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**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN**

**Cause No: 99/2009**

**BETWEEN:**

**M B**

**Petitioner**

**AND:**

**J B**

**Respondent**

**Appearances:**

**Mr. Nigel Dyer Q.C. and Ms. Laura Briggs of Samson and McGrath for Petitioner**

**Mr. Nicholas Cusworth Q.C. and Ms. Angelyn Hernandez of Hernandez & Co for Respondent**

**Before: Hon. Justice Charles Quin**

**Heard: 15<sup>th</sup>- 18<sup>th</sup> June 2010**



**Preamble**

*This Ruling is distributed on the strict understanding that in any report of this kind no persons other than the counsel or the attorneys instructing them (and other persons identified by name in Ruling itself) may be identified by name or location and, in particular, the anonymity of the children and the adult members of the family must be strictly preserved.*

**RULING**

1. The Petitioner issued a Summons on the 31<sup>st</sup> March 2010 for an Order that the Petitioner be permitted to remove the children of the marriage, M and J, from the Cayman Islands, to live in with her in Ontario, Canada.

**Matrimonial Proceedings**

2. The parties are both Canadian citizens and accountants, who came to live in the Cayman Islands in 1992. The parties were married in the Cayman Islands on the 21<sup>st</sup> May 1994. Since the celebration of their marriage they lived in two matrimonial homes in Grand Cayman. The parties lived in one home from October 1994 to 2000 and in the second home from 2000 to January 2008. This second home is the matrimonial home where the Petitioner and the two children reside.
3. There are two children of the marriage namely, M, born on the 26<sup>th</sup> July 1999, and J, born on the 27<sup>th</sup> June 2001.
4. The father is a Chartered Accountant and a Certified Management Accountant and is employed in the financial services industry. The mother is a Chartered Accountant who worked fulltime until her job ceased in April 2010.
5. The father and the mother have both obtained Caymanian Status. Their children have both Canadian and Cayman passports. The children of the marriage are both born in Cayman and to date have been educated at their current school in Cayman.
6. On the 17<sup>th</sup> June 2009, the Petitioner filed her divorce Petition on the grounds of an irretrievable breakdown of the marriage and sought dissolution of the marriage.
7. In January 2010 the Petitioner filed a Summons for general directions, requesting the preparation of a welfare report to address, *inter alia*, the question of the Petitioner returning to Canada with the children or, alternatively, the possibility of the parties and the children remaining in the Cayman Islands.
8. On the 19<sup>th</sup> March 2010 Roy Jones J. (Actg.) made an Order for the preparation of a welfare report which addressed:
  - a. The ascertainable wishes and feelings of the children concerned (considered in the light of his/her age and understanding);
  - b. His/her physical, emotional and educational needs;
  - c. The likely effect on him/her on any change of circumstances;
  - d. His/her age, sex (i.e. gender), background and any relevant characteristics;

- e. How capable each of his/her parents are in meeting his/her needs;
  - f. The possibility of a move to Canada;
  - g. The possibility of remaining in the Cayman Islands.
9. On the 31<sup>st</sup> March 2010 the Petitioner issued a Summons for an Order that she be permitted to remove the children of the marriage from the Cayman Islands to live with her in Ontario, Canada.
10. The following Affidavits, Reports and written material have been put before the Court:
- i. Affidavit of the Petitioner in support of her application to relocate the children – dated 16<sup>th</sup> April 2010;
  - ii. Affidavit of Ms. L – dated 16<sup>th</sup> April 2010;
  - iii. Affidavit of the Respondent – dated 16<sup>th</sup> April 2010;
  - iv. Affidavit of Ms. S – dated 8<sup>th</sup> April 2010;
  - v. Affidavit of Ms. H – dated 15<sup>th</sup> April 2010;
  - vi. Affidavit of Elaine Danson – dated 13<sup>th</sup> April 2010;
  - vii. 2<sup>nd</sup> Affidavit of the Petitioner – dated 30<sup>th</sup> April 2010;
  - viii. 2<sup>nd</sup> Affidavit of the Respondent – dated 30<sup>th</sup> April 2010;
  - ix. 3<sup>rd</sup> Affidavit of the Respondent in response to Ms. L – dated 30<sup>th</sup> April 2010;
  - x. Report of Dr. Elma Augustine, a Clinical Psychologist – dated 29<sup>th</sup> May 2010;
  - xi. Affidavit from Mr. M – dated the 15<sup>th</sup> June 2010
  - xii. Position statement on behalf of the Petitioner – dated 11<sup>th</sup> June 2010;
  - xiii. Position Statement on behalf of the Respondent – dated 11<sup>th</sup> June 2010;
  - xiv. Respondent's closing submissions – dated 19<sup>th</sup> June 2010;
  - xv. Petitioner's closing note – dated 19<sup>th</sup> June 2010.

