



# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION

2024: No. 26

**BETWEEN:**

**A**

**Appellant**

**-and-**

**B**

**Respondent**

## RULING

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**Before:** **Hon. Alexandra Wheatley, Acting Puisne Judge**

**Appearances:** **Adam Richards of Richards Limited for the Appellant**

**The Respondent, In Person**

**Date of Hearing:** 9 October 2024

**Date of Submissions:** 16 October 2024

**Date Draft Circulated:** 26 November 2024

**Date of Ruling:** 28 November 2024

*Child Access; Allegations of Emotional, Physical and Sexual Abuse;  
Finding of Facts; Civil Burden of Proof*

## **RULING** of Acting Justice Alexandra Wheatley

### **INTRODUCTION**

1. This hearing emanates from an appeal of an order made by the Magistrates' Court on 25 June 2024 (**MC June Order**). The subject matter of the appeal made by the Appellant (hereinafter referred to as the Father) is twofold: (1) the refusal of the Learned Magistrate to grant the Father overnight access to the parties' 4 ½ year old child (hereinafter referred to as **Y**) in circumstances where no issues of welfare such as neglect, harm or ability of the Father to care for **Y** were raised by the Mother during the Magistrates' Court appearance; and (2) the sum of maintenance awarded to the Mother as the Father says the parties respective incomes and expenses were not properly considered.
2. The issue of child maintenance has not yet been heard as following the filing of the appeal, several disputed concerns were raised in relation to the Father's access with **Y** in accordance with the MC June Order.
3. Between 21 July 2024 and 23 August 2024 which was the first return date of the appeal, the Mother made various allegations against the Father that he had inflicted physical abuse on **Y**. The allegations continued and escalated in nature to include allegations of sexual abuse up to 20 September 2024 which was the third return date of the appeal for case management purposes. The Mother has made a total of eight allegations of abuse (a mix of physical and sexual abuse) against the Father. Six of these eight allegations were reported to the Department of Child & Family Services (**DCFS**), with one not being reported at all. With regard to the eighth reported allegation, the Mother was advised to contact the Police in relation to her attendance with **Y** at the King Edward Memorial Hospital (**KEMH**), which resulted in an immediate investigation.
4. The Mother also obtained a Temporary Domestic Violence Protection against the Father on an *ex-parte* basis on 15 August 2024 Order (**the Temporary DVPO**). The Temporary DVPO was thereafter resolved by consent on 12 September 2024 on the basis that the Father did not make any admissions as to the allegations made in the Mother's application for the Temporary DVPO which was filed on 15 August 2024 (**the Mother's DVPO Application**).
5. At the case management hearing on 20 September 2024, given the seriousness of the allegations made against the Father in relation to **Y**, I made an order that the Supreme Court would retain jurisdiction of all matters relating to **Y** under its inherent jurisdiction. Furthermore, given the nature of the allegations it was necessary to list a fact-finding hearing for this matter to progress any further.

6. Therefore, this hearing is solely for the determination of narrow issues as to (a) whether the allegations occurred, (b) whether the Mother has fabricated the allegations, and (c) in the alternative, a finding that the Mother believes abuse has occurred where none exists, and that such behavior has caused emotional harm to Y.

## THE EVIDENCE

7. The Mother relies on her second affidavit sworn on 27 September 2024 (**Mother's Affidavit**) as well as her *viva voce* evidence at the hearing. The Father relies on his second affidavit sworn on 8 October 2024 (**Father's Affidavit**) as well as his *viva voce* evidence. Additionally, the Investigations Team of DCFS provided a letter dated 17 September 2024 (**the DCFS Report**) in relation to the outcomes of the complaints made by the Mother. The Investigations Team also provided a report via email to the Court on 20 September 2024 addressing three additional complaints that had been made subsequent to the Report being written and sent to the Court.

8. The Mother's Affidavit says that when Y comes home after having access with the Father, that Y "*is a different child*". The Mother asserted as follows in paragraph 4 of the Mother's Affidavit:

*"4....His demeanour changes completely, he becomes easily upset and becomes incontinent...When I speak to [Y] about these [bruises] or ask him how he is feeling his answers are very dismissive, seem rehearsed, and are protective of the [Father], causing me to fear that the [Father] is coaching [Y] as to what to say and is grooming him..."*

9. In cross-examination the Mother accepted that the nature of the allegations of abuse had increased in severity on each occasion. She stated "*Yes, of course, because that's how abuse works*" and asserted that it is the "*natural cycle of an abuser to escalate from physical to sexual abuse*".

10. The Father denies all the allegations made against him by the Mother in both his affidavit and throughout his cross-examination by the Mother.

