



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2024: No. 26

BETWEEN:

A

Appellant/Father

-and-

B

Respondent/Mother

RULING

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

Appearances: **Adam Richards of Richards Limited for the Appellant**
Nicole Smith of the Legal Aid Office for the Respondent

Date of Hearing: 15 May 2025
Date of Submissions: 16 May 2025
Date Draft Circulated: 3 July 2025
Date of Ruling: 7 July 2025

*Custody; Care and Control; False Child Abuse Allegations; Legal Principles to Apply in an Appeal;
Section 36.1C of the Children Act 1984; Welfare of the Child the Paramount Consideration*

INTRODUCTION

1. This is the substantive hearing of the Appellant's (hereinafter referred to as **the Father**) appeal of the Magistrates' Court, Family Court decision of 25 June 2024 (**Magistrates' Court Decision**). The subject matter of the appeal is in relation to the parties' now, 5 ½ year old child (hereinafter referred to as **Y**). The appeal is twofold:
 - (i) The refusal of the Learned Magistrate to grant the Father overnight access to the parties' 5 ½ year old child 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 (hereinafter referred to as **the Mother**) during the Magistrates' Court appearance; and
 - (ii) *"The Magistrates Court erred in its assessment of child maintenance which was determined without proper scrutiny of the parties' pause dictation financial positions, including but not limited to:*
 - a. *failing to consider the income of the [mother] and her ability to contribute towards the cost of the minor child, and*
 - b. *failing to consider section 36.1C (4) and in particular the [mother's] capacity to provide support, the measures available for the respondent to be, able to provide support in the length of time to enable her to take those measures; and the desirability or otherwise of the [mother] remaining home to care for the child;"*
2. A fact-finding hearing occurred on 9 and 16 October 2024 (**Fact-Finding Hearing**), following which the determination was issued on 26 November 2024 (**Fact-Finding Ruling**). The purpose of the Fact-Finding Hearing was to determine the narrow issues as to (i) whether the Mother's child abuse allegations made against the Father, (ii) whether the Mother fabricated those allegations, and (iii) 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.
3. To briefly summarize the Fact-Finding Ruling, I made the following findings:
 - (i) that all allegations made by the Mother did not occur;
 - (ii) that two of the allegations made by the Mother had been fabricated by her and that she had falsified evidence;

- (iii) that the Mother's motivation for the complaints against the Father was her dissatisfaction with the courts, DCFS or Counsel;
 - (iv) the legitimacy of the allegations the Mother made against the Father in order to obtain the Temporary Domestic Violence Order in the Magistrates' Court.
4. A costs order was also subsequently made against the Mother in relation to the Fact-Finding Hearing on 4 July 2025 as I considered her actions which led to the necessity of conducting a fact-finding hearing to be unreasonable and reprehensible.

THE LAW

Appellate Jurisdiction

5. The case of *RB v MB* [2014] Bda LR 98 was an appeal of a decision of the Magistrates' Court that set out the circumstances required for an order made in the lower court to be set aside or varied. Justice Wade-Miller at paragraph 47 confirmed the position as follows:

"45. In AW v Director of Child and Family Services [2008] Bda LR 42, Bell J cites Kawaley J (now Kawaley CJ) in D v Attorney General [2004] Bda LR 45 who reflected on the mechanism when dealing with appeals from the Family Court and the effect of the proviso to the Criminal Appeal Act s. 18(1):

'56. It is no doubt helpful to set out how Kawlaey J viewed the application of section 18 (1), since I respectfully agree with approach. He said;

"In my view section 18(1) clearly applies to appeal such. Section 18 of the Children Act confers, on a person dissatisfied with orders made under the 1998 Act, the same right of appeal as a person convicted of an offence by the Magistrates' Court enjoys under the 1952 Act. References to 'conviction' must read as 'order' and references to 'criminal proceedings' as 'civil proceedings', with references to 'sentence' presumably ignored. So a decision of the Family Court can be reversed on the grounds of (a) it being against the weight of the evidence, (b) an error of law, or (c) any other miscarriage of justice. But the proviso entitles this Court to dismiss an appeal if satisfied that "no substantial miscarriage of justice occurred"'.

