The Judgment was delivered in private, but the Judge hereby gives leave for it to be published. The Judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.

IN THE GRAND COURT FOR THE CAYMAN ISLANDS

CAUSE NO. FAM 123 OF 2014

BETWEEN:

KN

PETITIONER

AND

MN

RESPONDENT

Appearances:	**Mrs. Karin Thompson, Attorney-at-Law for the Petitioner** **Ms. Denise Owen of Travers Thorp Alberga for the Respondent**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**8th, 9th & 14th April 2015**
Judgment Delivered:	**16th June 2015**

Re M. (a Child) (Fact-finding Hearing)

IN CHAMBERS

JUDGMENT

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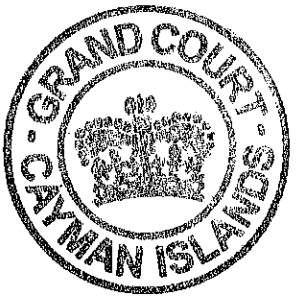

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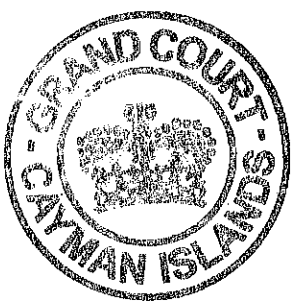

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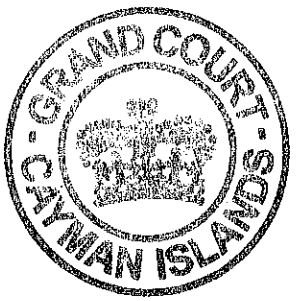

JUDGMENT

INTRODUCTION

1. The Court is concerned with a little girl, M, who was born on the 19th December 2012. The parties to the proceedings were married on 23rd December 2007 in George Town, Grand Cayman. Both parties were born in South Africa and M is the only child of the marriage. Proceedings were issued first in the Summary Court pursuant to the *Children Law* by Mr. N. and subsequently in the Grand Court pursuant to the *Matrimonial Causes Law* by Mrs. N. For ease of reference I will refer to Mrs. N. as the Mother and to Mr. N. as the Father. References to 'M' are references to the child. This has been done to protect the parties' privacy.

CASE MANAGEMENT ORDERS

2. On 2nd October 2014, Williams J. made a number of orders in respect of the matters in issue between the parties, including orders in respect of injuries which the Mother alleged were suffered by M. Amongst the orders made were the following:

   (a) The production of a Scott Schedule, to be sequentially completed, to identify the allegations made by the Mother, allow for responses by the Father, and providing a column for the Court's findings in relation to those allegations;

(b) The parties to sequentially file and serve affidavits providing for the Mother to detail her allegations and for the Father to respond to them;

(c) The provision of evidence from third-party sources, i.e. the Department of Children and Family Services ("the DCFS"), the Royal Cayman Islands Police Service ("the RCIPS"), and full medical notes from the date of birth of M;

(d) DCFS to file an interim welfare report, addressing in particular, the issue of contact; and

(e) The matter to be listed for a final children order hearing to deal with issues of contact, such hearing to coincide with the relevant fact finding hearing on the first open date after 4th December 2014.

3. However, on 20th November 2014, after the Scott Schedule had now been filed, Williams J. ordered a split hearing, in that he ordered a 2 day fact-finding hearing on 27th and 28th January 2015, and ordered that the parties seek a listing for the final hearing of the matter on a date after 1st April 2015.

4. I understand from the parties that the fact-finding hearing was unfortunately unable to proceed on 27th and 28th January 2015 and it was adjourned and relisted for hearing on 8th and 9th April 2015.

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FACT FINDING HEARING AND FURTHER CASE MANAGEMENT ORDERS

5. It was with that prior case management background that I conducted the fact-finding hearing on the 8th and 9th of April 2015. I also listed the matter for hearing for a further half day on the 14th April 2015 to accommodate for additional evidence in relation to an additional allegation raised by the Mother during the hearing on the 9th. After all of the evidence was concluded, I ordered the Mother to file and serve written closing submissions and copies of any authorities to be relied upon, by 27th April 2015. The Father was ordered to file and serve written closing submissions in response and copies of any authorities relied upon, by 29th April 2015, a date suggested by his Counsel. Unfortunately, the Mother's attorney experienced some personal difficulties and was unable to provide her submissions and authorities until 29th April 2015. This had a domino effect on the date of filing of the submissions and authorities on behalf of the Father, which were filed on 5th May 2015. I am satisfied that the delay on the part of the Mother's attorney was not intentional or contumelious, and that in turn the father's Counsel could not reasonably have been expected to complete her submissions any earlier than she did. As such, I allow the late filing of both sets of submissions and authorities to stand.

6. The Court received written evidence as contained in the trial bundles submitted by both parties as well as oral evidence from Ms. Wesley Tempora and Ms. Keisha Smith, social workers at DCFS, and the Mother and Father as well as the maternal Grandmother. All witnesses were cross-examined with the Mother and Father and the Grandmother being cross-examined extensively in respect of the contents of their affidavits.

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In addition, on 22nd April 2015 an updated report was produced by DCFS in respect of contact. DCFS has been involved in supervising contact for approximately 1 year and 8 months. The Mother has attended all sessions of contact during this time.