11. As it relates to the each of the eight allegations, the Mother's evidence is summarized as follows:

- (i) **From Access with Father on 21 July 2024:** The Mother states that Y was returned to her after having access with the Father with a "*mark on [Y's] thigh*" and says he was "*very subdued and reclusive during [Y's] friend's birthday party*". The Mother also said she had concerns about spontaneous incontinence

for which she reported that she took Y to the pediatrician on 22 July 2024. In cross-examination the Mother accepted that the pediatrician did not believe Y's incontinence symptoms was a child protection issue and suggested that the incontinence could be stress related. The Mother accepted that Y disclosed nothing to her or to DCFS in relation to this complaint but stated under cross-examination that the reason for Y not disclosing anything is because he has *"been groomed since a small child and told you'll go to jail if you tell"*. The Mother also accepted that Y "falls over a lot" and is "very clumsy and wild". The Father produced an email from Y's school which requested the Mother to provide Y with a different pair of school shoes as the pair Y was wearing were too big and Y kept falling over. The DCFS Report confirms that Y made no disclosure during the interview and the allegation was unsubstantiated.

- (ii) **From Access with Father on 4 August 2024:** The allegation is that Y returned to her care on 4 August 2024 after having access with the Father and Y had bruising on his face, hips and *"bottom"*. On this occasion the Mother did not make a complaint to DCFS. Father produced photographs from this date.
- (iii) **From Access with Father on 11 August 2024:** The Mother makes a 3<sup>rd</sup> allegation as well as makes a complaint to DCFS alleging that Y had a bruise on his cheek and forehead and that Y had told the Mother that the Father had *"roughed him up and threw him on the bed"*. The Mother accepted that she has no photograph of the alleged injuries and that play fighting is actually a good thing between a father and son as she stated that she *"read in parenting books that it builds oxytocin in a child that a mother cannot"*. The DCFS Report confirms that Y made no disclosure during the interview and the allegation was unsubstantiated.
- (iv) **From Access with Father on 25 August 2024:** On this occasion the Mother alleged that when Y returned from having access with his Father on 25 August 2024, that Y had a bruise on his face as well as one on his arm. This allegation was reported to DCFS on 28 August 2024. When asked why there was delay in reporting to DCFS the Mother said because the situation was "overwhelming". The Father submitted a video recording which shows Y shirtless with his arms up turning around so that his face, torso and arms can be seen. The Mother accepted that it would take approximately 12 minutes for Y to have been returned to the Mother's residence on this day. Photographs were produced by the Mother of the alleged injuries.
- (v) **From Access with Father on 1 September 2024:** An allegation of sexual abuse, namely that the Father had showered with Y and asked Y to touch/wash

his genitals. The Mother made a 5<sup>th</sup> allegation and issued a further complaint to DCFS. This complaint alleges that on 1 September 2024, after Y had been returned to the Mother following access with the Father, that Y had disclosed to her during bath time that evening that the Father had made Y wash the Father on “*his bum, his penis and all over his body*”.

- (vi) **From Access with Father on 15 September 2024:** An allegation of bruising to the forearms, thighs and buttocks of Y. The Mother made a 6<sup>th</sup> allegation and complaint to DCFS alleging that after Y had access with his Father that Y had returned home with “*deep, tender to touch bruises on his forearms, thighs and buttocks*”. The Mother also reported that since returning home that Y had five incidents of spontaneous incontinence (three urine and two fecal). DCFS’ Screening Coordinator determined that these allegations did not require investigation “*as it does not meet the threshold for maltreatment concerns*”. The Mother relied on photographs of the bruises and asserted under cross-examination that the bruises were not as dark in the photographs compared to two to three days later when they would have been the darkest.

This incident was described by the Mother in her written submissions as follows: “*Of all the dates that I am most concerned about it is September 15, 2024, because it was the most severe of all the injuries*”.

- (vii) **From Access with Father on 17 September 2024:** An allegation that Y had suffered a busted lip, scratches on his chest and several bruises. During the Mother’s meeting with DCFS regarding the 6<sup>th</sup> allegation the Mother made a 7<sup>th</sup> allegation against the Father to DCFS alleging that after Y had access with the Father on 17 September that he was returned home with “*a busted lip, scratches on his chest and several bruises on his body about the size of a quarter*”.

Under cross-examination the Mother stated that she had never reported that Y had a “*busted lip*”, but rather said she told the DCFS investigators that it was a small cut that Y could have made from biting his lip and that she was also not concerned about the scratches on his chest as she believed Y had likely done that to himself from scratching at an itch.