Bell J continued:

'58. Kawaley J then carried on to consider how the courts to Russian shall be exercised in a child welfare case, given the wording of the proviso, and in particular reference to "no substantial miscarriage of justice". Kawaley J took the view that regard must be had to the provisions of section 6 of the act, and that the requirement that in the administration and interpretation of the act, the welfare of the child should be the paramount consideration. He carried on to say:

“In the appellate context, therefore, seems to mean the circumstances will be in which is not clearly inconsistent with the interests of the child and/or not fundamentally flawed will be interfered with by this Court.”

and

“Thus for this additional policy reason, in my view this court should be slow to second-guess the family Court on the merits of a child welfare decision unless something is obviously materially wrong.” [Emphasis added]

Custody and Care and Control

6. As non-married parents, the application to determine the custody and care arrangements for the children is determined pursuant to the provisions of the Minors Act 1950 (**the Act**).
7. Section 6 of the act confirms that the courts are required the welfare of the minor as the first and paramount consideration and should not consider the claims of either mother or father to be “superior” to the other.
8. Section 12 of the act allows the court to make such orders as it deems fit as it relates to the custody and care arrangements of a child.
9. In addition, section 36C of the Children Act 1998 (**Children Act**) confirms that both the mother and the father “... *as joint guardians of the child and are equally entitled to custody of the child*”, including “*the right to care and control of the child and the right to direct the education of moral and religion training of the child*”.
10. As it relates to a shared care and control order it has been long established that it is no longer necessary to demonstrate that exceptional circumstances exist before an order for shared living arrangements will be granted by the court. There is only a need for it to be demonstrated that a child’s welfare would be best served by an order for shared care¹.
11. In the UK Court of Appeal case of *T v T* [2010] EWCA Civ 1366, the Court of Appeal confirmed that a shared care order did not necessitate an exact equal division of time:

“Whether or not a joint or shared residence order is granted depends upon a determination of what is in the best interests of the child in the light of all the factors in the individual case. However, it has certainly been established that this is not a prerequisite for a shared residence order that the periods of time spent with each adult should be equal and nor is it necessary that there should be cooperation and goodwill between them and shared residence orders have been made in cases where there is hostility.”

¹ Re W (Shared Residence Order) [2009] 2 FLR 436

12. Furthermore, Lord Justice Thorpe confirmed in the case of *Re R (residence: shared care: children's views)* [2006] 1 FLR 491 that the inability of parents to cooperate does not preclude the making of a shared care order:

“... for the judge to dismiss what was an important option on the basis that the parents had the potential for continuing emotional conflict is not good enough.”

13. It was the Court of Appeal's approach in the case of *A v A (shared residence)* [2004] 1 FLR 119, that a shared residence order could encourage parental cooperation, preventing one party from seeking to take control and reinforcing their equal duties and responsibilities. This approach was also taken by the court in the case of *Re L (Relocation: Second Appeal)* [2018] 2 FLR 608.

Child maintenance

14. PART IVB of the Children Act sets out the parameters that must be considered when making an order for child maintenance. The relevant sections are as follows:

“Obligation of parents to support child

36.1B (1) Every parent has an obligation, to the extent the parent is capable of doing so, to provide support, in accordance with need, for his or her child who is unmarried and is under the age of 18 years or, if 18 years of age or over, is enrolled in a full-time programme of education or is unable, by reasons of illness, disability or other cause, to withdraw from the charge of his or her parents or to obtain the necessities of life.

(2) The obligation under subsection (1) does not extend to a child who is 16 years of age or older and has withdrawn from parental care.

Order for support

36.1C (1) A court may, on application, order a person to provide support for his or her dependents and determine the amount of support.

(2) An application for an order for the support of the dependent may be made by the dependent or the dependent's parent.

(3) In making an order under this section in respect of the child the court shall-

(a) recognise that the parents have a joint financial responsibility to maintain the child; and

(b) apportion that obligation between the parents according to their relative abilities to contribute to the performance of their obligations.