AUTHORITIES AND GUIDANCE IN RELATION TO ENGLAND AND WALES *CHILDREN ACT 1989* AS TO FACT-FINDING HEARINGS

7. Before moving on to discuss the allegations and evidence, I think that it is pertinent to observe that the experienced Counsel who appeared for the Mother and Father have advised that they are not aware of any previous local written precedents in relation to fact-finding hearings (at any rate private law hearings) and that there are no authorities or guidance in relation to the Cayman Islands *Children Law* (2012 Revision) with regard to the same. However, it was submitted by Ms. Owen, at paragraph 4 of her Legal Skeleton Argument, dated 7th April 2015, provided at the commencement of the hearing, (and Mrs. Thompson did not appear to disagree) that, given the "striking similarities between the Cayman *Children Law* and the *Children Act 1989* in England and Wales.... The Grand Court can utilize both the authorities and guidance produced in relation to the *Children Act 1989* in assisting it in resolving issues in a fact finding hearing in the Cayman Islands." Ms. Owen went on to refer to the England and Wales Practice Direction (PD) 12 J., which incorporates and supersedes advice issued by the President of the Family Division, then Waller L.J., in 2010 about fact finding and split hearings. This PD was revised and came into effect on 22nd April 2014 and applies to both public and private law proceedings in the Family Court under the *Children Act 1989* where a question about contact between a child and a family member arises.

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8. I accept that assistance may be derived from these authorities and guidance and I wish to express my gratitude to both Counsel for the very careful and helpful submissions, and to Ms. Owen in particular for providing some very instructive authorities emanating from proceedings under the *Children Act 1989*.

9. A fact finding hearing enables the Court to determine factual disputes between the parties within both private or public proceedings under the *Children Law*. The proceedings before me, are of course, private proceedings between Mother and Father. In ***S (A Child)*** [2014] EWCA Civ 25, Ryder L.J. considered the question of the appropriateness of split hearings and opined that split hearings must be confined to cases where there is "a stark or discrete issue to be determined and an early conclusion on that issue will enable the substantive determination ....to be dealt with more expeditiously."

PURPOSE OF FACT FINDING HEARING

10. In the instant case, the issues to be determined relate to serious allegations of physical abuse made by the Mother against the Father and such allegations, if proven, would have a significant effect on the final order to be granted by the Court. They are relevant to the issue of contact between M and the Father which fall to be determined by the Court. A determination of these allegations is vital in order to allow the Court to consider a welfare-based order at the second tranche of the previously ordered split final hearing. It is likely that I will order a final report from DCFS before the resumed hearing and the facts found at this hearing will no doubt provide an important aspect of the factual matrix for the recommendations to be made within that report.

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SPLIT HEARINGS - TO BE CONDUCTED BY SAME JUDGE

11. It is expected that save in exceptional circumstances, the judge who conducts the fact-finding hearing should also conduct the final or resumed hearing- see paragraph [20] of the PD J12. In the leading House of Lords' decision ***In re B (Children) (Care Proceedings: Standard of Proof)*** [2008] UKHL 35, although it was a public law case, Baroness Hale of Richmond, at paragraphs 74-76 provides the following critical and pellucid analysis:

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"Split hearings

> *74. Care proceedings are not a two stage process. The court does have two questions to ask. Has the threshold been crossed? If so, what will be best for the child? But there are many cases in which a court has two or more questions to ask in the course of a single hearing. The same factual issues are often relevant to each question. Or some factual disputes may be relevant to the threshold while others are relevant to the welfare checklist……*
>
> *75. The purpose of splitting the hearing is not to split the two questions which the court must answer. It is to separate out those factual issues which are capable of swift resolution so that the welfare professionals have a firm foundation of fact upon which to base their assessments of family relationships and parenting ability: see In re S (Care Proceedings : Split Hearing) [1996] 2 FLR 773. A fact finding hearing is merely one of the case management possibilities contemplated by the new Public Law Outline. It is not a necessary precondition for the core professional assessment, which the Public Law Outline now expects should normally be done before the proceedings even begin: Practice Direction (Public Law Proceedings: Case Management) [2008] 1 WLR, para 9.2, pre-proceedings checklist and flowchart. There is no point in splitting the issues if the facts cannot be determined relatively quickly, still less if it is unlikely to result in clear cut findings to help the professionals in their work.*
>
> *76. But the finding of those facts is merely part of the whole process of trying the case. It is not a separate exercise. And once it is done the case is part heard. The trial should not resume before a different judge, any more than any other part heard case should do so. In the particular context of care proceedings, where the character and personalities of the parties are*

important components in any decision, it makes no sense at all for one judge to spend days listening to them give evidence on one issue and for another judge to spend more days listening to them give evidence on another. This is not only a wasteful duplication of effort. Much useful information is likely to fall between the gaps. How can a judge who has not heard the parents give their evidence about how the child's injuries occurred begin to assess the risk of letting them care for the child again? The experts may make their assessments, but in the end it is for the judge to make the decision on all the evidence before him. How can he properly do that when he has heard only half of it?"

