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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FAMILY DIVISION

CAUSE NO. FAM 245 OF 2010

BETWEEN:	**KP**	**PLAINTIFF**
AND:	**JB**	**DEFENDANT**

Appearances: Mr. David Holland of Samson & McGrath for the Plaintiff

Ms. Laura Clemens of Bodden & Bodden for the Defendant

Before: Hon. Justice Richard Williams

Heard: 14th, 15th, 16th, 17th, 20th, 21st, 23rd, 24th and 30th August 2012

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GRAND COURT – CAYMAN ISLANDS

HEADNOTE

Guardianship and Custody of Children Law (1996 Edition) – Application for leave to remove young child from jurisdiction for 18 months – Relevant considerations to be applied to a temporary removal application – What amounts to a shared-care arrangement - Application for care and control / joint care and control – Comparison of joint custody and care and control with shared residence orders.

JUDGMENT

1. This matter concerns J, a young girl born on 13th December 2009 and who is, therefore, just over 2 1/2 years old. I shall refer to her as J in this judgment. Her unmarried parents are KCP (her mother – "M"), aged 23, and JB (her father "F"), aged 32. I shall refer to them as M and F.

2. Both parties are Caymanian nationals. M has been in secure employment with the same insurance company for a number of years and holds the post of assistant broker. F has a primary position in his family's construction company and he is self-employed.

3. The **Children Law, 2003** is now, subject to the transitional provisions, applicable. Regrettably, as I am dealing with pending proceedings, I am not in a position to make use of any of the helpful and modern orders made available by that Law, including parental responsibility and/or residence orders. Sensibly, at the outset of the hearing, the parties agreed that the Court should make a joint custody order in relation to J in their favour.

4. The applications before the Court are M's application for leave to remove J temporarily to live with her in Tallahassee, Florida, United States of America for a period of 18 months to enable her pursue a degree in risk management and

insurance at Florida State University ("FSU"). This would require a discharge or variation of the ex-parte order made on 9th November 2011 which prohibits removal of J from the jurisdiction. Due to the delayed date of the hearing M has had to change the proposed commencement of her studies firstly from January 2012 to September 2012 and now further to January 2013. M also seeks an order for care and control. In the event that leave to remove is refused M seeks a reduction in the level of J's access with F which was ordered on 13th December 2011. F opposes all of these applications.

5. F's application is firstly for joint care and control or alternatively a sole care and control order in his favour in relation to J. M opposes these applications.

6. Although this is not a permanent removal case, the predicament that this court finds itself in is similar to the one faced by Theis J in ***C v C (International Relocation: Shared Care Arrangement)*** [2011] 2 FLR 701. In that case Theis J stated at paragraph [2]:

> *"These cases are very difficult, particularly when they are finely balanced, as this case undoubtedly is. There are powerful arguments advocated by the parties on paper and in oral evidence in support of their respective positions. The court has been greatly assisted by the parties having legal representation of the highest*

standard. There is no middle ground and inevitably one party is going to find the court's decision very difficult."

Background

7. The hearing of this matter was spread over nine days. This is rather unfortunate, but is indicative of the situation where these otherwise two intelligent relatively young adults seem, due to their negative interaction with each other, unable to consistently function and co-operate in a manner that creates a positive environment for J. This hearing is the first time during these proceedings that the parties have been able to give oral evidence and be tested in cross-examination. As a consequence, both parties seemed intent on trawling through the whole history of their relationship from its inception to the current date. Such a detailed analysis of the history of their relationship is not as helpful to the Court when determining the applications as the parties appear to believe it to be. A great deal of irrelevant and unhelpful evidence has been placed before this Court. Since the parties have been given the opportunity to conduct such an exercise at this hearing, the Court would not now expect them to seek or feel the need to do the same at any future related hearing.

8. I will now go on to deal with the relevant background. I have regard to the approach of ***Thorpe LJ in Re F (Shared Residence Order)*** [2003] EWCA Civ 592, [2003] 2 FLR 397, namely that one of the functions of the judge is to make

findings and that another function is to be selective and to make findings that are relevant and necessary for the disposal of the issue. When considering what orders would be in the best interest of J at this time, I am not required to make findings on every area or issue that has been presented to me for determination or which have become apparent during the hearing. I must determine the factual issues that have implications for the decisions that I have to take in relation to J.

9. The parties met in December 2007 and started to have a relationship in around April 2008. M was aged 19 and F was aged 27. During their courtship they resided in their respective parents' homes.

10. J was conceived in March 2009. It appears that F had concerns, due to them being an unmarried couple at that stage of their life, about bringing a child into the world. F comes from a traditional family and his parents possess high morals. It is evident that they had told F, pre-conception, that they viewed it to be wrong to have a child out of wedlock. At one stage, F discussed with M the possibility of her terminating the pregnancy. F was forthright with the Court when he admitted that in the doctor's surgery at a pre-natal appointment held four months into the pregnancy, upon being informed that the fetus was female, he told M that she was "*now on her own*". F stated that he said that as, at the time, he had wanted a son. M wanted to go ahead with the pregnancy. F, after his parents telling him about the

error of his ways, subsequently supported M's wishes, as evidenced by his attendance at a number of the prenatal classes and appointments.

11. J was born in December 2009. F was at her birth. It is patently clear to the Court that J is the pride and joy of both of her parents. I am satisfied that J has bonded with both M and F, and that they both have a strong and important relationship with her.

12. M took a leave of absence from work for the first six months after J's birth. She wanted to use this time to complete her associate degree in business administration at University College of the Cayman Islands ("UCCI"), having changed her associates degree from natural-science (pre-med). M attended UCCI on weekdays from January 2010. It is agreed that at that time, at least during the day time, J would stay at the paternal grandparents' home in George Town ("F's house'"), the home in which F then resided.

13. M's ability as a single mother, albeit with a then supportive partner and his family, to balance her academic drive with her care of a newborn baby is indicative of her genuine desire to improve herself and thereby put herself in a better position to provide for her family. M received high grades at UCCI and the next natural step

for her advancement is for her to undertake a degree course.[1] The reasons and motivation for M seeking to now attend Florida State University ("FSU") are the same that she had when she balanced working at her career in parallel to her ongoing studies and later when she returned to her studies shortly after J's birth. I note that M's sister has similar drive and is about to commence her legal studies in the United Kingdom. M's reasons are all the more understandable now that she and J's father are, unlike for a period of time after the birth, no longer together in a supportive relationship.

14. M attended classes at UCCI in the morning and then returned to F's house to look after J. While M was in class, the paternal grandmother would assist by looking after J. F would come home, taking time out from his working day, to assist with J's care. M stated that in the morning she would come from her mother's home in Newlands, where she was living at the time, and drop J off at F's house where her then nanny, NM, would look after her. The involvement of F and his family at that time is to be commended, as it not only showed a strong desire to play an important role in the care of baby J, but by being supportive of M's studies, it also showed a recognition that M was seeking to advance herself by obtaining a good education. It is a great pity that this insight and mutual respect between M and F is now a thing of the distant past.

[1] See Letter dated June 9, 2011 from Royland Davis- Senior Lecturer- UCCI to Secretary to the Education Council in support of an application for a scholarship. -

15. There is a dispute between the parties as to where M and J lived and slept during this period. M states that she would usually sleep over at F's house at weekends, but would do so only occasionally during the week. M stated that she and J rarely slept over at F's house during the week and that she only did so if F insisted or if it was raining. M told the Court that during the week, after her evening class had concluded, she would go to F's house, collect J and take her to her home in Newlands.

16. The maternal grandmother stated that M took leave from work for the first six months after J's birth to enable her to bond with her. She stated that M and J stayed at her home, but did spend some weekends at F's house. The maternal grandmother accepted that there were occasions when J would sleep over at F's home but on the whole she was *"cared for, put to bed and slept with"* M. This is consistent with M's evidence.

17. The maternal grandmother also accepted that, after M went back to work in June 2010, she and LM (J's nanny In December 2010 following NM's departure) cared for J on some afternoons and evenings when M was at evening classes or when on occasion she went out. This again is consistent with M's evidence, that she did go out socially, but it was only occasionally.

18. The maternal grandmother acknowledged that, during that time, F would come to visit the house during the day for between one to two hours and then return to work. This was confirmed by LM. LM stated that F came to the house every day and he would play with J, change her diaper, help feed her, put her to sleep and bathe her. The maternal grandmother said that M and J remained living at her property until M and J moved into M's new apartment in West Bay in February 2011.

19. Although the evidence from M and her witnesses create a picture of a father willing to play a hands-on and commendable role in J's life immediately after the birth, F contends his involvement was even greater. F stated that the maternal grandmother took time off work for the first three weeks to assist M with J. He said he came home several times during the day to assist with J's care and he slept there overnight. F said that it was agreed that it would be better for J to be cared for at his house while he was at work and M was at school. He, unlike M, contends that she and J primarily slept at his house at that time and on the occasions that she did not sleep there she would bring J back in the morning before attending UCCI. F said that there were occasions when M was in the middle of revision for her examinations when she would leave J with him, so that she could study at another house. M stated that if she needed to revise she would not leave J, but would study at the dining room table at F's house. F said that, at that time, his mother cared for J during the day with the help of EE, the paternal family's housekeeper. F stated

that he would come home at multiple times during the day to assist with J's care. He contended that he played a full role as a father with a young baby by feeding, bathing, changing diapers, clothing and giving general care to J in the day and during the night. In June 2010, to coincide with when M went back to work, F hired a nanny, NM, to relieve his mother and to assist with the care of J during the day.

20. NM was J's nanny from June 2010 to the end of September 2010. In her affidavit she said that she worked from F's house and that M was living there at the time. This is consistent with F's evidence. However, NM was not a live-in nanny. She said that when she arrived for work at 8am in the morning J and M were at the house. NM said that when she left work at 5pm M had not returned from work. NM could not give conclusive first-hand evidence of where people were before 8am and after 5pm. I note that NM said that, after she arrived in the morning, F would bring J downstairs and play with her and give her instructions for the day. NM stated that M would be upstairs getting ready for work. This would infer that they could have been there overnight. On the other hand, NM also recounts working for the maternal grandmother for a weekend. She also stated that M asked her if she could drop J off with her so that she could go out and that M went out every week or every other week. This tends to show that M and J were not residing at F's house all of the time.

21. NM said that both parents would come home at some point during the day on most days. NM said that M would usually come home at lunch to see J. She said that F would come home during the morning or early afternoon and then go back to work and on occasion he would also come at lunchtime. From NM's brief period of employment with the family, totaling only two to three months back in 2010 and her apparent subsequent visits accompanying F to J's pre-school, visits which were unknown to M, I was surprised to see that NM felt sufficiently informed and well placed to air her concerns about J being removed from jurisdiction[2] and qualified to now question M's ability to care. NM stated that she based her conclusions on her belief that family is important. However, undermining this contention somewhat, NM told the Court that she had five children with three different fathers (although she still resides with the father of the youngest child), all out of wedlock. I found NM's affidavit and oral evidence, in content and from her demeanour, to lack objectivity. I found the manner in which NM gave her evidence to be rather partisan, despite her assertions that it was not affected by the manner in which her service had come to an end. As a consequence, I approach NM's evidence with a degree of caution.

22. The paternal grandmother's evidence was consistent with F's to the extent that it supported his contention that he played a dutiful role in the care of baby J. However, she was not as clear as F as to where M and J were actually residing. It

[2] Paragraph 21 affidavit 21 March 2011

is clear that the paternal grandmother holds traditional views about the appropriateness of an unmarried couple living under her roof and sharing a bedroom. She said that she suggested to M, who accepted, that she could take care of J after she went back to UCCI. She went on to say, "*she still remained going home. She used to come and stay some nights. I think some nights she went home. Not recall how much she stay there. January to June when study I did everything for J, bath and fed and put sleep. M come back around 1 to 2 o'clock from class and take her off me so I could go to work. I guess M would stay.*"

23. In her evidence in chief the paternal grandmother said, "*I not think she actually packed up and live there, since she go back to school and hard with baby, (J) could help her, better off, she could stay.*" In cross examination she stated, "*It not seem that packed up and came live there. She need assistance with baby so not appear as if coming for good. (F) said to my husband that she need help with the baby as she studying.* She continued "*She drive all the way to Newlands to take to Newlands to her grandmother to take care of her. So I said this is too much for you and the baby. I said leave the baby here and I will take care of the baby. She did. She still remained going home. She used to come and stay some nights. I think some nights she went home. I not recall if she there all the time. Period may be every night a few weeks, month I not remember.*"

24. I found the paternal grandmother to be a delightful and upstanding lady. Although protective of her son, she accepted that he would like to "*mouth off and curse*" at her sometimes. She stated that she thought M was a good mother and that she was very good with J and loved her. She said that M may not like to stay at home doing things like feeding, but she went on to say that she understood that M *"liked her profession, which is what a lot of young people do"*. It is quite clear that she holds a traditional view that children should be brought up in a family unit, or failing that with their wider family around them. She told the Court that she had hoped that M and F could put everything behind them and get married and thus give J a stable family life. It is clear that she feels that J should not go to Florida as it would reduce her interaction with the wider paternal family. She stated that if M could get the same education here as in Florida then that would be the better option, as there would be more people here to support them. She accepted that M had discussed going to school with her, that M had obtained a scholarship and that M could help J better if she got an education. Despite this, she said that her views are that one should stay with children when they are young. In fact, she said that if M were to leave to Florida with J for her studies it would be better for that to happen when J had reached primary school age. However, in temporary removal cases, the general consensus is that the move is preferable when a child is younger, especially if pre-school age, as there would be less disruption. When commenting upon her views about the proposed move, the maternal grandmother said that she was like a "*mother hen*". Without wishing to sound impolite, I think that the maternal

grandmother has summed up her caring and protective attitude towards her family and J very well by using that phrase. She wants to keep her family close to her, so that she can ensure that they are safe and well looked after. She stated that she did not like the modern trend for children of this age to attend preschool, especially if there are people at home to care for them.

25. When asked about the effect of any move, the paternal grandmother expressed her concerns that M's coursework would be demanding and that may mean that M would not be able to give J the attention that she requires. She felt that it would be tough on J if they left. I also noted the manner in which she said the following: "*if they went, it would hurt (F) terribly. Desperate. Every night he goes to bed and has a picture of (J) on his iPod.*" It is clear, and understandable for a paternal grandmother, that an important part of her reasoning for objecting to J's temporary removal is founded on her concerns about the effect of that on her son, F.