- (viii) **From Access with Father on 19 September 2024:** An allegation of sexual abuse, namely that the child complained of pain to his bottom and the Mother, having observed the area, described his anus to be dilated with red spots which she could not tell whether these were tiny cuts. The Mother made an 8<sup>th</sup> allegation and contacted police to make report whilst she was at the hospital

with Y (attended hospital with Y around 10:30 p.m. and did not leave until after midnight). The allegation was a further one of sexual abuse against the Father after access previous day. Y taken to hospital by Mother who reported that “[Y] had blisters on his anus and that his anus was dilated”. A mandatory SART exam was conducted at the hospital, and it was confirmed that there were no significant findings to indicate that sexual abuse had occurred. The Police did not carry out an investigation given the results.

12. The Mother also made references to additional incidents where she says that Y obtained bruises, scratches and night terrors which she alleges occurred in 2021 and 2022 during times when Y would have access with the Father. The Mother says that she did not have concerns at these times as she asserts that access was minimal so that she “*did not make the connection*” between Y’s injuries/symptoms and access with the Father. Paragraph 8 of the Mother’s Affidavit states as follows:

*“8. In 2022 there were some instances where the [Father] had [Y] in his care and I had concerns about what had transpired during access. The Appellant would be very touchy with [Y] in front of me, and when [Y] protested or tried to get away, the [Father] would restrain him and say things like, “I can touch you, I’m your father”, and “you can’t say no to me, I’m your father” ...The [Father] would bump or hurt [Y], during play fights or clumsiness and then try to convince [Y] that he did it to himself or jokingly blame it on another child, which confused [Y]. When I addressed my concerns, the [Father] became defensive.”*

## **THE LAW**

13. There were no arguments contesting the law surrounding fact-finding hearings which can be summarized as follows:
- i. The standard of proof is the civil standard, namely the balance of probabilities. The seriousness of the allegation does not create any difference to the standard of proof. The inherent probabilities are simply something to consider.
  - ii. It is for the person who asserts the fact to prove the allegation. It is not for the accused to disprove it by showing how the injuries were in fact sustained.
  - iii. Any findings must be based on evidence and not suspicion or speculation.
  - iv. It is essential that the Court forms a clear assessment of the parties’ credibility and reliability.

14. The guiding legal principles to be applied in fact finding hearings can helpfully be found in the judgment of *Devon County Council v EB and others* [2013] EWHC 968 (Fam). In this case, Justice Baker identified ten aspects the Court should keep in mind when considering fact finding hearings.
15. At paragraphs 53 and 54, Justice Baker established that the burden rests with the person making the allegations and the standard of proof is the balance of probabilities rather than the criminal hurdle of beyond a reasonable doubt:

*“53. In determining the issues of this fact-finding hearing, I apply the following principles. First, the burden of proof lies with the Local Authority. It is the Local Authority that brings the proceedings and identifies the findings they invite the court to make. Therefore, the burden of proving the allegations rest with them.”*

*54. Secondly, the standard of proof is the balance of probabilities, *Re B* [2008] UKHL 35. If the Local Authority proves on the balance of probabilities that E and/or J have sustained non-accidental injuries inflicted by one of their parents, this court will treat that fact as established and all future decisions concerning their future will be based on that finding. Equally, if the Local Authority fails to prove that E or J was injured by their parents, the court will disregard that application completely. As Lord Hoffman observed in *Re B*:*

*“If a legal rule requires facts to be proved, a judge must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are nought and one.”* [Emphasis added]

16. In terms of evidential considerations, Justice Baker, set out the following principles commencing at paragraph 55:

*“55. Third, findings of fact in these cases must be based on evidence. As Lord Justice Munby, as he then was, observed in *Re A (A child) (Fact Finding Hearing: Speculation)* [2011] EWCA Civ. 12: “It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation”.*

*56. Fourthly, when considering cases of suspected child abuse, the court must take into account all the evidence and furthermore consider each piece of evidence in context of all the other evidence. As Dame Elizabeth Butler-Sloss, President observed in *Re U, Re B 9 (Serious Injuries: Standard of Proof)* [2004] EWCA Civ. 567, the court*

“invariably surveys a wide canvas”. In *Re T* [2004] EWCA Civ. 558, [2004] 2 FLR 838 at paragraph 33 she added:

*“Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to the other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the Local Authority has been made out to the appropriate standard of proof.”*

57. *Fifthly, the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental injury includes expert evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence.* In *A County Council v KD & L* [2005] EWHC 144 Fam. at paragraphs 39 to 44, Mr Justice Charles observed: “It is important to remember that (1) the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. The judge must always remember that he or she is the person who makes the final decision.”

