

21/2/08

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 366 OF 2005

IN THE MATTER OF THE GUARDIANSHIP and CUSTODY OF CHILDREN  
LAW (1996 REVISION)

AND

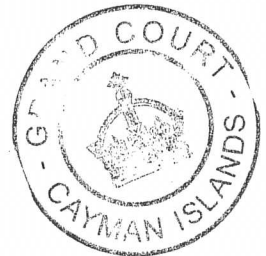
IN THE MATTER OF THE MINOR CHILD, C

BETWEEN:	A	-	Applicant
AND:	R	-	Respondent

Appearances: Mrs Linda Da Costa of Myers & Alberga for the Applicant  
 Mr William Helfrecht instructed by Mrs Zena Merren of  
 Appleby for the Respondent

BEFORE: The Hon. Mr Justice Foster (Acting)

In Chambers

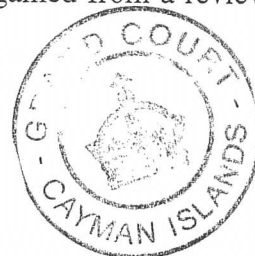


**JUDGMENT**

1. These are applications by the Respondent mother ("the Mother") in proceedings originally initiated in 2005 by the Applicant father ("the Father") under the Guardianship and Custody of Children Law (1996 Revision) ("the Law"). The Mother now seeks sole custody of the minor male child ("C") and permission to remove C from the jurisdiction to live with her permanently in Canada. Her

applications are strongly opposed by the Father. The Mother also seeks orders in relation to access, maintenance and certain other matters. However, both parties counsel agreed that the real issue before the Court is whether the Mother should have leave to take C to live with her in Canada.

2. As Chief Justice Smellie said in H-P v P [2001] CILR 103 at 109 “Among the most difficult decisions a Court has to take is that involving the custody of a child in circumstances where one of his parents feels compelled to re-locate to another country”. He went on to say “In considering first and foremost the welfare of the child, as it is obliged to do, the Court must be very reluctant to accept that there should be further disruption of the child’s circumstances. Yet this is inevitable if a parent moves to another country and even more so if the child is to be required to re-locate there as well”. As in that case, this is the difficulty in this case.
  
3. By way of clarification I should explain that in light of the significance and the emotional and personal nature of this very difficult matter for the parties, in which the welfare of their young son is in issue, I have considered it desirable and appropriate to set out or summarise at some length what was said in evidence by the parties and particularly by the expert, Dr. Michael Hughes. I appreciate that this renders some of the judgment somewhat repetitive. For the avoidance of any doubt, I should also make it clear that my conclusions are to a considerable extent based upon my impressions and assessment of the witnesses, particularly the Mother and the Father, which, of course, cannot be gained from a review of the transcript of the proceedings.



## Background

4. C is a boy born on 9<sup>th</sup> July 2002 and is accordingly just over 5½ years old. The Father is a 43 year old Caymanian who has lived in Cayman most of his life. He is the managing director of his family's well-known local company, the business of which is furniture supply and interior design ("the Company"). The Mother is a 34 year old Canadian who came to Cayman to work as an interior designer for the Company in March 2001. She has therefore lived in Cayman for almost 7 years. The Mother and the Father are not married to each other and never have been. They are both single, although the Father is divorced, having been married until some 8 years ago. There are no children of that marriage and the Father has no child other than C. The Mother, however, does have another child, a daughter ("D") born a little over a year ago, on 14 December 2006. D is not the Father's child. The identity of D's father was not disclosed to the court.

5. The Mother is adopted and does not know the identity of her biological parents. She has one brother, also adopted, who lives in St. Louis, Missouri, USA. He is married with 2 young children. The Mother has not seen her brother for about 5 years but they communicate with each other by e-mail. The Mother's adoptive parents live in Wallaceburg, a small town in southern Ontario, Canada, approximately 2 ½ hours drive from Detroit, Michigan and close to the border with the USA. The Mother's adoptive father is a first generation Canadian whose parents emigrated to Canada from Belgium. He is 65 years old and carries on business as a barber but also engages in some farming activities and owns a small apartment block. The Mother's adoptive mother ("the Maternal Grandmother") is



retired and is also 65 years old. She was formerly employed as assistant to the administrator of the local hospital. The Mother was brought up in Wallaceburg and went to the same school there as her father. She was rebellious in her youth and for some time relations between her and the Maternal Grandmother were particularly poor and tempestuous. However, shortly after her graduation from college, the Mother had an unfortunate accident and broke her neck which required her to stay at home with her parents for several months. During that time her relations with the Maternal Grandmother improved and she is now much closer to her. The Mother qualified and thereafter carried on a successful business in southern Ontario as a self-employed interior designer. Just over 7 years ago, in response to an advertisement, she successfully applied for a job with the Company in Cayman. She arrived in Cayman in March 2001 and shortly after that she and the Father commenced a relationship. Within not many more months the Mother became pregnant and C was born in July 2002.



6. The Father is one of 8 children and all of his 7 brothers and sisters live in Cayman. Between them they have 17 children. The Father was educated in Cayman through High School and then attended college in the United States. He has degrees in business, human resources and sociology. He then joined Cayman Airways during which time he worked for some 18 months in Miami. About 8 years ago he joined the Company where he is the managing director. One of his brothers and his mother are the other directors and the Company is wholly owned in different proportions by family members. There are about 36 employees. The Father's own parents separated when his father left home when the Father was

about 9 years old. He now has good relations with his own father but he described them as being more like friends rather than father and son. The Father married in 1989 but the marriage ended in divorce after about 10 years. His relations with his ex-wife, who does not live in Cayman, are civil. The Father has a close relationship with his own mother and with his siblings and they meet regularly for family social gatherings.

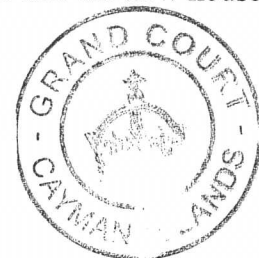
7. As the Father was managing director of the Company and the Mother was an employee they initially tried to keep their relationship confidential. However, within a fairly short time the Mother moved to live in the Father's house. Nonetheless, the relationship was a fluctuating one because the Mother apparently continued to have a relationship with another man. The Father was initially surprised and upset when the Mother became pregnant because, he said, she had told him that she could not get pregnant. He suspected that she had deliberately planned to become pregnant without his knowing. According to the Father, near the time of C's birth the Mother agreed to end her relationship with the other man and the Father made the commitment at that time to stick with the Mother.



8. Although the relationship between the Mother and the Father seems to have been inconsistent and variable there were times when their relationship was good. The time around C's birth appears to have been one of the happiest but there were other times too when they were happy together. I got the impression that for some time the Father would have liked the Mother's relationship with him to be stable and permanent and there was reference during the course of the evidence of the Father having proposed marriage to the Mother at one stage. However the

Mother was not willing to commit to a permanent and exclusive relationship with the Father. From the beginning she appears to have carried on an independent lifestyle much of the time and although there were periods of stability in her relationship with the Father, she had relationships with other men and led her own life to a large extent, notwithstanding that she and the Father continued to live in the same house.

9. A significant event in the relationship between the Mother and the Father occurred in October 2003 when the Mother left Cayman with C, who was then just over a year old, and returned to Canada without telling the Father. It is clear that the Father was taken completely by surprise by the Mother's departure with C. Inevitably this caused considerable upset and mistrust on the part of the Father. The Father then travelled to Canada to try to persuade the Mother to return to Cayman with C. She did eventually return after several weeks but there is a dispute between the Mother and the Father as to the circumstances in which she did so. According to the Mother she only returned to Cayman on the understanding that the Father would purchase and provide her with separate accommodation where she would live alone with C and not in the same house as the Father. The Father denied this and said he could never have afforded that. The Mother said that when she returned to Cayman with C she had to continue to live under the same roof as the Father contrary to her wishes. The Father says that not long after her return the Mother willingly moved with him into the new house he had bought.



10. Relations between the Mother and the Father continued to deteriorate and eventually, after the Father refused to do so, in July 2005 the Mother moved out into separate rental accommodation taking C with her. She said she would have done so sooner but for the shortage of alternative accommodation caused by Hurricane Ivan in September 2004. In 2006 the Mother purchased her own house a couple of blocks away from the Father's house in Savannah, where she now lives with C. Her daughter, D, was born in December 2006 and also lives there.
11. There was considerable dispute between the Mother and the Father about the details of their relationship and its eventual complete breakdown but it does not seem to me necessary to rehearse those details. My overall assessment is that it is probable that, albeit living under the same roof for most of the time for some 4 years, the Mother's general unwillingness to live as a family unit in a permanent and exclusive relationship with the Father and particularly her relationships with other men, caused him increasing annoyance and then anger with her attitude and irresponsible conduct, which he felt created an inappropriate environment for C. The Mother for her part increasingly resented and objected to the Father's attempts to dictate to her and to control her life and her independence. This caused increasing friction and bitterness leading to hostility, particularly, although not exclusively, on the part of the Mother.
12. The Mother also alleged that while they were living together the Father had used physical violence towards her. She also alleged that subsequently during access visits the Father had used physical violence towards C on one occasion and abused him sexually on another. The allegation of physical abuse of C, which was



in 2005, was reported by the Mother to the police and during their investigation the Father's access to C was limited to supervised and non-residential access. It was determined that no action was warranted and the Father's unsupervised and overnight access to C was resumed by order of the court.

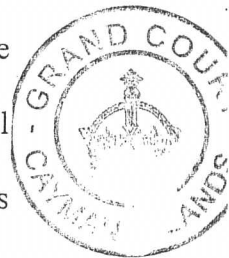
13. Counsel for the Mother expressly stated that these allegations of abuse by the Father were not part of the Mother's case and he was not asking the court to make findings of fact in relation to them, although he said that the Mother nonetheless still believes the allegations to be true. The allegations have always been strongly denied by the Father. Notwithstanding the position taken in this respect, during her evidence the Mother produced some photographs purporting to show bruising to her neck which she said had been caused by the Father. She also said that on the same or another occasion (it was not clear which) the Father had hit her with a belt. She was unable to say when during the 4 years she lived with the Father these alleged incidents had taken place. I note that at the hearing before Madam Justice Levers on 14 and 15 September 2005 the Mother also made these allegations but they were not tested in cross-examination and the denial of the allegations by the Father was accepted by the court (see Judgment dated 10 October 2005 at page 9). It does not therefore seem to me that they could now be resurrected even if the Mother wished, which her counsel anyway said was not the case. I accept that in the course of an increasingly tempestuous and acrimonious relationship, with increasing frustration and anger by the Father with the Mother and by the Mother with the Father, heated rows with loss of temper leading at least to verbal and emotional abuse, is quite likely. It seems to me most



improbable that there was any conduct by the Father towards C which could be considered abuse and I accept the evidence of the expert, Dr. Hughes, that the Father is not a physical threat to the Mother or to C.

14. C has lived with the Mother most of the time for the past 2 ½ years (and since about a year ago, with his half-sister D). During this time the Mother and the Father have been quite unable to co-operate and agree about matters concerning C's on-going welfare, and there have been frequent acrimonious disputes between them about various issues relating to both C's physical and emotional health, his education and other aspects of his welfare, as well as continuing disputes about access.