26. I do not accept M's suggestion that the father is primarily objecting to the removal application because he is finding it difficult to handle the breakdown in their relationship. Although, I do feel, from the evidence and his demeanor, that he is finding the breakdown difficult to come to terms with, the main reason why he does not want J to go is because she is the most important thing in his life and he would miss her terribly. Although recognizing that I must have regard to the effect on the parents of any order that I make, as well as the effect that may have on their

relationship with the child, my primary responsibility is to make an order that is in the best interests of the child.

27. I am satisfied that the maternal grandmother tried hard to give an accurate recollection of events as best she recalled them. Her evidence in relation to where M and J resided is not as decisive or as firm as that given by F. In some ways the maternal grandmother's evidence is more consistent with that given by M. It shows that the living arrangements of M and J, at least between January and June 2010, lies somewhere in between the levels contended by M and F. I am satisfied from her evidence that F played a significant role in the care of J, even if F's contentions concerning where M and J resided in the first year are exaggerated.

28. The paternal grandfather's evidence was similarly not as firm as F's concerning the living arrangements during J's first year. He said that he could not state for sure whether M and J stayed there every night, but for the "*good majority of the time she stayed at the house in the night-time.*" He said he saw M all the time in the day, but if she did leave at night he may not have seen her leaving because after 6pm he liked to read in his study upstairs. When it was put to him that M's main residence was at her mother's house he replied "*she did stay and sleep at our house. Both of them did stay there for some time during that time.*"

29. It appears from the evidence that M and J spent considerable time at the paternal grandparents' home. It is agreed that they did so, at the very least, from Monday to Friday during the daytime. It is agreed that F returned home during the day to assist with the care of J and that in the evenings he assisted with her evening routine. I am satisfied that M and J also slept over at F's house to a greater degree than M recalls, although it was clearly not every night as suggested by F.

30. The impression gained from the evidence is that when M returned to work she and J were not at F's house to the degree that they were when M was at UCCI. I need not determine the dates when M stayed there, for what is important, is the fact that it is very clear that F played a full role in the care of baby J at that time, even on M's evidence. It should not go unnoticed that the paternal family also played a significant part in baby J's care. This took a considerable amount of pressure off M, thus enabling her to pursue her studies and later on return to work.

31. It appears that after J's birth the parents had an inconsistent relationship - at times it was good and at other times rather fraught. It appears that they had even contemplated marriage. F expressed a concern during the proceedings that he felt that, after M returned to work in June 2010, she prioritised her social life to the extent that it was to the detriment of J. He said that she used to go out "*partying and drinking*" and on occasions got "*extremely drunk*". He said that this was a "*huge source of concern*" for him. F contended that he feared that M might

embrace, at J's expense, the social lifestyle that is sometimes associated with college student life if she is permitted to leave to Tallahassee with J.

32. F said that, on Friday, 24th September 2010, an incident occurred when M returned to his house under the influence of alcohol and insisted that she take J with her in a vehicle. F refused to allow her to take J and he called the police. It is contended that the police were of the view that, due to M's condition, she should return home and leave J with F.

33. The paternal grandmother said that she had never seen M drunk at the house, so she was very surprised by the events of that night. She could not confirm whether M was drunk that night, although she stated that the police said that she was. The paternal grandfather, gave similar evidence. He did not say whether M was drunk, but he recalled the incident and he recalled the police stating that they could smell alcohol and that she was drunk.

34. Having reviewed the evidence, it does appear that M had been out socialising and drinking alcohol that evening. I am not able to make a finding that she was drunk, but I am able to conclude that F was right to tell her that J should remain with him that evening. Having regard to the surrounding circumstances, M should have been sensitive to F's concerns, and she was wrong to insist that she take J in the vehicle

with her and those who were accompanying her. M acted irresponsibly in refusing to leave J there.

35. NM stated that on a separate occasion, one evening after work, she acceded to M's request for her to leave J at her house so that M could go out with some friends to a club. NM said that M arrived back at her house after 1 a.m.. However, NM noticed that M was drunk, so NM asked one of the women accompanying M to drive. Due to her concerns she telephoned EE, who has been a domestic helper for the father's family for 17 years, and told her what had happened and "*asked her to pray for J*". EE told the Court that NM had called her and told her that she was afraid for M and J because M had come to pick up late at night and she had been drinking. She confirmed that this telephone call was around 1:30 a.m. in the morning and that NM asked her to pray. Although I have the aforementioned concerns about NM's evidence[3], I am satisfied, having regard to the surrounding evidence, that NM is accurate in her recollection about this particular incident. I am fortified in this view by the highly consistent evidence of EE who I found to be a reliable and upstanding witness. The importance of this evidence is not so much that on that occasion M turned up in an intoxicated state at 1:30 a.m. and demanded to take J in the vehicle with her and those accompanying her, although such an act is irresponsible, its significance is that M flatly denies that this incident happened. It, to a degree, impacts on M's credibility.

[3] Paragraph 21 above

36. Having reviewed all of the evidence in this case, despite my highlighting the two instances above, the impression gained is that F's evidence about the level of M's "drinking" and "partying" is somewhat exaggerated. It is not uncommon for parents to have a reasonable social life, even shortly after they have the child. What is important is that this is done to a reasonable degree and that the child is adequately cared for when they are out. The impression gained is that when they were a couple before J's birth they had an active social life. The type of lifestyle regularly enjoyed by young adults of that age. It appears that after J was born F removed himself from such a lifestyle but M, especially after she went back to work, did socialise. This involved consuming alcohol during happy hour after work with colleagues, which in itself is not unduly alarming. On the evidence before me and having had the advantage of seeing M give her evidence spread over 4 days during this hearing, although finding M's conduct on the two above occasions to be unacceptable, I am not satisfied that F's concern, that if M attends FSU she will embark on a student social life that will impact on her care of J, to be well founded. I am satisfied that M is now mature enough to recognise what is reasonable and unreasonable when it comes to her having a social life and how this may impact on her care of J. I find that M's wish to attend FSU is motivated by a desire to excel academically, increase her employment prospects which in turn will in the long term ensure a better quality of life for J and not by a desire for undergraduate social events. I do not accept F's submission that M wants to attend

FSU because it is "*a party college*" or because all of her friends have gone to university in Florida.

37. The real significance of the September 2010 incident is that it resulted in the parties, to use modern parlance, "splitting up." It is clear that as a consequence M thereafter very rarely slept over at F's house and that she clearly resided elsewhere.

38. Following this incident the parties had a disagreement as to where J should be during the day. NM's service as a nanny had been brought to an end towards the latter part of September 2010 at M's request. The replacement nanny, LM, did not arrive until December 2010. In the interim M left J in the care of her sister-in-law. F was not happy with this, as it meant that J was seeing less of him and his family. F said that this also meant that he could no longer see and help care for J during the day.

39. On 1st October 2010 M applied for and obtained an ex parte restraining and exclusion order. In addition M was granted custody, care and control of J.

40. F contends that from around 5th October to 30th October 2010 the parties reconciled. He said that at that time he was able to take care of J several times a week at his home as well as caring for her at M's. The child orders granted in

favour of M remain in force and therefore have now been in place for just under two years.

41. In February 2011 M moved from the maternal grandmother's home to her own property in West Bay. Her mother moved into the West Bay property soon after and assisted with J's care. F said that on the days when he was caring for J he would bring her to his home where J would interact with him and his family. On the days when he was not caring for J he would go to M's house twice during the working day to spend time with and care for J. F added that, after work, he would go to M's house and care for J until her bedtime. F stated that during the period when he and M had reconciled he would often spend the night at M's house and would be there from after work until the following morning. F said that the reconciliations occurred between January to March 2011 and April 2011 to September 2011.

42. On 17th March 2011 the Court, by consent, renewed the restraining order and varied the address on the exclusion order. F was not represented at the time. The allegations grounding the making of the injunction were not tested at the time nor during the hearing before me. They do not assist me with the determination I must make at this time.

43. F has produced calendars and spreadsheets which he contends illustrates the number of days upon which he had care of J and also when this occurred overnight. It is contended by F that they are an accurate record, although at the same time indicating that he had not recorded all of the occasions when he had cared for J, especially during periods when he says he was reconciled with M. I note that, as highlighted by M, the calendars do not reflect J staying overnight with F to the level F suggests to the Court. The calendars appear to specify overnight stays ranging from two to a maximum of five per month between the period October 2010 and April 2011. M contends that the calendars, in their current form, are a fairly accurate record of the access that J was having with F. M rightly contends that the calendars do not reflect F's assertion, contained in his first affidavit, that J had typically slept at his house at least twice a week over the previous two years.

44. At paragraph 37 of F's affidavit sworn on 23rd March 2012 he stated:

> *"At (M's) insistence, (LM) worked almost exclusively from (M's) mom's and then (M's) home in the West Bay when she moved there in February 2011. As such, on days when I was caring for (J) I would bring her to my home and me and my family would care for her. On days when I was not caring for J, I would go to (M's) house twice during the workday to spend time with and care for (J). After work I would go to (M's) house and care for (J) until*

bedtime. During periods when (M) and I had reconciled and were romantically involved, I would often spend the night at (M's) and therefore I would just stay on after work until the next morning."

45. At paragraph 38 in the same affidavit F stated that, with the exception of one week when M kept J from him due to a dispute that happened on 9th March 2011, he saw J every day. At paragraph 40 he said that he would call in the morning at 8 a.m. and 10 a.m. to speak to J. F said he would spend lunchtime with J and play with her until naptime. He said he would talk to J after her nap at 3:30 p.m. He said he would go to M's property after work at 4:30 p.m. and stay with J until bedtime about 4 to 4½ hours later. Although carefully analysing each paragraph in his affidavit in her affidavit in reply, M did not challenge the assertions contained in paragraphs 38 and 40. I note that at paragraph 20 of her affidavit sworn on 6th August 2012, M says that sometimes both she and F would be at her property in the evening if things were civil between them, thus inferring that F may not have been there for 4 to 4 ½ hours every night.

46. At paragraph 20 of the affidavit sworn by M on 6 August 2012 she said concerning paragraph 37 of F's fifth affidavit that it:

"essentially reiterates what I've been saying all along. (J's) primary residence was with me and (F) was having access. Sometimes we would both be present at my home in the evenings

when things were civil between us but (J) would generally always sleep at my home."

47. M stated that there was a *"fundamental disagreement between myself and (F) surrounding historical care/access arrangements"* in respect of J. M contends that it was not a shared care arrangement, but something that was more loose in nature and more akin to F having access. M said that she was, due to J's age and because it was not conducive to a settled routine, reluctant to let her stay overnight with F during the week. M said that this is evidenced by her e-mail of 22nd November 2010 in which she wrote *"I have no problem with you taking J for the night on a weekend. But unfortunately I'm not comfortable with J sleeping out on the weekdays as yet."*

48. I do not feel it is necessary for the Court to undertake a line by line analysis of the calendars as, although I find that J was not sleeping over at F's house to the degree that F contends she was after October, I am satisfied that during the day, although not necessarily every day but still on a significant number of days, F was participating in the care of J. The issue of whether there was shared care of J at a time when F was frequently involved in the care of J during the daytime is not simply, although it is not something that should be disregarded, a computation of how many nights J slept at M or F's house. However, it is a factor to take into account if the Court is satisfied that a greater shared care arrangement has come

about after these proceedings were initiated and if that arrangement is affecting J's stability due to the change of circumstances and a lack of routine.

49. The evidence, including F's calendars, show that from February 2011 until the court proceedings J's primary base was M's home in West Bay. I am satisfied that J was spending some time at F's property and that importantly F was spending a significant period of time at M's property during the day where he assisted with J's care.

50. M's evidence is that following the separation in September 2010, although there may have been periods during which they tried to work on their relationship as friends and parents for the sake of J, they never reconciled in a romantic sense. M agrees that between April 2011 and October 2011 she was encouraged by her mother to see if they could reconcile. However, she said that she made it clear to F that due to his past behaviour she did not trust him enough to start a romantic relationship.

51. There is a dispute as to why an e-mail on 4th May 2011was sent by F to M. M contends that it was because F recognised that they would not be getting back together. F says it is because they were and M had instructed him to write the letter to his attorney to withdraw his summons and that it would help them with their reconciliation.

52. It is agreed that in June 2011 the parties went to Miami together. It is also agreed that in July 2011 they went to Panama together to stay with the maternal grandmother. M stated that F only accompanied her on the trip to Panama because he "*begged her*" to let him come so that he could spend time with J and, although they shared the same bedroom, F slept in a separate bed. It is prior to and during the trip to Panama that the F said that they had discussed the possibility of M going to college in Florida and that if she did then J would live with F. F says that subsequently M reneged on this agreement under pressure from her mother. M denied ever making such a representation. Having regard to M's clearly evident strong desire for J to accompany her, coupled with her starting to put in place arrangements for J in Florida as early as August 2011[4], on the balance of probabilities, I am satisfied that M did not communicate a decision to leave J with F if she were to attend FSU.

53. F contends that, reconciliations having come to an end, that the parties finally separated for the last time in early September 2011. When I consider whether there was a reconciliation or reconciliations, I again find that the position lies somewhere in between the degree that each party contends. The photographs produced by F of him and M together in intimate settings, as well as pictures including J, are consistent with M and F having a positive relationship during parts of the periods of alleged reconciliation. This coincides with the time when the

[4] Email dated 15th August 2011 from B Thompkins concerning enrolling J in the FSU Child Development Programs.

parties agree that wider family members were encouraging them to get back together. I am satisfied that during that period there was an attempted reconciliation although, for a part of the time, M's relationship was developing with her current fiancé. The impression gained from the parties is that M was ready to move on with her life, but F found it a little bit more difficult to come to terms with the separation. F's difficulty in coming to terms with the breakdown were evidenced by his words and actions including calling the mother derogatory sexual names like *"prostitute"* and criticising her male and female friends as well as her work colleagues. It is evident from their written communications to each other that F was not enamoured by M starting to have other relationships or friendships and, as a consequence, he did not think highly of her having any form of social life. I am not critical of F for feeling this way, as family life is important for him, but the relevance is that he misconstrued the mother's attempts to make their relationship more civil and friendly as amounting to a full reconciliation, something which the evidence shows he and his family hoped for at the time. What is important to the application before me is that during the time when M and F were better communicating F continued to play a significant role in J's life. At that time it was easier for the parties to co-parent and work together in J's best interest, co-operation which sadly came to an end in around September 2011.