Later in the same judgment, Mr Justice Charles added at paragraph 49:

*“In a case where the medical evidence is to the effect that the likely cause is non-accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non-accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof ... The other side of the coin is that in a case where the medical evidence is that there is nothing diagnostic of a non-accidental injury or human agency and the clinical observations of the child, although consistent with non-accidental injury or human agency, are the type asserted is more usually associated with accidental injury or infection, a court can reach a finding on the totality of the evidence that, on the balance of probability there has been a non-accidental injury or human agency as asserted and the threshold is established.”*

As Mr Justice Ryder observed in *A County Council v A Mother and others* [2005] EWHC Fam. 31: “A factual decision must be based on all available materials, i.e. be judged in context and not just upon medical or scientific materials, no matter how cogent they may in isolation seem to be”.

...

59. *Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility*



*and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them: see Re W and another (Non-accidental Injury) [2003] FCR 346.*

*60. Eighth, it is not uncommon for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for various reasons, such as shame, misplaced loyalty, panic, fear, distress and the fact that the witness has lied about some matters does not mean that he or she has lied about everything: see R v Lucas [1981] QB 720.” [Emphasis added]<sup>1</sup>*

17. Mr Richards also referenced the crucial principle that the seriousness of the nature of the allegation does not require a higher burden of proof than the balance of probabilities. This position was confirmed in the case of *Ealing London Borough Council v JS and another* [2022] Lexis citation 40, Baroness Hale’s confirmation of this principal is confirmed at paragraph 5 which says the following:

*“...the standard of proof in finding the facts...is the simple balance of probabilities...Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied to the facts.”*

## **THE MOTHER’S POSITION**

18. The Mother is adamant that the alleged injuries incurred by Y could only have been caused by the Father. The Mother maintains that there is historical evidence of abuse which she did not connect with the Father due to his inconsistency in exercising access with Y. Furthermore, she says that there has shown to be a clear pattern of Y receiving the alleged injuries from July to September 2024 as they were apparent upon Y’s return home after having access with the Father.
19. On the two occasions that the Mother says Y disclosed the abuse to her, the Mother asserts that she believes that what Y told her was the truth and she continues to have concerns with the Father having unsupervised access with Y.

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<sup>1</sup> For the purposes of this case, the sixth factor set out by Justice Baker has not been referenced as it is not applicable to this case as it relates to a specific type of injury inflicted.

## THE FATHER'S POSITION

20. The Father denies all the allegations made against him by the Mother. Mr Richards submitted that there several issues with the evidence the Mother has presented to support her allegations which can be summarized as follows:

- i. There is very little by way of corroborating evidence. The Mother produces undated photographs which do not assist the Court in deciding whether these matters occurred and, in some instances, there are no photographs produced at all.
- ii. There is some evidence from doctors and DCFS that bruising was witnessed. However, each of the allegations was reported two or three days after the alleged incident.
- iii. At no time has the child made an allegation to the Mother that the Father has struck him. The only incident contended by the Mother was that on 11 August 2024 the child stated that the Father threw him on his bed during rough play.
- iv. The lack of disclosure is inconsistent with the Mother's own evidence where she stated that Y was: "*Very outgoing. Very jovial. If he had concerns, he would tell me. He trusts me*". The evidence, however, shows that Y has not complained to his Mother that his Father has caused him any harm.
- v. Likewise, Y has not made any disclosures to the Police or to DCFS. Initially the Mother contended that, given his age, Y was not ready to talk to anybody, yet in her evidence she stated clearly that Y's character was such that he would run up and hug strangers and be open with them. Again, he has not made any disclosures despite that description of his character.
- vi. When it was put to the Mother that this was inconsistent with Y's failures to disclose, the Mother simply contended that the child had been groomed from a very young. No evidence or examples of the Father's "grooming" was provided by the Mother.
- vii. The grooming charge is inconsistent with the evidence which shows the Mother raised no concerns in the Magistrates' Court in June and had allowed free and liberal access until this summer.
- viii. The cross-examination of the Father was also very strange. Even accounting for the fact that the Mother was not represented, her focus was upon structure and

welfare issues, and she hardly put anything to the Father regarding the allegations.