BURDEN OF PROOF

12. One of the first issues that it is important for the Court to resolve is upon whom does the burden of proof lie? In relation to these proceedings, at first it appeared that there was some dispute between Counsel as to who was the applicant for the purposes of the fact-finding hearing. The Mother's Counsel appeared to at first deny that her client was the applicant. However, ultimately it appears to have been accepted that the Mother is the applicant. In my judgment, the authorities show that the burden of proof remains upon the party who made the allegations in the Scott Schedule and it so remains on her, the Mother, throughout the hearing. Indeed, in ***Re M (Fact-Finding: Burden of Proof)*** [2013] 2 FLR 874, (a public law case) courts were in effect warned to guard against the danger of reversing the burden of proof where there is sparse evidence as to causation. At page 881, Ward L.J. stated:

"That, too, was the effect of the judge's view of the case: that absent a parental explanation, there was no satisfactory benign explanation, ergo there must be a malevolent explanation. And it is that leap which troubles me. It does not seem to me that the conclusion necessarily follows unless, wrongly, the burden of proof has been reversed, and the parents were required to satisfy the court that this is not a non-accidental injury."

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THE STANDARD OF PROOF

13. The standard of proof to be applied is the civil standard, i.e. on a balance of probabilities, in other words, is it more probable than not. In ***Re B*** (above) the House of Lords explained that neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. There is no "heightened standard" as had been suggested or thought to be suggested in some authorities, and there is no legal rule that "the more serious the allegation, the more cogent the evidence needed to prove it." There may be a few proceedings which though in civil form, are of such a nature that it is appropriate to apply the criminal standard of proof. However, finding hearings within family proceedings do not fall into that category-see paragraph 67-73, per Baroness Hale. At paragraph 2 Lord Hoffman stated:

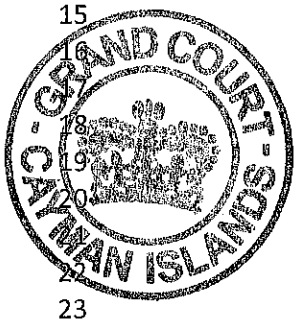
> *"2. If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."*

SOME GUIDING PRINCIPLES

14. In *Re B*, where despite a judgment totaling 159 pages in all, and carrying out an elaborate and meticulous analysis of all of the evidence, the judge expressed himself unable to make a finding about certain alleged sexual abuse. At paragraphs 31 and 32, Baroness Hale had this comment to make:

"31. My Lords, if the judiciary in this country regularly found themselves in this state of mind, our civil and family justice systems would rapidly grind to a halt. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds who to believe. They are guided by many things, including the inherent probabilities, and contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task we are paid to perform to the best of our ability.

32. In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing something took place will not have satisfied him that it did. But generally speaking the judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."



15. In ***A County Council v RH, KS, JS (By His child's Guardian)*** [2012] EWHC 1370, a public law case involving allegations of non-accidental head injury, Baker J. at paragraphs 36-45 provided very useful guidance as to the legal principles involved, some of which I have already discussed. Paragraphs 38 to 45 are in my judgment worthy of quotation in full:

"38. Third, findings of fact in these cases must be based on evidence. As Munby LJ, as he then was, observed in Re A (A Child) (Fact-finding: 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."

39. 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 the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in Re T [2004] EWCA Civ 558, [2004] 2 FLR 838 at 33:

"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 other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

40. *Fifthly, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical 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. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence (see A County Council & K,D & L [2005] EWHC 144 (Fam); [2005] 1 FLR 851 per Charles J). Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.*

41. *Sixth, in assessing the expert evidence I bear in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others (see observations of King J in Re S [2009] EWHC 2115 Fam.).*

42. *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).*

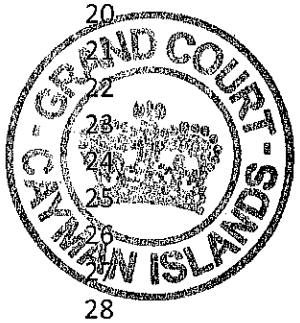
43. *Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything (see R v Lucas [1981] QB 720.*

44. Ninth, as observed by Hedley J in Re R (Care Proceedings: Causation) [2011] EWHC 1715 Fam:

"There has to be factored into every case which concerns a disputed aetiology giving rise to significant harm a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities."

The court must resist the temptation identified by the Court of Appeal in R v Henderson and Others [2010] EWCA Crim 1219 to believe that it is always possible to identify the cause of injury to the child.

45. Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or real possibility that he or she was the perpetrator.(see North Yorkshire County Council v SA [2003] 2 FLR 849). In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see Re D (Children) [2009] 2 FLR 668, Re SB (Children) [2010] 1 FLR 1161."



16. In addition to the considerations outlined above, I consider that although the evidence must be viewed in its totality and evidence as to one matter must be looked at to see its relevance to other aspects of the evidence, I think it appropriate to remind myself, that in so far as there are separate allegations to consider, I must consider the evidence for and against each allegation separately, in the sense that, in the circumstances of this case if I find one allegation made out or not made out, that does not mean that I am bound to come to the same conclusion in respect of any other allegation.

17. I have to say that I have not found this an easy case but cases of this type are well known to be difficult – see the comments of Baroness Hale in ***Re B***, quoted at paragraph 14 above. The written judgments are also quite lengthy, as is this one, and for this I apologize.