### **Relevant chronology**

11. During 2006 and 2007 difficulties between the parties started to emerge and eventually the marriage broke down irretrievably towards the end of the 2007 and the beginning of 2008. The marriage broke down as a result of fundamental irreconcilable differences

between the parties and, consequently, the Respondent left the matrimonial home on the 1<sup>st</sup> February 2008.

12. The children have continued to live with the mother in the matrimonial home. The parties have negotiated and agreed a financial settlement and, their assets have been divided equally (even though implementation has not been entirely finalized) leaving them each with substantial financial resources.
13. The mother is in a relationship with a Canadian, Mr. M., who lives in Canada. Mr. M is separated from his wife and also has two children – aged 8 and 6 – who live with their mother in Canada.
14. The father in this case, JB, is in a relationship with a woman who has an 11-year-old son and they both live in the Cayman Islands.
15. Over the last two and a half years since the parties have separated, they have managed to negotiate a regime, whereby over two weeks the mother has the children for eight nights and the father has the children for six nights. The parties have divided the school holidays, whereby each of them has the children for half of the time.
16. It is accepted that although the mother is in primary care of the children, the father is a very committed father who has, and continues to have, a very strong relationship with the children. Both parties have worked admirably in ensuring that the parties have an almost equally-shared care relationship. Even on occasions, they have gone on holiday together as a family since the separation.
17. It is clear that up to late 2009 both the father and the mother had very successful fulltime careers in the Financial Services industry.
18. It has to be said that the Court is impressed with the evidence from both parties. Their approach to the children at the time of their separation can properly be described as a model approach in a very difficult situation. They sat M and J down in the bedroom of the matrimonial home and made it clear that they both loved them more than anything in the world. They also made it clear that although the mother and the father were going to live

in different houses, there would be consistent and constant contact with both the mother and the father. I can do no better than to quote from the script which they provided: "The troubles we have experienced are between mommy and daddy and have nothing to do with you (the children). You are both terrific kids and we love you very much. Mommy and daddy are going to live in different houses. We know that this is a big surprise to you, but we are going to do our best to help you with any questions you have as these changes take place. You and mommy will live in this house and daddy is going to live with Alan for a while. Daddy will still come and drop you to school in the mornings and pick you up after school whenever he can. If daddy can't, then mommy or "Yaya" (the nanny) will, the same as it is now."

19. It continued, "Daddy and mommy will both help put you to bed and read stories to you at night. We will take turns or do it together as we always have. Sometimes on the weekends you will be with mommy, and sometimes with daddy. Sometimes you will be with both of us as we were this weekend with grandpa and everybody."

20. Finally the parties said, "Mommy and daddy are very sad about making this decision and we know that you will be sad too. Even though mommy and daddy will live in separate houses we are still a family. Mommy and daddy care a lot about each other and are always going to be friends. We both love you very much. You know that you have always been able to talk to us about anything so let's talk about the questions you have now."

21. Shortly after this meeting the parents entered into a shared parenting regime where the children spent six nights with the mother, four nights with the father and then split holiday times – two nights with each parent. The mother's counsel appropriately likened this to a 6-4-2-2 football formation. This is an admirable regime and, as can be seen by the schedules produced by the mother at W7 and W2, both parents were fully involved in their children's lives on a daily and weekly basis.

22. I think it is fair to say that all counsel and the Clinical Psychologist, Dr. Augustine, appointed by the court as a joint welfare officer, have been deeply impressed by the love, commitment and support that the parents have shown for and towards M and J throughout the marriage and also since the separation in 2008.

### **The Issue**

23. The mother now wishes to relocate to Canada with M and J because she is of the strong view that now is the time to move the children to Canada, which she claims was always an understanding that she and the father had. Consequently, for a number of other reasons which I will outline, she believes that this is the right time for this relocation.
24. The father wishes the children to remain at the present school in Cayman for the foreseeable future and for the current regime, which both parties accept has been working well, to continue.

