

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FAMILY DIVISION**
3

4 **CAUSE NO. FAM 180 OF 2011**

5
6 **BETWEEN:**

7 **NB**



Plaintiff

8
9 **AND**

10 **SB**

11 **Defendant**

12
13 **Appearances:** Mr. Clyde Allen of Chambers for the Respondent
14 Mr. David McGrath of Sampson and McGrath for the Petitioner
15

16 **Before:** Hon. Justice Richard Williams
17

18 **Heard:** 8th January 2014
19
20
21

22 **EX-TEMPORE JUDGMENT**

- 23 1. This matter comes before me in my capacity as the judge responsible for heading
24 the Family Division of the Grand Court and also due to my being the Hague
25 Network Judge for the Cayman Islands.
26
- 27 2. Due to the requirement for a prompt decision to be made, I give this in the form of
28 an *ex tempore* judgment. Regrettably, it may not read as neatly as a written

1 reserved judgment and there may be typographical errors, but it is designed to
2 enable the parties to immediately understand the reasons for my decision. I will
3 have this judgment immediately transcribed and direct that copies be provided to
4 the parties. Additionally, I permit copies of this and all child related judgments in
5 these protracted proceedings to be provided to the parties' attorneys whether they
6 be in United States of America or Cayman Islands and to the Central Authorities
7 of the Cayman Islands and United States of America involved in any Hague
8 Convention procedure concerning the relevant children.



9
10 3. This matter concerns C, a young boy born on 14th May 2007 who is, therefore 6
11 years of age and his sister K born on 26th December 2008 and aged 5. They were
12 born in the Cayman Islands and have since birth resided in the Cayman Islands.
13 Importantly, on 18th August 2011 Quin J. ordered that the Cayman Islands was be
14 deemed to be the country of residence for the children for the purposes of the
15 Hague Convention for the Prevention of the Abduction of Children. I shall refer
16 to the relevant children as "the children" in this judgment.

17
18 4. The children's parents met in Florida in late 2005, moving to the Cayman Islands
19 around September 2006. They were married on 22nd December 2008 in Grand
20 Cayman. They are separated and are involved in highly contentious divorce
21 proceedings. They are SB (their father "F") and NB (their mother "M"). F is a

1 Cayman national. M's immigration status is by a Residency and Employment
2 Right Certificate. I shall refer to them as F and M in this judgment.

3
4 5. There have been an unusually high number of children applications made by the
5 parties. There are a number of judgments in this matter, which fully set out the
6 background. I am aware of the content of the judgments and I do not seek to now
7 again set that out in detail herein.

8
9 6. In April 2011 the family went to Florida to attend M's aunt's wedding. F returned
10 to Cayman leaving M and the children to extend their stay. Against the F's
11 wishes, M initially refused to return to Cayman. Also against F's wishes, she
12 started to make enquiries into employment for herself and schooling for the
13 children in Florida. It was only after F flew back to Florida that he was able to
14 persuade M to let C come back to Cayman with him, and to attend school. K
15 remained with M in Florida. Reluctantly, after the wedding M, eventually
16 returned to Cayman because she said she was missing C. In my judgment dated
17 10th April 2013 I stated:

18 *"Even if the mother's reasons for remaining in Florida with the*
19 *children were as stated, the court cannot accept that it was the*
20 *appropriate thing for her to have unilaterally decided to remain*
21 *there with them."*
22



1 7. On 21st September 2011 M applied for an order permitting her to temporarily
2 remove the children from the jurisdiction to enable her to celebrate Thanksgiving
3 in the United States. Due to the supervening events the hearing became a hearing
4 for leave to remove in December to celebrate Hanukkah. The application was
5 objected to by F as he was concerned that M would abduct the children and not
6 return them to the Cayman Islands after the visit. After a fully contested hearing, I
7 gave a detailed judgment in which I gave leave for M to remove the children from
8 the jurisdiction temporarily. I was then satisfied that M would return to the
9 jurisdiction with the children, which she did. Importantly, I recognised in the
10 judgment that the children were habitually resident in the Cayman Islands.