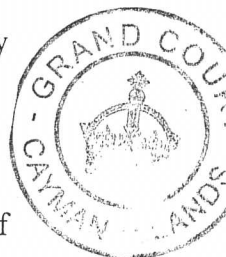
15. Until about 6 months ago the Mother continued to work full-time for the Company as an interior designer. However, she and the Father were increasingly unable to separate their personal difficulties from their relationship at work. The Mother claimed that she was harassed and victimized at work by the Father and that this got worse after she became pregnant with D. At one stage she reported the Company to the Labour Board. The Father claimed that the problems at work were caused by unprofessional conduct by the Mother. However there were undoubtedly various incidents and acrimonious and inappropriate email exchanges relating to C and of a personal nature between them at work. Actions were also initiated by the Father in relation, for example, to the Mother's salary which seemed to me to have been unnecessarily provocative or even rather spiteful. Perhaps not surprisingly in the circumstances, there were also various difficulties in the relationship between the Mother and her employers generally as



a result of which formal warning notices were given to her relating to inappropriate behaviour at work. The Mother denied the accuracy of the allegations made against her, although in light of the evidence relating to this I consider that the incidents concerned were reasonably fairly recorded in the warning notices.

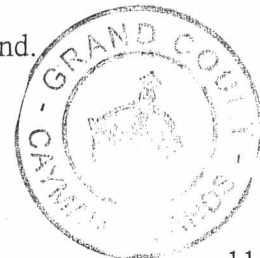
16. The Mother had been diagnosed with Epstein Barr virus by a local family doctor at an early stage in her relationship with the Father. Her evidence was that this recurred in 2007 and, combined with the stress and turmoil affecting her, the tension and emotional strain caused by working for the Father seriously affected her health and she became unable to work and unfit to do so. She eventually went on sick leave on 1 June 2007. She has not worked since then, save for a small amount of finishing up with former clients which she has been able to do from home. At present she remains on sick leave from the Company. As she was paid by the Company on a commission basis, the Mother's remuneration, which at times in the past had been substantial, has gradually dwindled and is now very modest. The Father pays monthly maintenance for C.

17. Despite the very difficult relationship between them and despite the existence of these proceedings, in August 2007, when Cayman was threatened by the approach of Hurricane Dean, the Father contacted the Mother and arranged to take her, C and D with him off the Island to safety in Florida, having obtained permission from the Court to take C out of the jurisdiction. They were all together in Florida for several days. They stayed at the same hotel, ate meals together and took C and D to the zoo. They then drove for several hours to Orlando and went together



to Disneyworld. The Mother took C on rides while the Father looked after D. Although in her evidence the Mother was critical of the Father on this occasion, this does appear to have been a rare time when the Mother and the Father were able to co-operate, albeit rather reluctantly on the part of the Mother, in the interests of the welfare and safety of C (and D).

18. The Mother now intends to return home to Canada to live and she wishes to take C with her. She says that in view of her hostile and bitter relations with the Father and their constant inability to agree anything about C, she can no longer tolerate the stress, upset and emotional turmoil which are badly affecting her. She believes it can only be avoided if she leaves Cayman and returns home to her family in Ontario where she feels she will be free from the constant conflict and much happier. She is convinced that if she remains in Cayman the fights and hostility will continue and her health and well-being continue to be adversely affected. She feels she has no choice but to leave and would like to go home as soon as possible. She said that if she is not allowed to take C with her she would try to stay as long as possible although she did not elaborate on that. In light of all she said, my understanding is that if her applications were refused the Mother would try to stay in Cayman as long as she felt able to but that before long she would return to Canada anyway even though it would mean leaving C in Cayman. In other words she would not remain in Cayman for much time once the Court's decision on her applications was known as she feels she really must return to Canada anyway for the sake of her own health and state of mind.



19. The Company holds a work permit for the Mother which is valid until June 2008. Pursuant to the Cayman Government's immigration "roll-over" policy, the Mother will be required to leave Cayman after that permit expires. The only way in which this mandatory requirement could be avoided would be for the Mother to continue in employment with the Company and to be designated by the Company and accepted by the immigration authorities as a "key employee". Although there is no guarantee that the immigration authorities would approve such a designation, there is a reasonable chance that they would and this would enable the Mother to remain in Cayman and in due course to apply for permanent residence. The Father said he would be happy from a business perspective for the Mother to continue working for the Company because he considers the Mother to be an excellent interior designer and he would like her to remain in Cayman for C's sake. However, the Mother simply does not feel she could continue working for the Company in light of the hostile and stressful environment there and its effect on her health. She is convinced that it would simply make matters worse for her to return to work for the Father's business and she is not willing to do so. She feels strongly that she must now return home to Canada in any event and she intends to do so

### The Legal Proceedings

20. These proceedings were commenced by the Father on 11 August 2005, shortly after the Mother had moved out with C, when he applied for orders relating to the custody of and access to C. He applied the following day ex parte for an order restraining the Mother from removing C from the jurisdiction. He believed that



the Mother was intending to leave for Canada taking C (and D) with her and that she would not return, although the Mother says she only wanted to go to Canada for 2 weeks and intended to return. A temporary restraining order was granted and this was then extended until 14<sup>th</sup> September 2005 for a hearing on that date to determine custody, care and control of C. At that time the Mother had care and control of C and the Father was awarded interim access to be agreed between the parties, although agreement between the parties about access has not generally been possible.

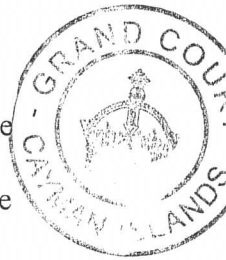
21. The Mother then applied for an order that access to C by the Father should be limited to specified week days between specified hours and the Father applied for an order that he and the Mother should have joint custody of C, with the Mother having care and control and the Father having access, including overnight access on specified days and also during the summer, Christmas and Easter holidays. He also applied for orders concerning maintenance and responsibility for payment of C's health and education expenses as well as various orders relating to co-operation between the Mother and Father in relation to C's welfare. All these various applications by the Mother and the Father were heard and dealt with at the hearing on 14 September 2005.

22. The hearing on 14 September 2005 which was before Madam Justice Levers, lasted for 2 days. Both the Mother and the Father gave oral evidence and were cross-examined as well as having submitted lengthy affidavits. The hearing resulted in a very comprehensive order dated 30 September 2005 in respect of which a reasoned judgment was issued on 10 October 2005. The order of 30



September 2005 awarded the Mother and the Father joint custody of C with care and control of C to the Mother. The Father was awarded the access to C, including the overnight access, which he had applied for. The Father was also ordered to pay monthly maintenance for C. The order recorded that the Father and the Mother consented to sharing equally the cost of C's educational and medical expenses. It also recorded the Mother's and the Father's agreement that it is in C's best interests that they confer and inform each other on matters effecting C's health, education and religious upbringing with a view to arriving at a harmonious policy calculated to promote C's best interests. They were both recorded in the order as having acknowledged their respective duties to keep each other so informed. In addition the order recorded the agreement of the Father and the Mother that neither of them would remove C from the jurisdiction without the written consent of the other or the prior approval of the Court.

23. Regrettably what might have been thought to be a complete resolution of the issues between the Mother and the Father concerning C's interests and welfare proved not to be so. Since the order of 30 September 2005 the Mother and the Father have been quite unable to co-operate in any respect about C and there have been a number of bitter arguments resulting in strongly contested applications to the Court relating to C's welfare, including access to C by the Father. There have also been several other applications by the parties relating to procedural matters. The current position is that the Mother and the Father continue to have joint custody of C with the Mother having care and control and the Father having access to C on 3 week-day afternoons and overnight on alternate Saturdays as



well as for periods during school holidays. A restraining order remains in place and neither party may remove C from the jurisdiction.

### The Evidence

24. At the hearing before me both the Mother and the Father gave evidence at length and were extensively cross-examined. They had each sworn affidavits for the purposes of the hearing (the Mother's affidavit sworn 4 October 2007 and the Father's affidavit sworn 22 October 2007), which they each adopted as their evidence. I shall refer to the evidence of the Mother and the Father and record my impressions and assessment of them later in this judgment.
25. 3 other witnesses gave evidence on behalf of the Father. Ms Kristen Thomson, who swore an affidavit (19 October 2007) has worked in human resources for the Company for approximately 2 years. Her evidence in her affidavit, which she confirmed as true, concerned the conduct of the Mother at work since October 2005 as a result of which she had received formal warning notices. It was put to her that as an employee of the Company and on a work permit she would be inclined to slant her evidence towards the Father's point of view. She strongly denied that and having observed her myself I am quite satisfied that what she said in evidence and in her affidavit was objective and reliable.
26. Evidence also was given by a senior employee of the Company, Mr Gary Hollins, who had also sworn an affidavit (19 October 2007) for the hearing, the content of which he also adopted as his evidence. He too was cross examined but I found his evidence also to be objective, credible and reliable.



27. Mr Hollins and his wife, Mrs Rebecca Davidson-Hollins, have known the Mother and the Father for over 6 years. They and their 3 children and particularly their elder son, have spent a lot of time with the Father and C. Mr Hollins spoke highly of the Father's strong relationship with C, of his excellent parenting abilities and of the time he devotes to C, which Mr Hollins described as "beyond the call of duty". The Hollins' son and C are very close friends and greatly enjoy each other's company. Mr Hollins and his wife were previously friendly with both the Mother and the Father and even after the Mother moved out of the Father's house into her own accommodation in mid 2005 they and their children spent time with the Mother and C. However, they have grown apart from the Mother, mainly because they were increasingly uncomfortable with her continual disparaging and negative remarks about the Father, sometimes in the presence of C. They also found the presence of different men when they were with the Mother embarrassing and they were concerned about how C would view that. Latterly they felt unwelcome by the Mother. Mr Hollins' evidence was that the Mother told them they were no longer welcome if they continued to associate with the Father. Now the Mother will not allow C to socialize with the Hollins and their son when C is with her. Mr Hollins also said that he felt it was evident that the Mother continues to use C and the arrangements relating to C to hurt and inconvenience the Father to the detriment of C himself. He cited an example when C's school finished 1½ hours early on a day when the Father was scheduled to have C after school but the Mother nonetheless deliberately made special



efforts to arrange for C to be picked up by someone else rather than allow the Father an extra 1 ½ hours time with C.

28. Evidence was also given by Mrs Rachel Gepolla (“the Nanny”) who was employed as nanny to C and general helper some 6 weeks after C’s birth. She is from the Philippines but understands and speaks English well. She too swore an affidavit (19 October 2007) for the hearing which she adopted as her evidence. The Nanny was also cross-examined extensively but I was quite satisfied by her demeanor and attitude and her response to questions that she was a truthful and reliable witness with the interests of C at heart. She is the mother of 2 children herself, although they are now grown up and are in the Philippines. She had previously worked as a nanny for nearly 5 years to 2 children in Hong Kong and then as a nanny for 3 years for another family in Cayman before moving to work for the Father and the Mother as nanny to C in 2002.

29. I was concerned that at times during her evidence the Nanny appeared nervous and reluctant to go into detail in response to questions about the Mother. She repeatedly looked in an apprehensive way at the Mother, who was sitting not far away, before responding in a hesitant and limited fashion to such questions. I had to ask her several times to look at me and not at the Mother when answering questions about the Mother. My distinct impression was that the Nanny was fearful of incurring the Mother’s displeasure or at least embarrassed about saying anything critical about the Mother in her presence. It seemed to me that this inhibited the Nanny from saying as much about the Mother as she could and otherwise would have done.



30. The Nanny was in my view a particularly important witness. She has known and been very close to C since he was a very young baby. She worked for the Father and the Mother together for about 4 years while they were living together in the same house. Then, after the Mother moved out she worked for the Mother with whom C was living. She also worked for the Father during access, preparing meals and tidying up. After some time the Nanny was told by the Maternal Grandmother, who was visiting Cayman from Canada, that she was no longer needed. However, after several months she returned to work for the Mother again for a further period until the Mother stopped work and told her that she did not require her services any more. Since then the Nanny has worked only for the Father. She is therefore in a position to have closely observed C with each of his parents both while they were living together and while they were living separately.