### **Mother's position**

25. It is the mother's position that she and the father had always planned to educate the children in a Canadian school and then on to a Canadian University. She said that they had felt that with significant investments, they had the means and the flexibility to provide the children with the best education and life experiences possible. It is the mother's view that it would be in the children's best interest to attend school in Canada and in particular in Oakville, Ontario.
26. In November 2008 the mother's attorneys wrote to the father's attorneys indicating that the parties had previously discussed the possibility that the children would be educated in Canada once M had completed Year 6 at his Cayman school. The mother made it clear that this is something they would have to discuss again. Although it would not be possible to incorporate it into a Consent Order, she wished it to remain an option which may be in the best interest of the children.
27. It is accepted that, from a professional standpoint, the mother had a very difficult time for approximately 18 to 24 months. In October 2009 when she knew her job was ending, she went to see a school in Ontario, Canada ("FH"). She also investigated some excellent senior private schools in Ontario and then some time in November 2009, made up her mind that she wanted to relocate to Ontario with the children.

28. The mother was concerned that M had not been happy at his current school in Cayman. Although she accepts that early incidents which may have disturbed M were no longer a problem, she felt that the education that M was receiving was not as good as the education she felt he could receive at FH in Ontario. It should be noted that everybody accepts that M is an exceptionally talented and academic child who has the potential to obtain very high marks and enter a top Canadian university like his parents.
29. The mother decided that September 2010 was the best time for this move. She felt that M was about to move into High School in the Cayman Islands and was at a critical point in the school career – moving from basics to topics more specific to the local curriculum.
30. She felt that J was still young and likely to adapt better to a move than if it were to happen late in childhood. In her Affidavit sworn on the 16<sup>th</sup> April 2010 the mother said that she was about to retire from her job, which would allow her to be fully available to the children.
31. Accordingly, the mother arranged to have a meeting with the father on the 13<sup>th</sup> November 2009 when she told the father that she was of the decided view that the children should start school in Canada next fall.
32. The mother prepared an agenda (W8) for this meeting. In this agenda she suggested letting the children know that the mother and the father are discussing this as an option and telling the children that their views would be helpful in assisting the parents in making the decision on the matter. It is fair to say that the mother also had in her agenda that she felt very strongly about this, and so strongly that if the father would not agree, she was prepared to let a judge rule upon this issue.
33. After the meeting the mother suggested that she and the father attend FH in Ontario and other schools in Ontario. She sent the father a considerable amount of information on the school and on other private schools with excellent reputations.
34. It is clear that the parents did not make any joint visits to these schools and, from that time onwards, have formed sharply conflicting views on the future education of the

children. They gradually moved into entrenched positions with neither party showing any inclination to compromise on the issue.

35. Although the mother wishes to move the children to Canada, she is anxious that the father remains deeply involved in their children's lives. She has proposed that the father have all the long weekends when the children are on holiday from their Canadian schools – whether he wishes to spend these weekends in Canada or Cayman. Furthermore, the father can have any other weekend in Canada. In addition, the mother proposes that the children spend 12 of their 18 weeks of holidays – amounting to 1/3 of the holiday time – with the father. She would also ensure that the father had daily Skype and telephone contact.
36. The mother is anxious for the parents to work closely together on her proposals in the same way that they have with the present 6-4-2-2 regime.

#### **Father's position**

37. The father's primary contention is that to relocate M and J in Canada in September 2010 would not be in their best interest.
38. The father is concerned that the loss of his daily and weekly contact with the children at this stage will have a very negative effect on the children. He has made it clear that he is not a "weekend father" and certainly does not want to be a "holiday-time" father. The father is a committed and involved parent and has consistently been involved in the children's lives since the separation in February 2008.
39. The father has accepted that during their marriage the parties discussed the possibility of the children being educated in Canada and agrees that he would very much like M and J to attend Canadian Universities. However, the father also maintains that these conversations regarding the children being educated in Canada were based on the premise that the parents would remain married and that they would return to Canada as a family. The father says the circumstances in which the family now finds itself are quite different as a result of the separation in February 2008.

40. The father submits the mother's proposal for five weekends is impracticable and unrealistic. His view is that it will interrupt the children's normal school timetable and their time with friends and, he has no wish for them, or himself, to spend long weekends traveling from Cayman to Toronto and back again. In effect the father argues that the relocation will ensure that he is no longer able to play the part in their lives to which they have grown accustomed, and which he maintains has come through great cooperation between the parents and has met with a high degree of success.
41. Whilst the father recognizes that M is exceptionally bright, he feels that his current academic needs are being met, and, furthermore, M has, over the past few years, improved, both emotionally and socially. Therefore the move is not a good time for M to change schools, and, at the same time, removing the father from him during school term time. It is the father's case that this move now could have a detrimental effect on both children and a detrimental effect on the relationship between the children and him.
42. The father does not challenge the fact that the private schools in Canada, which the mother has identified, may have better academic results than the school that the children are currently attending. But, he is of the view that their current school meets their current needs. Accordingly, he opposes the mother's application to relocate the children with her to Canada.