- ix. The Mother's evidence was almost entirely devoid of emotion. She did not seem nervous even when cross-examining the person who she said was her abuser. She was often jovial.
  - x. The Father's evidence was notable for the way he showed deference to the Mother. He would openly accept that suggestions regarding parenting from her were something that he could consider. The way the Mother cross-examined the Father and the manner in which the Father gave evidence suggested that the Father was very much the submissive party in the relationship. This is borne out by the texts exchanged between them on the school fees.
  - xi. It is the Father's position that the Mother's allegations are extremely coincidental regarding their timing. The chronology shows that the complaints only began after the Appeal was filed, that they have increased in severity over time, and that referrals to DCFS are made at times when the Mother is challenged.
  - xii. Finally, the Father notes that despite repeated investigations, DCFS have found all allegations to be unsubstantiated. The Police have also made the decision recently not to even investigate matters.
21. The Father maintains his position that the evidence shows that the allegations have only been made as a consequence of the Appeal and, in particular, that the Mother is upset that the Father is seeking to pay less in maintenance. The Father refers to the text messages exchanged between the parties on the issue of school fees. It is also noted that the Mother spent a significant amount of time questioning on expenses. For example, asking the Father to comment on his spending at The Beach restaurant and indicating that she would get his spending through some other means.
  22. Mr Richards submitted that there is no proper basis upon which the court can find the Mother's allegations to be proven. The child has made no disclosures, DCFS have found all claims to be unsubstantiated, there is very little, if any, corroborating evidence. In relation to two allegations, there is evidence to show there was no bruising when the Mother claims there was.
  23. Over time the allegations have increased in frequency and severity. It is contended that as the Mother has become frustrated at the refusal of DCFS to substantiate her claims, so the allegations have become more serious.

24. Attention was drawn by Mr Richards to two occasions where the Mother's claims, the Father says, have been proven to be untrue and the Father says is falsified:
- a. From Access with Father on 4 August 2024 – On this occasion the Father took pictures before returning Y to the Mother which show no bruising. The Mother had complained that Y had returned with scratches and a “*busted lip*”. DCFS confirmed there were no marks present and no busted lip. Under cross-examination the Mother said that she told DCFS on this occasion that she was not concerned about these alleged injuries and she accepted Y could have easily inflicted them on himself.
  - b. From Access with Father on 25 August 2024 – The Father took a video of Y just twelve minutes before Y returned the Mother and no bruises can be seen.
25. Additionally, Mr Richards asserted that the Mother's report to the police regarding the DVPO breach and her intent to pursue charges supports the assertion that this is about getting back at the Father rather than child focused.

## **FINDINGS AND ANALYSIS**

26. To assist with establishing a comprehensive view of how this matter has progressed, it was necessary to prepare a chronology of these proceedings and the allegations. Mr Richards produced a chronology with his written submissions which I have largely used to prepare the which can be found at **Appendix 1 (the Chronology)**. Particular consideration when compiling the Chronology was given to the Father's position as to the Mother's motives in falsely making these allegations against him.
27. The Mother was well prepared and very articulate when presenting her submissions as well as during her cross-examination of the Father; however, the Mother's evidence is conflicting and inadequate. I accept Mr Richards' summation of how the Mother presented on the stand as being lacking of emotion which one would expect of a mother in a hearing surrounding the alleged abuse of her child. She did not appear to nervous even when cross-examining the Father whom she says she is fearful of.
28. Whilst the Father did show some nerves, his evidence appeared to be both thoughtful and genuine. It is clear the Father has a sincere desire to play a significant role in Y's upbringing and that he is willing to do the utmost to ensure that he can do so. The Mother does also clearly love and care for Y, but her view of the Father appears to unnecessarily create upset and discord between her and the Father where there is none. Where the Mother and Father's evidence conflict, I prefer that of the Father.