31. The Nanny had no hesitation in saying that the Father is a good father and is quite capable of caring for C and does so properly and appropriately. She spoke admiringly of the time and attention which the Father devotes to C. She made it clear that the Mother is much more strict and less tolerant with C. The Nanny was quite upset, for example, by the Mother's instructions to her to smack C at a young age if he had an accident while still being potty-trained. She obviously found the Father more relaxed and tolerant with C, although she said that the Father would nonetheless speak firmly to C if he did something wrong. She had never seen the Father smack C but the Mother had done so and she was much more bad tempered. She also confirmed that the Father had played as much a part

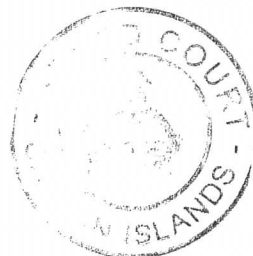


as the Mother in looking after C from a young age, although she agreed that she was not saying that the Mother is a bad mother to C.

32. In relation to access arrangements, the Nanny's evidence was that C was always upset and reluctant to leave the Father when access ended and it was time for him to return to the Mother. She also said that the Mother insisted on sticking rigidly to the precise access times and that even if they arrived to collect C from the Mother's house 5 minutes early and C could be seen at the door of the Mother's house waiting and wanting to come to them, the Mother would prevent C leaving the house until the precise time. She felt that the Mother was trying to prevent the Father doing all he could for C and is doing all she can to limit the time C spends with the Father. The Nanny also stated that the Mother had frequently exhibited contempt for the Father in her presence. She had witnessed arguments but never anything physical between the Father and the Mother. She obviously found the Mother temperamental and sometimes rather spiteful, for example withholding payment of her salary if the Nanny had inadvertently done something that displeased her. On the other hand, the Nanny had always found the Father respectful and courteous to her. It seemed to me clear that there had been occasional differences between the Nanny and the Mother and that the Nanny did not always appreciate the Mother's attitude towards and treatment of her. Nonetheless I am satisfied that the Nanny's evidence was objective and fair and that she is clearly very attached to C. I found her a compelling and helpful witness.



33. The Nanny is also subject to the Government immigration “roll-over” policy which will preclude her obtaining another work permit after 7 years unless she can be exempted, which may be unlikely. This means that the Nanny will probably have to leave Cayman in about 6 months time, in June 2008.
34. Evidence was also given by video link by Dr Michael Hughes from Miami, Florida. Dr Hughes is a highly qualified and experienced specialist in child psychiatry. He has extensive experience over many years of cases like this where one parent wishes to move to live elsewhere and take the child or children. Although most of his experience has naturally been with American cases, he has experience of cases in other countries and has previously acted as an expert in a matter before this court. In the present case the court had ordered (12 March 2007) that an expert report should be obtained from Dr Hughes and the parties had agreed to that. Dr Hughes had subsequently spent considerable time in Cayman with each of the Mother and the Father, both alone and with C, as well as with C alone. He also spoke to the Nanny. He produced a Report dated 29 August 2007 and swore an affidavit (18 October 2007) exhibiting his Report for the purposes of the hearing, which he adopted as his evidence and on which he elaborated considerably at the hearing. He was examined and cross-examined at length. In light of his curriculum vitae and very extensive relevant experience I had no hesitation in accepting Dr Hughes as an expert witness. I found his evidence, which I shall summarise in some detail below, to be objective, credible and convincing. It was of great assistance.



35. Various other affidavits were filed but the deponents concerned did not give evidence in person. Affidavits by Mr Hollins' wife, Mrs Rebecca Davidson-Hollins (19 October 2007) and by Ms Belinda Auld (22 October 2007) were submitted on behalf of the Father. Counsel for the Mother expressly stated that he did not wish to cross-examine these deponents and was not challenging their evidence. He had no objection to the Court accepting the evidence in their affidavits.
36. Mrs Davidson-Hollins' affidavit essentially corroborated the evidence of her husband and I therefore found her evidence too to be credible and reliable. It was equally helpful in confirming the strong relationship between C and the Father, his interest in C's welfare and his ability to care for C. Mrs Auld said she has known the Father and the Mother for over 3 years, since her son started nursery school at the same time as C at the age of 2. She and her son have also spent time with the Father and C during access visits. Her evidence was that the Father has, from her own frequent observations, clearly demonstrated that he is a responsible, caring and loving parent with C's best interests at heart and whose well-being is his utmost concern. Her evidence was consistent with the evidence of Mr and Mrs Hollins and of the Nanny and I found it convincing and helpful.
37. An affidavit by the Maternal Grandmother sworn on 25<sup>th</sup> October 2007 was also included in the hearing bundle. However, the Maternal Grandmother did not give evidence in person and accordingly was not available for cross-examination on her affidavit. I was informed that she was currently unable to travel from Canada due to a recent operation on her foot. Objection was taken on behalf of the Father



to the Maternal Grandmother's affidavit being used as evidence in the case in light of her unavailability for cross-examination. In light of that objection I have not attributed weight to the content of that affidavit. This was unfortunate because the Maternal Grandmother would have an important role if the Mother were to take C to Canada to live with her in the Maternal Grandmother's house. Although she denied it in her affidavit, there was evidence of hostility by the Maternal Grandmother towards the Father and the Mother admitted to Dr Hughes that the Maternal Grandmother and the Father have had a bad relationship from the start. The Maternal Grandmother has visited Cayman on a fairly regular basis and, at least in the early years of the relationship between the Mother and the Father, they visited Canada and saw the Mother's parents on a few occasions. The Father's evidence was that he felt strongly that the Maternal Grandmother did not like him from the start and that she made it obvious that he was not what she would have wanted for her daughter. He was also convinced that to an extent her dislike was racially based. The Father had no problem with the Mother's own father. However, both he and Dr Hughes considered that the Maternal Grandmother was much the dominant figure and a strong influence on the Mother and that she was hostile towards or at least strongly disliked and disapproved of the Father.



38. Affidavits were also submitted on behalf of each of the Mother and the Father from Canadian lawyers concerning the possibility of registration of any order made by this Court concerning C in the relevant court in Ontario and the procedure for doing so, if C went to live with the Mother in Ontario. They did not differ materially except as to the time such registration would take. A further

affidavit by a lawyer from Toronto, Mr Jeffery Wilson, sworn on 4 December 2007 was submitted by counsel for the Mother with his closing submissions. This latter affidavit satisfied me that Mr Wilson is a specialist in the law of Ontario concerning children and particularly cross-border issues relating to custody and access. Since counsel for the Father had no objection, I have accepted that Mr Wilson is an expert witness. I have found his evidence very helpful and have relied on it and taken it into account.

### The Mother

39. The Mother denied the suggestion that her application to take C to live with her in Canada was an attempt to eliminate or minimize contact between C and the Father. She said she agreed that the Father should have access to C in Canada and she mentioned several places where the Father could stay and places he could visit with C in the Wallaceburg area. It was also emphasized on her behalf that any order of this court that the Father should have access to C could be registered in and enforced by the court in Ontario if C went with the Mother to live there.
40. The Mother proposes that she, C and D would live with her parents in their house in Wallaceburg. She said her parents have converted their basement to make accommodation for her and the children. The Father disputed that the basement was adequate or that it had been or could be converted to provide appropriate accommodation for the Mother and the 2 children. However, there was insufficient evidence to substantiate the Father's claim in this respect and I accept the Mother's evidence about this. The Mother has also provisionally arranged for



C to attend the same school in Wallaceburg which she attended and arranged for him to be registered with a local doctor. She has also looked into the other facilities available locally for children. The Mother would have the assistance of the Maternal Grandmother in looking after C and D. She also has aunts and cousins in the area who would be able to assist. She has arranged employment for herself as an interior designer locally through a friend of hers. She said in evidence that she could carry out much of her work from home.

41. The Mother asserted that she has always been the primary carer of C ever since his birth, even when she and the Father were living in the same house. C has lived with only her since she moved out of the Father's house in July 2005. She said she was the one who deals with all day to day matters concerning C's education, health and general welfare. She had also taken C for psychological counselling with Dr Hawkins until the Father objected to not being involved in that. She says there is no reason to move C from her care and that it is in C's best interests to continue to live with her when she goes home to Canada. She pointed out that the Father has not objected to her having care and control of C since that was first ordered by the court in August 2005. Her evidence was that the Father had played little or no part in the care of C before she moved out with C and that now, during access, the Father is heavily dependent on the assistance of the Nanny and on the parents of other children to care for and entertain C. She said that C returns to her after access visits without having done his homework and over-excited and undisciplined as a result of the Father's lack of care and control and the rowdy activities with other children. She does not consider the Father capable of looking

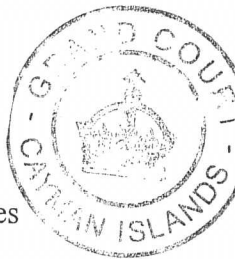


after C full-time. She says that spending time with the Father adversely affects C causing him separation anxiety and emotional upset resulting in nightmares, bedwetting and disruptive behaviour at school. She attributes C's anxieties to his concerns about leaving her for access visits to the Father. She says he is worried about going and in a bad emotional state when he returns.

42. The Mother also said that C had been very excited about the birth of her daughter, D, and is very attached and close to her. D's father has no contact or involvement with D and the Mother does not intend to seek maintenance for D from him.
43. The Mother argues that if C had to remain in Cayman in the care of the Father when she went to Canada, he would be separated, not only from her, but also from D. He would also shortly be losing the emotional support of the Nanny. She says C would be deprived of the 3 most significant and important females in his life.

#### The Father

44. The Father strongly opposes C going to Canada with the Mother to live. He does not believe that would be in C's best interests. He says, firstly, that the Mother does not need to leave Cayman. His proposed solution to the immigration requirement for her to leave Cayman in June 2008 is for her to continue in employment with the Company and to be designated as a key employee. It was also pointed out on his behalf that under the relevant immigration policy it would anyway be possible for the Mother to return to Cayman after a year's absence if she obtained employment and a work permit with another employer here. The Father felt that with professional counselling and support the Mother could



become happier and feel able to continue living in Cayman, which would be best for C. He did not disagree that if the Mother did continue to live in Cayman she should have care and control of C but only provided that she followed the recommendations of Dr Hughes. He thought she was good mother. On the other hand, if the Mother does leave Cayman he felt strongly that C should stay and live with him. He would never have agreed to the Mother having care of C if she were not living in Cayman. He says he has no desire to take C from the Mother and he believes strongly that C should have a close relationship with both of his parents. He would do all he could to encourage C to maintain a close relationship with the Mother and he believes that he and the Mother can be good and effective parents to C separately.

45. The Father is convinced that the main reason why the Mother wants to take C to live with her in Canada is to keep him out of C's life and to make access and continuing contact with C as difficult and as limited as possible. He believes that the Mother really wants to minimize or sever the ties between him and C and that this has been her attitude all along. He thinks that she does not believe that he has or should have any rights or role in respect of C and that she hopes that by taking him to live far away it would be much more difficult for the Father to remain involved with C. He believes she feels the same way about D's father. He also says that the Maternal Grandmother would support the Mother in this attitude. He is confident that they would influence C against him and would certainly not encourage C to have a significant continuing relationship with the Father. He does not think that registering any order for access made by this court in the court in



Ontario would change the situation and feels strongly that the Mother would continue to do all she could to create endless problems and difficulties about access in that court just as she has done in this court. He believes that the close relationship which C has with him would be destroyed, contrary to C's best interests.

46. The Father has a fairly large house and yard with ample accommodation for C if he lived with the Father. C is used to the Father's house, having lived there full-time for some 2 years and then staying there frequently during overnight access at week-ends and during school holidays. C has his own room with his clothes and toys and is happy and comfortable there. He would continue at the same school and to enjoy the company of his friends and the Father's family. While the Nanny provides housekeeping duties for the Father and assistance with C during access periods, the Father considers he is quite capable of looking after C himself. He points out that he has considerable family support available to him if necessary even if the Nanny does have to leave in 6 months time, although he would try to get her exempted from the "roll-over" policy so she could stay. He also said that since he is his own boss there is no problem with him taking whatever time off work he needs in order to be with C.