### The Law

43. The mother's leading counsel has submitted that the test in *Payne v. Payne* [2001] 1 FLR 1052 as applied by our Court of Appeal in *In Re C* [2008] CILR 400 is to be applied by the Court in this case. In *Payne v. Payne* Thorpe LJ stated at paragraph 26:

"In summary a review of the decisions of this court over the course of the last 30 years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:

- (a) the welfare of the child is the paramount consideration; and
- (b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to

relocate will be granted unless the court concludes that it is incompatible with the welfare of the children”

44. Then at paragraph 32 Thorpe LJ states:

“Thus in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother’s future psychological and emotional stability.”

45. Thorpe LJ then set out the following discipline in paragraph 40:

“However there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption then there would be an obvious risk of the breach of the respondent’s rights not only under Article 8 but also his rights under Article 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother’s proposals are necessarily compatible with the child’s welfare, I would suggest the following discipline as a prelude to conclusion:

- (a) Pose the question: is the mother’s application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child’s life? Then ask is the mother’s application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father’s opposition: is it motivated by genuine concern for the future of the child’s welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child, were the application granted? To what extent would that be offset by extension of the child’s relationships with the maternal family and homeland?
- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child’s welfare as the

paramount consideration, directed by the statutory checklist (Section 1(3) UK Children's Act 1989) insofar as appropriate.

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.”

46. In the recent decision of Mostyn J in **Re AR** [2010] EWHC 1346(FAM) in the High Court in England dated the 10<sup>th</sup> June 2010, he considers **Payne** and some interesting developments since Thorpe LJ's discipline was enunciated and followed.

47. Mostyn J states at paragraph 8 of **Re AR**:

“...there is a strong view that the heavy emphasis on the emotional reaction of the thwarted primary carer represents an illegitimate gloss on the purity of the paramountcy principle. Moreover, some argue that it promotes selfishness and detracts from the importance of co-parenting. Some argue that on the birth of children parents are indentured to sacrifice throughout their minority, but that the one word that is missing from *Payne* is, in fact, sacrifice.”

48. Indeed Mostyn J quotes from the decision of Wall LJ (the new President of the Family Court) in **Re D (Children)** [2010] EWCA where Wall LJ stated at paragraph 33 of in **Re D**:

“There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent.”

49. Mostyn J then refers to what he describes as “an interesting and potentially momentous development” being the recent gathering in March 2010 of judges from all over the world

in Washington DC and the promulgation by them of the eponymous declaration on International Family Relocation. This states:

“3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.

4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:

- (i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child’s development, except if the contact is contrary to the child’s best interest;
- (ii) the views of the child having regard to the child’s age and maturity;
- (iii) the parties’ proposals for the practical arrangements to relocation, including accommodation schooling and employment;
- (iv) where relevant to the determination of the outcome, the reasons for seeking or opposing relocation;
- (v) any history of family violence or abuse, whether physical or psychological;
- (vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
- (vii) pre-existing custody and access determinations;
- (viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
- (ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

- (x) whether the party's proposals for contact after relocation are realistic having regard to the cost of the family and the burden to the child;
- (xi) the enforceability of contact provisions ordered as a condition of relocation in the state of destination;
- (xii) issues of mobility for family members; and
- (xiii) any other such stances deemed to be relevant by the judge.

50. Mostyn J goes on to state at paragraph 11 of **Re AR**:

"The Declaration supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach. It requires the court in a real rather than synthetic way to take into account the impact on both the child and the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement. The hitherto decisive factor for us – the psychological impact on the thwarted primary carer – is relegated to a seemingly minor position at the back end of paragraph 4 (viii)."

51. In the recent English Court of Appeal decision of **Re H** (Lawtel 19/5/10) Wilson LJ considered the Declaration and stated at paragraph 26:

"In that the principal charge against our guidance, as it stands, is that it ascribes too great a significance to the effect on the child of the negative impact upon the applicant of refusal of the application, one is interested to discern the way in which, in [4] of the declaration, that factor is addressed. One finds (does one not?) that it is not squarely addressed at all. The closest to any address of it is to be found in (viii), namely "the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties". Some may share my initial perplexity even at the terminology of (viii) in that it appears to train the consideration of the Court not only upon impact "on the child" but also, and by way of contradiction, upon impact "on the parties" apparently irrespective of impact on the child. It is axiomatic that our notion of paramountcy excludes from consideration all factors which have no bearing on the child. But, that possible curiosity apart, there is no square address in (viii) of the impact upon the child likely to flow from negative impact upon the applicant of refusal of the application. Indeed the reference to the

child's extended family, education and social life, seems almost to draw attention away from such a factor."