54. After September 2011 when both parties agreed that any possibility of reconciliation was over, F contends that M agreed to him coming to her house

before she got home from work so that he could care for J. M stated that they had agreed on a schedule by which he would collect J everyday from school and on Tuesdays and Thursdays J would stay overnight with him. He said that it was agreed that M would have care of J on Mondays, Wednesdays and Fridays. This is evidenced by the SMS communication from M to F dated 11th October 2011 which said:

> *"I guess from now on you can pick her up from school on the nights ur not keeping her then drop her home. And we can keep the schedule you proposed. She sleeps with you Tuesday and Thursday and we alternate Saturday and Sunday. This will start from next week."*

55. Although F says this was a decrease in the amount of time that J was spending with him, I am satisfied that this was a proposal that amounted to a shared care arrangement. When I do so, I am conscious that in ***K v K (Relocation: Shared Care Arrangement)*** [2011] EWCA Civ 793 Black LJ highlighted the fact that there may be no clear dividing line between primary care arrangement and shared care. In ***K v K*** the children spent five nights each fortnight with the father and nine nights with the mother. The children spent more daylight hours with the father. This was held to amount to shared care, although nowhere in the case is shared care actually defined. In ***C v C International Relocation: SharedCare Arrangement)*** [2011] EWHC 33 (Fam) the court found there to be a shared care

arrangement where for the last year there had been a term time division of approximately 2/3 to 1/3. In ***C v C*** the court took into account that both parents ensured that the children's needs were met, that they were both interested in all aspects of the children's lives and development and that they were both 'hands on' when they could be. I am satisfied that this has been the position of both M and F almost throughout J's life. What really matters is not the precise quantum of time spent with each parent, but where there has been regular interaction and the nature of the relationship between the parent and the child. This is more important than the division of nights in a fortnight, whether it be exactly equal or 9:5. I use the figure 9:5 fortnightly as an example as it reflects an order frequently made by the courts, namely alternate weekends (Friday to Monday) and one midweek overnight stay.

56. F contends that this arrangement was due to be put in place after M returned from her visit to FSU in September. F stated that when M realised that he was applying for joint custody and was opposing her application to remove J from the jurisdiction the problems began. It is clear that there were problems between the parties as a consequence of this, and understandably tensions between them. M's reason for not adhering to the schedule for more than a few weeks was because she felt that it was upsetting J's routine. F said that he felt that at that time M "*had control and power*" and "*I needed to exert my rights.*" He told the Court that he

believed that M did this as she did not like to share J and she was being spiteful and malicious in keeping J away from him.

57. F contended that it was only recently that M had revealed to him that she had been accepted to attend college in Tallahassee, Florida and that she was due to start in January 2012, leaving with J just after Christmas 2011. His concern was increased because he saw that M's 'BBM' status was "*Tallahassee in 10 days*" and she had not informed him about the trip. However, F must have known that M was investigating this as in his evidence he said that it had been discussed before and during a visit to Panama and that he was aware that she had gone to the US Embassy in Jamaica to obtain the necessary visas.

58. On 9th November 2011 an ex parte order was granted forbidding M from removing J from the jurisdiction without the written consent of F or order of Court.

59. On 15th November 2011 M's summons to discharge the ex-parte order came before this Court. The Court retained the order, save that it was varied to give leave to M to temporarily remove J from the jurisdiction between 16th November 2011 and 20th November 2011. The position taken by F in opposing the application to remove for only five days on the basis that M would not return was found to be without merit not only on the evidence then before Court but also due to M's subsequent prompt return to the jurisdiction. I am still satisfied that M would

return to the jurisdiction with J at the appropriate time if leave were now granted. It is a pity that F could not recognise that it would be in J's interest, as it was a possibility that a Court might decide to give the mother leave to attend FSU, to accompany M on a trip during which she intended to try to arrange J's pre-schooling. M intended to take J to the pre-schools so that the staff could see her. F took this unhelpful position concerning this research trip and on the other hand criticises M for, in his view, failing to conduct sufficient research concerning a move to Tallahassee, including schooling and day care.

60. On 13th December 2011 the Court made interim orders concerning J. It was ordered that until the final hearing or further order that J would have overnight access with F on a two-week cycle. On week one she would stay with him on Tuesday, Friday, Saturday and Sunday and on week two it would be on Wednesday and Thursday. It was agreed by the parties that each would collect J from preschool at 12:15 p.m. on the weekday that they had care of J overnight, except that F would collect her from preschool on Monday of week one. Apart from the latter arrangement, the order was not a consent order.

61. The level of access, which admittedly was at a generous level, was designed for a child of this age having in mind the principle that if there is a possibility that the child may leave the jurisdiction then there should be increased contact with the potentially left behind parent to try and secure that parent's bond with the child. At

the time of making the order it was not intended that it would be required to last as long as it has, because the removal hearing was scheduled to be heard much sooner than this August hearing. The summons for leave to remove was issued on 10th January 2012. However, due to the delay in the matter being heard, that arrangement has remained in place since December 2011 and as a consequence, over approximately the last eight months, there has been a clear shared care arrangement in place. No matter how that arrangement came about and why it has remained in place, the consequence is that for a considerable period of time in young J's life there has been a shared care arrangement. Dr. Tasha Ebanks-Garcia, Psychologist/Marriage and Family Specialist at the Wellness Centre, who was jointly instructed to prepare the Court Report in this matter, no doubt had this in mind as one of the factors when she said that F met the criteria for a primary carer.

62. On 9th January 2012, and amended on 14th March 2012, F issued his summons seeking sole or joint care and control of J. In the summons he set out his proposals for a two-week *"joint care cycle"*. During week 1 he proposed that J would be with him on Monday, Tuesday, Friday, Saturday and Sunday and with M on Wednesday and Thursday. Then in week 2, J would be with him on Wednesday and Thursday and with M on Monday, Tuesday, Friday, Saturday and Sunday. F proposed that leave or consent would be required for J to leave the jurisdiction and that if M sought to leave for an extended period that J should reside with him, with

M having liberal access. The summons also set out proposals for collection from school and holiday arrangements.

63. On 10th February 2012 M issued a summons returnable on 23rd February 2012, to vary the interim arrangements by reducing it to overnight access on alternative weekends from Friday to Sunday or such other reduction that the court thought fit.

64. On 23rd February 2012 a report was ordered from the Wellness Centre, on a joint instruction by the parties, to investigate custody, care control, access/care schedule for J with the parents and the application to remove from the jurisdiction for a period of 18 months. Directions were given to trial on the first open date after 18th April 2012. As the Court aimed for an early trial, and the importance of reinforcing J's bond with F in light of a possible order granting leave to remove, the interim access order of 13th December 2011 was not varied. Most regrettably, for a number of reasons including the time taken to obtain the report, the matter did not come on for hearing until 14th August 2012.

65. The parties have given conflicting evidence as to the effect on J of the interim schedule put in place on 13th December 2011. F feels that it has enabled J to have a consistent routine. He contends that J greatly enjoys being at his property and having the increased interaction with his family members. F contends that J has settled into his new home in Beach Bay where he now cares for her along with the

nanny. M stated that the paternal grandparents had told her that J does not sleep well when with F and that on one occasion woke up in the night saying that she did not want to have anything to do with F. M says that on occasion J will try and force F away from M as she is aware of the tension between the parents. Despite what M says about communications made to her by the paternal grandparents stating that J was unsettled, they and F have testified that J is very comfortable with F and in fact becomes upset when they are apart and when she has to return to M.

66. M takes a different view saying that the increase in J's health issues are due to, what she terms, a change in routine. M is of the view that F does not have a strict regime or routine when J is with him and that his methods are inconsistent and to an extent undermine her approach to parenting. M is of the view that F is unfairly critical of her parenting and feels that his style of parenting is the only way. M contends that F does not seek to put in place a consistent routine.

67. M's views and beliefs are evidenced by the fact that despite Dr. Ebanks-Garcia's clear recommendation set out in her report of April 2012 that it was not in J's best interest to have both of them at the school at collection and drop-off time, F persisted in doing this. Although F may tell the Court that he is the parent who recognises the importance of counselling, it does not bode well for meaningful work when he unilaterally disregards the recommendation of the joint expert. This

is especially so when Dr. Ebanks-Garcia indicated that she made the recommendation because of the level of conflict between the parents at the school and that the evidence indicated that J was responding with symptoms indicating an awareness of that conflict. Dr. Ebanks-Garcia said in her oral evidence, "*it is possible that an end to the litigation coupled with therapy could bring an end to the conflict*" and importantly she went on to say *"but this is as long as the parties are able to accept recommendations made and the court orders."* Although F may feel that he would like to be there when it is not his access morning and although he feels that it is for the benefit of J, it may be more to meet his emotional needs than J's. As Dr. Ebanks-Garcia notes, this type of conflict at the gates of the school, which is being witnessed by J, "*is not an optimal way for (J) to begin her day.*"

68. M is also of the view that F says inappropriate things to her in front of J and has been confrontational during visits to the doctors. It is contended by M that F has not come to terms with the end of their relationship and that this is what is motivating his application for care and control and resistance to her application for leave to remove from the jurisdiction. Mr. Holland in his skeleton argument and submissions rightly highlighted what he contended as being examples of inappropriate behaviour from F to M. These include:

(i) a threat to chop off the hands and feet of M and any man in J's company,

(ii) referring to M as a prostitute in the presence of J and telling her to go and stand by the garbage,

(iii) referring to M as a surrogate mother as he believed that she was always going out partying and leaving the child,

(iv) saying to M *"watch you have givin' my child herpes,"*

(v) accusing M of beating J,

(vi) during medical appointments, despite the Doctor's clear indication that it was not appropriate, persisting with a request for the doctor to examine J's vagina and anus due to his unwarranted belief that J may have been abused (probably by M's fiancé) whilst in the care of M,

(vii) Sending photographs of J's stools when commenting that the mother was not feeding her properly,

(viii) Continuing to attend at preschool drop-off at the same time as M despite Dr. Ebanks-Garcia's recommendation that this was *"not an optimal way for (J) to begin her day"*. He did this as he disagreed with the recommendation, but in doing so failed to understand the reason why the child centric recommendation had been made by the jointly instructed expert,

(ix) Taking J to Dr Vance, a chiropractor, without M's consent, and

(x) Without the consent of M, deliberately bringing J into contact with her cousin who had a cold as a test to see how low her immune system was.

These actions, which are not disputed, are of concern and some show a rather obsessive and unilateral approach to parenting. When I say this, I also have regard to F's desire to surreptitiously video interaction he has with M in unsuitable settings. In particular F's apparent reluctance to recognise the unquestionable inappropriateness of videoing J's medical appointment without the consent of M or the knowledge of the doctor.

69. I do not accept that F's opposition to J leaving is primarily motivated by his having difficulties coming to terms with the relationship ending. It is, as already stated above, because of his genuine desire to maintain his role in J's life. He summarised his position in his evidence in chief when stating: "*I want to co-parent. Husband and wife important for child. I understood parents, she is the child's mother. I know when together (J) be extremely happy, just positive. There is fighting now. No child should be brought up without Mum or a Dad. Important has both parents. Better for (J) to stay here. She and I have a strong bond which had from very beginning. When wake up, call me and I go in. All her family here, aunts and uncles. For her to lose everything, Easter bunny, that be hard for anyone. Even*

soldiers have some station for long period of time. She be disconnected some time. Phone calls not work very well. She needs positive assurance."

70. M will not attend FSU unless J is with her. It is clear that F has little regard to the effect on M if she were unable to attend FSU. Although to a degree understandable, it is clear that F's contentions are greatly influenced by the effect on him and how upset he would be to have reduced contact with J. F said during evidence in chief *"She will be daddy's girl until the day I die. I not give her up ever. I will walk her down the aisle and I give her away."* It appears that J has an appropriate relationship with M's fiance and F says that it *"hurts me when she (J) says that she has two daddies."* A vivid illustration that F's position is partly taken due to his emotional needs is when he said in an upset state during cross-examination, *"I am sad. (J) is my rock. She is my strength."* This echoes the evidence of the maternal grandmother when she told us about the effect on F if J were allowed to leave. [5] Dr. Ebanks-Garcia addressed the same issue by saying, *"the effect on the left behind parent depends on them, they are adult and in a different place psychologically and in a better place (than a child) to deal with change."* The effect on the left-behind parent of any order made is relevant, but is only one of a number of factors when determining what is in the best interests of the child.

[5] Paragraph 24 above

71. F's strong feelings of love for J cannot be disputed nor can the feeling of loss he would feel if she were to leave the jurisdiction. Unfortunately, especially since the inception of these proceedings, his emotions have led on occasion to F behaving in a rather obsessive manner towards issues concerning J, F acting inappropriately in certain settings, as well as leading him to exaggerate what he perceives to be faults in M. An example of such behaviour can be seen when F states that he had to take his (video) camera with him all of the time as M lies. F said that he had "*countless videos*" that he could show the Court. The propensity for videoing has gone beyond what might be considered to be justified in seeking to prepare or gather best evidence for one's case.

72. F's persistent and exaggerated criticisms of the mother, in a bid to persuade the Court that she would be unfit to take J to FSU, are mostly not well founded. During cross-examination F was referred to his December 2011 text message in which he wrote that he would help M "*re-bond*" with J. F said that "*the mother cannot expect a child to love you just because you give birth to it.*" He accepted that Dr. Ebanks-Garcia had said that M and J had a strong bond but, when directly asked, he could not bring himself to accept that they did, simply answering that he had not seen them together in the house. F found it hard to compliment M's parenting skills, whilst at the same time recognising only to a limited degree the inappropriateness of some of his domineering conduct to J related to issues. F stated in cross-examination, when acknowledging that M had repeatedly asked him

to communicate only via her attorney and to stop communicating with her directly about his views concerning her parenting, that he was "*not sure why it caused her distress.*"

73. The coloured and inaccurate portrait that F creates concerning M's parenting ability (including totally unfounded inferences of sexual abuse by M's fiancé whilst J was under M's care), coupled with the devastating effect on M emotionally and in turn on her ability to better provide for J caused by a refusal of her application, as well as F's inability hitherto to abide even in the interim with an important recommendation of the jointly instructed expert would make counselling for the foreseeable future likely to be of little benefit. His comment that he "*hopes that the proceedings will make her a mother. I want the best mother possible for my child*" sadly shows a lack of insight in relation to the effect of these proceedings on M and on any future therapeutic intervention for this family. The proceedings themselves, although very stressful, are not solely what potentially may detrimentally harm M's parenting, but F's persistent, and on the whole unfounded, contentions about M's inability to parent do undermine and do not support F's stated objective to have the best mother possible for his daughter. I was left with a very clear impression from the evidence and from seeing M testify that the manner in which the case was brought against M and F's undermining and domineering interaction with M, especially since the commencement of the proceedings, has been very wearing for M. This is not in J's best interests. If the

parents' interaction were to continue in this way it would cause irreparable damage to their ability to co-parent and will affect J.