(4) In determining the amount of payments to be made under an order in respect of a child the court shall consider all the circumstances of the case including-

- (a) the mother's and father's current assets and means;
- (b) the assets and means that the mother and father are likely to have in the future;
- (c) the mother's capacity to provide support for the child;
- (d) the father's capacity to provide support for the child;
- (e) *the mother's and father's age and physical and mental health;*
- (f) the needs of the child;
- (g) the measures available for the mother or father to become able to provide for the support of the child and the length of time and cost involved to enable the mother or father to take those measures;
- (h) *any legal position of the mother father to provide support for another person;*
- (i) *the desirability of the mother father remaining at home to care for the child."* [Emphasis added]

INDEPENDENT EVIDENCE

15. The Litigation Guardian, Ms Lashonna Smith, (**LG**) produced two reports in this matter. The second, updated report was prepared for this substantive hearing and is dated 14 April 2025 (**LG Report**).
16. The recommendations set out in the LG Report are as follows:
 1. *It is recommended that [Y] have increased access with [the Father] which can include overnight and/or one week on and one week of access.*
 2. *It is recommended for [Y] to participate in any therapeutic services such as play, art, music therapy to address any concerns that may have impacted him in addition to helping him navigate his relationships with his parents in a healthy manner.*
 3. *It is recommended [the Mother] received therapeutic services to address any unresolved trauma.*

4. *It is recommended for [the Father] to participate in therapeutic counselling services as directed.*
 5. *It is recommended that [the Father] and [the Mother] participate and co-parenting classes.*
17. In the LG's *viva voce* evidence, she confirmed that her recommendation of week-on/week-off care schedule and that she would not recommend a 2-2-3 care schedule.
18. When asked about what the ideal of week-on/week-off care the LG said it should include that Y have contact with the other parent. She reiterated there should be regular interaction with the other parent whilst Y is in the other parent's care, i.e. phone calls, FaceTime, school drop-ins, etc.
19. The recommendations set out by the CASW in the SIR are as follows:
1. *The Parents should maintain Joint Custody.*
 2. *The Parents should Share Care & Control with the proposed 2-2-3 Access Arrangement being implemented, i.e. two (2) days with the first parent, two (2) days with the other parent, and three (3) days with the first parent. The following week the schedule alternates.*
 3. *The Parents should have Parental Capacity Assessments completed.*
 4. *The Child should attend individual counselling to address the potential impact of the allegations and subsequent legal proceedings/parent conflict on their sense of security and attachment.*
 5. *The Parents should attend individual counselling to address their co-parenting challenges, communication, and/or conflict with one another.*
 6. *The Parents should complete a Co-Parenting curriculum, (The Family Centre and The Coalition for the Protection of Children offer co-parenting courses).*
 7. *The Parents and Child should attend Family Therapy (Father/Child, Mother/Child) after the above recommendations have been completed.*
20. The SIR provided some helpful insight as it relates to the impact that false allegations made by the Mother against the Father can have on Y as well as the wider impact on the resources of the Department of Child & Family Services (DCFS) as follows:

“Firstly, it should be noted that The Department of Child & Family Services has

received eleven (11) referrals regarding the present matter, [Y], many of which were made in a short time span and in rapid succession. This is an abnormal and alarming number of allegations made for any one child.

For ease of reference the referrals comprise of,

- *One (1) Neglect Referral against the father;*
- *One (1) Emotional Abuse Referral against the father;*
- *Two (2) Sexual Abuse Referrals against the father;*
- *Four (4) Physical Abuse Referrals against the father; And,*
- *One (1) Physical Abuse Referral against the Maternal Grandmother;*

Additionally, there were two (2) referrals that were screened out, as they did not meet the threshold for child abuse or neglect.

It should be noted that all of the referrals, aside from the screen-outs, were investigated and ALL were Unsubstantiated for child abuse or neglect.

Due to the high frequency and rapid succession of referrals made, ongoing monitoring and support by the DCFS Family Preservation Team was initiated.

Secondly, this Office highlights that a strategic use of child abuse allegations in custody battles is a harmful tactic that can deeply damage families and familial relationships. When allegations are unsubstantiated or are exaggerated and utilized as weapons to gain an advantage in custody battles, it can undermine the Court's ability to ascertain the genuine best interest of the child.

Additionally, the misuse of child abuse allegations can have devastating effects on the children involved. It often subjects them to intrusive investigations and evaluations, causing profound emotional distress as they become innocent bystanders in their parents' conflict. This trauma can leave lasting scars on a child.

Children may internalize the conflict, leading to anxiety, depression, and behavioral problems, further complicating their emotional development and well-being (Grünbaum, 2018). Moreover, false allegations undermine a child's sense of security and trust in both parents, regardless of whether the claims are true.

It should also be highlighted that the parent targeted by these allegations also suffers profound consequences, ranging from reputational damage and emotional distress to financial strain and the potential loss of custody rights. Defending against such allegations necessitates significant financial resources for legal representation and expert evaluations, resources that may be disproportionately burdensome for one parent, creating an unequal playing field in the legal proceedings.