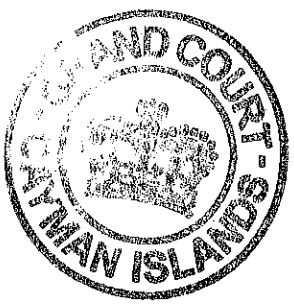
QUESTIONS/ISSUES INVOLVED

18. What, therefore, are the questions/issues that the Court will have to resolve in this case?

(a) Were any of the alleged injuries to M caused or inflicted non-accidentally?

(b) If the Court concludes that the injury did occur and is non-accidental in nature, is it possible to identify the perpetrator of that injury or the pool of perpetrators? Since it is in this case the Mother making the allegations against the Father, is it possible to identify the Father as the perpetrator?

I should point out that when I use the term "injury", I use it to include the allegation in Allegation 3 as to psychological or mental abuse.



THE SCOTT SCHEDULE

19. I set out herein the Scott Schedule:

SCOTT SCHEDULE

NO.	DATE	ALLEGATIONS [Including paragraph refs to Affidavit]	RESPONSE TO ALLEGATIONS [Including paragraph refs to Affidavit]	JUDGE'S FINDINGS
1.	Last January	The first incident occurred when M was just a month old. W was not at home.	There was no occasion when M suffered an injury to her arm whilst	

	2013	W had left [M] in her father's care to run some errands. Upon W's return, she noticed, W noticed[sic] that M was not able to move her right arm and cried as if in pain when W laid her down to change her diaper. Prior to that day, M had always been relatively quiet and could easily move her are[sic] by lifting it slightly, but it just fell back. W thought M's father may have accidentally have pulled a tendon in her shoulder. With this in mind W made sure to stabilize M's arm I [sic] in order for it to recover properly. After about a week, [sic] was able to move her arm again. Hat [sic] had it taken longer, W would no doubt have taken her to the doctor. (See W's affidavit dated 7th November 2014 at paragraph 4 and 5)	in her father's care, at this time or any other. Father never noticed any injury to M's am or any difficulty with her use of her arm, or any other part of her. He never saw any "stabilization" on the arm. If he had noticed this he would have sought immediate medical assistance. [Para 4-7 Father's affidavit]	
2.	Mid February 2013	Second incident occurred shortly thereafter, when W's mother who was visiting the family form [sic] from South Africa, and W were sitting together in the living room downstairs. M was upstairs with her father. Suddenly, W and her mother heard M begin to scream. From the sound of the scream, M sounded distressed. W and W's mother immediately ran upstairs. As W reached the top of the stairs, W saw the father pushing M's face into his shoulder as if to soothe her or stifle her cries. Immediately, W removed M out of her father's arm soothing her as best she could. When W laid M sown [sic] down to change her diaper M could mot [sic] not lift her legs without screaming. The lower part of M's little body seemed to be more acutely painful. W starts making plans to leave. (See W's affidavit dated 7th November 2014 at paragraph 6 Affidavit of C.O dated 7th November 2014 at paragraph 13)	No incident as described occurred. Father has never held M as alleged with her faced [sic] face pressed against his shoulder. Father never noticed any difficulty wither [sic] with her legs or any other part of her. If he had noticed this, in particular any "acute pain", he would have sought immediate medical assistance. [Para 8-10 of Father's affidavit]	
3.	No Date	During this period, M's evening bathing routine becomes the source of major concern. Father insisted in [sic] participating but without fail would become argumentative and behave in	Father did not behave in the abusive manner alleged. Bath times were generally happy and co-operative. [Para 11-12 and 37-38 of Father's affidavit,]	

		an aggressive/abusive manner toward W in the presence [sic] who would become extremely upset. On occasion H lifted M out of the tub whilst continuing his diatribe towards W. M becomes extremely agitated behaving in a fearful manner. (See affidavit dated 7th November 2014 Affidavit of C. O dated 7t [sic] 7th November 2014 at paragraph 9)		
4.	No Date	The climax of these excruciating bath times came one evening when the water the father run was too hot. Mother had to quickly lift M out of the scalding hot water, while holding M to soothe her. She asked the father to add cold water. Instead of doing so, he remained standing at the side of the bath, spewing put [sic] W's name, Upon W's attempting to hold M's head in her hands to wash the baby's hair, father start [sic] where he had left off shortly before, continuing to rant and behave in an angry and enraged manner (See affidavit of C.O. dated 7th November 2014 at paragraph 9)	No incident as described occurred. It is denied that M was placed in scalding water. On one occasion M's bath water was a little too warm to be conformable (comfortable) but father responded appropriately and no argument ensued. *[Para 11-12 and 39-41 of Father's affidavit.]*	
5.	No Date	In the aftermath of this incident W could not pick M up in the usual manner i.e. with her hands under M's arms, without M beginning to cry. M's bottom also seemed to cause M serve [sic] discomfort during diaper changes. Within a week or two M appeared to have recovered from her marked discomfort. (See W's affidavit dated 7th November 2014 at paragraph 11 Affidavit of C.O. at paragraph 15)	**It is unclear which incident this refers to. This is not a separate allegation and appears to be a continuation of allegation 3.*	
6.	Mid August	W takes M to Dr. seeking treatment for allergies and physical examination. Results of examination reveal a healed broken collarbone. A formal report by the Dr. made to DCFS and FSU (See Medical Records produced pursuant to Order of the court dated 2nd October 2014)	**This is not an allegation against father but a statement of undisputed fact.*	