74. F's sentiments are summed up when he said talking about M, *"I think she try to spite me and break the bond I have with J. Great great strong bond. Not sure she is being pushed to go to University. She needs education, I not fault that. Malicious intent. I think fiancé might be pushing her to go away from me .... (she) just want take (J) away to spite me."* F repeated this view when he later stated, *"I think there are alternative reasons. I think she is still emotionally entangled to me and she is being pushed by her family to get away from me. Her fiancé tried push away from me for whatever reason. I think she is trying to be spiteful, I know her very well. I know how family members move. How her mother got away from her husband."* F was invited to comment on a letter sent by his attorney dated 4th May 2011 in which, on his instructions, it was stated that both parties clearly loved J and that they both wanted to act in her best interest. F stated that he loved J and wanted to act in her best interests. When then asked what his views were in relation to M in light of that letter he reluctantly stated, "*You could say that about the mother in May. A child is always better in parents' care. In my case (J) is better with me rather than with LM (the nanny). That is my affidavit in October. I was aware that she is with (LM) all day."* F is wrong with his belief about M's intentions and reasoning for wishing to apply for the removal application and his damaging contentions are unfounded. On the evidence and having seen M under forceful

cross-examination, I am satisfied that she seeks the move for commendable education, career enhancement purposes and with the intention of being able to better provide long term for J. I also accept in her evidence that, if she were granted leave, she would promote regular access for J with F. I do not accept F's contention that M seeks the move to maliciously break F's bond with J.

75. When Dr. Ebanks-Garcia was questioned by Ms. Clemens she stated, *"to the extent that I got the impression that she feared for her safety-that she couldn't measure to what extent he may go in the conflict. He didn't present as though he has any interest in causing her harm, his interest was in the best interests of J. I did sense that in trying very hard to be the best father he could be, may not have been (as) much (balance) in his decision-making. So parenting style was quite rigid in terms of her bedtime and food that she eats. No room for the give and take that the mother might do. Co-parenting not require exactly same, but some give and take. I not feel he is willing to give and take. He was good to a fault..... Some of his suggestion is valid. I worry that he is too rigid. Counselling would help with that."* She went on to say that *"both want have control over what happened and not willing to let go, lack of flexibility. Both of them. They are both under the microscope, does not lend to true parenting. Sure he is trying to be super dad as it will help his case, but that is not necessarily good parenting. Lengths of videotaping, pictures, looking at excrement of the child, all speaks to [an] unhealthy environment the child is in due to the litigation."*

76. It is clear that both parties have differing views and that the views expressed are intended to support their respective position in relation to the applications before the Court. With this in mind the Court has sought to look at independent witnesses to see what effect, if any, the current arrangement is having on J. The Court has also looked for evidence from independent persons, in particular the joint expert, in relation to the possible effect of a reduction in the current level of J's interaction with F which would result from leave being given to remove her from the jurisdiction.

77. Dr. Ebanks-Garcia's report is dated 30th April 2012. Dr. Ebanks-Garcia was invited to address; (i) issues of custody; (ii) care control; (iii) access/care and control schedule of J with both parties and (iv) temporary removal of J from the jurisdiction for a period of 18 months. As a part of the preparation for the report Dr. Ebanks-Garcia interviewed M, F, M's sister, LM the nanny at M's property, the paternal grandfather and JW the nanny at F's property. She also observed J in the presence of M and on a separate occasion in the presence of F.

78. In her report Dr. Ebanks-Garcia expressed the view that J was at a stage of her life when she would engage in a number of developmental milestones. Dr. Ebanks-Garcia wrote that as J starts to exert her independence it was important that she have clear and consistent rules and expectations that are enforced in a loving and nurturing way. Dr. Ebanks-Garcia stressed that to enable J to successfully adapt

through these changes her caregivers must work together and be supportive of each other. Dr. Ebanks-Garcia stressed in her report that there should be open communication and coordination of child rearing between the caregivers in their respective homes.

79. It is not surprising that J may be exhibiting unsettled behaviour, for Dr. Ebanks-Garcia rightly highlights that a breakdown in the family unit is stressful and confusing for young children. She stated that the change in their parent's feelings and behaviour, and changing contact with each parent affects them. Dr. Ebanks-Garcia concluded that in order to facilitate J's healthy emotional development it is vital that her parents engage in a process of developing skills to become effective in the practice of co-parenting.

80. Regrettably, from her clinical observation, Dr. Ebanks-Garcia noted that both parents presented with "*a high conflict relationship as manifested by significant levels of anger and distrust, verbal conflict, poor communication and cooperation over parenting, ongoing negative attitude, and allegations about each other's behaviour and parenting practices.*" Dr. Ebanks-Garcia felt that this situation has created a "*toxic environment*" for J.

81. In her report Dr. Ebanks-Garcia went on to note that the relationship had resulted in J being "*triangulated between her parents*" and engaging in behaviours that

indicate she feels compelled to choose one parent over the other. The evidence of each parent and the respective grandparents is that on various occasions J has become upset and said that she would prefer to stay in the house that she was currently in rather than return to the other parent.

82. Both parents seek to rely upon J's expressed wishes to extend time at their property rather than return to the other parent's property in support of their contention that they are the primary carer, that J is more attached to them than the other parent and even to support a contention that the other parent does not have a positive relationship with J. However, Dr. Ebanks-Garcia has said that J is at a stage of her life when it is not uncommon for a child to present with shifts in emotional state. In other words they may be happy one moment and the next moment they are upset. This is consistent with the evidence given by the parents. I do not regard an expressed wish from J made to the parent in whose home she is in to stay there longer as being an indication that she is not comfortable spending considerable time with the other parent. Dr. Ebanks-Garcia importantly went on to report that this choice may be one made under duress resulting from her response to her parents' conflict and is not an indication of which parent is more effective or which parent she loves more.

83. In her written report Dr. Ebanks-Garcia observed that both parents present with the ability to successfully parent J. However, she said that they had not developed the

skills necessary to parent J together in a manner that supports co-parenting. She recommended joint custody as both parents are clearly embracing their parental responsibilities and both parents are consistently involved in the care given to J. As already mentioned herein, both parents indicated during the hearing that, at the very least, they can agree that there should be a joint custody order.

84. When Dr. Ebanks-Garcia considered the issue of care and control in her report she formed the view from the affidavits and her interviews that M had always been the primary and consistent caregiver. Dr. Ebanks-Garcia also formed the view that due to J's young age and her view that M had engaged in extended nursing that J's primary relationship has been with her mother. Importantly Dr. Ebanks-Garcia said that "*it is not necessary to have one caregiver, but due to the conflict in this case, it is.*" Dr. Ebanks-Garcia described the primary caregiver as the individual that the child is attached to and who was aware of the routine of the child, aware of the dislikes of the child, and who had the knowledge about how to reach the needs of the child. She was satisfied that both parents met that criteria.

85. Dr. Ebanks-Garcia accepted that the evidence showed that F had been involved in J's life since her birth. Dr. Ebanks-Garcia recognised F's interest in parenting and concluded that it resulted in J becoming securely attached to him as a care-giving figure. I recall that part of the evidence concerning the loving interaction she observed between J and F. She said "*I observed her playing with his ear.... He is*

able to redirect her. I saw her trying to write on herself and he was able to say that that was not right. She listens to him. When she bumped herself, she went to him. She feels safe by him. They played and it was evident to me that they had played many times before." I accept that this is an accurate illustration of the positive relationship and interaction between J and F.

86. However, having regard to her view that J's primary care-giving relationship was with M, the young age of J and her strong bond with M, Dr. Ebanks-Garcia recommended that care and control should remain with M. When examined by Mr. Holland, Dr. Ebanks-Garcia stated that "*J is at risk of harm due to the conflict between her parents. This is one of the reasons I do not recommend shared care but primary care to the mother.*" Dr. Ebanks-Garcia indicated in her oral evidence that J spending 6 nights out of 14 with the father was sufficient. When asked by the Court, Dr. Ebanks-Garcia said that even if the position was as set out by F in his affidavits, namely that he has been throughout at least an equal caregiver, she would not have changed her view about who was the primary care-giver or about any of the recommendations in her report, including the recommendation concerning day-to-day care and control.

87. When considering the issue of access, Dr. Ebanks-Garcia recommended that the current access schedule remain in place. Dr. Ebanks-Garcia supported the fact that it meant that each parent would have equal access to J. Dr. Ebanks-Garcia was

satisfied that J was able to adjust and would be able to adjust to the schedule. She went on to say though that this adjustment would be detrimentally affected if the parents' negative interaction continued. Dr. Ebanks-Garcia said in her oral evidence that, due to the conflict, J was *"having a problem to adjusting to the access regime."* Dr. Ebanks-Garcia found that that there was nothing inherently concerning regarding the different parenting styles but recommended that both parents attempt to have consistency in their expectations, rules and style of parenting. In other words co-parenting skills. She told Mr. Holland during her oral evidence that *"the optimal situation is that there be equal access for both parents. She is clearly attached to both parents. Both care very deeply for her and her needs is to be with both parents in the right circumstances and that is the challenge."*

88. When considering the application for leave to remove, Dr. Ebanks-Garcia stated in her report that she could not endorse the application for temporary removal, as to do so would require evidence of a commitment on the part of both parents to ensure regular and positive communication, as well as a mutual respect and understanding of the importance for the role of both parents in the child's current developmental stage.

89. Dr. Ebanks-Garcia stated in the report that she found little evidence to support the required commitment. In light of that, she expressed a concern that an extended

period of separation from either parent may negatively impact the relationship between child and parent that has been established. Dr. Ebanks-Garcia in her oral evidence conceded that the proposed temporary removal to Florida was much more optimal than an indefinite removal from the jurisdiction and to a place further away. She accepted that it was important to recognise the temporary nature of the arrangement sought.

90. Dr. Ebanks-Garcia said that attachment develops as a child ages. She said that such attachment would not be broken if a child was not in constant communication with a parent or if there was a reduction in the level of contact. Dr Garcia indicated that once the attachment is secure, as she accepted it was in this case, it is a part of the child's personality. Dr. Ebanks-Garcia indicated that by the age of two to three years the child's personality has developed and it is important that during that period they do attach. Dr. Ebanks-Garcia accepted that between the age of two and a half and four that a child would go through tremendous physical, psychological and cognitive development. She said that although it may be important to have both parents during that time it is not strictly necessary for the development. Dr. Ebanks-Garcia felt that a loving and nurturing environment was important.

91. Dr. Ebanks-Garcia reported that the parents would "*need assistance to diminish the acrimonious, effectively manage conflict, build effective parenting alliances and established child-centred parenting plans built around co-parenting*". Dr. Ebanks-

Garcia stated that J was suffering harm as a result of the parents' interaction with each other. She went on to say *"if there was not the level of conflict that there is, it would not be a serious risk of psychiatric harm if she were separated from her father for a period of 18 months or if she were separated from her mother for 18 months. The conflict does not allow the parties to negotiate."*

92. Dr. Ebanks-Garcia stated in her report that it was evident that F and M loved J very much. She found it was also evident that J was securely attached to both M and F and that she loved them very much. Dr. Ebanks-Garcia felt, from her interviews, that F and M had a commitment to create an environment which would be conducive to J having healthy relationships with both of her parents. However she felt that, to ensure that this happened, a therapeutic plan needed to be put in place. That plan should include independent therapy for the parents focusing on processing individual issues so that open communication can be established and healthy parenting practices can be developed. She felt that, after the independent therapy had shown some success, conjoint therapy was required with both parents with the objective of developing their co-parenting skills.

93. When examined by Mr. Holland, Dr. Ebanks-Garcia said that therapeutic intervention would only be successful if both parents wanted change and she accepted that it may not work for all persons. She recognised that they went to parenting classes last summer and also to mediation in December concerning

access and that this was not successful. She also accepted that M went to seek help with Catherine Tyson to help improve communication with F. She accepted that M had 'taken on board' her advice about not attending the school on her non-access days. She accepted that, despite saying to Ms Clemens that the mother showed the same inflexibility as the father[6], M had to a degree respected F as J's father and used the example of her willingness to adopt F's recommendations as to J's diet.

94. Dr. Ebanks-Garcia accepted in her oral evidence that removal jurisdiction cases will inevitably cause conflict. Dr. Ebanks-Garcia stated that even if therapeutic intervention was successful that M may still seek to leave the jurisdiction. However, she felt that this was only if the relationship could be one based on trust.

95. I understand that this might be very important if there were concerns that M would not comply with any access schedule or would be obstructive to J maintaining his bond with F. I am satisfied that M will not be obstructive to access, but I accept civility between the parents is required. I do not accept F's concern that M would call the police in the US to arrest him for no reason if they had a disagreement.

96. Dr. Ebanks-Garcia felt that F might find himself at some stage willing to consent to a temporary removal from the jurisdiction for education purposes. Having heard all of the evidence, I find Dr. Ebanks-Garcia's view to be overly optimistic and

[6] Paragraph 74 above

unrealistic. Based on F's evidence, demeanour and flawed reasoning at the hearing of M's application to remove for a few days heard on 15th November 2011, it is highly unlikely that F will ever agree to a temporary removal for the period of time required for M to undertake her studies.

97. Dr. Ebanks-Garcia indicated that, as well as the conflict reasons, she had considered the merits of the support system in Cayman, involving family members like the paternal grandparents. Dr. Ebanks-Garcia did not say that J could not adjust, but felt it was better for her to remain with support that is familiar.