47. The Father was adamant that from the time of his birth until the Mother moved out in July 2005 he was the principal carer of C rather than the Mother. He said that the Mother returned to full-time work only a week after C's birth and that it was he, not the Mother, who took primary responsibility for looking after C. He said that a few months after C's birth the Mother resumed having relationships



with other men and often did not come home until the early hours of the morning and sometimes not at all. He said that unidentified men sometimes called the house late at night looking for the Mother. He felt that the Mother's behaviour did not create an appropriate environment for a young child.

48. The Father said that this was also the case after the Mother returned from Canada to Cayman in 2003 when C started at pre-school. His evidence was that after a few months the Mother began regularly consorting with other men again and resumed returning home very late or not at all. He said that once again it was he and not the Mother who was the one who really took responsibility for C and his welfare. In his view it is important and beneficial for C to spend time with his friends, which he greatly enjoys and he denied that he was dependent on the Nanny or on C's friends and their parents to entertain and look after C. The Father considers that C's anxiety and emotional upset is due to the Mother's overt animosity towards him and her hostility towards access which she makes obvious to C.

49. The Father has always vehemently denied the Mother's allegations of abuse of her and of C. He pointed out that the allegation of physical abuse of C had been fully investigated and he had been exonerated.

50. The ideal solution as far as the Father is concerned would be for the Mother to continue living in Cayman. That would avoid C being separated from either of his parents and enable him to spend time with both of them frequently. This could be achieved if the Mother continued to work for the Company and also



underwent counselling. However, if the Mother does insist on going to live in Canada the Father believes strongly that it would be in C's best interests to remain in Cayman with him, although the Mother would have regular access to him and he would do all he could to encourage C to maintain a close relationship with her.

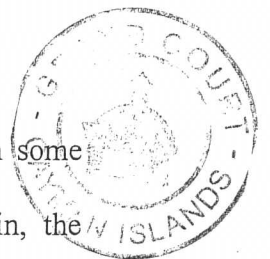
### The Child

51. C is just over 5 ½ years old. I did not see C myself and it was not suggested that I should do so. The discretion of a judge to see a child is to be exercised very cautiously, only if persuaded that there is a good and special reason for doing so after hearing submissions from the parties and then only if it is considered to be in the interests of the child. (See: Mercer v Hermans [2003] CILR 510 at 522). However, I was invited to, and did, view a lengthy home movie on CD of C with the Father during access, and also various photographs of C with the Father, of C with D and a few of him with the Mother. C is a slim, dark-haired boy and wears glasses. I was told that he has a slight speech impediment and has suffered at times from stomach pains, vomiting and an irritable bowel, most probably attributable to his anxiety about his parents disputes. From what I saw of him on film with the Father he appeared to be active and at ease and enjoying himself with the Father and they are obviously close. I did not have the opportunity to see him in this way with the Mother. However, according to Dr Hughes, the expert, who spent considerable time with C both alone and with each of the Mother and the Father, C clearly loves both of his parents, although he has a quite different kind of relationship with each of them.



52. Not surprisingly C is considerably emotionally affected by the situation between his parents. However the Father and the Mother do not agree about the extent and cause of this and they each blame the other. The Mother had, without consulting the Father, taken C to a local psychologist, Dr Hawkins. After a time Dr Hawkins developed a relationship with C which encouraged him to begin to express and work out some of his feelings with her. However, for some unexplained reason, Dr Hawkins worked only with the Mother and did not involve the Father, who was not aware for sometime that Dr Hawkins was seeing C and the Mother. The Father objected to Dr Hawkins seeing C without any input from him and unfortunately Dr. Hawkins then became embroiled in the disputes between the Father and the Mother. Dr Hughes was of the opinion that Dr Hawkins should have worked with both C's parents and involved the Father as well as the Mother from the start. He felt that C's separation anxieties could have been better addressed by, for example, having the Father take C to see Dr Hawkins sometimes, with the Mother doing so at other times. He felt that Dr. Hawkins had only had the Mother's perspective on C's difficulties.

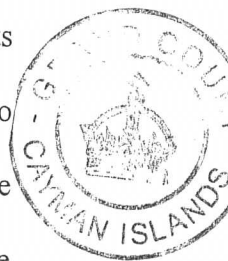
53. C attends the International School in Grand Cayman. There have been some incidents involving disruptive behaviour by C at school, although again, the Mother and the Father differed about the cause and the seriousness of this. It is not surprising that C's emotional distress at the acrimonious disputes between his parents about him should sometimes be reflected in his conduct at school. However, it is clear that C is very friendly and has a close relationship with Mr and Mrs Hollins' son and with Mrs Auld's son, who both attend school with him.



He clearly enjoys their company. This was also obvious from the film I saw. C has also spent time with the Father's mother and siblings and some of their children, his cousins. C also knows the Maternal Grandmother from her visits to Cayman which she has made 2 or 3 times a year (although last year she visited 4 times). C has spent less time with the Mother's father as a result of his less frequent visits to Cayman. C last visited Canada over 3 years ago so he will not have any real recollection of Wallaceburg or of any others of the Mother's family.

### The Expert

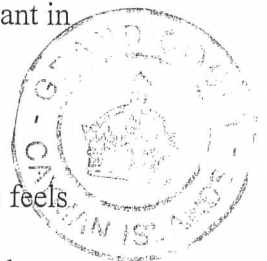
54. Dr Hughes was, in my opinion a very important witness and I found his report, which had been ordered by the Court previously, and particularly his oral evidence to be of great assistance. I also drew comfort from the fact that his professional assessments of the Mother (who gave evidence before he did) and of the Father (who gave much of his evidence before he did) coincided with my own impressions of them. Dr Hughes identified several factors that he considered particularly important in endeavouring to make an assessment of the best interests of a child in a case like this where one parent wishes to move with the child to live in another jurisdiction. First, it was important to try to determine who the primary attachment figure for the child is, that is which of the parents has the child "invested" in the most. Secondly, he would look at the nature of that attachment, both the positive and constructive aspects of it and also the less constructive and sometimes harmful aspects of it. In this connection he would also have regard to the support group available to each parent, namely what kind of support does each of the parents have to support their relationship with the



child in their nurturing of the child. Thirdly, Dr Hughes would consider the needs of the child and in particular the developmental needs of the child. He explained that an infant has one kind of developmental needs; a child of 5 has other kinds of developmental needs as does a school age child and as does a teenager. He would also have regard to the child's emotional state and his or her particular emotional needs or problems and how these would relate to each of the parents. Dr Hughes also considered it most important to consider which parent would do best at supporting the child's relationship with the other parent. As he put it, "We do not need to lose parents. We need all the parents we can get". From a positive perspective this involves supporting the relationship of the child with the other parent; the negative approach would be to undermine that relationship.

55. Dr Hughes' opinion was that the Mother has a very intense attachment to C, partly attributable to her having been adopted. In his view she feels that in C she has someone she can relate to genetically and emotionally which gives the attachment a particularly special meaning to her. Dr Hughes considered this to have advantages and disadvantages. As far as the Mother's own relationship with her adoptive mother, the Maternal Grandmother, is concerned, Dr Hughes considered that, although it had improved, there is still some ambivalence in that relationship. The Maternal Grandmother is a strict and forceful character. He felt that the Mother's father, who is apparently an easygoing man, is less significant in this context.

56. Dr Hughes said that currently the Mother's energy level is depleted and she feels unable to work. She has been on anti-depressants. He said that her mood is down



and that it is obvious that she is not a happy person but is sad, anxious and depressed. She worries a lot and he feels that she is not functioning well. Unfortunately her moods, anxieties, anger and bitterness are transmitted to C. Dr Hughes considers that this clearly adversely affects C and the way he functions and his relationship with the Mother. By way of example, Dr Hughes said that many of the things that the Mother talked about in C's presence were negative, pessimistic and unhappy. While he is with the Mother C is less spontaneous and more inhibited and generally sadder. He is sensitive to and worries about the Mother's state of mind and her hostility to the Father who he loves. He spent more time curling up in her lap in a more dependent, baby-like way. On the other hand, while he is with the Father C is much more relaxed and active. He is expressive, verbal and generally much happier. The Father in Dr. Hughes' view is functioning much better than the Mother emotionally. In Dr Hughes' opinion there is a significant difference in C when with each of his parents.

57. Dr Hughes also referred to the Mother's allegations of abuse against the Father. His opinion was that the Father is not and has not been a physical threat to the Mother or to C. Dr Hughes felt that if there had been any abuse in the past it would have arisen from the hostility between the Father and the Mother themselves and that it was most likely to have been emotional and verbal abuse, not physical. He did not believe that either parent had been abusive to C. He thought it unfortunate that such allegations, which are difficult to erase once made, were hanging as a cloud over the proceedings. Dr Hughes said that nonetheless the Mother had made it very clear to him that she felt that she and C



would be much better off without the Father. She has a very negative view of the Father. Dr Hughes also said that the Mother really did not want the father of her daughter, D, to have any role in the upbringing of D. He considered this to be of considerable concern because he felt that the Mother has the same wish about the Father in relation to C.

58. Dr Hughes was of the opinion that both the Mother and the Father have a very strong loving relationship with C. He considered them both to be caring parents and that they are both involved with C. C loves both of them, although the nature of the relationship which they each have with C is different and influenced to some extent by their backgrounds. Dr Hughes considered that part of the intensity of the Father's commitment to C is due to the Father's perception of a gap in his own life due to his own father having effectively abandoned him at a young age and his determination that C should not be deprived of a father and should not have that kind of "hole" in his life. However Dr Hughes felt that it was clear that the Father, notwithstanding his relationship with the Mother, genuinely is not seeking to take C from her and that he really does hope that both of them can parent C effectively separately from one another.

59. As far as the Mother's wish to return to live to Canada is concerned, Dr Hughes felt that it is understandable but he does not feel that all of the Mother's difficulties arise from her problems with the Father. In his opinion even if she were to return to live in Canada she would bring a good many of her problems with her. While returning to Canada may help the Mother to make a fresh start, he did not consider that would be the sole answer to her difficulties.



60. As far as determining the primary parental attachment person for C is concerned, Dr Hughes was of the view that that was not easy to determine. He pointed out that as a result of the various court orders since 2005, the Mother has ended up spending more time with C than the Father. He felt that C was probably more involved with the Mother than with the Father, partly because C worries about the Mother and that consequently engages more of him in that relationship. On the other hand C's relationship with the Father is less intense and more relaxed. Accordingly Dr Hughes considered that on balance the Mother is probably the primary attachment figure for C but not significantly more so than the Father. Dr Hughes did however express the view that one of the most important issues in relation to custody and access, especially in relocation cases, is as far as possible to minimize change and to maximize continuity and stability and support for the child's primary relationships, also minimizing hostility. Dr Hughes considered that the Father is in a better emotional state than the Mother and has a healthier relationship with C and can be more supportive of C's needs, allowing him to be more expressive and develop more naturally. He felt that the Mother's own suffering, anguish and anger is transmitted to C, which is not in C's best interests.

61. Dr Hughes also considered that a very significant factor is the need to support the child's relationship with both parents. In his opinion it is most important in cases like this, where the parents will be in two different places, to determine which parent will be best able to support the relationship of the child with the other parent, not just by allowing access but by actively supporting and encouraging that relationship. He considered that the Mother is not at all supportive of C's



relationship with the Father. On the contrary she is critical of it and very negative about it and, having many concerns about and criticisms of the Father, she feels that C would be better off without him. Dr Hughes opinion was that part of the Mother's desire to return to Canada is to get away from the Father both for herself and for C. He also felt that in Canada the Mother would covertly seek to undermine the relationship between C and the Father. He was of the view that the Father would be much better at maintaining C's relationship with the Mother.