1

GRAND COURT CAYMAN ISLANDS

THE ALLEGATIONS

20. Thus there were on the face of it six allegations that formed the subject-matter of the fact finding hearing as contained within the Scott-Schedule. However, I agree with Ms. Owen, Counsel for the Father at paragraph 3 of her Closing Submissions where she reminds that confirmation was given under cross-examination of the Mother that Allegation 5 is not a separate allegation but rather is an extension of Allegation 2. Further, I agree that allegation 6 is not a true allegation but rather a statement of fact that M suffered a fractured collar-bone. It was also argued by Ms. Owen that the fact that this injury was suffered is not *prima facie* relevant to contact, without an accompanying finding that it was non-accidentally caused or who the perpetrator of that injury was. In my view, that submission is correct. Counsel further sought that I deal with as a preliminary matter, the issue of whether Allegation 3 in the Scott Schedule is sufficiently specific to require the Court to make a finding of fact in relation to it. Allegation 3 does not deal with a physical injury, but it really amounts to an allegation of a pattern of controlling or coercive behavior, or psychological or emotional abuse. After giving the matter much thought, I have decided that it does require the Court to make a finding of fact. I am guided somewhat by the definition of "Domestic Violence" dealt with in the England and Wales Practice Direction PD 12 J referred to above, which includes allegations of patterns or incidents of controlling or coercive behaviour and psychological or emotional abuse in the definition of "Domestic Violence". As such, it does appear to me that there are four out of the six allegations set out in the Scott Schedule upon which specific findings of fact need to be made by the Court.

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21. In addition to those allegations that were properly set out in the Court-ordered Scott Schedule, Counsel for the Father considers that the Mother also made two additional allegations during the course of her oral evidence under cross-examination. Whilst these allegations were not made in accordance with the directions of the Court, Ms. Owen has requested that the Court make findings on those allegations in order that they be determined and to avoid any further delay to treat with them on a separate occasion.

22. For ease of reference the allegations will be referred to in the following way, with the last two being the ones made during the hearing:

- Allegation 1 – "The Arm Injury";
- Allegation 2 – "The Lower Body Injury";
- Allegation 3 – "General Allegations About Abusive behavior at Bath Time.
- Allegation 4 – "Scalding Bath Water Allegation.
- New Allegation – "Physical Abuse During Supervised Contact";
- New Allegation – "Historic Allegation of Sexual Abuse".

HISTORY OF PROCEEDINGS RELEVANT TO CONTACT AND CONTACT TO DATE

23. The parties separated on 17th March 2013 when the Mother left the matrimonial home and took M with her. It is not in dispute that the Father was not informed of M's whereabouts. The Mother made allegations of child abuse to M's General Medical Practitioner at an appointment on 3rd July 2013. Following presentation

at the George Town Hospital on 26th August 2013 X-rays were taken which revealed a possible fracture of the right clavicle.

24. As regards contact arrangements, direct contact was arranged by the parties on three occasions in the six months between the date of separation and 12th September 2013 when DCFS first arranged contact between M and her father. Four sessions of supervised contact were facilitated by DCFS in the three months between that date and 19th December 2013, when the Mother terminated contact and was not in communication with the DCFS.

25. The Father initiated proceedings in the Summary Court by an application made pursuant to the *Children Law* and dated 31st March 2014. Before initiating proceedings he had both himself and through his attorney attempted to negotiate contact with the Mother but this did not result in any agreed position. Factually, M did not have contact with the Father for approximately 4½ months between the 19th December 2013 and 8th May 2014, when contact was re-established by an interim order of the Summary Court. The Father's evidence is that he sought the re-introduction of contact in line with the recommendations provided by the allocated social worker from DCFS, Ms. Tempora Wesley which were set out in a letter dated 14th March 2014 in addition to a Family Assistance Order ("FAO") and a Professionals' Meeting. This involved a gradual increase of contact supervised by DCFS at their offices. Ms. Wesley confirmed within this letter that she did not have any concerns about contact between M and her father but was

prepared to offer supervision to facilitate it. She stated that the Mother's concern about not allowing M to have unsupervised contact with the Father needed to be addressed and a long-term solution for contact that did not necessarily involve DCFS needed to be identified.

26. That application was heard before Her Honour Chief Magistrate Hall on Friday, 2nd May 2014. The grant of an interim contact order was opposed by the Mother and the Judge heard submissions from both parties before granting the order as requested by the Father, an FAO and a professionals' meeting to facilitate the progression of contact. The Mother was ordered to *"make the child available for all contact sessions and facilitate transport of the child to and from each contact session ordered herein"*. The Father requested through his attorney that directions be provided for a fact finding hearing to allow the allegations made against him to be determined by the Court and for a review hearing to progress contact. No further hearings were listed as the attorney for the Mother indicated that she would be issuing a divorce petition forthwith which would effect a transfer of the matter to the Grand Court for further consideration.

27. The Petition was issued on 1st July 2014 and relied upon accusations of spousal and physical child abuse to support the assertion of unreasonable behaviour against the Father. A professional's meeting took place on 22nd July 2014 but the parties were unable to reach any agreement to advance contact. The Father produced an Answer denying those allegations contained in the Petition.

