and preferences. In one instance as Q1
17 thought his opinion would have been 'sensitive'; he choose another way of
18 relating his thoughts when encouraged to do so. He chooses not to remain
19 silent but to let his voice be heard.

20 This family was observed as exhibiting significant strength and a common
21 bond in relating and protecting their children despite their adult
22 differences, conflicts and preferences. As cited in an article including in
23 the bundle (exhibit 'TK1'), "the greatest gift you can give children who
24 are impacted by divorce is to shield them from adult issues. There is no
25 benefit in destroying the image they have of the other parent".

26 The Respondent has moved back into the family's home and the children
27 have shared their opinion and pleasure in having their mother return
28 home, Q1 described it as feeling 'secured'. They appeared to be also
29 aware that their living arrangement is likely to change with their parents
30 being divorced and they also shared their views and preferences when that
31 happens.



1 *It is therefore recommended that the living arrangements continue with the*
2 *Respondent living in the matrimonial home pending the resolve of their*
3 *marriage within the best interest of their children. It is also recommended*
4 *that the family attends counselling in preparing the children for the*
5 *ultimate changes and transitions as this would protect them emotionally*
6 *and mentally."*
7

8 16. The second Report, dated 19 June 2015, directly addresses the issue of future
9 residence. Paragraphs 24-29 are of particular relevance, and they are set out as follows:
10



11 "24. *It is indeed infelicitous that even though both parents have demonstrated*
12 *strong and admirable parental capacity and were observed as being very*
13 *loving and attentive to the needs of their children, they have failed to agree*
14 *on a crucial area affecting the lives and future of their children. The*
15 *children expressed their desire and opinion clearly and precisely as they*
16 *related their affection for both parents and the special times they treasure*
17 *with each parent. They made effort to underscore their equal love for both*
18 *parents as they choose to have only two weeks secluded vacation with one*
19 *parent with Q2 clarifying her decision by stating "three weeks would be*
20 *too long without seeing my other parent".*

21 25. *It was strongly noted that both children individually choose the same*
22 *living arrangement which is alternate week with each parent. It is also*
23 *interesting to note that Q2 made reference to this arrangement in an initial*
24 *family session in April 2015 as being 'cool' as she shared an experience*
25 *related to her by her teacher where the children were made to live in the*
26 *family's home and the parents stayed with them in alternate weeks.*

27 26. *This arrangement is referred to in literature as Joint Physical Custody,*
28 *Shared Parenting or Dual Residence. It is said to be more ideal and*
29 *strongly recommended for parents with the capacity to co-parent within*
30 *the best interest of their children. KQ & PQ's capacity to co-parent is*
31 *evident in their decision to enter mediation and in coming to an amicable*
32 *agreement regarding most matters relating to their children.*



1 In addition, they have made successful efforts to protect their children
2 from the negative and argumentative aspects of the divorce proceedings
3 and by explaining the reason for divorce as 'mommy and daddy don't love
4 each other anymore'.

5 27. Despite the eminent strengths, KQ stated his concerns and fears which
6 have influenced his decision in having sole residence custody of the
7 children with them having sleep overnight access with PQ on alternate
8 weekends only. PQ stated adamantly that she has positively redirected her
9 lifestyle and have been attending AA meetings weekly. She added that she
10 has absolutely no intentions to return to drinking or to jeopardize her
11 relationship with her children by any means. To corroborate her
12 commitment to change, PQ requested that it was included in the sign
13 agreement. At this point in mediation, both parties were observed as being
14 very emotional with KQ stating, "if you are really serious about that,
15 [calling her by her first name], then let us cancel the whole divorce and go
16 back to being a happy family". PQ paused for a while and then in tears
17 stated, "that too much have been said" and that she has come realized and
18 accept that emotionally and physically they have been separated for years.
19 PQ commitment to change was noted when she stated that she would
20 attend AA meetings during her lunch on the week when she would have the
21 children.

22 28. One of the pros of Joint Physical Custody is that both parents are
23 established as equals and enjoy approximately the same amount of
24 parenting time with the children and that neither parent is deemed a
25 'visitor' in the children's lives. On the other hand, one of the cons is that
26 of routine and the responsibility placed on the children to pack up and
27 switched homes every other week.

28 29. The cons were discussed in details with both parties. It was noted that
29 routine including homework, after school activities and bedtime would
30 remain the same. Both parties were encouraged to make the same
31 provision to provide for the children necessities in each home should this
32 be the chosen option. They both assured that this would not be an issue."
33

1 17. Finally, as stated above there is another Report by Ms. Powell, dated 27 October 2015.

