

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FAMILY DIVISION**
3
4

CAUSE NO. FAM 36 OF 2013

6 **IN THE MATTER OF AM**

8 **Appearances:** Ms. Sonia Bush of Sonia Bush & Associates for the father,
9 AEM.

10
11 **Before:** Hon. Justice Richard Williams

12
13 **Heard:** 19 January 2016

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15 **Transcript of Ex Tempore**
16 **Ruling provided:** 19 January 2016



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20 **EX-TEMPORE RULING**

21
22 **The Background**

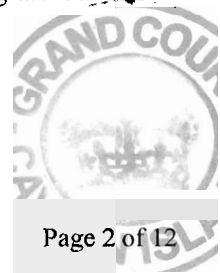
23 1. This matter comes before me this afternoon in my capacity as the Judge
24 responsible for the Family Division of the Grand Court and also due to my being
25 The Hague Convention Network Judge for the Cayman Islands.

26
27 2. Due to the requirement for a prompt decision to be made, I give this in the form of
an Ex-Tempore Ruling. A copy of this oral ruling will be transcribed and copies
provided later on this afternoon to the parties. Additionally, I permit copies of the
judgment to be provided to the parties' attorneys and the Court in any related

1 proceedings that may be brought in Jamaica. Most regrettably, Jamaica is still not
2 a signatory to the 1980 Hague Convention on the Civil Aspects of International
3 Child Abduction (Hague Abduction Convention). I am not aware of any bilateral
4 agreements in force between Jamaica and the United Kingdom and her Territories
5 concerning international parental child abduction. I believe that custody/residence
6 orders and judgments of foreign courts are not automatically enforced in Jamaica,
7 but may be formally recognised by a Jamaican Court. The father will need to
8 obtain legal advice from an attorney in Jamaica.

9
10 3. This matter concerns AM (female), born on 8 September 2005 and who is,
11 therefore, 10 years old. AM is a Caymanian national and has resided in the Islands
12 until the mother removed her on or around 24 December 2015. Her parents were
13 married on 24 July 2004. There are ongoing divorce proceedings commenced by
14 the mother in the Cayman Islands which have not concluded as there remains to
15 be resolved a jurisdictional issue as the father contends that a decree absolute was
16 properly obtained by him in Jamaica on 26 November 2010.

17
18 4. AEM, the child's father, is a Caymanian national and MM, the mother, is a
19 Jamaican national, but she holds Permanent Residency status here. At paragraph 3
20 of her Divorce Petition filed on 27 February 2013, MM pleads that she is
21 domiciled in the Cayman Islands and in paragraph 5 of her verifying affidavit, she



swore on 27 February 2013 she states that she has been living here for more than 9 years, in other words throughout the relevant child's life.

4 5. On 16 September 2014 a Court Welfare Officer's Report was requested from the
5 Department of Children and Family Services into the issue of shared residence
6 and contact, applications to be determined within the ongoing divorce
7 proceedings. On the same date, by consent, a prohibited steps order was made
8 prohibiting either party from removing the child from the jurisdiction without the
9 written consent of the other party or order of the Court. That order did not have an
10 expiry date and remains in force. As the mother has removed the child from the
11 jurisdiction without the father's consent or an order of the Court she is
12 fundamentally in breach of this order of the Grand Court.

13
14 6. On 17 December 2014 the parties signed an Agreement witnessed by Lucille
15 Bodden, the social worker tasked with preparing the Court Welfare Report. This
16 Agreement is important, as it clearly illustrates that the parties recognised the
17 importance of both parents to AM and the need for both of them to be involved in
18 making decisions about the child's future. The Agreement highlights that there
19 was a clear understanding and recognition that neither parent could act
20 unilaterally when making important decisions concerning the child. The parties
21 stated in the Agreement:
22



- 1 “1. We realise that our child loves both of us and that it is important
2 for us to be involved in her life; consequently, we agree that both
3 of us have parental responsibility and will be involved in making
4 decisions about the care of our daughter¹ as she is at an
5 impressionable age.
6 2. We agree that our daughter will reside with (the mother), while
7 (the father) has liberal access, more specifically every day after
8 school until approximately 6 PM and every other weekend from
9 Friday until Sunday after church. In addition, there will be room
10 for flexibility by both of us should there be a need.
11 3. We agree that the other parent will care for the child fully in the
12 event the other parent has to travel.
13 4. We agree that our daughter will not be subjected to the adult
14 matters and any animosity between us.
15 5. We agree to return to the Department of Children and Family
16 Services for mediation if proven necessary.”
17

- 18 7. In the spirit of the Agreement, when the matter came back before the Court on 18
19 December 2014, by consent, a Residence Order was made in relation to AM in
20 favour of her mother. By consent, liberal and flexible contact was ordered
21 between AM and her father. It was agreed in the same order that the husband
22 would pay \$450 per month child maintenance, and this was increased to \$525 per
23 month in the order of McMillan J. made on 28 May 2015. Under the Children
24 Law (2012 Revision) (“the Law”) married birth parents always have and share
25 parental responsibility for their child.