98. Dr. Ebanks-Garcia said in her oral evidence that she felt, unlike F, it was clear from her interviews that M had appropriately researched the move to Florida. This included the details of her visit to the school and access to childcare. Importantly Dr. Ebanks-Garcia was of the view that M was mindful of the need for proximity to F and that is why the school was chosen in Florida rather than one in another State. She went on to say *"I felt confident that she could sort out the process and when she did so she did it with the expectation that the father was supporting it."* Dr. Ebanks-Garcia accepted that M was committed to her education and to providing a better life for J. Dr. Ebanks-Garcia accepted that if you take a long-term view, M's ability to provide better care would be increased by her education, however she balanced that with her concern that it could increase conflict, bitterness and resentment. Dr. Ebanks-Garcia failed to put into the equation the

increase in conflict, bitterness and resentment caused by a refusal and the thwarting of M's commendable reasons for the move, reasons which Dr. Ebanks-Garcia found to be genuine and in the long term to possibly be in J's best interest.

99. At the outset of her evidence Dr. Ebanks-Garcia indicated that this was only the second report that she had prepared for Court proceedings. Significantly she indicated that this is the first report that she had ever done for a removal jurisdiction case. It is clear that Dr. Ebanks-Garcia was not well versed in the general principles applied in these cases. Dr. Ebanks-Garcia's resume shows that her expertise is in family therapy and counselling. It is clear that she has approached the report with therapeutic intervention being at the forefront of her mind, to the exclusion of a number of the other factors the Court may usually consider in temporary removal applications.

100. Dr. Ebanks-Garcia's recommendation was primarily based on her view that there was a need for therapeutic input into the family and that such input could not take place if M left to Florida. Dr. Ebanks-Garcia was of the view that, as a therapeutic approach has not been exhausted, it would not be in J's best interest for her to be removed from the jurisdiction. Dr. Ebanks-Garcia stated that she maintained this view despite all that had been put to her in examination. Dr. Ebanks-Garcia, although acknowledging that a temporary removal was more advantageous than a permanent removal, failed to properly address what was proposed. Dr. Ebanks-

Garcia did not consider how frequently J would be able to see F during the proposed removal period. She also failed to pay proper regard to the reasons why M felt that now was the best time for her and J for her to further her education at FSU.

101. Dr. Ebanks-Garcia also failed to properly consider the effect on M not being able to fulfil her academic aspirations and advancement if leave to remove were not granted. Dr. Ebanks-Garcia was of the view that M would still be able to participate in therapeutic work despite the distress caused by her being unable to carry out her studies at FSU. I find Dr. Ebanks-Garcia's view to be unrealistic in the circumstances. I accept that there is a need for both M and F to receive counselling. However, such intervention would have little prospect of success at this time having regard to the significant disappointment that would be caused to M if she were not given leave to remove, coupled with F's inflexible approach, namely his entrenched view that his parenting style and decisions are right.

102. Dr. Ebanks-Garcia indicated that if M moved to Florida it may act as a "*band-aid*" to the conflict and that it may also exasperate the conflict. Dr. Ebanks-Garcia did not give the same consideration to the effect on the conflict if the mother is forced to remain in Cayman, forfeiting her opportunity to attend FSU funded by government grant, whilst living in closer proximity to F. For these reasons I have

concerns about the reasoning which led Dr. Ebanks-Garcia to her recommendation that leave should not be granted for temporary removal, and I depart from it.

103. J has unfortunately been rather sickly over recent months. She has had a history of repeated upper respiratory infections, occasional ear infections and some questionable asthma. J has a history of enlarged tonsils and adenoids. J's ill-health has caused conflict between the parents. As Dr. Glatz insightfully stated in his report "*Both parents are sincerely interested in her well-being but because of their marital discord, the child's health has become a major point of contention.*" In his oral evidence he mentioned that both parents were able to give him a good history and that they both had an opportunity to speak to him. He said that he was impressed that M and F were able to sit in the same room with him although he could tell that there was strain and conflict between the two of them.

104. Dr. Glatz found that J has "a significant obstruction of the nasopharynx causing probable sleep apnea, nasal airway obstruction most likely secondary to tonsil and adenoid hypertrophy. Associated with that she has eustachian tube obstruction and secondary middle ear effusion." Dr. Glatz informed the Court that this was a common problem among children. Dr. Glatz believes that it is this that is causing J's repeated infections. He recommended "a tonsillectomy and adenoidectomy with a bilateral Tympanostomy's and placement of ventilating tubes." Dr. Glatz concludes that this surgical intervention would go a long way towards returning J

to normal health. It would improve her hearing as well as decrease the likelihood of recurrent "otitis media".

105. During his oral evidence Dr. Glatz informed the Court that the surgery was not urgent and that the parents should make the decision. He was of the view that J could continue to attend preschool. Dr. Glatz stated that the surgery was a simple procedure, involving an operation of approximately twenty minutes in length. The recovery would take around one or two weeks.

106. If the parents decide that J is to have the surgery, I do not find that to be a significant factor in the determination of the leave to remove application. The surgery could take place in Florida. Alternatively, the relatively straightforward procedure could be performed by Dr. Glatz in the Cayman Islands. If M were to leave to Florida in early January there would be sufficient time for the surgery to be performed here. Dr. Glatz said the surgery could take place on a Tuesday, with a follow-up check-up on the Friday. This would then be followed by an appointment one week later and then an appointment a month after that. There would be a further appointment six months after the surgery which could be arranged when J was visiting Cayman. He was of the view that J would have no problem taking a flight two weeks after the surgery. Dr. Glatz indicated that surgery could be scheduled ten days after he was notified by the parents of their consent. Therefore, surgery could take place well before any proposed departure to

Florida. Dr. Ebanks-Garcia in her oral evidence recommended that if the surgery was to be performed it might be better to do so in Cayman as J would be familiar with Dr. Glatz and have a supportive family network post operation.

107. F had concerns about the preschool that J is currently attending. F is of the view that J does not enjoy the school and he would consider moving her from that school if she remained in the jurisdiction, particularly if he had care and control. However, the evidence from the letter from the nursery school dated 7th June 2012 portrays a settled child, interacting well with other children and growing in confidence. The report seems to back up M's contention that preschool has been a positive experience for J. It is evidence that if M were to go to FSU, J would not find attending preschool a traumatic experience. I am satisfied that M will be able to make suitable arrangements for J's educational needs, as limited as they are, in Tallahassee.

The Law - Temporary Removal from the Jurisdiction

108. If this were a case seeking relief for permanent removal the Court would have to carefully consider whether the principles in ***Payne v Payne*** [2001] EWCA Civ 370 applied and what was the effect on ***Payne*** of the approach outlined in ***K v K (Relocation: Shared Care Arrangement)*** [2011] EWCA Civ 793.

109. ***Payne*** had until recently been viewed as a case giving firm guidance that should be closely followed in all permanent removal cases, and to a much more limited

degree in temporary removal cases. In ***Payne***, Thorpe LJ stated at paragraphs [40] and [41] :

> *"[40] 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 relationship with the maternal family and homeland?*

(c) What would be the impact on the mother, either as a single parent or as a new wife, of 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."

110. The ratio of Payne was expressed by Thorpe LJ at paragraph [26] when he said:

"In summary a review of the decisions of this court over the course of the last thirty 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."

111. In ***Re Y (leave to remove from the jurisdiction)*** 2004 2 FLR [330] Hedley J declined to follow ***Payne*** where the child's care was almost equally shared, namely four nights with the mother and three nights with the father. Hedley J said at paragraph [14]:

"Now, the court clearly contemplates two different states of affairs. The one, the more common and in some ways the more obvious, is where the child is clearly living with one parent, and it is that parent that wishes to leave the jurisdiction, for whatever reason. The other, and much less common state of affairs, is where that does not exist and either there is a real issue about where the child should live, or there is in place an arrangement which demonstrates that the child's home is equally with both parents. In those circumstances, which are the ones that apply in this case, many of the factors to which the court drew attention in Payne v Payne [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052 *whilst relevant may carry less weight than otherwise they commonly do."*

112. Hedley J referred to the welfare checklist set out at Section 1 of the 1989 Children Act stating at paragraph [16] that:

> *"... the ones that are important in this case are the educational and emotional needs of Y, the likely effect on him of any change in his circumstances, and his age and background so far as his life is presently concerned. It seems to me that I need to remind myself that the welfare of this child is the lodestar by which the court at the end of the day is guided."*

113. Hedley J continued at paragraph [24] :

> *"in reaching a decision in this case I have tried to focus on Y's welfare and to postpone the interests of both the parents however fair and reasonable, to that one consideration. It truly is a case in which the paramountcy of the child's welfare has led to one parent been dealt a crushing disappointment."*

114. In ***K v K*** the Court of Appeal followed the approach in ***Re Y*** and considered the ongoing impact on the guidance given in ***Payne.*** In ***K v K*** the parents had British and Canadian citizenship. The father was of Polish origin with family members living in England and Poland. The couple married in England and had a four-year-old child and a two-year-old child. After the failure of the marriage, the parents agreed a shared care regime whereby each worked less than full time so that they

could care for the children on a 9/5 out of 14 days arrangement. The mother wished to permanently relocate back to Canada with the children and the trial judge granted her leave to remove them from the jurisdiction.

115. Moore-Bick LJ recognised that the guidance in ***Payne*** was important, but the court must be free in each case to weigh up individual factors and make the appropriate decision in the best interests of the child. At paragraph [86] Moore-Bick LJ stated that:

> *"I accept, of course, that the decision in* Payne v Payne *is binding on this court, as it is on all courts apart from the Supreme Court, but it is binding in the true sense only for its ratio decidendi. Nonetheless, I would also accept that where this court gives guidance on the proper approach to take in resolving any particular kind of dispute, judges at all levels must pay heed to that guidance and depart from it only after careful deliberation and when it is clear that the particular circumstances of the case require them to do so in order to give effect to fundamental principles..... as I read it, the only principle of law enunciated in* Payne v Payne *is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted. 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. As Hedley J said in* Re Y, *the welfare of the child overbears all other considerations, however powerful and reasonable they may be. I do not think that the court in* Payne v Payne *intended to suggest otherwise."*

Black LJ and Thorpe LJ agreed with Moore-Bick LJ's sentiments.

116. ***K v K***, as submitted by Ms. Clemens, is important as it also deals with the applicability of the principles in ***Payne*** to shared care cases. There was a different approach between the members of the Court of Appeal to the guidance set out in ***Payne***. At paragraph [41] Thorpe LJ said that the guidance in ***Payne*** was based on the premise that the applicant was the primary carer. Thorpe LJ at paragraph [57] indicated that in shared care cases the approach of Hedley J should be followed and stated:

> *"[w]hat is significant is the practical arrangements for sharing the burden of care between two equally committed carers. Where each is providing a more or less equal proportion and one seeks to relocate externally then I am clear that the approach which I suggested in paragraph 40 in* Payne v Payne *should not be utilised. The judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in Section 1 (3) of the Children Act 1989."*

117. Black LJ did not feel it appropriate to disregard ***Payne*** as she viewed that case and ***Re Y*** to be complimentary rather than alternative. At paragraph [144] Black LJ stated:

> *"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 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."*

118. Black LJ wisely commented that the cases should not get *"bogged down"* with arguments as to whether the time spent with each of the parents or other aspects of the care arrangement make the case a ***Payne*** case or a ***Re Y*** case . Black LJ said

that she would not expect "*preliminary skirmishes*" over the label to be applied to a child's arrangements. Black LJ observed that the ways in which parents provide for the care of their children are infinitely varied and ideally flexible and responsive to the needs of children over time. Black LJ went on to say that when a relocation application is being determined all of the facts need to be considered.

119. Despite the different approach between these two members of the Court of Appeal, ***K v K*** and ***Re Y*** makes it clear that, on applications for permanent removal, the welfare of the child is the paramount consideration and all the factors that are considered by the Court in reaching its determination are put into the balance with a view to measuring its impact on the child. Therefore the guidance from earlier case law, such as ***Payne***, should be considered as being guidance and not as a rigid principle. As a consequence the previously held view that there may have been a presumption that the reasonable relocation plans of a carer will be facilitated unless there is some compelling reason to the contrary is not the correct approach in shared care cases.

120. In a permanent removal case the paramountcy principle cannot be subverted by the ***Payne*** guidelines. Due to the different approach and lack of agreement in ***K v K*** as to ***Payne's*** applicability to shared care cases, it does not mean that the factors raised in ***Payne*** should be ignored, for they may still be of significance in this type of application. However, each factor should not be over emphasised in such a way

that one be given disproportionate importance. What is clear from all the judgments in ***K v K*** is that the guidance given in ***Payne*** should be regarded as just that, and not be elevated to strictly binding legal principle. The Court in all cases should focus on the welfare of the child, which should be paramount and not subverted by the guidance in Payne.

121. Although it may be at least arguable that there was not a shared care arrangement prior to these proceedings coming before the court, it cannot be disputed that over the last 10 months such an arrangement has been in place. During this period of time the father has shared the burden of care to a significant degree. Although, prior to the current shared care regime, J may not have stayed overnight with F to the degree that F contends, it is clear that even at that time F was playing a significant role in J's care which was not limited to periods of overnight access at his property. I am satisfied that I should approach this case as if it is a shared care case.

122. When determining the applications I must have regard to s.19 of the Guardianship and Custody of Children Law (1996 Revision) , which provides:

> "*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 at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

123. In ***B(M.) v B(J.)*** 2010(1) CILR 419 Quin J highlighted the principles that are ordinarily followed in permanent removal cases by the courts in the Cayman Islands. Quin J expressed the view that the welfare checklist set out in the Children Act 1989 "*sit[s] comfortably*" with s.19 of the Guardianship and Custody of Children Law (1996 Revision).

124. Quin J stated at paragraph [41]:

"The Grand Court has consistently followed the principle laid down by S.19 of the Guardianship and Custody of Children Law. In 2003, Henderson J. in M v A [2003] CILR Note 20 ruled that-

"on an application by a parent with joint custody to remove the parties' children from the Islands to permanently reside overseas, the applicant must show on the balance of probabilities that relocation would serve the children's best interests."

The note goes:

"A proposed relocation which would restrict the children's contact with their other parent would not be in their best interests, but the court may grant the application if the applicant shows that a strong factor in favour of their best interests offsets that detriment."

125. Quin J also referred to the case of ***In Re C*** (4th February 2010) in which Foster J followed the principles in s.19 concluding that *"the sole issue is what is best for the child in the view of the court having regard to all of the circumstances."*

126. Quin J's helpful guidance is a reminder that the Court should always consider the child's needs first and also how a court may go about doing that.