11
12 8. M later issued an application for leave to permit her to permanently remove
13 children from the jurisdiction. Following the hearing spread over four days in
14 December 2012, I delivered, on 10th April 2013, a 95 page judgment containing
15 the reasons for my decision to refuse the application. Leave was given to M to
16 appeal my decision. I am informed that after a full day hearing, the Court of
17 Appeal upheld this Court's decision.

18
19 9. It became evident to this Court at a number of hearings that have come before it
20 since the Court of Appeal's decision that M is unhappy with the rulings of the
21 Courts. In fact, her attorney indicated to the Court that M's intention was to work
22 towards and restore her application for leave to permanently remove the children

1 from the jurisdiction. At the same time, the Court was made aware that M had
2 made trips to Florida and had started an interest in a business in Florida and
3 appeared to be making enquiries in relation to the children's schooling in Florida.
4 Having regard to the recent evidence placed before me and M's express intention
5 to breach the Court order and wrongfully retain the children in Florida it is clear
6 that she had no intention to make an application in the proper manner and had
7 already been making plans for a while.



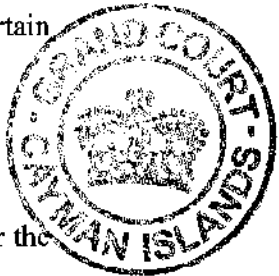
9 10. On 19th December 2013, the Court was asked to consider an application made by
10 M, by means of summons filed only three days earlier, for leave to remove the
11 children from the jurisdiction from 22nd December 2013 to 5th January 2014. At
12 the hearing the parties came to a consent agreement whereby the children would
13 be taken to M in Florida by F on 27th December 2013 and that she was to return
14 the children to the Cayman Islands, not later than Sunday, 5th January 2014.

15
16 11. M has fundamentally breached the Court order by failing to return the children to
17 the jurisdiction. This means that the children have been unable to start the school
18 term in the Cayman Islands. Mr. McGrath has indicated to the Court that shortly
19 before this hearing he has received a telephone communication from M. In that
20 communication M indicated to him that she had no intention of returning the
21 children to the jurisdiction. Mr. McGrath indicated to the Court that she is fully
22 aware of the requirement for her to do so.

1 12. This Court greatly appreciates Mr. McGrath's frankness. It entitles the Court to
2 make a finding of fact, beyond all reasonable doubt, that M is in contempt of
3 court by failing to return the children to the jurisdiction by or on 5th January 2014.
4 It is clear that she intends this contempt to be ongoing as she has no intention of
5 returning these children to the Cayman Islands.

6
7 13. F has issued a Summons. The Court has directed that the Summons come before it
8 on an ex parte on notice basis. Again, the Court is grateful to Mr. McGrath for
9 attending on short notice this afternoon. The Summons is supported by an
10 affidavit sworn by F today. The Summons seeks a number of orders, the majority
11 of which are not appropriate for me to deal with today. However, in the light of
12 the evidence now before the Court is clear that the Court must make certain
13 orders.

14
15 14. I have been informed that F has been in contact with the Central Authority for the
16 Cayman Islands under the Hague Convention on the Civil Aspects of
17 International Child Abduction ("the Convention"). The Central Authority will
18 likely contact her counterpart in the United States and hopefully submit a formal
19 written "Application for Assistance under the Hague Convention on Child
20 Abduction" as well as a factual background document signed by F. Any such
21 application would be made by the Central Authority pursuant to Article 8 of the
22 Convention on the basis that M has wrongfully retained the children in breach of



1 custody rights in accordance with Article 3. I should add that I am aware that the
2 USA is an active participant in the Hague Network of Judges. I had the pleasure
3 of meeting with a Network Judge from Florida at the global meeting of the Hague
4 Network Judges held in London in July 2013 and as a consequence I am hopeful
5 that any such request will be promptly addressed in Florida.