¹ My emphasis by underlining.



1 **The Application**

2 8. **The father** seeks orders as a consequence of the alleged wrongful removal and
3 retention of AM in Jamaica since 24 December 2015. The particulars of and the
4 factual basis for the application are set out in the father's affidavit sworn and filed
5 today. The father's evidence is that the mother removed AM without his
6 permission and that he had no idea she was leaving with AM. The father states
7 that the mother has no intention of returning AM to the Cayman Islands, where
8 the child has lived throughout her life.

9
10 9. The father seeks orders (i) determining the habitual residence of the child; (ii) for
11 the immediate return of AM to the jurisdiction; (iii) residence in his favour and
12 (iv) supervised contact for mother with AM. I will also consider making an order
13 (i) confirming the prohibited steps order to prevent the removal of AM from the
14 /jurisdiction, especially as under newly adopted procedures any such order has to
15 be registered with the Immigration Department. Having regard to the mother's
16 flagrant breach of the Consent Prohibited Steps Order, I will also consider
17 whether to order the suspension of the existing child maintenance order made by
18 this Court.

19
20 10. **Ex-Parte** Orders of this nature are Draconian and are ordinarily made only in
21 exceptional circumstances, based on sufficient evidence filed by the Applicant. A
22 determination is made by the Judge based on the evidence placed before him by

1 an applicant in the absence of any representations from the other party. Therefore,
2 an applicant has a clear duty to assist the Judge and provide the Court with full
3 and frank disclosure of the evidence, in other words, he has a high duty of
4 candour. A failure to do so would ordinarily be grounds for a discharge of the
5 order. An applicant at an ex parte hearing should, if aware of it, outline to the
6 Judge any defence the respondent would likely argue if they had been in
7 attendance. For example, if the father had knowledge that the mother intended to
8 return AM to the Cayman Islands. I note that, in a “WhatsApp” message exhibited
9 to the father’s affidavit and sent on 5 January 2016 to him by the mother after he
10 had requested details about when AM would be returning to the jurisdiction, she
11 made it clear that she was not coming back to Cayman and had relocated to
12 Jamaica, primarily for education reasons. She said that he was free to visit, but
13 ended the message by saying “...wherever I go my daughter will go to.”
14

- 15 11. When I today consider the father’s Ex Parte Application before me I am acutely
16 aware of the obligation placed upon the applying party and the Court at such
17 hearings. Mostyn J. in *UL v BK* [2013] EWHC 1735 (Fam) sets out his concerns
18 about the overuse of ex-parte applications and the duty placed on the applying
19 party. Although that is a case dealing with freezing injunctions made within
20 divorce proceedings, the general principles arising out of his review of the case
21 law are insightful when considering Children Law applications.
22



1 **Habitual Residence**

2 12. I am aware of the following case law. Due to the urgency of the situation, I herein
3 set out my review of the case law in my decision in *CMS v RGS* Fam 177 of
4 2013. Therein I stated that it is the habitual residence immediately before a
5 wrongful removal or retention that is the determining factor when considering
6 habitual residence: *RE S (A Minor) (Abduction)* [1991] 2 FLR 1 & *Re F*
7 *(Minors) (Abduction: Habitual Residence)* [1992] 2 FCR 595.

8

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

12 “2. *Habitual residence is a question of fact to be determined by the*
13 *trial judge. He or she should normally stand back from the*
14 *evidence and take a general view, rather than conducting a*
15 *microscopic search. An appreciable period of time and a settled*
16 *intention will be necessary to enable a person to become habitually*
17 *resident in country B as opposed to country A.*

18 3. *The requested period of time is not fixed and will depend upon*
19 *the facts of each case. Bringing possessions, doing everything to*
20 *establish residence before coming, having a right of abode,*
21 *seeking to bring family, durable ties with country of residence or*
22 *intended residence and many other factors have to be taken into*
23 *account. Habitual residence may be acquired despite the fact that*
24 *a move may only have been temporary or on a trial basis. A month*
25 *has been held to be ‘an appreciable period of time’ though that has*
26 *been described as ‘the high watermark’ in a case where the Court*



of Appeal upheld the trial judge's finding that six weeks was sufficient to result in the acquisition of a new habitual residence.