28. A first directions appointment took place on 24th September 2014 before Williams J. The *Children Law* proceedings issued in the Summary Court were superseded by the Grand Court proceedings and by consent the FAO and contact order granted by the Summary Court were extended. The Father's Counsel indicates that the Father again requested that the allegations against him be tried by the Court but this was opposed by the Mother. Representatives from DCFS and RCIPS were ordered to attend at a case management hearing to provide further information to the Court.

29. As discussed earlier, a case management hearing was heard before Williams J. on 2nd October 2014. It was attended by Ms. Tempora Wesley of DCFS and Detective Constable Dave Howell of RCIPS. A residence order to the Mother was granted with the consent of the Father. The contact order was varied to provide that DCFS supervised contact could take place away from the DCFS offices. Fact-finding hearing directions as discussed above were made. At the pre-hearing review on 20th November 2014 it was also recorded in a recital to the Order of Williams J. the Court's expectation that contact be rescheduled at a time to allow it to be activity-based.

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THE MEDICAL EVIDENCE

30. The RCIPS and DCFS investigations were initiated as a result of a fracture to M's right clavicle. The Mother asserts that this must have been caused by Allegation 1 whereas the

Father's evidence is that he cannot say how or when this fracture was caused. Neither party has sought to challenge the relevant medical evidence which is as follows:

- Inpatient Physician Notes, 20th December 2012 (birth of M) *Neonate delivery by forceps...skin: indentation from forceps to scalp, ? bruise/indentation to R side of face lateral to eye."*

- General Diagnostic, X-rays chest, both clavicles and shoulders, 26th August 2013 *"The distal 1/3 of the right clavicle appears sclerotic and deformed on all views when compared with the left, but there is no acute injury seen. The left clavicle, both shoulders and bilateral ribs are normal. Lungs pleura and mediastinum are normal. No obvious abnormality of the thoracic and upper lumbar spine seen on Ap view. Impression – The features of the right clavicle suggest possible old fracture."*

- Skeletal survey, Outpatient Physician Notes, 26th August 2013 *"No obvious metaphysical fractures, or periosteal reaction seen. (Spine and skull x rays not done – patient to come to clinic tomorrow."*

- XR Skull, Outpatient Physical Notes, 27th August 2013 *"Skull and lateral cervical spine no acute bony injury seen. There is no evidence of periosteal reaction. The cervical spine alignment is normal."*

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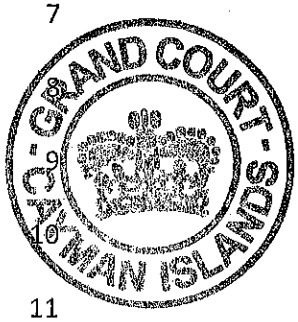
- Preliminary Report, Dr. Robinson, Outpatient Physician Notes, 27th August 2013 *"Had discussion with Dr. Sida, orthopaedic surgeon prior to this. Fracture clavicle in children is a relatively common fracture that can occur during birth or at time of an accidental fall but can also be from physical abuse as a result from direct pressure while shaking baby. However in itself it is not indicative of child abuse. Although it is my belief that this fracture occurred around the time that this baby was not moving her right upper arm, the mechanism and timing of the fracture cannot be determined by the X-ray. It is my concern however that the baby did not receive medical attention at the time of the two incidents described by mum when it seemed serious enough to mum for her to separate from her husband."*

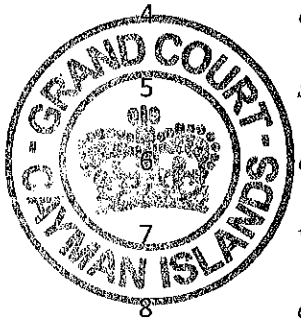


31. It would therefore appear that the medical experts involved in treating M at George Town Hospital were unable to determine the date, mechanism or cause of the fracture. There has been no medical evidence about the second allegation, the lower body injury.

RCIPS INVESTIGATION

32. Criminal prosecution would proceed on a more stringent standard of proof, than is involved in a fact-finding hearing in these proceedings. However, I do note that the evidence is that the RCIPS investigated the matter and passed the file to the DPP who *"ruled that due to the uncertainty surrounding the period the injury occurred or the person whose care the child was in when the injury occurred they have agreed with*

[Detective Dave Howell's] *recommendation that no charges be filed as there is another possibility that the injury could have been caused at birth."* The RCIPS investigation decided *"Having concluded the above enquiries it is clear that no one can say with any certainty when the child obtained the injury to her arm...We are also not in a position to say which caretaker injured the baby, whether it was mother, father or if it was an injury obtained at birth. What is of concern to this investigator and to the doctors concerned was the fact that mother suspected that the child may have been injured on two occasions and did not seek to have the child seen by a doctor."*



DCFS INVESTIGATION

33. In relation to the investigation carried out by DCFS, they did not make any findings and indicated that they did not consider themselves in a position to do so, particularly having regard to the stage at which they had become involved, which was in August 2013. They also indicated that they were content for unsupervised contact to occur between M and the Father.

EVIDENCE OF DCFS – MS. TEMPORA WESLEY

34. In her evidence, the witness Ms. Tempora Wesley, one of the social workers involved in this case, and whose various progress notes and emails were also before the Court, indicated that there were no concerns having to do with forceful, emergency or public law orders as there was no perceived risk of imminent harm to M. She said that she had visited the home where the Mother, M and the Grandmother lived and that the Mother takes care of M very well, in a neat, comfortable suitable and well-ordered environment.