Further, the emotional toll on the accused parent can be devastating, as they grapple with the fear of losing their children and the stigma associated with abuse allegations. This emotional distress can manifest as anxiety, depression, and other mental health

issues, further complicating their ability to effectively co-parent and support their children.

This Office cannot further stress the strain placed on child protective services, law enforcement, and the courts in investigating and adjudicating multiple unsubstantiated allegations. This strain potentially delays or hinders intervention in cases where children are truly at risk. Essentially, the weaponization of child abuse allegations often diverts resources and attention away from genuine cases of abuse and neglect.

In cases such as this, the Court's primary objective is to ensure the child's safety and well-being, which would typically involve implementing a Care & Control and Access arrangement that restricts the accused parent's access to the child until the allegations are thoroughly investigated and deemed unfounded. In the present matter, all allegations have been unsubstantiated. Upon reviewing the gathered information, the Court Social Work Office has additionally found that neither parent has been shown to present any intentional harm to the child. Notwithstanding, the [mother's]'s concerns remain.

To address the continued reporting of child protections allegations, the Court should consider ordering counseling or therapy to address the parent's anxieties and fears. This would greatly assist the parent in developing more realistic perceptions of the accused parent and reduce the likelihood of future misguided allegations.

To further assist the Court, consideration should be giving to ordering psychological evaluations or parenting assessments to determine the parent's fitness and ability to care for the child adequately. In particular, an evaluation of parental capabilities would be important (Rika, 2021).

Additionally, having the parents attend a co-parenting course and possibly even mediation, could also assist in improving their communication and cooperation skills and help facilitate a more positive co-parenting relationship (Behrens, 2002).”
[Emphasis added]

21. In the CASW’s *viva voce* evidence, he confirmed that a 2-2-3 care schedule would be the easiest to transition to because it would not require the parents to communicate that much. He said that in a week-on/week-off care schedule the parties would have to communicate more and presently the parties do not “*have the right building blocks to support this*”.
22. In addition, the CASW confirmed that he had no concerns about the Father’s presentation or mental health during their interviews. He accepted that alternating Sunday access with the Father is insufficient and that there is nothing that supports any access with the Father requiring to be supervised.
23. The CASW also expressed concern with the Mother being unable to accept the Fact-Finding

Ruling. The CASW confirmed that the reason why a psychological evaluation was recommended was made given the Court's direction in the Fact-Finding Ruling but suggested that a Parenting Capacity Assessment may be more beneficial because it would be less expensive due to its narrower focus on the relationship between the parent and the child. The reason expressed for recommending that both parents obtain a Parenting Capacity Assessment is that when it makes the recommendation for one parent, it makes it for the other. The recommendation for the Father to complete a Parenting Capacity Assessment was not made because there are not any concerns with the Father.

THE FATHER'S EVIDENCE AND POSITION

Custody, Care and Control

24. The Father relied on his affidavit sworn on 25 April 2025 (**Father's Affidavit**) for this application as well as giving *viva voce* evidence and was cross-examined by Ms Smith. Mr Richards also questioned both the CASW and the LG during the hearing regarding their respective reports.
25. Mr Richards submitted that both the CASW and the LG's recommendations are that the parties have joint care and control of Y. It is the Father's position that a 2-2-3 care schedule would be the best outcome for Y at this time.
26. The Court was reminded by Mr Richards that the Mother's evidence is that she still does not accept the Fact-Finding Ruling and highlighted that when the Mother was asked if she made the complaint to DCFS in February 2025 (which the Father was unaware of) she refused to answer.
27. Given the history of the false allegations being made by the Mother, Mr Richards submitted that one of the consequences of this has been to further erode the ability for the parties to communicate in an effective and amicable manner. In the scenario where a week-on/week-off care schedule is implemented, the parties would need to regularly communicate, which Mr Richards says is simply unrealistic.
28. Mr Richards also submitted that given the Mother's ongoing concerns (albeit these are not accepted by the Father) a 2-2-3 care schedule would assist in reducing any concerns the Mother may have as there would be shorter periods where Y would be in the Father's care compared to more lengthy periods in a week-on/week-off care schedule. It would also lessen the need for the parties to communicate with each other until they are in a position where communication has greatly improved.