52. Mostyn J continued at paragraph 12:

"The factor of the impact on the thwarted primary carer deserves its own berth and as such deserves its due weight, no more, no less. The problem of the attribution of great weight to this particular factor is that, paradoxically, it appears to penalize selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocater is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on, and work to promote contact with the other parent, is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice receive their due reward."

53. Mostyn J then referred to Thorpe LJ's article in *[2010] IFL 127* where he stated:

"Were England and Wales to subscribe to the text of the declaration, or anything in similar vein, it would represent a significant departure from the principles that our court has applied consistently since the decision in *Poel v Poel* [1970] 1 WLR 1469. The case for such a shift is not difficult to articulate. The principles stated in *Poel* were substantially founded on the concept of the custody or parent. Furthermore, there is an emerging body of significant research in various jurisdictions that must be brought into account."

54. As Mostyn J states at paragraph 14:

"In *Payne* Thorpe LJ at paragraph 26(a) and the President at paragraph 85(a) made clear that ultimately the decision in a relocation case turns on the application of the paramountcy principle. In *Re H Wilson* LJ reiterated this stating at paragraph 21:

Nevertheless one must beware of endorsing a parody of the decision. Both Thorpe LJ at paragraph 26(a) and Dame Elizabeth Butler-Sloss P, at paragraph 85(a), stressed that, in the determination of applications for permission to relocate, the welfare of the child was the paramount consideration. It is only against the subsidiary guidance to be collected from *Payne* that criticisms can perhaps be more easily levelled."

55. Mostyn J went on to state:

“In applying the paramountcy principle the court must of course have particular regard to the specified factors mentioned in s1(3) UK Children Act 1989 when deciding whether to make, vary or discharge an order under s8 namely:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of which the court considers relevant;
- (e) any harm which he suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.”

56. The Order for Directions dated 19<sup>th</sup> March 2010 mirrors and uses some of the wording of the UK Children Act as guidelines for the Clinical Psychologist to adopt in her welfare report for the parties and this court.

57. When this Court considers the questions set out in *Payne v. Payne*, the dicta of Mostyn J in *Re AR*, the paramountcy principle as directed by the UK statutory checklist and the Order for Directions herein, they all sit comfortably with, and direct this Court to follow, the principle under s19 of the Guardianship and Custody of Children Law 1996, the relevant portion of which states:

“Where in any proceeding before any court the custody or upbringing of a child is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right in Common Law possessed by the father, in respect of such custody, upbringing, administration or application as superior to that of the mother, or claim of the mother is superior to that of the father.”

58. The Grand Court has consistently followed the principle laid down by Section 19 of the Guardianship and Custody of Children Law. In 2003 Henderson J. in *M v. A* [2003] CILR Note 20 ruled:

“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 interest.”

Indeed Henderson J. went on to state:

“A proposed relocation which would restrict the children’s contact with their other parent would not be in their best interest, but the courts may grant the application if the applicant shows that a strong factor in favour of their best interest offsets that detriment.”

Henderson J concluded by stating:

“It is crucial to the children’s best interests that their parent be given the fullest opportunity to reapply, supported by fresh evidence and a Social Inquiry Report where appropriate.”

59. Indeed, the same family to which the *In Re C* case refers, which was before the Grand Court and the Court of Appeal in 2008 has recently been back before the Court and on the 4<sup>th</sup> February 2010 Foster J again followed the principle as set out under Section 19 of the Guardianship and Custody of Children Law, concluding that:

“The sole issue is what is best for the child in the view of the court having regard to all the circumstances.”

### **Analysis**

60. It is clear to the Court that both parents are highly intelligent and successful accountants who had senior positions in the Cayman Islands Financial Services industry, for which they were substantially compensated. With good financial housekeeping they have provided well for their children and they are in the comfortable position of being able to

afford the fees of all the best private schools, whether they be in the Cayman Islands, or in Canada. It is apparent that they both view their investments as being put aside for their children in the future.