62. Dr Hughes was concerned that if C did leave the jurisdiction with the Mother it would be a traumatic separation for him since he would not only lose significant contact with the Father and the Father's family, but also lose his familiar home, his friends, his school and his familiar environment. C would have to deal with a new, unfamiliar environment in Canada and adapt to all of that change in addition to the loss he would have experienced as well as having a father who would be emotionally very hurt. Dr Hughes believed that it would be desirable for the Mother to return to Canada and to spend time there with her parents for her own benefit but that the parent most able to provide the continuity and stability for C and who is functioning the best and where C would have fewer changes, would be the Father. He also felt that the Father would be much more supportive of access by the Mother and in sustaining a positive image of the Mother on the part of C.

63. On the other hand, Dr Hughes agreed that for the Mother to have to go to Canada without C, leaving him in the care of the Father, would be very distressing and upsetting for her. He hoped that if that was the case, the Mother would understand



that it was considered to be best for C but he agreed that it would be very difficult for her.

64. In Dr Hughes' opinion the period between the ages of 4 and 6 or 7 is when a child develops from being a little child to being either a little boy or a little girl. Child development specialists consider that is the age when a male child learns what it is like and how to be a boy and when a female child learns what it is like and how to be a girl. The boy learns this primarily by identifying with his father. In Dr Hughes' opinion a good deal of that identification is now taking place in the relationship that exists between C and the Father. Dr Hughes considers C's present age to be a particularly important time for the father/son relationship. He was also concerned that the Mother has a somewhat negative view of men generally which could be transmitted to C and which would not be desirable. Dr Hughes opinion was that it is particularly important for C to have more time to consolidate his identification with his Father.

65. Dr Hughes also explained that even if one parent lives in a different location from the child, while obviously that has an impact on that parent's relationship with the child, it need not be as great an impact as might be thought. In his view, if the absent parent has confidence in the child and in his or her relationship with the child and has regular communication with the child by frequent phone calls, exchanges of letters and by email, as well as seeing the child on a regular basis, the relationship can be a sustained and strong one. He considered that geographical distance, in and of itself, is not necessarily a major factor in the nature of the relationship. He felt that if the Mother were in Canada and C with



the Father in Cayman and the Father was actively encouraging C to call the Mother on a regular basis and to have frequent communications back and forth, and the Mother was also seeing C often, the relationship could remain a close and good one. Also, while he agreed that in that situation the separation of C from his half-sister, D, would be a negative factor, Dr Hughes did not think that this was as detrimental as it might be and felt that a close relationship between C and D could be sustained in the same way.

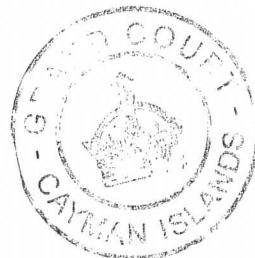
66. Dr Hughes was concerned about the probability that the Nanny will have to leave Cayman in June 2008 and that C would accordingly no longer have the benefit of the love and support of someone he had known all his life. Of course that would also be the case if C went to live in Canada. He did, however, point out that the Father has extensive and close family in Cayman, including his mother, who would continue to be a source of love and support from which C would benefit. On the other hand, Dr Hughes expressed concern about the apparent hostility on the part of the Maternal Grandmother towards the Father, which he had discussed with the Mother. He felt that would not encourage the Mother to actively help C to maintain close contact with the Father if C was living with her at the Maternal Grandmother's house.

67. I asked Dr Hughes myself about the desirability of effectively removing a child as relatively young as C from his mother. Dr Hughes said that there is no doubt that it is harmful to "lose" a mother but he considered that in the case of C this has been supplanted, at least in part, developmentally by the fact that C is now identifying closely with the Father and starting to move from being a pre-school



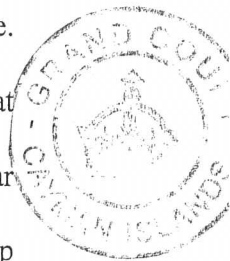
child to being a little boy, in which his relationship with the Father was particularly important. He felt that at C's age the desirability of identification by C with the Father was slightly more important than being separated from the Mother, particularly if C's relationship with the Mother was encouraged and maintained as he had suggested. If that was done the relationship could continue to be close and C to that extent would not be "losing" the Mother.

68. Dr Hughes recommendation in his report was that the ideal solution in the interests of C's welfare would be for the Mother to remain living in Cayman for at least another 2 years so as to enable C to benefit from seeing both the Mother and the Father on a regular and frequent basis. He also recommended that C should continue to see Dr Hawkins, albeit on the basis that Dr Hawkins should focus solely on working with C, and that the Mother and the Father should each seek separate counselling themselves. This in his opinion would be the best solution. However, given that the Mother intends to return to live in Canada in any event, Dr Hughes opinion was that, while it was a very difficult case, in all the circumstances it was on balance in the best interests of C, or least damaging to C, for C to remain in Cayman in the care of the Father. He was, however, clear that this view was based on the Father actively supporting and encouraging C to maintain as close a relationship with the Mother as possible through frequent communication with and regular access by the Mother. He believed that the Father would genuinely do that.



Assessment of the Mother and the Father and their evidence

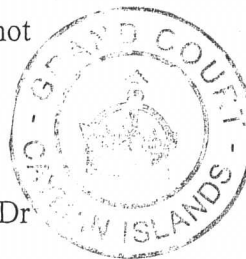
69. Even making allowance for her inevitable nervousness, emotion and defensiveness, I did not find everything that the Mother said entirely convincing or reliable. My distinct impression was that some important parts of her evidence were somewhat misleading or exaggerated and intended to prejudice the position of the Father or to enhance her own position rather than being wholly accurate or genuine. I infer from her judgment of 10<sup>th</sup> October 2005 that at the hearing in September 2005 Madam Justice Levers also did not find the Mother consistently believable. I formed the strong view myself that the Mother is quite unable or unwilling to divorce her own strong antipathy and hostility towards the Father from C's interests and that she is insensitive to C's welfare in this respect. The evidence of the Nanny and of Mr. Hollins was clearly to the effect that the Mother has been using C and the arrangements for access in order to hurt and inconvenience the Father. She was, I thought unreasonably and unfairly, not prepared to concede anything at all positive about the Father or his part in C's life. She was insistent that the Father played no role in the past in caring for C and that he is simply not capable of looking after C himself, directly contrary to the clear findings of the Court in the Judgment dated 10<sup>th</sup> October 2005 (see Judgment pp 5-6 and 9-10). Her evidence in that respect was also clearly contradicted by all the other witnesses at the hearing before me. I did not accept what she said about that and did not feel she was being truthful. She also blames C's anxieties and emotional upset entirely on the Father and I felt that she could not or would not



consider the possibility that such anxieties and emotional upset might be due to the effect on C of her own overt hostility towards the Father and her very obvious negative attitude towards access. At one point she became quite emotional and said she would never see C again if he remained in Cayman when she went to Canada, notwithstanding that the Father has made it quite clear that he has no intention of taking C from her and that he strongly supports C having a close relationship with both his parents. I nevertheless also formed the view that, despite her depressed and emotional state, the Mother is in many respects quite willful and determined. I was not convinced by her assertion that she is afraid of the Father and my distinct impression was that she is quite capable of holding her own in any verbal argument or dispute with him or anyone else. I regret to say that my overall impressions of the Mother were not entirely favourable.

70. None of this means that I do not accept that the Mother loves C because she clearly does and C clearly loves her. This is also not to say that the Mother is not capable of looking after and caring for C because she is. The Father himself said she was a good mother, although presumably that would not extend to her refusal to consult him on significant issues relating to C's welfare or her attitude towards C's relationship with him. The Mother has in fact had C living with her for most of the time during the past 2 ½ years and there is no suggestion that she has not looked after him properly.

71. The Father is clearly a quite different personality from the Mother and, as Dr Hughes said, he is in a much better emotional state. I was more impressed with him as a person. I found him to be considerably more objective and frank in what



he said. Although there were some parts of his evidence relating to his relationship with the Mother which seemed somewhat self-serving, I did find the Father generally credible and convincing. He also seemed to me fairer in his approach, notwithstanding that he clearly feels strongly that it is not in C's best interests to go to Canada to live with the Mother. For example, while he clearly found the Mother and her attitudes and behaviour very frustrating and provoking, he did quite fairly say that she is a good mother. He also affirmed that it never has been or would be his intention to damage the relationship between C and the Mother, still less to try to take C from the Mother and I believed that. I found his assurances that he would always encourage C to maintain a close relationship with the Mother to be convincing and consistent with what other witnesses said about him. Notwithstanding the allegations by the Mother of abuse of C, which he strongly has always denied, and the undoubted hurt and difficulty that must have caused him, he appeared to me to be genuinely motivated by his assessment of C's best interests rather than solely his own. I do not doubt that the Father gains much personal pleasure and satisfaction himself from his obviously close relationship with C but having seen and heard him give evidence at length I am satisfied that the Father's objection to the Mother's application to take C to live with her in Canada is motivated by genuine concern for C's welfare and not by some other ulterior motive.

72. I did gain the impression that the Father was sometimes somewhat lacking in insight into and sensitivity about the situation with regard to the Mother and about the ways in which his own attitudes and actions towards her had been provoking



and upsetting for the Mother and to a large extent contributed to her bitterness and hostility towards him. Dr Hughes view was that he may in the past have resorted on occasion to emotional or verbal abuse of the Mother, although he did not believe there had been any physical abuse. While he denied any physical abuse of the Mother, the Father accepted that he had played a part in her unhappiness. He also accepted that the Mother's desire to return home to Canada is understandable from her own perspective.

73. I found the Father's evidence concerning the part he had played in caring for and looking after C over the first 4 years convincing, consistent with the evidence of the Nanny in particular and I accept what he said about that time. I accept that he is capable of looking after C himself and that he has the ability and genuine desire to do so. I do not accept the criticisms made by the Mother of his care of C during access. The evidence did suggest a difference in attitude and approach between the Mother and the Father towards the upbringing of C, no doubt reflective of their own different backgrounds and cultures. The Mother believes in a strict routine for C and is more of a disciplinarian, apparently using physical punishment when she considers it necessary, whereas the Father is more easygoing and relaxed, although he apparently recognises where C needs to be disciplined by a firm talking to. However, I do not consider that it can be said that one approach in this respect is superior to the other and both parents are clearly very committed to and caring of C.

74. Like Dr. Hughes, my own assessment of the Mother is that a significant part of her motivation to go to Canada to live with C is her underlying belief that she and



C would really be better off without the Father in their lives. While I do find it understandable that in her current state of mind she should want to leave Cayman and return to her home and to her family and friends, I did get the clear impression that in her mind keeping the Father out of her life necessarily means keeping the Father out of C's life. I felt that in her desire to have nothing more to do with the Father, she does contemplate C also having nothing or as little as possible to do with the Father. As I have already noted, the Mother denied this in her evidence and said she agreed that the Father should have access to C in Canada but I was not persuaded that she was really genuine and certainly not enthusiastic about this. I got the impression that she was paying lip service to the desirability of a strong relationship between C and the Father. I felt that it was more likely that she was saying that she agreed that the father should have access to C because she thought she had to do so in order to support her case rather than because she was truly committed to it. It seems to me that at most she envisages 1 or 2 short visits to Canada each year by the Father and nothing more and that she and C will not have to see or hear from him otherwise. My assessment of her over a considerable time giving evidence, her demeanour and attitude, together with the past history of this matter, her obvious malevolence towards the Father and her difficult and obstructive approach towards access to date, also causes me to seriously question whether registration of any order of this court relating to C in the court in Ontario would in effect simply amount to a transfer of the ongoing disputes from this court to the Ontario court. In the final analysis I think the Father is probably right that if C lived with the Mother in Canada she would be



likely to continue to undermine C's relationship with the Father and to create whatever difficulties she could about anything more than very limited physical access and that over time she may well try to discourage even that. I consider it improbable that moving to live in Canada would cause any significant change in her present attitude. It certainly seems most unlikely to me that she would actively encourage C to maintain an ongoing close relationship with the Father.