127. Mr. Holland contended that ***Re A (Temporary Removal from the Jurisdiction)*** [2005] 1 FLR 639: [2004] EWCA Civ 1587 would provide the most helpful and persuasive guidance to the court. However, in his written opening submissions Mr. Holland contended that the principles in ***Payne*** remained applicable, albeit to a lesser degree. He contended that ***Payne*** was the appropriate case, as his client was the primary carer and that this was not a shared care case. Mr. Holland did not address the potential effect of parts of the ***K v K*** decision on the approach to all permanent removal cases.

128. Ms Clemens submits that as this is a shared care case and the Court should consider the approach set out in ***K v K*** *and totally disregard* ***Payne***. I agree, although due to the different position taken by members of the Court of Appeal, it is arguable that ***K v K*** approach to the ***Payne*** guidelines has some applicability to non-share care cases as well. The rationale for treating shared care cases differently is that when both parents play a significant role in the child's everyday life, the loss of one parent's day-to-day involvement is likely significantly to affect the child's emotional well-being. From a welfare perspective, it is the damage likely to be done to the child's relationship with the left behind parent that is significant.

129. It is extremely important to appreciate that I am not dealing with an application for permanent relocation, but for a temporary move to Florida. I have been referred to the case of ***EJ v VB***, Cause No. D11/99 (Judgment 4th May 2005). In that case the application was for a series of orders which would allow the child of the marriage to reside temporarily in Chicago up until June 12, 2005 and thus enable completion of the school year there. Henderson J highlighted that he must be guided only by his opinion as to the best interests of the child. Henderson J refused leave to remove, although being satisfied on the balance of probabilities that the applicant was the primary caregiver for the child. It appears that little or no case law was placed before Henderson J. It also appears that Henderson J was not aware of the approach in ***Re A***, a case which had been decided in 2004. It is quite clear

that Henderson J's concern and reasonable apprehension that the applicant would return to the United States to live with the child played heavily on his mind.

130. Henderson J stated at page 2, line 21- page 3, line 2:

> *"Where, as here, two parents share joint custody, the burden of proof rests with the parent who wishes to remove the child from the jurisdiction. There must be convincing evidence justifying the removal of the child to a foreign country. I consider that the burden of proof is relaxed somewhat when the proposal is to remove the child temporarily, but there still must be credible evidence supporting the need for removal"*

131. It is important for the parties to recognise that the considerations relevant to an application for permission to relocate overseas permanently are not automatically applicable to applications for temporary removal. As stated by Thorpe LJ in ***Re A***, the more temporary the removal, the less regard should there be to the principles that govern permanent removal applications. ***Re A*** was decided after ***Re Y*** but before ***K v K***, at a time when ***Payne v Payne*** was the guiding case. I am satisfied that the approach taken in ***Re A*** and the factors considered therein are applicable in the matter before me.

132. In **Re A**, the child was four years old and care was shared, although the child spent five nights a week with the mother. The cohabiting parents had separated and they both had parental responsibility. The mother secured an academic position in her specialist area, which included the chance to obtain a Ph.D. and, as part of which, two years' study in South Africa would be required. The evidence showed that the mother was obliged to relocate under her contract with her employer. The mother wanted to take the child and the father opposed the application.

133. At first instance, the judge held the opportunity to be serious and important for her career development. However, placing reliance upon the case of ***Payne v Payne***, permission was not granted. The judge granted a joint residence order. The Court of Appeal found that the judge had misdirected herself and that the principles set out in ***Payne*** applied to applications for permanent removal and had little or no relevance in an application for temporary removal.

134. The Court of Appeal felt that the judge had also undervalued the mother's career prospects, which would significantly improve in the United Kingdom as a result of her studies in South Africa. The Court felt that consideration should be given to the career aspirations of a female lone parent who was not reliant on someone else as provider and emphasis may be placed on her career aspirations. The Court felt that there should be greater focus on the longer term consequences, beneficial and detrimental, for the mother and the child of moving, or not moving, temporarily to

South Africa, in particular in relation to the career options that the stay in South Africa would open to the mother and the benefits to A of those and the consequences of refusal of leave on the mother's employment. I strongly endorse that approach in the matter before me.

135. The Court of Appeal also rightly highlighted the practical means of meeting any detriment to the child such as indirect contact options of telephone, email, text messages, DVD and digital photography.

136. In ***Re A,*** balancing positive against negative, the mother's application was found to be justified and she was given permission to remove the child. It was conceded that the joint residence order should stand if permission to relocate were granted.

137. It is important to appreciate that any reduction or loss of contact between J and F will be temporary. Accordingly, the focus must also be on the longer term consequences, beneficial and detrimental, for M and J moving or not moving temporarily to Tallahassee. The Court may have regard to the career options in Cayman that may be opened for M and the benefits of those for J, coupled with the consequences of refusal of leave on M's future employment prospects. At the same time, close attention must be given to the rights of F and to the ways in which contact can be arranged for a temporary period to overcome any loss of the important day-to-day relationship between F and J, recognising that this is more

feasible in a temporary arrangement than where the removal is permanent. These are all factors relevant to the issue of the likely effect on J of any change in her circumstances.

138. I must still consider the reasonableness and genuineness of the reasons behind the proposed alteration to J's interaction with F that will be occasioned by this relocation. When considering J's physical needs, I should look at the proposed accommodation and living conditions as well as the financial implications of any proposed move.

139. I am entitled to look for evidence from M as to what will be the emotional consequences of refusal. I accept that this is a temporary removal case and that this is only one of a number of factors which should be taken into account to some degree. When considering J's emotional needs, the Court is entitled to consider whether there would be an impact on M's sense of well-being and whether that would be transmitted to J. M's explanation for the temporary relocation has to be assessed in the context of her emotional and psychological well-being. This is important when recognising that the welfare of J is the paramount consideration.

140. J is too young to be able to express her wishes. Although this has become a shared care case I must, when considering J's welfare, have regard to her age, especially as F suggests that if M is to leave the jurisdiction that J resides with him in

Cayman. In ***Stephenson v Stephenson and Johnson*** (1980-83) CILR 93 a three-year-old female child was placed with the mother. The Court held that the special relationship and bond between a very young child and his or her mother could rarely be duplicated by the father. In that case the marriage had become strained after the wife had taken up employment to supplement the family's income. As a consequence, the husband was compelled to look after their daughter on a regular basis. Due to stresses in the relationship, the wife committed adultery upon which the husband obtained a decree of divorce. The wife went to live with her mother and took the daughter with her. The husband forcibly removed the little girl and an interim order was made placing the child in his care. At the custody hearing it was held that, although the husband had demonstrated that he was a good and devoted father and able to take care of the child's needs, a custody order was awarded to the wife based on the fact that the child was a very young female who needed the continued nurturing and bond with her mother.

141. Summerfield CJ stated at 95-97 in ***Stephenson***:

> *"There is no doubt that, throughout, the father has shown himself to be a good and devoted father. On many occasions he bathed the child at night, washed her clothes and diapers, fed her at night and put her to bed..... The mother's insistence on improving her qualifications and taking employment to augment the family's income obviously caused some friction between the parties.*

However, her explanation for doing so is reasonable..... This is a common pattern of living today where a wife understandably asserts her independence and wishes to improve the quality of life for the family in material things... In all cases the paramount consideration is the welfare of the child and the court must look at the whole background of the child's life and on all the circumstances of the case... More important, however, is the fact that the child is a female of tender years. There can be no doubt that, other things being equal, the interests of such a child are better served by placing her in the care and custody of her mother. The special relationship and bond between a very young child and his or her mother can rarely be duplicated by the father. And, as a girl growing up, the example and home training of the mother's is obviously better suited to her needs while maturing into a young woman."

142. Summerfield CJ appeared to have formed the view that there was a presumption that a female of tender years should live with the mother. That approach is no longer the correct one for a Court to take. In ***Mercer v Hermans 2003 CILR 115*** Levers J stated at paragraph 17:

"There was a time when the courts tended to apply presumptions that young children should be with their mother, that girls

approaching puberty should be with their mother and that, at a certain age, boy should be with their father. The modern approach, with which this court agrees, is not to make such presumptions."

143. Levers J went on to say at paragraph 4:

"if the petitioner and the respondent were equally positioned financially, with family support in a stable environment, with guarantees of security in which the children could develop, there is little doubt that two young girls should ideally be with their mother. However, I do not believe that greater consideration should be given to the mother, because of the age and sex of the children, where all things are not equal."[7]

144. I accept that there is neither a presumption nor a principle that a child of this age should necessarily reside with the mother. It is a consideration.[8] I accept that the importance of whether a child should live with the mother will vary according to the age of the child and to the particular circumstances of each individual case. Factors such as whether the child has been living with or apart from the mother and whether she is or is not capable of providing proper care are relevant. However, where the child is a very young child and has been with the mother since birth and there is no concern as to her ability to care, the traditional advantage of a

[7] NB: In *Mercer v Hermans [2003 CILR 510]* the Cayman Islands Court of Appeal found that Levers J. had given insufficient weight to the age and sex of the children.
[8] Re S(A minor) (Custody) [1991] 2 FLR 388, Re A (A Minor) (Custody) [1991] 2 FLR 394

very small child being with the mother is a consideration which the court should take into account when considering where her best interests lie. The welfare of J is paramount and I must assess both parents as carers and not have a preconceived approach that young girls should reside with their mother. I am satisfied that it would not be in J's best interests for M to take up the suggestion of the father for her to attend FSU without J. Despite F's clear devotion to J, I am satisfied that it would not be in J's best interests for F to have sole care and control of J. Although F has played a considerable role in J's life, I am satisfied that J has remained throughout with M. I do not accept F's inference that M may be unsuitable to care for J. The unbroken relationship of M and J is one which would be difficult to displace.

145. In her evidence in chief M stated:

> *"If I were not able to move I would feel devastated and I would feel punished by having a child and I would not be able to fulfil my dream about what I always wanted to do because the father did not consent for me to go. It is a once in a lifetime opportunity it would be taken away from me. I am not rich. I got a scholarship. I had to study really hard to get the grades. It just be hard. I do not think I will ever get over it. The last number of months it was very hard to me and J, as have to deal with this. I [do] not think I would ever get over it. I would not be able to be what I want to be."*

146. I accept this to be an accurate description of the effect on M if she were unable to take up her studies due to the fact that her application for leave to remove J from the jurisdiction was refused. Having watched M closely when she gave her evidence I am satisfied that refusal would negatively effect on her for the rest of her life and leave her with a sense of simmering injustice. The consequence of a refusal would affect her emotionally, which would not be in the interests of J. I have little doubt that it will cause irreparable damage to and have a negative lasting effect upon her relationship with F.

147. It is important that J continue to have a good relationship with both parents and any polarisation of their attitudes towards each other will inevitably impact firstly upon J. The therapeutic assistance so strongly commended by Dr. Ebanks-Garcia would have little or no prospect of success for some time to come, if ever. The sense of bitterness which a refusal of M's request would generate is not in the long-term interests of J.

148. I am satisfied that M has carefully thought out the future arrangements for the next 18 months. I was impressed that she is still organised despite the proposed commencement date being pushed back on at least three occasions. M's affidavit of 21st March 2012, drafted after her familiarisation visit to FSU, details the arrangements that she has sought to put in place for herself and J if she were to attend. The nature of the accommodation that M has located, as well as the likely

schooling, is appropriate for J. J will be adequately cared for at preschool when M attends class, as well as the periods during the day when M may be conducting her out of class studies.

149. I am of the view that it is in J's best interests for M to take up this opportunity at this stage, at a time when J is aged two and still at preschool, rather than embarking on such a course when J is older.

150. M's financial arrangements are satisfactory. M will have the benefit of a full scholarship, as indicated in the letters of 30 January 2012 and 16 November 2011 from the Ministry of Education. The success in being awarded such a scholarship is no mean feat in itself. In addition, her fiancé, who will remain in Cayman, will supplement her income to the tune of $1,200 per month.

151. F raises concerns about the certainty of M's proposed arrangements. I am satisfied that uncertainty as to the finality of the arrangements has been caused by these proceedings and through no fault of M. These drawn out proceedings have meant that arrangements have had to be made and broken and then re-made. I am satisfied that, by the departure date, M will have put in place all the necessary arrangements. I was impressed that she has not only located suitable school and taken steps to have J enrolled, but also has found suitable and appropriate accommodation. I am satisfied that she has carefully analysed her financial

obligations and disbursements and commend her for her successful application in obtaining a government scholarship.

152. During the hearing M was cross-examined about crime statistics as well as local sexual offender details which were obtained by F just before or during the hearing. Regrettably the documents were produced at such a late stage giving an inadequate time for the contents to be properly addressed by M. It was suggested by F that because M had not carried out similar research, and had stated that Tallahassee was a safe and family orientated city, she had failed to carry out proper inquiries. I do not agree. FSU is a well-known university. It is a university to which a number of parents feel safe sending their children. I am satisfied that M, on the information that she has provided, has found suitable and safe accommodation and schooling for J. Crime statistics can be misleading and it might be an interesting exercise to compare the serious crime statistics in Tallahassee 'per head' with those in Grand Cayman last year.

153. I am persuaded that success is of great value to M in her current ambitions to study at FSU. That said, I am satisfied that her case is child focused and coherent. I am also satisfied that M fully intends to return to the Cayman Islands at the end of her course. M is obligated to do so pursuant to paragraph 12 of her scholarship recipient commitment dated 30th November 2011. In addition, her employer, in a letter dated 22nd November 2011, have granted M a leave of

absence in order to complete her bachelor's degree and importantly will enable her to keep her health insurance in force. I believe that J will benefit from M's success which will engender in M an increase in her self-esteem, self-confidence and career prospects. I am satisfied from M's evidence that local employers would welcome such a qualification from an institution such as FSU. It could also be that her increased earning capacity could lead to an improvement in the relationship between herself and F. Her increased career prospects which this qualification will give to her may well reduce the financial impact on F long-term. M's current employers in a letter dated 10th February 2012 state:

> *"Risk management is a highly specialised, yet diverse degree that can be utilised in many industries in Cayman, from government to finance to insurance. As long as finance is a pillar of Cayman's economy, risk will be a key element of this sector. It is the backbone of strategic planning, and has become even more important with the downturn in the world economy. It is not a degree that is offered locally; therefore, it is necessary to study abroad, and to our understanding Florida State University is a highly accredited university that offers such an opportunity.*
>
> *To our knowledge, (M) will be one of the only, if not sole, Caymanian, to earn a degree in risk management and along with her reputable work ethic and experience in the insurance sector, she could command a six-figure salary. Here at (employer), we*

anticipate that on her return she could start earning CI$66,000-CI$72,000/annum."