61. Much has been made of the fact that the mother did not tell the father of her visit to FH in Ontario. Correspondingly, much has been made of the father seeming to deliberately dilute the number and significance of the conversations between the parties during the marriage and prior to their separation regarding their children's later education in Canada.
62. It is clear to the Court that both parents love their children unconditionally. They both fervently and sincerely want what is best for the children and they both want to act in the children's best interest.
63. The mother strongly believes that the children should be moved with her so that they can attend FH in Ontario as from September 2010. The father equally firmly believes that the children should stay at their current school in Cayman for the next two to four years and possibly longer.
64. I consider it to be both natural and understandable why the parties would maintain their respective positions. It is also natural and understandable to take whatever steps they deem necessary to try and persuade the other parent of the correctness of their own view on this issue, and, correspondingly, to highlight what each viewed as the flawed content of the other parent's opinion. I do not criticise either parent. They have both been impressive witnesses and I find that they have been honest with the Court as to their actions in the past and as to their hopes for their children in the future. It is clear that they both hold sharply conflicting views on the question of where their children should be educated over the next three to four years. The parents' interest and concern for their children is admirable and often sadly lacking in many parents of today.
65. As has been submitted by her leading counsel, the bedrock of the mother's case is their joint longstanding acceptance that the children would be educated in Canada. The mother claims to be taking the long-term view and wants them settled into a Canadian school by the fall of this year so that they can start the Canadian curriculum as soon as

possible. The mother said that she would obviously be a full-time mother and the children would be in a very nice environment near to their cousins and in a very comfortable home. The mother is concerned that in M's case he is not being stretched as much as he should be and she feels that he will receive a more challenging and better education at a school in Ontario than at his present school.

66. The father accepts that there were many conversations regarding schooling and University in Canada. However, the father maintains that any discussions regarding returning to Canada for the schooling of their children were based upon the family staying together and not based on this unforeseen separation and divorce. The father submits that neither the mother nor the father anticipated this separation and therefore the circumstances are quite different from those imagined in the earlier discussions. The father maintains that M and J are happy, contented and receiving a good education. It is the father's opinion that the present regime works well and allows for both parents to be with the children on a weekly, if not daily basis. It is quite apparent that the father has a significant relationship with both M and J and that he is very much involved in their daily lives and in their extracurricular school activities.
67. The Court notes that the mother had a very upsetting and disruptive time professionally and has experienced a rather frustrating and depressing 18 to 24-month period when the company she helped to grow experienced difficulties and eventually closed its office.
68. To add to this, the mother's own mother had been living in Cayman for five years and then returned to Canada. She obviously misses her mother. Moreover, she feels that the separation from her husband has put a strain on her relations with their friends, and also on her relations with some of the staff at the children's school. The loss of her job and her mother's departure to Canada, combined with the current strain in the relationship with the father, has all made her somewhat unhappy.
69. Consequently, I can understand why the mother views a new life in Ontario, with the children attending a new school of her choosing in Ontario Canada, as a more attractive option for her life at this time.

70. On the other hand, if she stays in Cayman, the present contact arrangements with the children for both parents have been working exceedingly well for over two years and could in all probability continue to do so.

71. Indeed, the Court observes that the very strain of this application seems to have caused great distress to both the mother and the father and, inevitably, their distress, or, at least some of their distress may well have been transferred to the children.

### Conclusion

72. Consistent with our Court of Appeal's decision in the *In Re C* case and Mostyn J in *CR v. LRG*, I turn now to the Discipline enunciated by Thorpe LJ in *Payne v. Payne* and ask myself the questions he posed:

- a. Question 1: "Is the mother's application genuine in that it is not motivated by some selfish desire to exclude the father from the child's life?"
  - i. It is my view that the mother's application is genuine and it is not in any way motivated by any selfish desire to exclude the father from the children's lives. In fact, it is apparent from the mother's evidence that she wants to include the father in the children's lives as much as possible.
- b. Question 2: "Is the mother's application realistic, by which I mean, founded on practical proposals both well researched and investigated?"
  - i. It is the view of this Court that, in light of the fact that we are entering the summer holidays of 2010, it is unrealistic to expect the children to pack up, not only their clothes, but also, in M's case, 10 years of life and friends in Cayman, and, in J's case, 8 years of life and friends in Cayman, before September 2010.
  - ii. The Court's view of the unrealistic nature of the Petitioner's proposal is further supported by the fact she has been unable to secure a place for J on her preferred campus of FH in Ontario.