75. Despite what she rather reluctantly said in the limited evidence she was prepared to give about the father of her daughter, D, the Mother gave me the clear impression that she was very negative about D's father having anything to do with D. Dr Hughes was also of this view and considered that this attitude could be indicative of and was consistent with her negative attitude towards the Father playing any significant part in C's life. Dr Hughes said that his assessment of the Mother is that she has a negative view of men generally and it did seem to me possible that this underlies her actions and her attitude to some extent. I did infer from the evidence of the Father and Dr Hughes, as well as from the Mother's own attitudes and reactions, that it was not unlikely that she had simply wanted children for herself and had deliberately become pregnant with C and then with D with no intention of their respective father's playing any role in relation to the children other than their procreation. Of course in the case of C, after his birth she did continue to live in the same house as the Father, who, the evidence shows, did play a major part in the care of C at that time. However, the circumstances were such that that was not, in my view, necessarily inconsistent with my inference and the Mother's subsequent attempts to exclude the Father from any



rights or role in respect of C are certainly consistent with it. If my impression in this respect is the reality of the situation then it is most regrettable from the children's perspective.

76. Although the Mother feels that going home to Canada will remove the source of all of her problems, Dr Hughes' opinion was that such a move is unlikely to solve all her difficulties. While there may well be some improvement, he was very much of the view that it would not be the panacea to all the Mother's worries and problems that she appears to think. I found his views convincing.

### The Law

77. There was little, if anything, between counsel on the principles to be applied and the factors to be considered. They submitted, and I accept, that in considering whether or not to grant the Mother's application for permission to take C out of the jurisdiction to live permanently with her in Canada, as is well established by the authorities both here and elsewhere in the Commonwealth, and as is also prescribed in the Law, the first and paramount consideration for the court is always the welfare of the child. Section 7(i) of the Law 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 [my emphasis] 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....*". Section 19 of the Law provides that: "*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, [my emphasis] 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."* The cases I was referred to all proceeded on that basis and I have endeavoured to do so in this case.

78. It is also clear from the authorities that the preferred solution, having regard to the welfare of the child concerned, will always depend on the particular circumstances of the case and that what may be the appropriate answer in one case is not necessarily appropriate in another even if the facts may be similar. I was referred to a number of cases from this jurisdiction and from the United Kingdom and one from Bermuda concerning applications by one parent to move to live in another country with the child or children concerned. They inevitably all involved different facts which in the end of the day determined the respective courts' decisions based on their assessment of the welfare and best interests of the child or children in the specific circumstances. In Re H (Application to Remove from Jurisdiction) [1998] 1 FLR 848 Thorp LJ (as he became) said "...these applications for leave [to take a child to live abroad] are always difficult cases that require very profound investigation and judgment. But not a lot is to be gained by seeking support from past decisions, however superficially similar the



*factual matrix may appear to be*". His comments were referred to with approval by the English Court of Appeal in Payne v Payne [2001] 1 FLR 1052 at 1076.

79. Although there are authoritative and helpful guidelines as to of the factors which should be taken into account in such cases and the approach which should be adopted, it does seem to me that slavish adherence to those irrespective of the different circumstances risks losing sight of the first and paramount consideration, namely what is best for the child's welfare in the particular circumstances of the case. I have, I hope, paid due regard to these guidelines as helpfully extracted from the authorities by counsel for the Mother (and counsel for the Father did not significantly disagree) and I shall refer to them. However, it seems to me that at the end of the day it must be that, doing the best I can, having regard to all of the particular circumstances of this case and my assessment of the witnesses and the evidence, I must endeavour to determine what, on balance, is the overall best, or perhaps the least harmful, solution for C's welfare in what is obviously a very difficult and unsatisfactory situation.

80. In Payne v Payne [ibid] a mother from New Zealand who had married and then divorced an English man was given permission to take their daughter, who was almost 4, to live with her in New Zealand. Butler-Sloss P traced the general principles applied by the Court of Appeal in England back to Poel v Poel [ibid] and made reference to several subsequent cases in considering whether the Human Rights Act 1998 affected the principles previously adopted. In particular she considered whether the previous principles created a presumption in favour of the parent (usually the mother) having care of the child if she wanted to take the



child with her to live abroad. She and Thorpe LJ both said that there was no such presumption but that reasonable proposals [to move elsewhere] made by the primary carer, the refusal of which would have adverse consequences on the stability of that parent (or any new family if there is one) and therefore an adverse effect on the welfare of the child, continue to be of great weight. Thorpe LJ said that in England relocation cases have been consistently decided upon the application of 2 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 and therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

81. Poel v Poel [ibid] was referred to and relied upon by the Chief Justice in the Cayman case of H-P v P [2001] CILR 108 and the comments in Payne v Payne [ibid] itself were discussed and largely adopted in the more recent English case Re C (Permission to Remove from Jurisdiction) [2003] FLR 166 to which I was particularly referred. Both of these cases bear similarities in some respects (although are by no means identical) to the present case and I have therefore found them particularly helpful.

82. In light of the comments in the authorities both counsel in their closing submissions proceeded on the approach extracted from the cases by counsel for the Mother that in considering whether it is in the best interests of C's welfare to go with the Mother to live in Canada, the Court should take into account in particular:



(i) the reasonableness of the Mother's wish to leave Cayman and to return to live in Canada;

(ii) the effect the Court's refusal of the Mother's application would have on her and on C, and

(iii) the effect of the proposed move to Canada on C's relationship with the Father.

It was submitted that in undertaking this exercise the Court must decide whether the Mother's application to take C to live with her in Canada is genuine and realistic and, if it is, whether the Father's opposition is motivated by genuine concerns or by some ulterior motive. It was also said lastly that the Court must determine how the grant or refusal of the Mother's application would affect the Mother and the Father, although it does seem to me that this must mean such effect as is likely to impact upon C and his welfare. I accept that these are appropriate issues for the Court to determine and to take into account and I propose to do so in seeking to arrive at my overall assessment of what is best for C's welfare in the particular circumstances of this case.

### Discussion

83. It was argued on behalf of the Mother that she has been the primary carer of C for some time, having had care and control of him, without objection by the Father, for the past 2 ½ years and that therefore, since her proposals in relation to moving to live in Canada are reasonable, in accordance with the guidelines in Payne v Payne (ibid), the Mother's application should be granted unless the court



considers that it is clearly not in the interests of C's welfare to do so. The rationale for this approach is that refusing the primary carer's reasonable proposals in relation to her future life is likely to impact adversely on the welfare of the child. Whether or not this approach is adopted here, clearly the fact that C has since July 2005 lived for most of the time with the Mother, who has mainly been responsible for his day to day care during that time, is a very important factor of considerable weight in assessing what is best for C's welfare in light of the Mother's intended move to live in Canada. In this respect I do, however, consider it relevant to note that during most of this period the Mother and C have lived in the Mother's own house, which is only 2 streets away from the Father's house, where C lived for the previous 2 years or so and where he visits and stays with the Father during access. While C has been living with the Mother the Father has had frequent and regular access to C, including overnight access. Also, over this period, there have been frequent disputes between the Father and the Mother about many aspects of C's welfare while in the Mother's care and the Mother has exercised care and control of C, or at least attempted to do so, on the basis that the Father has or had few or no rights or role in respect of C and that C's relationship with the Father was not important. It should also be noted that the Mother's young daughter, who is now just over 1 year old, also lives with the Mother and C.

84. Apart from issues concerning C's emotional and psychological state, to which I shall refer further later, there is no suggestion that the Mother is not capable of looking after C properly on a day to day basis. The Father has not, until the



possibility of the Mother taking C to live with her in Canada arose, objected to her having day to day care of C although, as I have said, there have been many bitter arguments about aspects of C's care. This has also been on the basis that she lives in Cayman and that he has frequent access to and a close relationship with C. The evidence of Dr Hughes was that on balance the Mother is the primary attachment figure for C, that is she is the parent with whom C has the most intense relationship, although both parents are clearly key attachment figures for C. However, it is also clear that the relatively more intense relationship of C with the Mother is due to C's painful awareness of and anxiety about her obviously depressed and unhappy state and her antipathy towards the Father and access to C by him. On the other hand his relationship with the Father is far more relaxed, happier and more natural. In Payne v Payne [ibid] Thorpe LJ said that the health and well-being of the child depends on the primary caregiver. He pointed out that the child cannot draw emotional and psychological stability and security from the dependency unless the primary carer is herself emotionally and psychologically stable and secure. A parent cannot give what she herself lacks. In light of the views of Dr Hughes, this latter comment seems particularly relevant in the present case since it is clear that the Mother is depressed and unhappy and not emotionally and psychologically stable and secure herself. Dr Hughes was most concerned about the negative impact of this upon C. Of course the Mother's belief is that leaving Cayman and going home to live in Canada will greatly improve her state of mind because she will no longer be subject to the stress and tension of her disputes with the Father about C. While going home to Canada



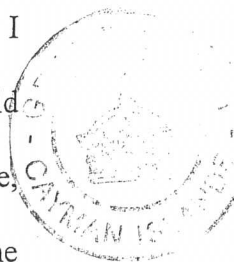
may make her happier in the short-term, it is much less certain that it will resolve all her difficulties after the initial happiness and excitement of going home has worn off. Quite apart from the stressful demands arising from the practical issues and problems in starting afresh in Canada after 7 years absence with 2 young children and living in her parents house with the inevitable tensions, a major part of her stress and turmoil arises from her unwillingness or inability to accept that the Father should have any significant role in relation to C. That issue is most unlikely to go away. The Mother is, of course, applying for sole custody of C if she is given permission to take him to live with her in Canada, presumably with the intention and anticipation that the Father's rights and role in relation to C should as a result be limited to physical access only. However, it must be obvious to her that the Father is determined to be as much of a father to C as he can and irrespective of the legalities consequent upon an award of sole custody in her favour, it seems most unlikely to me that he will not seek in whatever way he can to continue to be involved as far as possible in all major aspects of C's welfare.

85. As far as the practical arrangements proposed for the care of C by the Mother in Canada are concerned, they do not seem unrealistic in themselves. She has made provisional arrangements as already indicated. Both the Mother and the Father, like other working parents, have been and would be dependent to an extent on third parties if they had care of C. They have both been reliant upon assistance from the Nanny in the past. In Canada the Mother would rely upon the assistance of the Maternal Grandmother and of her aunts and other family members in the Wallaceburg area. She could also work to an extent from home, although she



would presumably still require the assistance of others look after C (and D) while doing so. The Father would continue to be reliant upon the assistance of the Nanny if C were to live with him. If and when the Nanny leaves Cayman, as she will probably have to do, the Father would no doubt recruit another domestic helper but would anyway have the support and assistance of his mother and his wider family and friends insofar as necessary. Being effectively his own employer, he could take whatever time off work was needed to enable him to be with C, although it does seem likely that if he is to fulfill his role as managing director of the Company adequately he would at times inevitably need assistance to look after C.