29. Moreover, Mr Richards argued that given Y's current access schedule with the Father being Tuesdays, Thursdays and Sundays, a 2-2-3 care schedule would be an easier transition for Y.
30. As it relates to the Mother's foremost concern with Y being in the Father's care is the medication he takes for his mental disorder and his overall mental stability, Mr Richards pointed out that it would be difficult to think of a scenario for the Father that would be more stressful than what the Father has experienced since the outset of these proceedings. Mr Richards noted that the Father has remained stable throughout despite the egregious allegations made against him and criminal proceedings initiated by the Mother could have seen him receive a term of imprisonment.
31. Mr Richards confirmed the Father is willing to undertake individual therapy sessions as well as complete a co-parenting course and likewise he confirmed the Father is agreeable for Y to be enrolled in play therapy as soon as possible. Mr Richards stressed that it was crucial for the Mother to have assessments carried out that get to the root issue as to why the Mother made the false allegations but nothing that has been presented to the Court would support that the Father requires similar assessments.

Child maintenance

32. Mr Richards for the Father drew the Court's attention to the factors that must be considered in determining a reasonable sum for child maintenance which are set out in paragraph 14 above in Section 36.1C of the Act (**the Section 36.1C Factors**).
33. It was submitted by Mr Richards that in considering the Section 36.1C Factors the Magistrates' Court failed to consider that the parties have a joint responsibility to support Y financially. Moreover, Mr Richards argues that no consideration was given to "*the measures available for the mother or father to become able to provide for the support of the child...*" as the Mother has one of the highest qualifications in her field and has had previous high paying positions in the hospitality arena.
34. It was argued by Mr Richards that it was uncertain how the Family Court determined that the Father pay \$800 per month to the Mother for child maintenance in addition to paying all of Y's private school fees and continue to maintain Y on the Father's major medical insurance.
35. Most significantly, the Magistrates' notes indicate that a one-half portion of Y's monthly expenses amounted to \$650.78, exclusive of "*travel expenses*", but then ordered that the Father pay \$800 per month. Moreover, Mr Richards noted that the sum of the Father's monthly contributions totaling \$3,211.98 which also does not include any contribution towards the camps that Y is enrolled in during school breaks. Taking into consideration the Father's net

monthly income, this represents approximately 36% of the Father's monthly income which is disproportionate.

36. Additionally, Mr Richards submitted that it was clear that the Mother's expenses presented were submitted without any close examination.
37. Ultimately, the Father is seeking the \$800 monthly maintenance payable to the Mother be set aside and that he continues to be responsible for Y's school fees and major medical insurance. On the basis that there is an order for shared care and control, the parties shall be equally responsible for paying the cost of camps Y is enrolled in during school breaks.

THE MOTHER'S EVIDENCE AND POSITION

Custody, Care and Control

38. The Mother relied on her affidavit sworn on 25 April 2025 (**Mother's Affidavit**) for this application as well as giving *viva voce* evidence and was cross-examined by Mr Richards. Ms Smith also questioned both the CASW and the LG during the hearing regarding their respective reports.
39. During the Mother's first interview with the CASW, the Mother said she would prefer to have sole custody and sole care and control of Y. She expressed at this time that the Father could have Y alternating weekends on Saturdays from 10 a.m. to 6 p.m. and Sundays from 10 a.m. to 3 p.m. However, the CASW noted in his second interview with the Mother that she withdrew from her previous position in relation to access stating that the father could have Y every other Sunday with no access during the week.
40. In the Mother's Affidavit she resigned from her previous position of sole custody and confirmed her agreement to joint custody. The Mother then confirmed at paragraph 33 that she was agreeable for the parties to have joint care and control with a week-on/week-off schedule. She also then confirms that she does not wish the Father to have overnight access that is unsupervised.
41. Under cross-examination the Mother's evidence was that the Father should have access every other weekend. Her position remained that she has concerns if overnight access with the Father was unsupervised. The Mother also said that even if access were supervised it should only occur once per week and then there should be a gradual increase in access rather than an abrupt change to a week-on/week-off care schedule as this would be a number overwhelming for Y. She gave an example of the father having access Thursdays, Fridays, Saturdays and Sundays

with Saturdays being supervised, overnight access. The Mother suggested that this should occur for a few months and “*see how it goes*”.