6
7 **Habitual Residence**

8 15. In my recent decision of *CMS v RGS 177/2013* (9th September 2013) I reviewed
9 the case law in relation to habitual residence. I am satisfied that my observations
10 in that transcribed ex tempore ruling are equally applicable to this case. Due to
11 time constraints this morning, I will not repeat those.

12
13 16. It is the habitual residence immediately before a wrongful removal or retention
14 that is the determining factor when considering habitual residence: *RE S (A*
15 *Minor) (Abduction)* [1991] 2 FLR 1 and *Re F (Minors) (Abduction: Habitual*
16 *Residence)* [1992] 2 FCR 595.

17
18 17. The legal principles in relation to habitual residence are helpfully set out by Mrs.
19 Justice Pauffley in *FT and NT (Children), Re* [2013] EWHC 850 (Fam) when
20 she states that:

21 *"2. Habitual residence is a question of fact to be determined by the*
22 *trial judge. He or she should normally stand back from the*
23 *evidence and take a general view, rather than conducting a*

1 *microscopic search. An appreciable period of time and a settled*
2 *intention will be necessary to enable a person to become habitually*
3 *resident in country B as opposed to country A.*

4 3. *The requested period of time is not fixed and will depend upon*
5 *the facts of each case. Bringing possessions, doing everything to*
6 *establish residence before coming, having a right of abode,*
7 *seeking to bring family, durable ties with country of residence or*
8 *intended residence and many other factors have to be taken into*
9 *account. Habitual residence may be acquired despite the fact that*
10 *a move may only have been temporary or on a trial basis. A month*
11 *has been held to be 'an appreciable period of time' though that has*
12 *been described as 'the high watermark' in a case where the Court*
13 *of Appeal upheld the trial judge's finding that six weeks was*
14 *sufficient to result in the acquisition of a new habitual residence.*

15 4. *In relation to 'settled intention' it has been said that there must*
16 *be a degree of settled purpose. The purpose may be one or there*
17 *may be several. It may be specific or general.*

18 5. *The habitual residence of young children of married parents all*
19 *living together as a family is the same as the habitual residence of*
20 *the parents themselves and neither parent can change it without*
21 *express and tacit consent of the other or order of the court.*¹



23 18. ***In Re J (A Minor) (Abduction: Custody Rights)*** [1990] 2 AC 562, Lord

24 Donaldson MR stated:

25 "*...in the ordinary case of a married couple... It would not be*
26 *possible for one parent unilaterally to terminate the habitual*

¹ My emphasis

1 *residence of the child by removing the child from the jurisdiction*
2 *wrongfully and in breach of the other parent's rights."*
3

4 19. Millett L.J. stated in *Re M (Abduction: Habitual Residence)* (1996)1 FLR 887:

5 *"Where both parents have parental responsibility, neither of them*
6 *can unilaterally change the habitual residence of the child*
7 *wrongfully and in breach of the other party's rights: Re J at 572*
8 *and 449 respectively per Lord Donaldson, MR."*
9

10 20. In the Court of Appeal decision of *ZA & Anor v NA* [2012] EWCA Civ 13

11 Patten L.J. said at para 52:

12 *"...Whether one treats both parents or only the mother as having*
13 *the care and control of the children, it is well established that the*
14 *habitual residence of the children cannot be changed by the*
15 *unilateral action of one parent, which is not consented to, or*
16 *acquiesced in by the other. This would be a charter for abduction.*
17 *The forced retention of the children in Pakistan cannot therefore*
18 *found the basis of a claim that by passage of time and their*
19 *inevitable involvement in family life and education in Pakistan the*
20 *older children have ceased to be habitually resident in England."*
21



22 21. The children were born in and have always resided in the Cayman. The Courts
23 have confirmed since 2011 that they are habitually resident here. That order has
24 never been appealed or challenged. It is clear, from an objective view of the facts
25 of this case, that despite M's unilateral actions in relation to the children that they
26 were and remain habitually resident in the Cayman Islands.