86. If the Mother's application to take C to live with her in Canada is refused and she returns to live in Canada without him, that would undoubtedly cause her very considerable distress and upset. She became upset during her evidence when this possibility was necessarily being explored with her and one can envisage that her departure from Cayman without C would be very unsettling and distressing for all concerned. Dr Hughes agreed that would be so, although he said that he would hope that the Mother would try to understand that it was considered to be best for C's welfare for him to remain in Cayman. Having observed the Mother myself, I would not be very confident of that and Dr Hughes himself agreed that it would be very difficult for the Mother to have to leave C behind. She would, of course, be returning home to Canada to the support of her own parents and family and she would be taking her young daughter D with her and have her to consider and care for. She would also be starting a new job and re-establishing relations with her



wider family and with friends, as well as generally dealing with the many practical issues which would arise. All of this would be a significant distraction for her. Nonetheless, it seems unlikely to me that whatever assurances were given to the Mother concerning her continuing access to and regular contact with C, they would be unlikely to alleviate her distress a great deal, at least in the short-term. Although the emotional state of the Mother on leaving Cayman without him would clearly affect C and he would certainly be upset and concerned, particularly considering his anxiety and worry about her emotional state anyway, handled carefully and sensitively, in my view it should be possible to limit at least to some extent the impact on C. With appropriate comfort and reassurance from the Mother, which in the interests of C I would hope she would try to give, but especially from the Father and perhaps his mother and friends as well, about C's continuing contact with the Mother, it should be possible to confine the emotional effect on C to the short-term. Over a relatively short time, as such frequent contact with the Mother became established, it seems to me that C should come to understand that he could and would continue to have a very close relationship with the Mother and become reconciled to her living in Canada while he lived with the Father in Cayman, although he would see her quite often. While it is difficult to predict, it may even be that as he got older he might come to the view that there were some advantages to having a parent in each of Cayman and Canada to spend time with in those countries, with the different attractions which they would offer to a growing boy.



87. In most of the cases to which I was referred, if the mother concerned had not been given permission to take the child or children with her to live abroad she would not have left but would have felt compelled to remain so as to continue to have the child or children in her care. In some instances that would have meant her new husband also having to remain to be with her and not being able to pursue new career opportunities abroad. It is in that context that the courts have considered that refusing the primary carer's (usually the mother's) reasonable proposals for relocation is likely to impact detrimentally on the child in her care. This is because of the inevitable frustration and bitterness to which the effective thwarting of the mother's reasonable proposals to relocate would give rise. In the present case, however, the circumstances are slightly different in that the alternatives under consideration are for the Mother to leave Cayman to live in Canada with C or for her to leave Cayman to live in Canada without C. Unlike most of the other cases, a refusal of the Mother's application will not, it seems, effectively compel her to remain living in Cayman for the sake of C because she does not intend to remain in Cayman in any event. The only way in which she could remain in Cayman beyond the next 6 months even if she wanted to, which she does not, would be to continue working for the Company in the hope that the immigration authorities would approve her designation as a key employee. However, she simply cannot countenance that for the reasons already explained, which do not seem unreasonable. But quite apart from the immigration issue, the Mother feels that she must leave for the sake of her own well-being and she intends to do so anyway. Thus the alternatives for C are either that he goes with



the Mother to live in Canada or that he remains in Cayman and lives with the Father. The significance of this, it seems to me, is that in the present case a refusal of the Mother's application would not have the effect of compelling her to remain in Cayman with consequent detriment to the welfare of C because of the Mother's bitterness and unhappiness at such refusal in the manner contemplated by the other cases, because if her application were refused the Mother would thereafter be living in Canada without him and he would not be in her care. There could, of course, be a short period after such a refusal of the Mother's application and before she left Cayman during which she could continue to have care of C, when her distress and bitterness at such refusal could adversely impact on him. However, if that were the situation it would be short-lived. It might also be possible to mitigate the effect on C in those circumstances by directing that C should move into the Father's care and control from the time when any such order refusing the Mother's application were made.

88. I do not consider that too much should be made of this point because it is clear that a refusal of her application would, as I have already discussed, be very upsetting for the Mother and even if she did not have care of C for much longer as a result, such distress and unhappiness would inevitably be felt by C and particularly at the time of the Mother's departure from Cayman without him. However, it does seem to me that for the reasons outlined above it should be possible to at least reduce or limit the impact on C of the Mother's distress at a refusal by the court of her application to take C with her to Canada if that were the case.



89. The Father's principal reason for his strong opposition to the Mother's applications of course relates to C's close and beneficial relationship with him and the Mother's attitude towards that. He is also concerned about the effect on C emotionally and psychologically of the Mother's depressed and unhappy state and her open hostility and bitterness towards him. He also believes that C's continuing stability and security requires that he continues to live in Cayman. I have already commented on my assessment of the Mother and her attitude towards C's relationship with the Father and I am in little doubt that the effect of the Mother's intended move would be seriously detrimental to that relationship. In Re C Permission to Remove from Jurisdiction [ibid] decided in 2003 Charles J said that Payne v Payne "*indicates that usually the harm that is likely to flow from a reduction in contact [with the parent not having care] will not found a conclusion that the welfare of the child would be best promoted by refusing an application by the primary or custodial parent to take the child abroad*". In the present case the Mother's proposed move with C to Canada will in my judgment undoubtedly cause a very significant reduction in contact between C and the Father; my assessment is that it is likely to reduce it to at most one or two short access visits to Canada by the Father each year and quite likely over time the undermining of even that. However, Charles J went on to make it clear that Payne v Payne only gives guidance and that "*the competing considerations between a reasonable proposal for a move and a reasonable objection thereto must be carefully considered and weighed. This judgmental exercise will involve an assessment of a likely effect of the available possibilities and gives rise to*



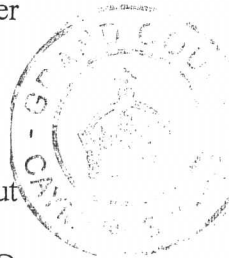
*issues of degree which have to be assessed having regard to the circumstances of the case.*” While the comment in Payne v Payne about reduction in contact may indicate the “usual” position, it is surely not intended to represent the inevitable position. Quite apart from the other factors which I have already discussed, in the present case there was strong evidence from the expert, Dr Hughes, that in the case of C the harm that would flow from a reduction in contact with the Father would indeed found a conclusion that the welfare of C would be best promoted by refusing the application of the Mother to take C to live abroad. I should perhaps add that, although the Father is clearly a very different personality from the Mother, the effect on him of the court granting the Mother’s application would undoubtedly be considerable. He would clearly be very upset, hurt and distressed. My assessment is that, probably unlike the Mother, he would be likely try to keep his disillusionment and distress from C and, of course in that event C would move to Canada with the Mother. Nonetheless it would in my view inevitably impact adversely on C, who would already be very upset anyway at leaving the Father behind.

90. I was also urged, by reference to the comments of Lord Jauncey in the Scottish case, Brixey v Lynas [1996] 2 FLR 499 to give weight to the “widely held belief that there is an advantage to a very young child in being cared for by its mother. It was pointed out that C already has separation anxieties in relation to the Mother. I have already referred to Dr Hughes opinion that on balance, although physical separation of C from his Mother was obviously not desirable and was a significant factor, in light of C’s sex and age it is particularly important that C



should maintain and consolidate his relationship with the Father for the reasons already explained. In Dr Hughes opinion that factor outweighs the importance of separation from the Mother given that C must, in the circumstances, live with one or other parent. I note that in Brixey the child concerned was only 4 years old, whereas C will soon be 6 years old and it was made clear that the significance of this widely held belief will vary according to the age of the child and, of course also with the other circumstances of the case. The observations in Brixey were approved by the Cayman Islands Court of Appeal in Mercer v Hermans [ibid] in which the sex of 2 young girls aged 5 and 3 and the strong bond which they had formed with their mother, who had reared them from birth, were the basis for the court determining that the children should not have been allowed to leave the jurisdiction to live with their father in Holland but should be returned to live with their mother in Cayman. Of course the reasons given by Dr Hughes for the importance of C maintaining and consolidating his relationship with the Father did not arise in Mercer v Hermans.

91. The effect on C of losing day to day contact with his half sister D was also put forward as another reason why it would be best for C to go with his Mother and D to live in Canada. Dr Hughes agreed that this was a factor to be taken into account, although not as significant a factor as C's separation from the Mother. However, Dr Hughes view was that, in the same way that C could in practical terms maintain a close relationship with the Mother notwithstanding her physical absence much of the time, so he could maintain and continue to develop a close relationship with D. There does not seem any reason why C's interest in and



relationship with D could not be maintained and developed by various means enabling them to see and communicate with each other frequently as well as through access visits.

### Conclusions

92. This is clearly a very difficult case and there is no ideal solution. Whatever course is adopted will cause considerable distress and unhappiness to one or other of C's parents at least in the short term. I am satisfied that both the Mother and the Father genuinely love C and that he loves each of them, although clearly he has a very different relationship with each of them as a result of their different backgrounds, personalities, attitudes and states of mind. I am also satisfied that the Mother and the Father are each capable of caring for C in a physical and material sense and that they each could and would provide for him adequately and properly. Although the accommodation which the Father would provide at his house, with which C is familiar, would be slightly superior to the accommodation which would be provided by the Mother at her parents house, with which C is not familiar, I do not conclude that the accommodation for C in either place would be unsuitable. I also conclude that the different practical arrangements which each parent could and would make for the physical and material care of C are not so materially different as to be significant in one way or the other in themselves.

93. I consider that it is understandable in light of her depressed and unhappy state for the Mother to wish to return home to her family in Canada to live and that she genuinely wishes and intends to do so. I do not think it reasonable to expect her

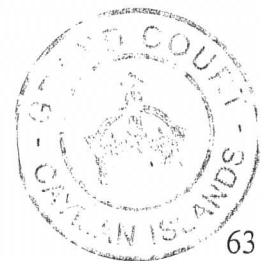


to continue in employment with the Company in order to be able to remain in Cayman. Her case is that she wants to leave and go home and intends to do so. From her own perspective it may well be desirable for her to do that. I accept that she may become happier, at least in the short term, in Canada with the support of her family and far from Cayman and the cause of her stress and worries as she sees them. However, I also accept the evidence of Dr. Hughes that it is unlikely that all her difficulties will be resolved as a result of moving back to live in Canada. I consider it unlikely that it will be the solution to all her problems as she seems to think. My impression is that she rather over estimates the benefits of returning to live in Canada and rather under estimates the difficulties of rebuilding her life there with two young children in all the circumstances. Nonetheless, irrespective of the immigration issue, I can see that she would think she must go home. However, it is my opinion that the Mother is motivated to a considerable extent by her feelings that she and C would actually both be better off without the Father in their lives and that a move to Canada will help her to achieve that. Like Dr. Hughes I sensed a bitterness, towards, even hatred of the Father on part of the Mother, which I do not believe is likely to be dispelled by a move to Canada. Indeed, I too consider that it would probably be reinforced by such a move rather than reduced. In fact, the Mother's underlying hope that a move to Canada with C would make it much harder for the Father to have any part of their lives seems to me most unlikely to be fulfilled in light of the Father's obvious determination to maintain as close a relationship with C and to play as much of a part in his life as possible. That would undoubtedly continue to impact considerably on the



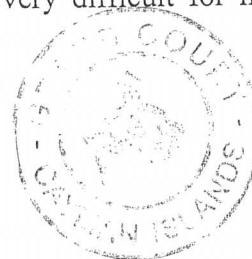
Mother's life. In my view a grant of sole custody of C to the Mother is most unlikely to deter the Father from this. If the Mother's reaction to that continues as it has done so far, as seems most likely, there would inevitably be continuing friction and more stress and emotional strain for her, which in turn would continue to adversely affect C.

94. In my opinion in the circumstances of this case, it is in the best interests of C's welfare that he maintains as close a relationship as possible with both his parents and this was very much the opinion of Dr. Hughes. He presently has a close relationship with both of them. Although for practical purposes, with his Mother living in Canada and his Father living in Cayman, he would have to live on a day to day basis with one or other parent, it was the view of Dr Hughes, which I accept, that with modern transport and communications it is much more realistic for a child in such a situation to maintain a close relationship with the absent parent. However, in order for that desirable situation to come about the parent having day to day care of the child must take all steps reasonably possible to positively encourage and actively promote the relationship of the child with the other parent. It seems to me that it would obviously be desirable if there was also such active encouragement of the child by other family members and friends who are close to the child and who should at all times promote to the child a positive view of the absent parent. Mere reluctant or grudging compliance with court orders for defined physical access is not sufficient and very unlikely to achieve this objective in the best interests of the child.