42. A summary of the main concerns the mother raised in relation to the Father having unsupervised overnight access are as follows:
- (i) The Father having been diagnosed with having a mental disorder and because of that he must have a Parenting Assessment completed as well as a BARC assessment.
 - (ii) The type of medication the Father takes for his disorder prohibits him from waking up during the night if needed by Y.
 - (iii) The Father is not consistent with his medical regime which will cause instability and be detrimental to Y.
 - (iv) The Father has not had overnight access with Y.
43. The Mother said she was opposed to the recommendation of the 2-2-3 care schedule as she says she is not organized enough to accommodate such an arrangement and that it would be “*too chaotic for Y*”. Her evidence was that a week-on/week-off schedule would be preferable however, when asked why she is now appearing to be agreeable to a week-on/week-off schedule, she indicated “*because the court seems inclined to increase access*”.
44. Ms Smith submitted that the LG’s recommendation of a week-on/week-off care schedule would be in the best interests of Y as the parties would have equal time with Y and will breed consistency.
45. Ms Smith reiterated the Mother’s evidence that there should be a transition period for a week-on/week-off care schedule to commence for the Father to have access with Y each Thursday to Sunday with the Saturday being supervised overnight access. Ms Smith suggested that after a period of three months of the Father exercising this access, the parties should return to Court for a review.
46. As it relates to the therapy recommendations made by the CASW and the LG, Ms Smith confirmed the Mother’s willingness to participate and undergo individual therapy as well as complete a co-parenting course. Ms Smith submitted that in relation to the Parental Assessment that the Father should undergo this as well as it would only be for his benefit rather than for it to be seen as a form of punishment. It was also confirmed by Ms Smith that the Mother was agreeable for Y to commence play therapy as soon as possible.

Child maintenance

47. As was the case for Father's Counsel, Ms Smith could neither make heads nor tails of how the \$800 per month figure was determined.
48. Ms Smith submitted that the Mother is earning well below the standard wage and to set aside the requirement for the Father to pay this would be "like a punishment to the child".
49. It was also argued by Ms Smith that the Magistrates' Court was provided supporting documentation in determining the Mother's application for child maintenance and that there was enough evidence to make an assessment of both parties' financial positions.
50. Accordingly, Ms Smith submitted that the Magistrates' Order should remain in place.

FINDINGS AND ANALYSIS

51. I agree with the recommendations of both the CASW and the LG save for the LG's recommendation of a week-on/week-off care schedule. It is my view that a 2-2-3 care schedule would be in Y's best interest.
52. The Mother's actions against the Father have led to the further deterioration of the parties' relationship which has ultimately impacted the ability for the parties to co-parent Y. I also continue to have serious concerns regarding the Mother's inability to comprehend the impact of the findings made against her by this Court in the Fact-Finding Ruling. As a direct result of the Mother's false allegations against the Father, these proceedings were significantly protracted. Moreover, both the Litigation Guardian and the CASW noted the potential impact the Mother's behaviour could have on Y and that harm might not be evident now but may arise at a later stage of Y's life. It is therefore imperative that the Mother undergo a Parenting Capacity Assessment which will hopefully identify any challenges that the Mother may be experiencing so that she can be directed to the appropriate services.
53. As another consequence of the Mother's inability to accept the Fact-Finding Ruling, I have a complete lack of confidence in the Mother giving Y electronic or other access to the Father during periods where Y is in her care. This will undoubtedly cause further contention between the parties and have a significantly negative impact on Y.
54. I agree with Mr Richards that a 2-2-3 care schedule would not only be a smoother transition for Y, but the shorter periods of time spent away from the other parent reduces the risk in Y being restricted in his access to the other parent compared to a week-on/week-off care schedule.

Although I do not accept that the Mother should have the concerns that she does when Y is in the care of the Father, I also agree that, as Mr Richards submitted, the 2-2-3 should assist in curtailing the Mother's fears rather than the Mother being in a state of fear for seven days at a time.