29. Overall, the Mother's evidence set out in her affidavit, her *viva voce* evidence in cross-examination and in her submissions were extremely inconsistent. The Mother's Affidavit says that in 2021 Y started to have bouts of "*unexplained sadness, bruises on his legs and bottom, and night terrors, during periods that the [Father] exercised access*"<sup>2</sup>. In the Mother's verbal submissions she says that she had concerns with the Father neglecting Y since Y was born. Her written submissions go on to state that "*DCFS has been aware of the alleged neglect since April 2023*" when she is reported she had allegedly seen the Father give Y some espresso martini. Weighing these contradictions against the fact that during the appearance before the Magistrates' Court, the Mother neither raised any concerns against the Father's ability to care for Y, nor did she submit that she had suspicions the Father was abusing or neglecting Y (or had done so in the past) when Y had been in the Father's care. Furthermore, when the parties appeared in Magistrates' Court, the Mother did not make any assertions whatsoever that she feared the Father and that the Father was inflicting domestic violence against her. The Mother's DVPO Affidavit specifically addresses historical allegations which preceded the appearance in Magistrates' Court in June 2024 which does not accord with her assertion that she is fearful of the Father. Indeed, the Mother made much criticism of the Father not participating in the mediation process which she says was ordered by the Magistrates' Court.
30. Whilst the Mother accepted that she has not witnessed the Father inflicting any abuse on Y, she stated in her submissions that she has "*seen the consequences of a small child being terrified to leave home and be with his Father unsupervised*". She gave no evidence of this other than stating that Y had said to her on occasions that he did not want to go with the Father. The video produced by the Father where Y runs in open arms to him paints an entirely different picture. If a child is "*terrified*" of someone, exhibiting this excitement and joy that can be seen in the video directly opposed the Mother's evidence. Additionally, the video shows the Mother actually walking towards the Father and does not appear to show any fear or distress in being in proximity to the Father as she makes no attempt to remain where she was when Y ran towards the Father. It also appears to me that the Mother is smiling in the video whilst walking towards the Father.
31. Notably, one of the Mother's general explanations for not reporting the occasions where she said Y had bruises for at least two days after Y's return from having access with the Father, is that bruising takes time to develop so would not show up for a couple of days. This would have been a very reasonable explanation had it not been for the fact that the Mother accepted that it would take approximately twelve minutes travel time for Y to return from Y's grandmother's house to the Mother's and a video produced by the Father of Y just prior to him being returned home shows no bruising whatsoever, yet the Mother alleges that she saw the bruises immediately upon Y's return to her house that day. Indeed, having reviewed all the photographs

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<sup>2</sup> Paragraph 7 of the Mother's Affidavit.

provided by the Mother, I must say that in most of the pictures it is difficult to make out the bruising. One would have thought that if the suggested bruising was so significant that it could easily be seen and that one would have captured photographs of the alleged progression in the development of the bruises had there been genuine concerns of abuse.

32. The Mother's cross-examination of the Father was very unusual. This was not due to her being a litigant in person. Her questions were mostly irrelevant to assisting the Court with determining the allegations she made. Some of this unhelpful questioning included asking the Father if he could provide examples that show how he has a good relationship with Y. The Mother specifically asked about Y not having access to Y's pedal bike at the Father's residence for ten months, which she put to the Father would be something that would undermine Y's confidence, which had no relevance whatsoever to the purpose of this hearing. It appeared the Mother was putting questions in this way to attempt to elicit the Father to feel badly about his ability to parent.
33. There was also great criticism by the Mother of the Father not exercising access with Y the week commencing 30 September 2024. It was during this week that the Father was served with the Mother's Affidavit detailing the abuse allegations against him as well as when he received the statement from the police surrounding the criminal charges that the Mother is pursuing against the Father for an alleged breach of the Temporary DVPO. During this line of questioning, the Mother put to the Father that him not exercising access is detrimental to Y as there has been an access routine in place for approximately three months and that a sudden stop in this would confuse Y. The Mother even suggested that any deviation in the access routine by the Father should be communicated to Y so as not to have such a detrimental impact, which is a shocking suggestion when there is a Temporary DVPO in place prohibiting the Father from contacting the Mother. In my view, this criticism by the Mother is entirely unwarranted and unreasonable. Whilst the Father admitted that having inconsistent access with Y could be to his detriment, his rationale for doing so; i.e. he had just been served with the Mother's Affidavit setting out the physical and sexual abuse allegations as well as the police statement regarding the Mother's allegation that he had breached the Temporary DVPO; was more than justified. It was evident that the Mother had little to no insight of the impact neither of the allegations made against the Father would have on him, nor what reactions they might elicit in him. The Mother was simply fixated on the Father's lack of consistency.
34. One question that the Mother asked, which I believe was significant was when she said to the Father "*Would you think the allegations would stop if you were to seek help?*". She expanded in her reference to "*help*" meaning with help to cope with his stressors and to become more emotionally intelligent. This was asked when the Mother had not presented any evidence of the Father being unable to "*cope*" with his "*stressors*" and neither did she present any evidence to suggest that the Father had low "*emotional intelligence*" (even though the Mother did not actually define what emotional intelligence meant to her). In my view, the Mother's implication

behind this question was that if the Father were to do what the Mother was proposing in terms of access and any support services, she would no longer make allegations against him. I found this to be most worrisome.