154. I have very carefully considered the issue of distance education raised for the first time in F's sixth affidavit filed on 10th July 2012. F contends that this is a viable alternative option which would enable M to remain in the jurisdiction but still to obtain a qualification. F produces details of Indiana State University and Excelsior College who run similar programmes.

155. I have had to give considerable thought to this suggestion made by F. It has obvious merits, namely that J would be able to remain in the jurisdiction and the parties may be able to undergo therapeutic work recommended by Dr. Ebanks-Garcia.

156. However, it is clear that the Government scholarship does not cover the funding of distance learning. M would have to rely on financial support from her fiancé and remain at full time work to live. Even if M could afford the course, the balancing of a full time job with the care of J is good reasoning, as well as the benefits of direct teaching and interaction with fellow students supporting M's contention that she would get better results if she attends FSU. I accept M's evidence that a qualification obtained from distance learning would not be as well received by an employer as one obtained by someone attending the academic institution. It is

contended by F that the certificate would not show how the qualification was obtained. Be that as it may, one would have to be forthright with a prospective employer during the interview process. Having carefully considered this option, although recognising its potential merits, in M's circumstances it is understandable why she feels that she needs to attend FSU. I am satisfied that the FSU qualification would better enable her to provide for J in the long term.

157. In reaching this decision I have considered very carefully the importance of maintaining J's relationship with F. M indicated that due to the way that she had arranged her financial affairs, she would not require ongoing maintenance from F during the time of her course. M indicated that she would be content for F to utilise the monies that he was paying for child maintenance towards his expenses for visiting J.

158. I appreciate it will not be possible for J to enjoy the same level of contact with F if she is in Tallahassee. However, having heard from M and being satisfied as to F's dedication to J and his ability to self-mange his own work leave and employment, I am satisfied that contact can be maintained at such a level that J will still have a full relationship with F. I am satisfied that M will facilitate access and I am aware that it is important that the right to family life of all parties – F, M and J – be considered carefully.

159. M indicated in her oral evidence that she would be content for F to come up to Tallahassee every three weeks and for him to have J for the weekend. M said that she would also be visiting Cayman in the holidays and on some weekends and that J could stay with F at that time. In the summer M would have two months leave, between the beginning of May and end of June, and M accepts that F should have flexible access at that time. M stated that she would be back at the end of April for two weeks. M indicated that as she would have revision for examinations that J could possibly stay over for an additional week with F. M indicated that she intended to take a break at Christmas for three weeks and that she was willing to be flexible concerning access at that time. I am satisfied that a contact arrangement can be put in place sufficient to ensure that when M returned to the jurisdiction at the end of the course it will be possible for F to resume a full relationship with J.

160. When it comes to F's flights to Tallahassee, M provided details of flights in January using American Airlines which came out at $489. F provided details of flights in September. F's first quote US $1,940 was initially alarming. On closer inspection that price was not surprising, because rather than travel using one airline, it involved three different airlines and one of the legs of the trip was business class. The second quotation, again for September, utilised two different airlines, again one of the legs being business class and it showed a fare of Canadian $1,745 71. One would expect F to travel economy class and preferably use one airline.

161. The parties have some time now before January to finalise contact arrangements, including a structure for the dates of contact. It has been difficult to do so during these proceedings, as the proposed commencement date has had to be put back on more than one occasion. The arrangement that I have in mind and I expect the parties to now formalise is that J should have overnight access with F for at least one half of the Christmas, Easter, and Summer holidays. M should come to Cayman very shortly after each college term ends and return to Florida just before the new term. I would hope that additional access could be arranged for J to F during the daytime in the holidays when it is not his access time. F should have the opportunity to fly up to Tallahassee on alternate weekends so that J can have access with him, possibly between Friday and late Sunday or early Monday (the said times and days may vary depending on the flight arrangements of the father).

162. I note F's concerns at paragraph 23 of his affidavit dated 10th of July 2002 concerning indirect access. Contact by email, letters and telephone/Skype calls between each parent and child should be permitted in a reasonable fashion during all periods. I am satisfied that M will recognise the importance of this and ensure that it takes place.

163. If the parties cannot agree a precise access schedule then I will impose one. When arrangements are put in place for access it is vitally important that each parent return and collect J at the appropriate time. If a parent is acting in an unreasonable

fashion resulting in a need for further Court proceedings, then their conduct will be carefully scrutinised so as to ensure that the best interests of J are being observed by both parents. Both parents must understand that they a have responsibility to J by ensuring that access works, this includes complying with arrangements and behaving appropriately to one another.

164. I have also considered another alternative, namely whether care and control should be transferred to F, at least for the period when M would be out of the jurisdiction if she attended FSU without J. The older the child, or the greater the child's special needs at any age, the harder it may be to persuade the Court that the child would be better off being uprooted than left in the jurisdiction with the other parent, provided that parent played a full role in the child's care since separation. Although, I am satisfied that this is a shared care case, due to J's age and the nature of her bond with M as outlined by Dr. Ebanks-Garcia, I am not satisfied that it would be in her best interests for F to become the primary carer.

165. Accordingly, I grant M leave to remove J from the jurisdiction from January 2013 until the completion of her course in 2014. As the date of commencement has been ever changing due to the delayed hearing of this matter, I await the precise dates so that they may be placed in an order.

166. When I make the order I echo what Wall LJ said in ***Re A*** at paragraph [27]:

"It is the conventional wisdom in the Family Division, that for a child in A's position to grow up as a balanced, well adjusted child, ongoing parental cooperation and discussion about her welfare between her parents is essential. I do hope the father, despite his undoubted and natural disappointment at the outcome of this appeal, will nonetheless be able to bring himself to reassure A that she will have a wonderful time with her mother in South Africa; that he will be in contact with her as much as possible, and that he will look forward very much to the time when she comes back to Newcastle. Equally, I hope the appellant will negotiate realistic but generous contact for the father."

Custody, Care and Control

167. The parties have agreed that there be a joint custody order. I am satisfied that such an order is in J's best interests. This will secure F's position and custody rights whilst J resides in the U.S.A., a Hague Convention country.

168. F also seeks a joint care and control order. Section 7(1) of the Guardianship and Custody of Children Law (1996 Revision) provides that:

"The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having

regard to the welfare of the child and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge such order on the application of either parent....."

169. S.19 of the Law which provides that the Court should regard the welfare of the child as the first and paramount consideration and confirms the equality of the parents' position is again applicable to this application. As Lord Fraser said in ***Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security*** [1986] AC 112 at 170 :

"...parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child."

170. A convenient way of understanding the concept of custody and care and control is to compare the nature of the decision-making that is required to put them into practice.

171. The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child's health, development and general welfare. They include decisions as to whether or not the child should undergo a medical

operation, what religion the child should adhere to and what school the child should attend. A parent vested with custody has the responsibility of acting as the child's legal representative.

172. By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child's immediate care. They include, for example, decisions as to what the child will wear that day, what the child will eat that day and when the child will go to bed. They also include the authority to impose appropriate discipline.

173. A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered. Therefore, although a parent who is given sole custody has the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the

non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter.

174. Invariably, therefore, the giving of sole custody to one parent does no more than recognise that, in the circumstances of the breakdown of the marriage or relationship, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent's views have been given full and rational consideration. Thus an order of sole custody adds a qualification being that the final decision will rest with one parent.

175. In this matter joint custody of J is agreed and as such M is not entitled to unilaterally make any of these important decisions.

176. If a care and control order is only made in favour of M but F has access, the right of access is in effect a form of shared care and control. This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent's physical custody. This may be one of the reasons why shared residence orders have been more frequently made in England and Wales when compared to the more archaic joint custody orders.

177. The long-term best interests of a child are invariably best protected if, despite the breakdown of the parents' relationship, both parents are able to continue to play an equal role in making the important decisions that will determine the child's upbringing.

178. In the Cayman Islands, changes in line with the Children Act 1989 have now been put in place with the introduction of the Children Law, 2003, but regrettably, as these are pending proceedings, I am unable at this stage to make the orders provided for in that Law.

179. In the Cayman Islands, orders of joint custody are now in no way exceptional or unusual. This is because it appears to be accepted that, in principle, such orders are in the best interests of children. However, such orders should not be presumed to be the norm or routine and the making of such an order depends on the circumstances of each particular case.

180. The fact that relations between the parents are strained is not of itself a reason to refuse to make a joint order of custody. Such orders look to the future. They will govern a limited area of exchange between the parents, albeit one of the greatest importance.

181. I am not convinced that joint care and control orders are frequently made. I have not, prior to this case, been asked to make such an order in this jurisdiction despite hearing a large proportion of the child law cases over the past twelve months. I have been referred by Counsel to a number of cases from England and Wales concerning the approach to shared residence orders made under the Children Act 1989. I have not been referred to any case dealing with joint care and control. However, I am aware from a previous ruling that Levers J was willing to embrace the more modern approach to making joint custody orders but felt that joint care and control should be awarded only in exceptional circumstances.

182. The Children Act and the Children Law are designed to emphasise the continuing parental responsibility of both parents, even if an order has been made that the child will reside with only one of them. Orders for custody and access are no longer made in England and have been replaced by residence and contact orders, and the legal status of parenthood is defined in terms of parental responsibility. This should now be the position in cases in which the Children Law is applicable in the Cayman Islands.

183. The philosophy of the 1989 Act and our Children Law is to promote the family so far as it is consistent with the welfare of the child, on the belief that children are generally best looked after within the family with both parents playing a full part in their upbringing and without resort to legal proceedings. Therefore the concept

of parental responsibility was introduced and is defined at Section 5 (1) of the Law as *"all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property"*.

184. The 1989 Act or the Children Law do not produce a list of these rights, duties, powers, responsibilities or authority because it would be practically impossible to do so, as such a list would necessarily change from time to time to meet different needs and circumstances. The Children Law supports the idea that the primary responsibility for deciding on the upbringing of the child should remain with the parents.

185. The philosophy of the Children Act and the Children Law therefore is that a parent who does not have the child living with him should still be regarded as a parent so that he can be given information and an opportunity to take part in the child's upbringing. He cannot exercise a power of veto over the other parent, but can refer any dispute to the Court if necessary. It also encourages his involvement with the child and thus promotes the child's welfare. The retention of parental responsibility to a parent who does not live with his child would therefore give him a voice in any major issue over the child, thereby hopefully minimising conflicts with the other parent.

186. With both parents having parental responsibilities, the Act and Law also provide that each of them may act independently in meeting that responsibility without the need to consult the other except where statute expressly requires the consent of the other. The right to act independently must of course be read with the duty not to act in a way that would be incompatible with the child's welfare, or that a parent can ignore the need to consult the other parent on important issues.

187. As I have already commented, since this is a pending case, I can still only make the usual orders for custody and access, or joint custody care and control as argued by the Father in this case. That said it is important to realise that the Legislature has decided that a more modern approach should be taken to such matters and the parties in their ongoing interaction concerning J must recognise that.

188. The concept of shared parenting, as I understand from F's argument, is based on an order for joint custody care and control when the children will share their time and 'residence', not necessarily on equal basis, with their parents who still retain all parental responsibilities towards them, and at the same time to take the decisions that have to be taken when the parent is having their care and control. The English authorities to which Ms. Clemens has referred concern shared residence orders.

189. In ***D v D (Shared Residence Order)*** [2001] 1 FLR 495 Hale L J went through the basic principles upon which a first instance judge is to exercise his discretion in

deciding what is best for the children. Hale LJ also helpfully detailed the new reasons for the new approach under the 1989 Children Act, and importantly the difference between a custody, care and control order and a residence order. At this transitional time in the approach to be taken in child law cases in the Cayman Islands I see merit in setting out herein in great detail the views of Hale LJ starting from paragraph [21]:

> *"[21] In considering these arguments it may be helpful to go back to basics. Before the Children Act 1989 there was a Court of Appeal authority in Riley v Riley [1986] 2 FLR 429, to the effect that a shared residence order, which had been made and worked comparatively well in that case for 5 years, should never have been made at all. It is clear, as the court appreciated in the later cases, that the intent of the Children Act 1989 was to change that decision."*
>
> *[22] The background to the Children Act 1989 provision lies in the Law Commission's Working Paper No 96, published in 1986, on Custody, and the Law Commission's Report, Law Com No 172, published in 1988, on Guardianship and Custody. If I may summarise the basic principles proposed, the first was that each parent with parental responsibility should retain their equal and independent right, and their responsibility, to have information and make appropriate decisions about their children. If, of course,*

the parents were not living together it might be necessary for the court to make orders about their future, but those orders should deal with the practical arrangements for where and how the children should be living rather than assigning rights as between the parents.

[23] A cardinal feature was that when children are being looked after by either parent that parent needs to be in a position to take the decisions that have to be taken while the parent is having their care; that is part of care and part of responsibility. Parents should not be seeking to interfere with one another in matters which are taking place while they do not have the care of the children. They cannot, of course, take decisions which are incompatible with a court order about the children. But the object of the exercise should be to maintain flexible and practical arrangements wherever possible.

[24] Then dealing with residence orders the Commission said this at paragraph 4.12 of Law Com 172:

> *"Apart from the effect on the other parent, which has already been mentioned, the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In*

some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children's benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged. None of our respondents shared the view expressed in a recent case [Riley v Riley] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence

order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all".

[25] It is for those reasons that s 8 (1) of the Children Act 1989 defines 'a residence order' as:

" ... an order settling the arrangements to be made as to the person with whom a child is to live ..... ".

[26] "Person" of course includes "persons" on ordinary principles of statutory construction. It is, therefore, an order about where the children are to live. Section 11 (4) of the 1989 Act specifically provides:

"Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned".