55. In any event, I believe that given Y's age, Y should not be made to go long periods of time without physical contact with either of his parents. Once Y is older and has developed a more realistic sense of time as well as having had the opportunity to secure a strong and meaningful relationship with both his parents, he would be in a better position to go for longer periods of time without having physical contact with either parent.
56. Given the findings above, it goes without saying that I do not accept that there should be any form of supervised care imposed on the Father. There has been no evidence presented whatsoever to the Court or to the CASW and the LG which raises any cogent concerns that would require such a provision.
57. Indeed, it was very unsettling to hear Ms Smith's submissions that once a party discloses that he or she has a mental disorder that it is the Court's responsibility to ensure that the child remains safe whilst in the care of that parent, and that to do this the parent must produce evidence to support that he or she is capable of "*functioning*" and caring for a child. What was most concerning about these submissions is that the Mother presented no evidence whatsoever throughout the entirety of these proceedings that the Father's medications would hamper his ability to care for Y, and nor has she produced any supporting evidence for her *viva voce* assertions that the Father is unstable or that the Father's mental disorder had/has put Y in harm's way.
58. Effectively the Mother's position is that since the Father has a mental disorder he should be deemed to be an unfit parent unless he can prove otherwise. The Mother had numerous opportunities in the Magistrates' Court, in her interviews with the CASW as well as in these proceedings in her affidavits as well as in her oral evidence to provide detailed examples of the Father's alleged instability. She failed to do so and instead, simply made unsubstantiated, flippant comments such as, "*I don't trust that [the Father] is in the right mind*" and "*[the Father] can do more things to manage his temper/manic behaviour*".
59. It was equally disturbing that the Mother's affidavit was a clear attempt to re-litigate the Fact-Finding Hearing and she expressly stated under cross-examination, "*I don't accept the court's findings in its judgment*". The Mother, therefore, does not appear to have the ability to comprehend the consequences of the findings made against her but also does not comprehend the detrimental impact her actions may have had on Y as well as on the Father.
60. I agree that whatever access/care schedule is made that there must be a transition period. Regrettably, but understandably, the Father has had curtailed access with Y due to the

voluminous and serious child abuse allegations being made by the Mother. Furthermore, as a consequence of the Mother's false allegations, the Father's opportunity to commence overnight access with Y has been unreasonably protracted.

61. No evidence has been presented throughout these proceedings that the Father's access (or care) should be supervised. There should however, be a transition period for any new care schedule for Y compared to an immediate transition given that the Father has yet to have overnight access
62. As an aside, it is essential that the Court address the accusations in the Mother's Affidavit at paragraph 25 which state as follows:

"THAT in the discussion of primary obstacles I stated that the court is not holding [the Father] and I to the same standards, and that my concerns in evidence were willfully disregarded in this matter. I also told [the CASW] that I was told throughout the entire fact-finding hearing to not object or disagree because the time would come later to give my version, and it never came I even pointed out the gross misrepresentation of facts and they were ignored by the court;"

63. Without hesitation, I can say that the Mother was given a fulsome opportunity to present her case to the court. It may be due to the Mother being a litigant in person that she did not fully comprehend court processes. What did occur throughout the Mother's cross examination of the Father is she would continually make comments on and start giving submissions in response to the Father's answers. The Court explained to the Mother on several occasions that she should take notes on what she wanted to say about the Father's evidence as she would have the opportunity to present her case to the Court in final submissions. The concept of 'submissions' was also explained to the Mother. The Mother and Counsel for the Father presented their respective closing submissions on 16 October 2024. It is unfortunate that the Mother's recollection is inaccurate and as such it is recommended that the Mother obtain the audio recordings of the hearing so that she can refresh her memory.

CONCLUSION

Custody, Care and Control

64. In reaching my decision, I have considered all the evidence before the court, including the oral evidence, the affidavits, the LG Report, the SIR and the submissions made on behalf of the parties. I am mindful of the need to determine matters in accordance with Y's welfare as the most paramount consideration. Whilst not every point raised is referred to expressly in this decision, that does not mean it has not been taken into account. I have had regard to all relevant matters in arriving at my conclusions.