95. My conclusion is that unfortunately the Mother really would prefer to have nothing more or the minimum possible to do with the Father, including through C. In my judgment she does not genuinely believe that the Father should have any or at least any significant part to play in C's life and will at least covertly try to resist or even undermine that. Her open hostility and bitterness towards the Father is and is likely to remain obvious to C while he is in her care. I am also concerned about the Maternal Grandmother. My impression is that she would be likely to encourage or at least not discourage the Mother's attitude. I think it most improbable that the Mother would positively support the relationship of C with the Father; it is much more probable that either expressly or by her behaviour and attitudes she will continue to make her feelings of antipathy and hostility towards the Father obvious to C and deter him from having any meaningful relationship with the Father and possibly over time deter him from having any relationship at all. I do not consider that to be in the best interests of C's welfare.

96. On the other hand I accept the Father's evidence that he has no intention of taking C from the Mother and that he believes that C's relationship with the Mother is important. I am satisfied that he would genuinely support that relationship and that he would actively promote and encourage it. I do not consider that the Father's opposition to the Mother's application for permission to take C to live with her in Canada is other than genuine and I conclude that it is motivated by concern for C's welfare. My overall conclusion is that if C were living in Canada with the Mother it would not be possible or at least very difficult for him to



maintain a close relationship with both his parents. He would have a much better prospect of doing so if he were living with the Father.

97. Although I accept the evidence of Mr Wilson, the Canadian legal expert, in relation to the possibility of registering any orders of this court relating to C in the relevant Ontario court if C went to live with the Mother in Canada, it does nonetheless seem probable to me that the negative attitude of the Mother towards access which has been such a feature of these proceedings would mean that in practical terms the continuing disputes about C would simply be transferred from this court to the Ontario court. In my opinion that would not be in the best interests of C's welfare.

98. Dr Hughes' opinion was that at C's age it is particularly important developmentally for him to identify with the Father as he moves from being a young child to being a little boy. In this context he was concerned about the Mother's influence on C in light of what he considers to be a general antipathy towards men. In light of my impression of the Mother I found this to be convincing. I also accept Dr Hughes carefully expressed view that although it is clearly not desirable for C to be parted from his Mother at his relatively young age, nonetheless on balance, at this stage in C's life, it is more important for him to live with the Father than the Mother. It also seems to me, and this also accords with Dr Hughes views, that C's relationship with the Father is generally a healthier, happier and more natural one than his relationship with the Mother.



99. Dr. Hughes also emphasised the importance of continuity, security and stability for C. That must be correct. It seems to me particularly desirable for C to have a long period of stability and freedom from the stress and emotion of the constant disputes between his parents and particularly freedom from the Mother's open hostility and acrimony towards the Father to whom C is very close and loves deeply. In my view it is also in the interests of C's welfare for him to have the best chance of settling down, without emotional upheaval, in his familiar school, able to continue to benefit from his relationship with his good friends, in his accustomed routine and living in the established environment with which he is familiar. It does not seem to me desirable, in the circumstances in which he finds himself, for C to have to lose all that and to have to take on the inevitable stress and apprehension of an entirely new environment. In my opinion C has the best chance, at least in the longer run, of escaping the stress and emotional turmoil to which he is presently subjected and of leading a happier and more settled existence if he is in Cayman living with the Father. I consider that to be more likely to provide him with the stability and security which his health and well being require.

100. It is most regrettable that C's parents have, as a result of their inability to co-operate, if only as far as the best interests of their son, C, are concerned, created a situation where the court must in effect choose between them in determining where C should live. This cannot be in C's best interests and he is clearly suffering emotionally as a result of his parents' attitudes. The Court is essentially being required to deprive C of living with or in close proximity to one or other of



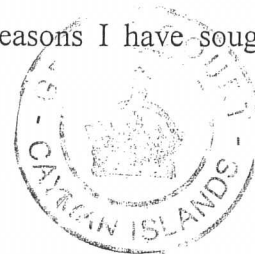
his parents in the hope that peace will come to him. There is no ideal solution to this dispute where the real victim of the parties' attitudes and actions is a small boy. However, it is C's welfare and not the welfare of the Mother or the Father which is the paramount consideration and it is to that which I must have regard.

101. After much anxious consideration and not without earlier hesitation, I have now come to the firm view that this is a case in which, no doubt unusually, it is clearly not in the best interests of the child's welfare to go with his mother to live abroad even though she has for some time been his principal carer (albeit in the circumstances and subject to the qualifications to which I have referred) and even if her proposals to move abroad are reasonable (which I anyway seriously question in light of my conclusions about at least part of her motivation). In other words I do consider that the Mother's proposal to take C to live in Canada is not compatible with C's welfare. In my judgment in all the particular circumstances the option which would be least damaging to C would be for him to remain in Cayman living with the Father rather than moving with the Mother to live permanently in Canada. I consider that this is the alternative that most likely to promote C's happiness and well being and the most likely to enable him to maintain a close relationship with both his parents. I consider also that it will be more beneficial to his future development as naturally and normally as possible and more likely to avoid the risk of continuing or even escalating problems for him. It is also more likely in my opinion to maximise continuity, security and stability for him. He needs a period of freedom from emotional stress and the opportunity to settle down in a happy and relaxed environment. In my judgment



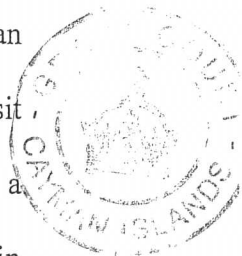
he has a better chance of all this by remaining in Cayman in the care of the Father. I consider his relationship with the Father to be healthier and more natural and more beneficial to him overall than his relationship with the Mother. I would hope that over time, living with the Father the emotional and psychological damage which he has suffered will heal with assistance from Dr. Hawkins or other appropriate professional help and that he will develop, secure in the knowledge that he has a close and loving relationship with both of his parents, into the happy, secure, stable and contented boy which I am sure he has the potential to be.

102. I should emphasize that I have not come to my decision on the ground that the Mother is a bad or unloving mother, on the contrary I am quite satisfied that she loves C very much and that C loves her very much and I do not see any reason why that should change in the least bit as a result of my decision. My judgment is solely based on my assessment of what I have concluded after much thought to be clearly in the best interests of C's welfare at this time in all the particular circumstances as presented to me and my impressions and assessment of the witnesses. Despite the emotional stress which my decision will cause I have to consider as impartially and unemotionally as I can the overall welfare of C and not the interests of his parents, although I entirely accept that their emotions and attitudes naturally strongly affect C, and I have very much had that in mind. I am also conscious that it may be thought unusual to order that a child, who has been in the day to day care of his mother for some time, should not remain in her care when she moves to live abroad. However, for the reasons I have sought to



explain, the circumstances here in my judgment do make that appropriate in the best interests of the welfare of the child.

103. I also wish to make it absolutely clear that I have arrived at this view on the assumption and in the expectation that the Father will do everything reasonably possible to actively encourage, facilitate and assist C to maintain as close a relationship as practicable with the Mother through regular, even daily if possible, contact and communication and that if necessary he will insist on C doing so. There must be very frequent communications between C and the Mother by telephone, letter and email (ideally involving use of videolinks or similar equipment enabling them to see each other) and regular exchange of photographs, CD's and the like. The Mother must also be regularly sent examples of C's school and art work, and copies of his grades, reports and test results and examples and records of C's interests and achievements. She must be kept informed of all significant aspects of his welfare. The Mother must in addition have regular physical access to C in both Canada and Cayman. I also consider it desirable and appropriate (and indicative to C and to the Mother of the Father's commitment to C's strong relationship with the Mother) for the Father to pay the reasonable transport costs (and accommodation costs if her own house in Cayman is for some good reason not available to her) of the Mother to enable her to visit Cayman to spend time, including overnight, with C not less than three times a year for a minimum period of 10 days on each visit. The Father must also, in addition, at his cost, take C to Canada to see the Mother for residential access there during the school summer holidays for not less than 3 weeks each year. The



Mother must also have residential access to C at least in alternate years at Christmas and also at C's birthday. If at other times physical access to C by the Mother, perhaps at some convenient location between Cayman and Ontario, can be arranged that is to be encouraged and should be positively explored. The intention is that the Mother should have as much physical access to C as is reasonably practicable. The precise arrangements for such physical access should, using their very best efforts at co-operation in C's best interests, be agreed between the Father and the Mother and/or their attorneys if at all possible. I also consider that the appropriateness and success of these arrangements and C's general welfare in the circumstances should be reviewed by the court in 2 years time in any event.

104. In order to try to minimise the upset and stress for C at the time of the Mother becoming aware of the Court's refusal of her applications and at the time of the Mother leaving Cayman for Canada without him, it seems to me that it may make things somewhat easier for him and help him to become more reconciled to that if he were to move to live with the Father soon. One way of achieving this with least upset for C may be for him to simply remain living with the Father at the end of the next period of weekend residential access following this judgment subject to any other reasonable alternative arrangement agreed by the parties. It is not clear precisely when the Mother will leave Cayman for Canada but in my view, once the parties are aware of the Court's decision, steps should be taken to minimise the impact of the Mother's likely upset on C. Having said that, in my opinion, if the Mother does not leave Cayman very soon, she should have regular

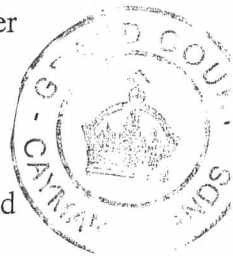


access to C in the meantime. I should also say that the Mother must try to grasp and appreciate the fact that the decision that C should remain in Cayman living with the Father is considered to be in C's best interests, however painful for her that may be. It is clearly desirable that in the interests of C she should do all she can to keep her emotions concerning this decision from him and the Court would hope and expect that she will do so for C's sake.

105. Lastly, I should particularly like to record my appreciation of and gratitude for the considerable assistance of Counsel, Mrs. DaCosta and Mr. Helfrecht, in what I think everyone would agree has been a difficult and stressful case, not only for the parties but also for all of the rest of us.

#### **Orders and Directions**


106. I refuse the Mother's applications in her summons dated 3 August 2007 for sole custody of C and for leave to take C out of the jurisdiction to live with her permanently in Ontario, Canada.
107. I direct that C shall move to reside with the Father who shall have care and control of C with effect from the next period of residential access by the Father following this judgment unless the parties otherwise agree having regard to C's best interests in light of the Mother's likely date of departure from Cayman.
108. As far as access by the Mother once she has left Cayman is concerned, I have already indicated in general terms what I consider to be appropriate. During any time that C is in the care and control of the Father and the Mother has not left



Cayman she should have regular access to C. The details of all such access should be discussed and hopefully agreed between the parties and their attorneys. I further direct that the Father shall at all times do all he reasonably can to encourage and assist C to maintain as close a relationship with the Mother as is practicable in the circumstances, including through frequent communications by telephone, email and letters and by the regular provision to the Mother of information about C and all aspects of his education, health and general welfare as well as through frequent access.

109. I also direct that this matter shall be brought back before the court by the Father for review of all these arrangements and of C's welfare generally in 2 years time in any event.
110. I make no order in relation to the costs of and incidental to the Mother's applications and the hearing thereof.
111. I recognise that there are issues consequential upon these orders which will require to be determined, I hope by agreement. However, I will endeavour to make myself available to resolve any outstanding matters.

Dated: 21<sup>st</sup> day of February 2008



The Hon. Mr Justice Foster  
Acting Judge of The Grand Court