[27] Not long after the Children Act 1989 came into force in October 1991 the matter came before the Court of Appeal, on 1st

December 1992, in ***Re H (A Minor) (Shared Residence)*** *[1994] 1 FLR 717, Purchas L J said at 728:*

> *"That such an order [which he referred to as a joint residence order] is open to the court, as has been said in the judgment of Cazalet J, is clear from the provisions of s 11 (4) of the Children Act 1989, as was indicated during the debate on the Bill by the Lord Chancellor. But, at the same time, it must be an order which would rarely be made and would depend upon exceptional circumstances."*

[28] He went on to refer to the case of ***Riley v Riley*** *[1986] 2 FLR 429.*

[29] The matter next came before the Court of Appeal, on 3rd February 1994 in ***A v A (Minors) (Shared Residence Order)*** *[1994] 1 FLR 669; Butler-Sloss L J (as she then was) at 677 said this:*

> *"Miss Moulder, representing the father, accepts that the conventional order still is that there would be residence to one parent with contact to the other parent. It must be demonstrated that there is positive benefit to the child concerned for a s 11 (4) order to be made, and such positive benefit must be*

demonstrated in the light of the s 1 checklist ..... The usual order that would be made in any case where it is necessary to make an order is that there will be residence to one parent and a contact order to the other parent. Consequently, it will be unusual to make a shared residence order. But the decision whether to make such a shared residence order is always in the discretion of the judge on the special facts of the individual case. [I suspect that when My Lady used the word "special" she meant "particular"]. It is for him alone to make that decision. However, a shared residence order would, in my view, be unlikely to be made if there were concrete issues still arising between the parties which had not been resolved, such as the amount of contact whether it should be staying or visiting contact or another issue such as education, which were muddying the waters and which were creating difficulties between the parties which reflected the way in which the children were moving from one parent to the other in the contact period".

[30] She went on to say (at 678):

"If a child, on the other hand, has a settled home with one parent and substantial staying contact with the other parent, which has been settled, long-standing and working well, or if there are future plans for sharing the time of the children between two parents where all the parties agree and where there is no possibility of confusion in the mind of the child as to where the child will be and the circumstances of the child at any time, this may be, bearing in mind all the other circumstances, a possible basis for a shared residence order, if it can be demonstrated that there is a positive benefit to the child".

[31] It is quite clear that in those words my Lady was moving matters on from any suggestion, which is not in the legislation, that these orders require exceptional circumstances. She was also recognising that it stands to reason that if it has not yet been determined where the children are to live, how much contact there is to be, or whether or not there is to be staying contact with the parent with whom they are not spending most of their time, then there could not be a shared residence order, because that would be an order that the children were to live with both parents.

[32] If, on the other hand, it is either planned or has turned out that the children are spending substantial amounts of their time with each of their parents then, as both the Law Commission and my Lady indicated in the passages that I have quoted it may be an entirely appropriate order to make. For my part, I would not add any gloss on the legislative provisions, which are always subject to the paramount consideration of what is best for the children concerned".

190. Butler-Sloss P, agreed and at paragraph [39] added as follows:

"[39] The approach of the Court of Appeal in the decision of Re H (A Minor) (Shared Residence) [1994] 1 FLR 717 *was made, as my Lady has already said, shortly after the implementation of the new Children Act 1989. It looked back at an earlier decision of the Court of Appeal* in Riley v Riley [1986] 2 FLR 429 *and, of course, a decision made under the old legislation. With hindsight that decision of the Court of Appeal was unduly restrictive. In* A v A (Minors) (Shared Residence Order) [1994] 1 FLR 669, *decided 18 months later, this court had a more relaxed approach to the concepts of shared residence. Now 9 years later with far greater experience of the workings of the Children Act 1989 it is necessary to underline the importance of the flexibility of the Children Act*

1989 in s 8 orders and, consequentially, that the Court of Appeal should not impose restrictions upon the wording of the statute not actually found within the words of the section."

[40]...A shared residence order is not the standard order and it is helpful to look at the guidance of the Children Act 1989 Guidance and Regulations, Vol 1, Court Orders (The Stationery Office Books, 1991), para 2.2(8) at p 10 and I am taking it for convenience from ***A v. A (Minors) (Shared Residence Order)*** *[1994] 1 FLR 669, 674 in the judgment of Connell J. He set out there a passage from the Guidance, a very helpful passage and it says at 674E:*

> *""...it is not expected that it would become a common form of order partly because most children will still need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the court to make any order at all. However, a shared care order has the advantage of being more realistic in those cases where the child is to spend considerable amounts of time with those parents, brings with it certain other benefits (including the right to remove the child from accommodation*

provided by a local authority under s 20), and removes any impression that one parent is good and responsible whereas the other parent is not.""

[41] I stand by what I said on 677 and 678, save to say, as my Lady quite correctly said, the word is not "special" facts, I meant on the "particular" facts of the individual case. I am not certain that one does have to demonstrate a positive benefit to make a shared residence order. One does have to demonstrate that a shared residence order is in the interest of a child in the accordance with the requirements of s 1 of the Children Act 1989.

[42] The importance for a judge of first instance is that the guidance that comes from the Court of Appeal, setting out the principles to be followed, is, I hope, valuable for first instance judges but, at the end of the day, it should not inhibit the first instance judge from making the right decision. The right decision is dependant upon the individual facts of each case where the judge exercises his discretion and decides what is best for the children in that particular case."

191. The dictum of Wall J (as he then was) in ***A v A (Shared Residence)*** [2004] EWHC 142 (Fam), [2004] 1 FLR 1195 at [119] which has been approved and adopted in a

number of Court of Appeal judgments highlights the developing approach to such orders when he stated:

> *".... a shared residence order is an order that children live with both parents. It must, therefore, reflect the reality of the children's lives. Where children are living with one parent and are either not seeing the other parent or the amount of time to be spent with the other parent is limited or undecided, there cannot be a shared residence order. However, where children are spending a substantial amount of time with both their parents, a shared residence order reflects the reality of the children's lives. It is not necessarily to be considered an exceptional order and should be made if it is in the best interests of the children concerned."*

192. As the case law has developed, it has become clear that the failure of parents to co-operate does not prevent the court making a joint residence order. On the other hand, the inability of the parents to work together is not by itself a reason for making the order. It is clear that the time spent in each household does not have to be spread evenly or even close to equally for an order to be made.

193. It is not necessary to show that exceptional or unusual circumstances exist before a joint custody order may be granted. What is required is, as in all cases involving

children, to demonstrate that the order is in the best interest of the children having regard to the particular facts of the case.

194. When considering the application of the shared residence case law to an application for joint custody and/or, especially in this case, joint care and control, I have in mind that the orders are not strictly the same in nature. A residence order is designed to reflect the place of the child's residence and is not intended to deal with issues of parental status. It is intended to move away from the old fashioned concepts of custody and care and control and the psychological effects of such orders. The order may specify the periods during which the child is to live in the different households. The cases regarding shared residence are helpful in recognising that both parents have an important role to play but caution must be had in regarding them as directly applicable to an application for care and control. Although there may be merits in making such an order, I am not in a position to make a shared residence order for the jurisdictional reasons already stated.

195. I am aware that shared residence orders are now viewed as being an appropriate order used more frequently and in more diverse situations. The fact that J would be living out of the jurisdiction would not be a bar to making a shared residence order. I mentioned the case of ***Re F (Shared Residence order)*** [2003] EWCA Civ 592 to the parties during the hearing. That case envisaged that one parent might live in Southern England and one in Edinburgh, Scotland. Thorpe LJ held that the

fact that the parents' homes were separated by a considerable distance, did not preclude the possibility of the children's year being divided between the homes in such a way as to validate the making of a shared residence order. It was held that there need not be an even amount of time spent at each house but the important factor was whether the home offered by each parent was of equal status and importance in the lives of the children. At paragraph [21] Thorpe LJ said:

> *"As this court has said recently, a shared residence order must reflect the underlying reality of where the children live their lives. The fact that the parents' homes are separated by a considerable distance does not preclude the possibility that the children's year will be divided between the homes of the two separated. parents in such a way as to validate the making of a shared residence order."*

196. I am aware of the case of ***Re D (Leave to Remove: Shared Residence)*** [2006] Fam Law 1006. I am conscious of the fact that this case was not referred to during the hearing, but I mention it as it may assist the parties to understand how they may sensibly approach any shared residence application that may be made. In ***Re D*** the children had been dividing their time between the parents under a mediated shared care arrangement, but the mother wanted to leave England to reside in the USA. The children were to spend significant time with each parent. Hedley J concluded that there was no reason why a shared residence order could not be made despite the distance spanning the two countries. Hedley J stated at para [44]:

"Neither Mr. Henry Setright QC, nor Mr Stephen Cobb QC could advance any argument as to why a joint residence order should not span more than one jurisdiction; nor did either wish to do so on the basis of their instructions. Although, perhaps a little surprising in concept, I am fortified in the view that I may make such an order if, as here, it is otherwise right to do so, by the judgments of the Court of Appeal in Re F (Shared Residence Order), *especially at paras. 38 and 39 of the judgment. I acknowledge that, of course, this case is different in that leave to relocate is required if the children and the mother are to move, this being to the United States rather than Scotland. But whatever is decided the children will, over a year, spend significant amounts of time in the United Kingdom and the United States. I do not see that as effecting a jurisdictional or procedural bar to a shared residence order and for those reasons it is one that I propose to make."*

197. The position in ***Re D*** is similar to the one I intend to be put in place in this matter. J will be spending considerable time between the two households. Although I am aware of F's, on the whole unwarranted, criticism of M's parenting skills and his view that 'he knows best' when it comes to J's care, if an application for shared residence was made I would not, on the evidence before me, find that he had an improper motivation for seeking such an order. This is not the type of situation as

expressed by Wilson LJ in ***Re K (Shared Residence Order)*** [2008] EWCA Civ 526, [2008] 2 FLR 380 at paragraph [21]:

> *"a (shared residence order) is sometimes viewed by a parent intent upon interfering with, or disrupting, the other parent's role in the management of the child's life, as a useful vehicle by which to do so; and I have experience of cases in which parents, although allowed to have substantial contact with the child, are nevertheless rightly refused shared residence on the basis that their motivation seems to be to strike at the other parent's role in the management of the child's life. In any application for an order for shared residence, the court should, in my view, be alert to discern such malign motivation."*

198. One other factor in this case is that, as a consequence of the granting of leave to remove, the view may prevail that J is primarily under the care of M. With that in mind, I have regard to Wall LJ's comments at paragraph [22] in ***Re P (Shared Residence Order)*** [2005] EWCA Civ 1639, [2006]:

> *"Such an order (shared residence) emphasises the fact that both parents are equal in the eyes of the law and that they have equal duties and responsibilities as parents. The order can have the advantage of conveying the court's message that neither parent is*

in control and that the court expects parents to co operate with each other for the benefit of the children."

199. It is regrettable that I am not able to make a shared residence order for jurisdictional reasons. If I had been able, having regard to the above sentiments, I would have likely found it be in J's best interests for a shared residence order to be made. Residence orders are designed to settle the arrangements to be made to the person with whom the child is to live as well as emphasising that parenting is a continuing and shared responsibility. Such an order would reflect the reality of the position, namely that that J would also be residing with F to the degree set out in paragraphs 160 to 163 above and not just visiting him.

200. Having regard to the orders available to me, I agree with the parties that it is in J's best interest to make a joint custody order. This will ensure recognition of F's rights and duties and protect his custodial rights especially when he is in the U.S.A. However, I do not feel that a care and control order is to be viewed as being the same as a residence order and the cases on shared residence, although supplying some helpful guidance, should not be read to be automatically fully applicable to daily care and control, especially during the periods when the child will be in the USA. Accordingly, I do not grant a joint care and control order but only a care and control order to M.

201. If F decides he wishes to apply for a shared residence order under the Children Law, I would hope that having regard to the contents of this judgment and having a chance to review the case law, M can see the benefits of such an order. Such a concession and recognition of the importance of F to J's life would be in J's best interest as it may assist with the parties' co-operation in matters relating to J at this sensitive time and into the future.

202. I reiterate the comments of Theis J set out at paragraph 6 of this rather lengthy ruling. In conclusion and in addition I would invite both parties to carefully consider the following postscript of ***Wall LJ in Re L (Shared Residence Order)*** [2009] 1 FLR 1157 at paragraphs [66] to [70]:

> *"[66] I cannot part with this appeal, without addressing a few words directly to L's parents. The judge was plainly right to find the both parents love L, and that, in turn, she loves them and is 'happy with either'. However, the judge was also right, in my view, to find that there is a risk to L if her parents 'continue to be at loggerheads'. Indeed, I would put the matter more strongly. If the parents retain their current hostility to each other, they will undoubtedly cause L serious emotional harm.*
>
> *[67] .... What matters, in my view, is that L should have love and respect for each of her parents and should be able to move easily*

between them. To achieve this, the parents must have respect for each other.

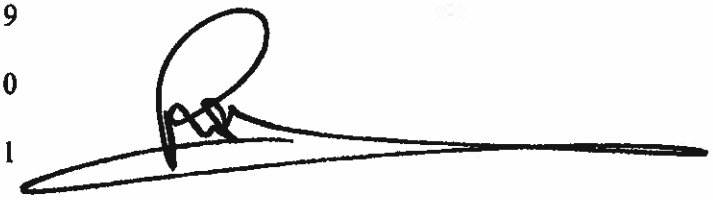
[68] Each parent represents 50 percent of L's gene pool. Children, moreover, learn about relationships between adults from their parents. In twenty years time it will not matter a row of beans whether or not L spent x or y hours more with one parent rather than the other: what will matter is the relationship which L has with her parents, and her capacity to understand and engage in mutually satisfying adult relationships. If she is given a distorted view of adult relationships by her parents, her own view of them will be distorted, and her own relationships with others – particularly with members of the opposite sex – will be damaged."

[69] L must therefore be able to appreciate that even though her parents are separated, they have respect for each other. Most disputes about children following parental separation have nothing to do with the children concerned: they are about the parents fighting all over again the battles of the past, and seeking retribution for the supposed ills and injustices inflicted on them during the relationship...

[70]...The father, in particular should not regard the outcome of this appeal as a victory: it is, in reality, a defeat for both parties, who have been unable to resolve their differences by sensible

agreement. They are fortunate in having a daughter whom they both love and who loves them. Each must fully appreciate the role the other has to play in L's life, and the current hostility between them must cease. Otherwise, in my judgment, emotional damage to L will be serious and lasting."

Dated this 22nd day of November 2012.



THE HONOURABLE MR. JUSTICE RICHARD WILLIAMS

JUDGE OF THE GRAND COURT

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