65. The parties will continue to share joint custody of Y, the meaning of which was helpfully summarized by the CASW as, “it should be understood that with Joint Custody, both parents are equally able to correspond with all professionals regarding [Y’s] healthcare, education, and religion. It should also be understood that decisions regarding these three aspects are to be made jointly, by agreement, or consent.”. [Emphasis added]
66. I set aside the Magistrates’ Court Decision on the basis that there was a significant miscarriage of justice in refusing the Father overnight access in circumstances where the Mother raised no issues of welfare such as neglect, harm or ability of the Father to care for Y.
67. The parties shall have joint care and control of Y and the following shared care and control schedule would be in the best interests of Y:
- (i) For the week commencing 7 July 2025, the Father shall have overnight access with Y on Tuesdays and Thursdays by collecting Y from camp/school and returning him to camp/school the following morning.
 - (ii) The Father shall also have overnight access with Y each Saturday, commencing on 12 July by collecting Y from the Mother’s residence at 3 p.m. and returning Y to the Mother’s residence at 3 p.m. on Sunday.
 - (iii) After six weeks of the above access, i.e. on 11 August 2025, the parties shall commence a 2-2-3 care schedule of care and control with the Mother having Y on the first two days (11 and 12 August). On 13 August the Father shall collect Y from camp/school and have care and control of him for 2 days with the Mother then having the 3 remaining days of the week. Thereafter, the parties will continue to alternate Y’s care in accordance with the 2-2-3 care schedule.
 - (iv) The parties shall share holidays equally.
 - (v) Both parties shall be at liberty to travel overseas with Y for vacation purposes only, subject to the traveling parent giving the staying parents with at least one month’s notice of the said travel along with the traveling parent providing a travel itinerary and contact details for the duration of the travel. Should the traveling parent be accompanied by another adult on the vacation who is not an immediate member of either the maternal or the paternal family, the traveling parent shall disclose the name of the said adult to the staying parent. Any missed period of care due to travel shall not be required to be ‘made up’ and upon return to the island, the 2-2-3 care schedule shall continue as it would have if Y had not travelled overseas.

- (vi) The parties shall consider transitioning Y to a week-on/week-off care schedule once Y is at least 7 years old. Failing any agreement between the parties regarding the transition to a week-on/week-off care schedule, the parties will be required to make the necessary application to the Court.
68. The Mother must undergo a Parental Capacity Assessment which should also not only address her parenting capabilities but also consider whether a comprehensive psychological and/or psychiatric assessment is necessary to be conducted. As raised by Ms Smith in her closing submissions, these assessments should not be seen as a punishment, but rather are being carried out to assist the Mother which will ultimately be for the benefit of Y. Given the financial circumstances of the Mother along with the serious concerns relating to the false allegations made by her, it is essential that DCFS, the Family Preservation Team or otherwise, cover the cost of these assessments. If these services are not provided to this family, I fear that these parents will find themselves back before the courts in crisis.
69. I am of the firm view that simply because one parent has been ordered to undergo an assessment, it does not follow there is a need for the other parent to be required to do so as well. In circumstances where DCFS' resources are already limited, it would only burden those resources further. As such, the Father is not required to undergo a Parental Capacity Assessment.
70. I note that both parties confirmed their willingness to undergo individual therapy as well as complete a co-parenting course which should both occur as soon as practically possible. Likewise, the play therapy (or any other form of therapy as deemed appropriate by the professionals) for Y shall also commence as soon as possible if Y has not already started sessions.
71. At a stage deemed appropriate by the professionals, following the commencement of individual therapy and after both parties have completed a co-parenting course, the parties shall commence Family Therapy which will incorporate sessions with Y.

Child maintenance

72. I agree with both Counsel that it is a mystery as to how the Family Court obtained the figure of \$800 per month for the Father to pay for child maintenance in addition to paying all of Y's private school fees and major medical insurance. I will say that it appears as if the Magistrate increased the figure of \$650.78 to \$800 simply because the Mother was seeking between \$3,200 and \$3,500 for child maintenance and had the sum of \$800 took the total sum to equaling just above this lower range being sought.
73. I accept Mr Richards' submission that the Family Court erred in law by failing to take into account the statutory obligation for both parents to contribute towards Y's financial support

(section 36.1C (3) (a) and (b)) and also failed to explore the Mother's capacity to obtain meaningful employment (section 36.1C (4) (b), (c) and (g)).

74. Further, I accept that the total level of financial contribution ordered against the Father was unreasonably as it was disproportionate given that the Mother's ability to contribute financially was not explored.
75. Accordingly, the \$800 monthly maintenance payable to the Mother is set aside. The Father shall continue to be responsible for Y's school fees and major medical insurance. Given the determination that the parties are to have joint care and control of Y, the parties shall be equally responsible for paying the cost of camps Y is enrolled in during school breaks.

Costs

76. In all the circumstances of this case and in giving consideration to the costs order made against the Mother in relation to the Fact-Finding Hearing, I do not believe there is any reason to deviate from the usual starting point in family cases that there be no order as to costs.

DATED this **7th** day of **July 2025**



ALEXANDRA WHEATLEY
ACTING JUSTICE OF THE SUPREME COURT