She indicated that in her opinion, the Father is a very good father and that if the allegations are not made out, there would be no need for supervised contact. Ms. Wesley also noted that only two allegations were made by the Mother to her, being the arm and lower body injury. She was never told about any incident where the Father was alleged to have placed M in scalding bath water in the presence of the Mother.

EVIDENCE OF DCFS – MS. KEISHA SMITH

35. Ms. Keisha Smith, the Social Worker who was involved in the case at the commencement, and who was the author of the original report "Social Enquiry Report (Pertaining to Contact)", dated 26th November 2014, also gave evidence. The Report and her Affidavit sworn 2nd December 2014 were part of the evidence before me. She too indicated that if the allegations are not made out, there would be no need, in her view, for supervised contact.

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ALLEGATION 1 - THE ARM INJURY

36. This allegation is based upon a number of reports given by the Mother. In her affidavit of 7 November 2014, the Mother, at paragraphs 4 and 5 states that the first incident occurred when M was just a month old. The Mother had left M in the Father's care in order to leave the home and run some errands. After she returned and took over M's care again, she noticed that M was not able to move her right arm and cried "heartbreakingly" when she laid her down to change her diaper. Prior to that M had always been relatively quiet and could easily flail her arms. The Mother states that she tried to prompt M to move her arm by lifting it slightly, but it just fell back. The mother says that she thought the Father

might have pulled a tendon in M's shoulder accidentally. With that in mind, the Mother claims that she made sure to stabilize M's arm in order for it to recover properly. The Mother says that after about a week M was able to move her arm again and she states that this served to allay her concerns. She claims that "Had it taken longer I would no doubt have taken her to the doctor."

37. The Mother states that she raised the matter with the Father and that he made it out to be her fault. After the Mother pointed out to the Father that M had been in his sole care, the Father did not answer. The Mother asked the Father if they should take M to the doctor. The Father, according to her, wanted to wait to see if M recovered.

38. At paragraph 12 of her affidavit the Mother explained that she did not go to the doctor immediately after the first incident. She said that not only did she have very few people to turn to but she was also extremely intimidated by the Father. She claims that her fear was due to the escalating threat of violence in their home and the Father's increasingly volatile temper. He had belittled her response to the incident, implying that she was overreacting. When he asked what she had done to M to hurt her, even though she knew that she could refute him by saying that she was not there when M was hurt, the Father's ability to influence people with his words made her doubt that a doctor would believe her version of events over the Father's. She thought that if M did not recover within a week, then she would take her to a doctor. However, she did recover. The Mother claims that she did what she could to keep M's arm comfortable and still to expedite her recovery.

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She said that she thought it might have been an accident, knew that he would not admit to it, and she still largely trusted him with M.

39. In his affidavit filed 20th November 2014, the Father deals with this first allegation at paragraphs 4-8. He stated that there has never been any incident where M has come to any harm while in his presence and that the Mother had never raised any concerns regarding M's safety with him. He states that he regarded the circumstances in which the Mother and himself were bringing M up as a family as a loving environment.

40. The Father states that the Mother left the home on 17th March 2013 at the end of the Grandmother's stay with them. She told him on the phone that she was moving out and needed some time to clear her head. She said that the Father should not try to find her or M. The Father states that he was shocked but he agreed to respect her request.

41. The Father states that following M's birth, he took paternity leave and then added vacation time onto that period so he could spend as much time at home as possible. He was away from work from the day M was born until the second week in February, except for one week when he had to go into work. He states that he took this time off in order to help the Mother care for M and set up a routine for her. He would therefore still have been on leave at the time that the first incident is alleged to have occurred. The Father states that he has no recollection of any incident as described by the Mother. He states that there has never been a time when M was unable to move her right arm. He states that if he had noticed that she had any difficulty in moving, he would have contacted a doctor

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and sought their advice. The Father states that he does not know what the Mother is referring to when she states that she stabilized M's arm; he never saw any wrapping, bandaging or support on M's arm at this time, or any other time. He says he was a very hands-on father and helped change diapers, feed her, burp her, put her down to sleep and lift her up. If M had any difficulty in moving her arm he feels that he would have noticed. He is a level one first aid instructor with the American Health and Safety Institution and NAUI first aider.

42. The Father stated that M would sometimes be left in his sole care and sometimes in the Mother's sole care. She was breast fed for the first three months of her life. Because of this the Father was the one that tended to run errands, as he was concerned that he would not be able to feed M if she got hungry. According to the Father there is only one specific occasion that he can recall when M was left with him for any period of time. This was when the Mother went to have tea with some friends, which they timed between M's feedings. M started to get hungry around the time that she would normally be fed and the Father phoned the Mother and she returned.

43. The Father's evidence is that M was a very quiet and content baby and would only fuss when hungry, cold, naked or needed a diaper change. The only time that he can remember that she was uncomfortable and a little distressed was when she had mild diaper rash at the end of January. They had been using a zinc barrier cream and they changed this to a higher concentration ointment, which stopped the rash in just over a day.

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44. According to the Father, there was never any conversation between the Mother and himself about M's arm. He never suggested that the Mother had caused any injury to M. The Father states that he was always very proactive about taking M to see her doctor and he would not have just waited if he felt his daughter was suffering in any way. He took her to Dr. Chen when she was about a month old, to be weighed. If the Mother had ever raised any concerns about M's health he would have suggested that they contact a doctor.