35. Moreover, the question referred to in paragraph 34 above, was put to the Father before the Mother had asked a single question about the allegations she made against him. This question was asked approximately one hour into the Father's cross-examination. It was not until approximately one and a half hours into the Mother's cross-examination of the Father that she began asking the Father questions about the allegations. Even then, the Mother did not ask any specific questions of the Father about each individual allegation. This lack of focus on the actual allegations in itself makes me doubt the Mother's own beliefs that abuse has occurred.
36. The Mother in her cross-examination of the Father also placed great emphasis on the Father no longer wishing to participate in mediation with her to resolve all matters relating to Y. In all the years I have been in the courts (both as counsel and as well as in a judicial capacity), I can say that I have not come across one individual who has been the victim of domestic violence, of any form, be so insistent and unwavering of expressing her desire to participate in a mediation process with her alleged abuser. It truly defies logic and begs the question as to the legitimacy of the allegations the Mother made against the Father in order to obtain the Temporary DVPO.

## CONCLUSION

37. I will start by saying that the allegations which have been made by the Mother are of a very serious nature which will undoubtedly have far-reaching consequences for all of those involved. I am reminded; however, of Baroness Hale's statement in paragraph 5 of her ruling in *Ealing London Borough Council v JS and another* "...the standard of proof in finding the facts...is the simple balance of probabilities...Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied to the facts". The seriousness of the allegation does not set a higher standard of proof.
38. Having considered all the evidence presented and applying the legal principles which are set out in paragraphs 13 to 17 above, I am satisfied the Mother has not met the burden of proof regarding each of her allegations. Therefore, on the balance of probabilities, I find that all the allegations of physical and sexual abuse made against the Father did not occur. In particular, I accept that on the balance of probabilities that the Mother's motivation to make the allegations against the Father, taking into consideration the findings set out above and the Chronology, was due to a clear pattern of dissatisfactions with either the courts, DCFS or the Father's Counsel. This inevitably resulted in the continual escalation of allegations, but also obtaining the Temporary DVPO in what I believe to be disingenuous circumstances.

39. Furthermore, I find that in relation to allegations (i), (iii) and (v) to (viii) that the Mother believed abuse occurred where none exists which had in turn caused emotional harm to Y. As it relates to allegations (ii) and (iv), I find that on these occasions the Mother falsified evidence to make it appear that the Father had physically abused Y.
40. In order for this matter to proceed, the matter shall be listed for mention on the next available date in court to consider access moving forward, further case management directions as well as to consider if the court should give any consideration to the psychological and/or psychiatric assessment(s) of the Mother.
41. Finally, as it relates to costs, and taking into consideration that the parties did not make submissions regarding costs, I am minded to make no order as to costs given the nature of this application. In the event, either party wishes to be heard on costs of this application, the parties have fourteen days to advise the Court of his or her respective intentions, failing which the order of no costs stands.

**DATED** this **28th** day of **November 2024**



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**ALEXANDRA WHEATLEY**  
**ACTING JUSTICE OF THE SUPREME COURT**



## **APPENDIX 1 - CHRONOLOGY OF PROCEEDINGS AND ALLEGATIONS**

- 25 June 2024** The parties attend Magistrates' Court as Mother made application for child maintenance. The issue of access was raised by the Father during this appearance. An order was made both in relation to the Father's access with Y and child maintenance. During this hearing the Mother raised no concerns of Y's welfare in the Father's care and likewise made no assertions that there had been a history of the Father neglecting or abusing Y.
- 16 July 2024** Appeal documents filed by Father and served on the Mother.
- 21 July 2024** The Father has Sunday access with Y.
- 23 July 2024** The Father says was prevented from access by Mother on the basis that "[Y] has an event after camp".
- 25 July 2024** The Father says he was prevented from access by Mother on the basis that "Y is tired".
- 26 July 2024** The Mother makes 1<sup>st</sup> allegation of abuse against the Father and makes complaint to DCFS. The Mother alleges that after Y had access with the Father on 21 July, Y had a bruise on his thigh. The Mother also said she had concerns about spontaneous incontinence for which she reported that she took Y to the pediatrician on 22 July 2024.
- 28 July 2024** The Father has Sunday access with Y.
- 30 July 2024** The Father has no access with Y.
- 4 August 2024** The Father has Sunday access with Y.
- The Mother's 2<sup>nd</sup> allegation of the Father physically abusing Y. Allegation included in the Mother's First Affidavit sworn on 12 September 2024. The allegation is that Y returned to her care on 4 August after having access with the Father and he had bruising on his face, hips and "bottom". On this occasion the Mother did not make a complaint to DCFS.
- 6 August 2024** The Father says he was prevented from having access with Y by the Mother on the basis that "*friends visiting Y*".

**8 August 2024** The Father has no access with Y as he was collected from camp by the Mother.

**11 August 2024** The Father has Sunday access with Y.

**12 August 2024** The Mother wrote two letters to Magistrates' Court. The staff of Magistrates' Court advised the Mother that they would only accept one of the letters .