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

5. The habitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without express and tacit consent of the other or order of the court."²

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

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

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

Patten L.J. said at paragraph 52:

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

² My emphasis.



1 16. Even though the mother has parental responsibility, she is not able to take
2 unilateral action to remove AM from the Cayman Islands. AM has resided in the
3 Cayman Islands throughout her life. It is clear, from an objective view of the facts
4 of this case, that before the mother's unilateral actions in relation to AM that she
5 was and is habitually resident in the Cayman Islands. It is also important to note
6 that the mother clearly accepts that the Cayman Islands is the appropriate
7 jurisdiction to determine any issues concerning AM, because it is she who has
8 brought the still ongoing divorce proceedings in which she plead that she was
9 domiciled in the Cayman Islands and in which she has sought and agreed to the
10 making of Children Law orders in relation to AM.

11
12 17. AM's habitual residence cannot change unless all of those with parental
13 responsibility create a change, for instance that they arranged for the child to live
14 in settled circumstances in Jamaica, or for example themselves moving to the
15 Jamaica for a settled purpose. What is important is that they changed the habitual
16 residence voluntarily. It is important not to elevate the test into a domicile or
17 quasi-domicile test because habitual residence is a question of fact. Consent,
18 agreement, acquiescence, acceptance of each of those with parental responsibility
19 is crucial because of the requirement that residence must be "voluntary" to be
20 habitual. If it is not voluntary, it cannot be said to have been settled. Accordingly,
21 admittedly only on the evidence currently before me and without having the

benefit of hearing from the mother, I find that AM remains habitually resident in the Cayman Islands.

18. I am satisfied that the mother has wrongfully removed AM from the Cayman Islands in breach of the custody rights attributed to the father who has parental responsibility.

Orders

19. Accordingly, I make a specific issue order requiring the mother to return AM immediately to the jurisdiction. A penal notice is attached to this order.

20. I suspend the Order of 28 May 2015 requiring the father to make child maintenance payments of \$525 per month into the Court Funds Office until further order.

21. I make a new prohibited steps order, which upon AM's return to the jurisdiction, prohibits anybody from removing her from the jurisdiction without an order of the Court. A penal notice addressed to both parties is attached to this part of the order.

22. I have carefully considered the father's application for an ex parte residence order. I am satisfied that due to the circumstances surrounding the removal of AM, on the evidence before me, that this case falls into one of those exceptional

circumstances for the making of an ex parte interim residence order mentioned by
Butler – Sloss L.J. in *Re G (Minors) (Ex parte interim residence order)* (1993) 1
FLR 910 at 912D when she stated:

4 *“In my judgment, it is very rare indeed that it is necessary to have*
5 *an ex parte interim residence order. The only situation I can think*
6 *of is where there is a “snatch” situation – child abduction. There*
7 *obviously will from time to time be other exceptional*
8 *circumstances in which it is necessary for the protection of the*
9 *children that there should be an ex parte order.”*



11 23. When considering whether to make the prohibited steps order and the interim
12 residence order, I have considered the contents of the welfare checklist set out in
13 s.3(3) Children Law (2012 Revision). In particular, I am satisfied that, in the
14 interim, this 10 year old female child’s physical and emotional needs can be met
15 by AEM.

16
17 24. Having regard to all of the circumstances of this case, including the fact that it is
18 an abduction case, I am satisfied that an interim residence order and the
19 aforementioned prohibited steps order are required to give certainty which would
20 be in the best interests of AM, which are paramount. I have considered the no
21 order principle contained in s.3(5) Children Law (2012 Revision).

1 25. Upon the mother's return to the jurisdiction I order that she will have regular and
2 flexible contact with the AM. It would not be in the child's best interest to have
restricted supervised contact with the mother. With the orders I have put in place
and the newly established procedures with the Immigration Department when a
prohibited steps order has been made preventing removal from the jurisdiction,
6 there is no need for supervision.

8 26. I give leave to the mother to apply to vary or discharge these orders on 48 hours'
9 notice (excluding weekends and public holidays) to the father. The mother must
10 personally attend the hearing of any application she makes.

11

12 Dated this 19th day of January 2016.

13

14

15
16 **The Honourable Mr Justice Richard Williams**
17 **JUDGE OF THE GRAND COURT**



18

19 The judgment was delivered in private, but the Judge hereby gives leave for it to be
20 published.

21

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