2 On page 2 Ms. Powell states:

3 *"Evaluation Procedures*

4 *(These are the procedures beginning April 2015)*

5 *A. Three visits to matrimonial home*

6 *B. Two family intervention sessions*

7 *C. Four Individual interviews Petitioner*

8 *D. Four Individual interviews Respondent*

9 *E. Unscheduled visit to the condo once occupied by Respondent.*

10 *F. Four mediation sessions with the Petitioner and Respondent.*

11 *G. Individual interviews with the children at school with their teachers*

12 *H. Telephone and email correspondences with both parties."*

13
14 18. Ms. Powell states the following words on page 3:

15 *"The welfare checklist criteria found in section 3(3) of the Children Law 2013*
16 *specifies seven criteria to be considered and provides directives when investigating*
17 *and reporting on the welfare of children. The criteria are:*

18 *The seven criteria included in the checklist in accordance to the Children*
19 *Law Section 3(3):*

20 *(a) The ascertainable wishes and feelings of the child concerned*
21 *(considered in light of his age and understanding)*

22 *(b) His physical, educational and emotional needs*

23 *(c) The likely effect on him of any change in his circumstances;*

24 *(d) His age, sex, religious persuasion, background and any characteristic*
25 *of his which the Court considers relevant;*

26 *(e) Any harm which he has suffered or is at risk of suffering;*

27 *(f) How capable each of his parents, and any other person in relation to*
28 *whom the Court considers the question to be relevant, is of meeting his*
29 *needs; and*

30 *(g) The range of powers available to the Court under this law in the*
31 *proceedings in question.*



1 *This worker has been critically guided and mindful of the importance of these*
2 *criteria throughout the entire investigation process of this report. Information*
3 *provided in this report can be referenced in the three previous reports provided to*
4 *the Court including a parenting agreement signed by both parties.*

5 *There are two children who are the subjects of this report, Q1 (male age 11) and*
6 *Q2 (female age 9). Developmentally they are both at the stage of School-Age*
7 *Children (6-12) with similar understanding, educational and emotional needs.*
8 *(Philip M. Stahl, 2011)."*
9

10 19. Ms. Powell then states on page 4:

11 *"During the open session with the family in the comfort of their home, the children*
12 *shared that they did not recall what they told worker at the interviews held at their*
13 *school. This worker proceeded to repeat to them the possible options in living*
14 *arrangements following the divorce. Worker began with option one scenario being*
15 *that father lives in the household with them and mother lives elsewhere and that*
16 *they sleep with mom at her house every other weekend Friday to Sunday. Both*
17 *children emphatically stated a resounding 'no'. They then volunteered to state*
18 *their desire. Q1 (who chose to remain hidden behind the sofa while he participated*
19 *in the session), began by stating that he wants three houses. He explained that he*
20 *wanted for himself and his sister to remain the family's home and that his parents*
21 *lives elsewhere separately, they would then take turn in alternative weeks staying*
22 *with them and caring for them in the family's house. His sister stated that what she*
23 *wanted is equal time with both parents by spending alternate weeks with them in*
24 *their homes.*

25 *Both children made it very clear that they desire to have equal time with both*
26 *parents and that they did not want to spend more than a week away from living*
27 *with the other parent. In emphasis, Q1 added that they can alternate every day or*
28 *three days from the family's house. In an effort to clarify their understanding of*
29 *equal time, this worker informed the kids that in addition to spend alternative*
30 *weekends with their mother she would still take them to school every day. They*
31 *both responded re-soundly 'no'. In emphasis, this worker asked the children what*
32 *is worst feared decision that may be made by the Judge. They both responded, 'not*
33 *to have equal time with both parents, with alternate weeks."*



1 20. Ms. Powell adds on page 5:

2 *"The literature indicates that school-age children thrive on structure and*
3 *routine...they often feel stuck due to loyalty conflicts and may become emotionally*
4 *constricted, worrying about both of their parents. It is also stated that while*
5 *children of this age often express a wish for equal time with each of their parents,*
6 *this may simply be to keep things fair for their parents and not reflect their true*
7 *feelings. Both children remained consistent with their responses regarding living*
8 *arrangements despite the varying settings and times in which they were*
9 *interviewed. Their bond with both parents was evident in the initial interview done*
10 *in April 2015. When interviewed separately and unexpectedly at school they both*
11 *shared their opinions expressing their value and the significant relationship they*
12 *share with both parents. It is opined that any change of circumstances that would*
13 *significantly affect the time spent with either parent would cause the children*
14 *emotional trauma and distress. They are both at a vulnerable stage emotionally*
15 *and both parents are observed and commended for making effort to protect the*
16 *children from the 'brunt' of the impact of the divorce.*

17 *The family observed Christianity as their religion; however, they do not share a*
18 *recent history of attending church together as a family. Mother attends church on*
19 *Sundays and is usually accompanied by daughter Q2 as reported to this worker in*
20 *previous interviews. However, within the last two months the children have been*
21 *going golfing with father on Sundays.*

22 *Given the parental commitment and care of both parents as observed and noted by*
23 *this worker, there is no perceived risk of the children in either of their care. Father*
24 *reports that mother is likely to return to the habit of consuming alcohol. However,*
25 *a recent report submitted by her mental health counsellor speaks of mother having*
26 *seven (7) months of sobriety and her continued utilization of positive support*
27 *systems."*



1 21. Ms. Powell finally reiterates at paragraph 4, page 7:

2 *"It was strongly noted that both children individually choose the same living*
3 *arrangement which is alternate week with each parent. It is also interesting to note*
4 *that Q2 made reference to this arrangement in an initial family session in April*
5 *2015 as being 'cool' as she shared an experience related to her by her teacher*
6 *where the children were made to live in the family's home and the parents stayed*
7 *with them in alternate weeks."*
8

9 22. Then at the conclusion of the Report Ms. Powell summarises her previous
10 recommendation as to joint residence (which she describes as *"Joint Physical*
11 *Custody"*).
12

13 23. It is important to record at this stage that counsel for the Petitioner extensively cross-
14 examined Ms. Powell as to the accuracy of her findings, including making an
15 allegation that she had in effect misrepresented Q1's reported position when he was
16 interviewed and claiming that in reality Q1 wished to reside in the matrimonial home,
17 which would ultimately be the Petitioner's separate home, rather than being otherwise
18 dislocated. Ms. Powell however denied emphatically those assertions.

19
20 24. By way of a general comment, it is in any case difficult to give any significant weight
21 or credibility to the Petitioner's contention that Q1 would in any event be expressing a
22 preference or priority to stay in one particular dwelling, as distinct from wishing to
23 spend time with both his parents, as the Petitioner apparently alleges.

24
25 25. Although the challenge to Ms. Powell's credibility was vigorously sustained,
26 nonetheless I ultimately accept both her Reports and her sworn testimony as being
27 accurate and correct.
28
29



1 *"Welfare Checklist*

2 78. *In applying the factors set out in the Welfare Checklist, it is*
3 *submitted that:*

4 a. *The ascertainable wishes and feelings of the child*
5 *concerned (considered in the light of his age and*
6 *understanding). This is a very clear case in which both*
7 *children have specifically said that they wish to spend*
8 *equal time with each parent. Furthermore, the Welfare*
9 *Officer has endorsed this view.*

10 b. *His physical, educational and emotional needs. The needs*
11 *of both children are currently met by spending time with*
12 *both parents. There is a serious risk that the children's*
13 *emotional needs would not be met if they are separated*
14 *from their mother in the manner described by the*
15 *Petitioner.*

16 c. *The likely effect on him of any change in his*
17 *circumstances. There would be no effect on the children if*
18 *shared residence is in place.*

19 d. *His age, sex, religious persuasion, background and any*
20 *characteristic of his which the court considers relevant;*
21 *The children are old enough to express their own views*
22 *and have done so without hesitation.*

23 e. *Any harm which he has suffered or is at risk of suffering;*
24 *There is no risk of harm in a shared parenting*
25 *arrangement.*

26 f. *How capable each of his parents, and any other person in*
27 *relation to whom the court considers the question to be*
28 *relevant, is of meeting his needs; W is their primary*
29 *carer. "*



1 30. I agree with these observations. Although counsel's submissions are dated 28
2 September 2015, they are further reinforced by the terms of Ms. Powell's subsequent
3 Report dated 27 October 2015, to which I have already referred in some detail.
4

5 31. The Court accepts fully both the evidence of Ms. Powell and the contents of her
6 various Reports and the Court finds her overall assessments to be extremely helpful.
7

8 32. In reaching the conclusion, as I do, that a joint residence order should be made in
9 relation to both children, with alternate weeks with each parent, the Court also adds
10 that, irrespective of the Social Worker's recommendation, the Court would nonetheless
11 come to the same conclusion in any event after considering both the evidence taken as
12 a whole and the applicable principles of law. The welfare of these children clearly
13 requires that a joint residence order should be made. As Ms. Powell has in effect
14 observed, if both parents are established as equals, neither parent is deemed a "visitor"
15 in their children's lives.

16 33. In this context, the Court has also borne in mind that, where the Court is considering,
17 pursuant to s.3(5) of the Law, to make one or more order under this Law in respect to a
18 child, it shall not make the order unless it considers that doing so would be better for
19 the child than making no order at all.
20

21
22 34. The Court considers that making no order could well be contrary to immediate and
23 longer term welfare of Q1 and Q2. At this juncture of their lives they need both
24 certainty and security.
25



1 35. By way of a general observation the Court reminds itself and the respective parties of
2 the critically important comments of Smellie C.J. in *MW v. FW*¹, where the learned
3 Chief Justice states:

4 "1. While divorce is always a difficult and traumatic experience for the parties
5 themselves, its impact upon and consequences for a young child of the
6 marriage can be even more devastating.

7 2. The likelihood of that happening can however be greatly reduced where
8 the parties are able to continue to relate to each other with the welfare of
9 the child as their primary concern and objective."
10
11

12 36. In conclusion, I add that, should either the Petitioner or the Respondent seek to propose
13 that any specific conditions should be attached to the Order itself, the Court will hear
14 and consider such proposals as may be brought forward.

15
16
17 Dated this the 16th day of December 2015

Robin McMillan

18

19 Mr. Justice Robin McMillan (Actg.)
20 Acting Judge of the Grand Court



¹ Cause No. FAM 0004 of 2013,