**13 August 2024** The Father has no access with Y.

Mother makes 3<sup>rd</sup> allegation as well as makes a complaint to DCFS alleging that Y had a bruise on his cheek and forehead and that Y had told the Mother that the Father had "*roughed him up and threw him on the bed*". The alleged injuries sustained by Y were stated as being "*another bruise and a bruise under his eye*".

**14 August 2024** Richards sends email to Mother regarding breaches of Order as preventing Father from having access with Y.

**15 August 2024** The Mother applied for and was granted Temporary Domestic Violence Protection Order against the Father on an *ex-parte* basis.

**19 August 2024** Richards requested access through Center Against Abuse. Mother indicated that she was not advised of this under cross-examination.

**20 August 2024** The Mother wrote a letter to the Supreme Court stating that DVPO does not prevent access and requests that the appeal be dismissed.

**23 August 2024** First return date of the Appeal (for directions) in the Supreme Court. Court confirmed its interpretation of the Temporary DVPO did not require the Father's access to Y to be supervised and as such confirmed that the Father is to have unsupervised access as per the Magistrates' Court Order of 25 June 2024.

**25 August 2024** The Father has Sunday access with Y.

**27 August 2024** The Father does not have access with Y as the Mother confirmed to the camp that she would be collecting Y from camp. Richards wrote to the Mother regarding this occasion of the Father not being able to have access

with Y. The Mother disputes that she prevented access.

- 28 August 2024** The Mother made 4<sup>th</sup> allegation and reported to DCFS. On this occasion the Mother alleged that when Y returned from having access with his Father on 25 August, that Y had a bruise on his face as well as one on his arm.
- 29 August 2024** The Mother writes to Supreme Court alleging that the Father is not permitted to have access with Y and says the Father made an attempt to “*breach the Domestic Violence Protection Order by attempting to see the child without supervision*”.
- 1 September 2024** That Father has Sunday access with Y.
- 3 September 2024** The Father had no access with Y as there was no school or camp this day and the Father was prohibited from attending the Mother’s residence or make contact with her.
- The Mother made a 5<sup>th</sup> allegation and issued a further complaint to DCFS. This complaint alleges that on 1 September 2024, after Y had been returned to the Mother following access with the Father, that Y had disclosed to her during bath time that evening that the Father had made Y wash the Father on “*his bum, his penis and all over his body*”.
- 5 September 2024** The Father attempted to exercise access with Y (in accordance with the Court orders) by collecting him from school, but as the Mother was unexpectedly present the Father decided to not exercise access.
- 6 September 2024** The Father was arrested at 6 a.m. based on the Mother making a complaint to the police alleging the Father had breached the Temporary DVPO the prior day when the Father attended Y’s school in an attempt to exercise access.
- 9 September 2024** The Father files a Notice of Motion for Committal on the basis of the allegation that the Mother not complied with the terms of the Court’s order by preventing the Father exercising access with Y.
- 11 September 2024** DVPO resolved by consent on a no admission basis.
- 15 September 2024** The Father has Sunday access with Y.

**17 September 2024** The Father has access with Y.

The Mother made a 6<sup>th</sup> allegation and complaint to DCFS alleging that after Y had access with his Father that Y had returned home with “*deep, tender to touch bruises on his forearms, thighs and buttocks*”. The Mother also reported that since returning home that Y had five incidents of spontaneous incontinence (three urine and two fecal). DCFS’ Screening Coordinator determined that these allegations did not require investigation “*as it does not meet the threshold for maltreatment concerns*”.

**18 September 2024** During the Mother’s meeting with DCFS regarding the 6<sup>th</sup> allegation the Mother made a 7<sup>th</sup> allegation against the Father to DCFS alleging that after Y had access with the Father on 17 September that he was returned home with “*a busted lip, scratches on his chest and several bruises on his body about the size of a quarter*”.

**19 September 2024** The Father had access with Y from 3 p.m. to 9 p.m.

**19/20 September 2024** The Mother made 8<sup>th</sup> allegation and contacted police to make report whilst she was at the hospital with Y (attended hospital with Y around 10:30 p.m. and did not leave until after midnight). The allegation was a further one of sexual abuse against the Father after access previous day. Y taken to hospital by Mother who reported that “[Y] had blisters on his anus and that his anus was dilated”. A mandatory SART exam was conducted at the hospital, and it was confirmed that there were no significant findings to indicate that sexual abuse had occurred.

**20 September 2024** Next mention date in Supreme Court for further directions.