1 22. The children's habitual residence cannot change unless both of the parents create
2 a change, for instance that they arranged for the children to live in settled
3 circumstances in Florida, or for example themselves both moved to Florida for a
4 settled purpose. What is important is that they changed the habitual residence
5 voluntarily. It is important not to elevate the test into a domicile or quasi-domicile
6 test because habitual residence is a question of fact. Consent, agreement,
7 acquiescence, acceptance of each of the parents is crucial because of the
8 requirement that residence must be "voluntary" to be habitual. If it is not
9 voluntary, it cannot be said to have been settled.



11 23. F did not consent to M's unlawful retention of the children. Both parents have
12 parental responsibility and M cannot change the habitual residence of the children
13 unilaterally, as the parents did not have a common intention to change their
14 residence. Accordingly, and I reiterate, on the evidence currently before me, I
15 again find that the children remain habitually resident in the Cayman Islands.

17 24. I also find that, due to the unlawful retention of the children and M's expressed
18 intention conveyed to the Court by Mr. McGrath to permanently remove them,
19 that M has abducted them from the Cayman Islands, removing them in breach of
20 F's custodial rights. Accordingly, I order that forthwith the children be returned
21 to the Cayman Islands pursuant to the Hague Convention and that M facilitates
22 this return. I order that there be a prohibited steps order stating that thereafter M is

1 not permitted to remove the children from the Cayman Islands without the written
2 consent of F or an order of the Grand Court. I order that a penal notice be attached
3 to each of these two provisions.
4

5 **Interim Residence and Other Orders**

6 25. I am satisfied that due to the circumstances surrounding the removal of the
7 children, on the evidence before me, that this case falls into one of those
8 exceptional circumstances for the making of an ex parte interim residence order
9 mentioned by Butler-Sloss L.J. in *Re G (Minors) (Ex parte interim residence*
10 *order)* (1993) 1 FLR 910 at 912D when she stated:

11 *"In my judgment, it is very rare indeed that it is necessary to have*
12 *an ex parte interim residence order. The only situation I can think*
13 *of is where there is a "snatch" situation – child abduction. There*
14 *obviously will from time to time be other exceptional*
15 *circumstances in which it is necessary for the protection of the*
16 *children that there should be an ex parte order."*
17



18 26. When considering whether to make the prohibited steps order and the interim
19 residence order, I have considered the contents of the welfare checklist set out in
20 s.3(3) of the Children Law (2012 Revision) ("the Law"). In particular, I am
21 satisfied that, in the interim, the children's physical and emotional needs can be
22 met by F.
23

1 27. Having regard to all of the circumstances of this case, including the fact that it is
2 an abduction case, I am satisfied that an interim residence order and the
3 aforementioned prohibited steps order are required to give certainty which would
4 be in the best interests of the children, which are paramount. I have considered the
5 no order principle contained in s.3(5) of the Law.

6
7 28. Having regard to M's expressed intention not to return to the Cayman Islands, I
8 order that F may gain access to Apartment 1, 121 Omega Bay, Prospect, Grand
9 Cayman.

10
11 29. I also order that the orders for child maintenance be suspended until further order
12 of this Court.

13
14 30. Costs are to be reserved

15 Dated this 8th day of January 2014.

16
17
18
19
20 **The Honourable Mr. Justice Richard Williams**
21 **JUDGE OF THE GRAND COURT**
22



23
24 The judgment was delivered in private, but the Judge hereby gives leave for it to be
25 published.

26
27 The judgement in this matter is being distributed on a strict understanding that in any
28 report no person other than the attorneys (and any other person identified by name in the
29 judgement itself) may be identified by name or location and in particular the anonymity
30 of the child and the adult members of their family must be strictly preserved.