- iii. I think what is important and vital for the children's continued happiness and emotional and psychological stability is for the mother to stay this application for a period of somewhere between one to three years. This would give the mother and the father an opportunity to prepare the necessary groundwork before allowing the children to go to Canada for their further education.
  - iv. I must point out that by making reference to what the mother claims were the original plans to have the children educated in Canada the Court recognizes and accepts that the mother and the father discussed the idea of moving the children to Canada at some stage. There is no evidence before the Court that either parent ever contemplated boarding school for M and J and therefore the pre-separation discussions regarding their future discussions were based on the premise that the mother and the father would relocate together with M and J to Canada. However, it is the Court's view that the timing of the implementation of this has been precipitated because of the recent unfortunate developments in the mother's own life, which I outlined in foregoing paragraphs. Such a precipitation of the move to Canada, in the view of this Court, would constitute a major and unnecessarily sudden upheaval to the children's lives.
- c. Question 3: "Is the father's opposition motivated by genuine concern for the future of the children's welfare, or is it driven by some ulterior motive?"
- i. In my view, the father's opposition to the mother's application is driven by genuine concern for the future of M and J. and not for any ulterior motive.
- d. Question 4: "What would be the extent of the detriment to him and his future relationship with the child (children) was (were) the application granted?"
- i. I believe that if this Court were to grant the application the father would suffer to a very great and possibly overwhelming extent. I believe that if the Court were to grant this application it would have an inevitable detrimental effect on his relationship with M and J.

- ii. I have been greatly assisted by a paper presented by Professor Marilyn Freeman at "The Family Law Bar Association Conference" on the 9<sup>th</sup> May 2010 in which she states on page 10, "indirect contact is no substitute for the meaningful, ongoing relationship between a child and his or her parent, which allows for the development of a relationship through the minutiae of life, without the obligation of having to treat each meeting as a holiday excursion or an important event; having the time to argue and differ with the opportunity of reconciling differences within a normal relationship and without fear that the distance and time lapse between visits will prevent the healing that occurs naturally in ongoing caring relationships; allowing the child to learn from the parent through regular observation in everyday circumstances, which builds understanding and familiarity with the issues that need to be faced in life."
  - iii. This important regular weekly or daily contact with the children would suddenly come to an end if I were to grant this application. I think before such a move is contemplated the parents should enter into much more investigation and discussion to prepare the children for their future educational and other needs.
- e. Question 5: "To what extent would that be offset by extension of the child's (children's) relationship with the maternal family and homeland?"
- i. I have carefully considered the evidence of both parties and in my view I don't think any contact with new friends in Oakville, Canada, or with family cousins would effectively offset the detrimental effect such a separation would have on the children and on the father, should the relocation take place before September 2010.
- f. Question 6: What would be the impact on the mother as the single parent of a refusal of her realistic proposal?
- i. As I said, I do not consider that, at the present time, the Petitioner's proposal is realistic. However, I must accept that the mother considers it

realistic and therefore I must consider the impact of the refusal to grant the application to relocate.

- ii. As I have said previously, the mother has experienced a difficult few years with the loss of her job and the return of her own mother to Canada. I believe that the mother is an extremely capable and resourceful person who can adapt to changing circumstances fairly well. She so obviously loves her children and I am impressed by the fact that she is adamant that should her application be refused she would stay here to be with them. As circumstances have now dictated, she would be in a position to be a full-time mother, whereas for the first nine years of M's life and six years of J's life she had a very significant full-time post. Since her retirement in April 2010 she is now able to devote as much time to her children as she feels they need.
- iii. Accordingly, it is the Court's view that the mother would be able to cope with the refusal of this application. She will be fortified by the fact that the father is equally determined that the children should gain entry to a good Canadian University and he has not voiced any inflexible opposition to both children being educated at Canadian schools in the future.

73. I now turn to the UK statutory checklist as reflected in the Order for directions which is designed to ensure that the welfare of the children is always the paramount consideration for the Court in cases of this kind:

- a. Number 1: The ascertainable wishes and feelings of the children concerned (considered in light of his/her age and understanding).
  - i. The clinical psychologist, Dr. Augustine appointed by the Court to prepare a welfare report at the joint expense of the parties, states that M clearly loves both his parents deeply and has a very strong relationship with each of them. Dr. Augustine states that "he is very conflicted and torn about this issue because he wants to make his mother happy, but does not want to leave his father behind."
  - ii. In her evidence Dr. Augustine said M was "very hurt, very frustrated, very upset and sick of it." Dr Augustine. said that M went on to say that "the

mother and father are not getting along anymore and are always fighting with each other” and M was distressed. It is quite apparent that the thought of the mother taking the children to Canada without the father has caused M much upset and distress.

- iii. It was clear from Dr Augustine’s report and evidence that M’s wish is for the parents to be together and happy and if that is not possible then he wants equal time with both parents. It appears to this Court that M would like the current regime to remain in place and that he hoped that his parents would not fight on this issue.
- iv. M also told Dr. Augustine that he would feel sad about leaving his friends and the good teachers and he definitely appears excited about the prospect of moving into the senior Cayman school.
- v. J, who is only 8, has said that she does not want to leave. She is happy living in Cayman and does not want to leave, even though she is under the mistaken impression that her father might be going with them.

b. Number 2: To his/her emotional, physical and educational needs.

- i. Having listened to the evidence of both the mother and the father, and the evidence of Dr. Augustine and having read the school reports, it is my view that M’s and J’s physical, emotional and educational needs are being met in a normal and successful manner. It would appear that M had more emotional and psychological problems in his early years, but I see from the review of his progress that he has greatly improved and is probably in a more stable and confident state than ever before. M and J’s stability and security, in my view, has been greatly enhanced by the successful co-parenting regime that both parties have implemented.

c. Number 3: The likely change on M and J of any change in their circumstances.

- i. Dr. Augustine is of the decided view that there is no necessity to move M at this point in time. In Dr. Augustine’s view, a move this summer would not be in the best interest of M and J. Dr. Augustine stated that this is

something that could be revisited at a later stage – allowing for at least one year to pass before a reexamination of the current position.

- d. Number 4: His/her age, sex, background and any relevant characteristics.
  - i. M is 10 and J is 8. It is my view that they seem to be performing well in school, and, what is very noticeable, both are heavily involved in extracurricular activities such as piano, riding, roller hockey and other pastimes that children enjoy with their friends for entertainment, exercise and all-round development.
- e. Number 5: How capable each of his/her parents is in meeting his/her needs.
  - i. At present, under the current regime, the mother and the father are capable of meeting these needs and are in a perfect position to meet the needs of M and J. If there were a relocation to Canada, then clearly the father would not be in a position to assist during the school term times and his close involvement with the children in school and with their extracurricular activities would cease.
- f. Numbers 6 and 7: The possibility of a move to Canada and the possibility of remaining in the Cayman Islands.
  - i. As Dr. Augustine has stated the father and the mother are “very caring, competent and invested parents.” According to Dr. Augustine at present “they both convey that their separation was mutual, and after separation their relationship was “amicable” and involved joint activities, shared time with the children, both covering for each other.” As Dr. Augustine states, both parents believe that this was good for the children. In Dr. Augustine’s opinion, “both parents have done an excellent job minimizing the negative effects of separation on the children.” What is particularly pertinent is that Dr. Augustine also states that “it appears that conflicts developed after the proposal to relocate was presented” and this has certainly led to some tension and anxiety, which, hitherto, was absent.

- ii. It is my considered view that both children are currently happy in their school environment and happy and content with the sharing arrangement of which both parents have actively been a part over the last two and half years. It is my view that any relocation from Cayman at this time would be incompatible with the welfare of the children. As M is only 10 and J is only 8, I believe that it is in the best interest of the children for this regime to continue at least for a few years. If I am asked to be more specific I would adopt Dr. Augustine's approach that any change should not be considered for at least one year. At that point it should be considered for implementation in three years when M would be 13 and J 11 or, possibly earlier or later, depending on how they are developing.
- iii. I do ask myself the question whether this co-parenting regime may possibly not continue to enjoy the success it has in the past, now that the children are clearly aware that the possibility of relocating to Canada is a matter that has been under consideration. However, as I stated earlier in this Ruling, if the parents can really continue with the current regime, and then enter into meaningful discussions regarding the children's future, then I am optimistic that they could come to an agreement regarding the future education of the children.
- iv. The father also candidly admitted that although his present professional position seems stable and secure, it was always possible that his current employers could initiate a transfer for him to either New York or Toronto in the future. I mention this because circumstances are constantly changing in today's uncertain economic environment and it is not out of the question that both the mother and the father could come to an agreement regarding the children's education sooner rather than later. If the parents could agree on their children's future education plans, then everyone involved would be in the position to accept the move and work towards making it a successful transition, with continued love and support, bringing with it psychological and emotional stability.

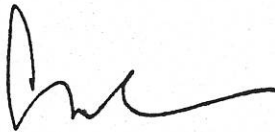
74. Accordingly I accept the evidence of Dr. Augustine and, in my view it is in the best interest of M and J that the present location and regime remain in place. Therefore, I

reject the mother's application to take the children out of this jurisdiction and to Ontario, Canada.

75. Should the parties wish to make any submissions as to costs, I will, of course, consider them.

Dated this the 22<sup>nd</sup> day of June 2010

**Cayman Islands**



**Hon. Justice Quin**

**Quin J  
Judge of the Grand Court**