45. I cannot trace any evidence from the Mother regarding the issue of the circumstances surrounding M's birth in her examination in chief or affidavit evidence. In her statement to the police she had said that there were no complications during the delivery of M. However, in cross-examination she indicated that forceps were used and that the force used had left an injury to the side of M's head. The doctors, according to the Mother, said this was quite normal. In his affidavit at paragraph 3, the Father states as follows:

> *"3. I understand that one of the purposes of the final [sic] hearing is to try to establish how my daughter came to suffer a fracture to her collarbone. I also understand that the doctors who treated her have raised the possibility that this injury may have happened when she was born, and so I want to provide some information from my perspective about M's birth. M was born at George Town Hospital on the 19th December 2012. We arrived at hospital between 3-4 a.m. and K was already in labour at this stage. After she was given an epidural her labour seemed to slow down and she became tired. She told the doctor that she couldn't continue anymore. He asked if she wanted some help and she agreed. Forceps were used to help deliver M. I was paying attention to K and staying out of the doctors' way at this time. I later cut the umbilical cord. I attach as exhibit 'MN-1' several photographs taken of me with M at hospital immediately after her birth. M had an indentation on the right side of her head from the forceps and this can be seen in the first photograph which was taken immediately after her birth. A little bruise developed on this area but it disappeared after about two weeks along with the indentation. M was examined before she left the hospital and I understand the results of this to have been normal. She appeared to be a normal healthy baby girl and no*

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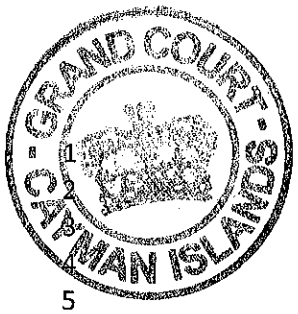


one had any concerns about her or about how she was moving. If I had noticed anything abnormal I would have sought the advice of the doctor. M was swaddled at night for about the first week of her life before K said that she preferred that she not be swaddled so that she could move about freely. I agreed with this."

46. It is noted that there is no independent evidence supporting the Mother's allegation as to this injury being caused by the Father. The Mother was cross-examined and it was submitted that there were the following inconsistencies on the basic aspects of her evidence in support of this allegation. Ms. Owen helpfully arranged the evidence as contained in different documents and submits that the following demonstrates the Mother's inconsistencies and changes over time.

47. Some of the most glaring inconsistencies pointed out were that the Mother made varying reports as to when the injury occurred and what age M was at the time. For example in her report to Dr. Chen, the Mother indicated this occurred two and a half months before the visit, which would put it at mid-April and after the parties had separated. At other times, the report was that M was a month old, and at other times two months, or three months of age.

48. Another inconsistency concerned what the Mother reported to be the injury suffered. Reference was made to the letter from Dr. Chen, which states that the Mother reported that she *"noticed that the baby's **left** shoulder/arm looked red and may be tender as **M** did not move it for the next few days."* Ms. Owen submits that it is notable that this is the only report that was made before the x-rays confirmed that there was a fracture to the

right collar-bone and that after the results of the X-rays are provided to the Mother she consistently reported an injury to the right arm. Under cross-examination the Mother denied having told Dr. Chen that it was the left arm that was injured and that this must be a mistake on the doctor's part in recording this. It is notable that the handwritten notes of the doctor are also available and confirm that it was the left shoulder/arm that was reported to be tender by showing a circled L. It was further submitted that these notes appear to be relatively contemporaneous notes that have subsequently been transcribed in to the letter, and so are unlikely to be inaccurate. It was also posited that a pediatrician would be very careful in noting the details of a complaint of child abuse and errors in this context would be extremely unlikely.

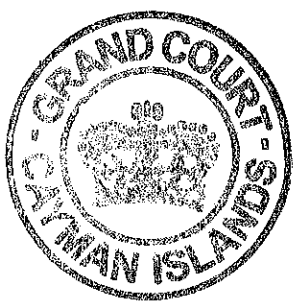
ALLEGATION 2 - THE LOWER BODY INJURY

49. In her affidavit of 7th November 2014, at paragraph 6, the Mother states that the second incident occurred shortly after the first one, i.e. in mid-February when the Grandmother was visiting from South Africa. They were both sitting together in the living room downstairs. M was upstairs with the Father. Suddenly they both heard M screaming. They could hear by the sound that M was extremely distressed. They immediately ran upstairs. As they reached M, the Mother saw the Father push M's face into his shoulder, "as if to sooth her or stifle her cries." She immediately removed M from his arms and, in the state of distress that she found herself in, she told the Father that he would never be alone with M again. She soothed M as best she could. However, when she laid M down to change her diaper, she found that M could not lift up her legs without starting to scream again. To the Mother, the lower part of M's body seemed to be more acutely painful to her. It

was at this point the Mother decided that she had to leave the situation and to remove M from this unsafe environment with the Father.

50. The Mother then went on to discuss the allegations about bath time in paragraph 7. In paragraph 12 of her affidavit, the Mother discusses that in relation to this second incident, she does not think that the Father caused serious injury. The Grandmother, who is a trained emergency medical assistant, and the Mother together examined M. Whilst it was evident to her that the Father had hurt M's back, the Mother states that the injury was not serious enough to warrant medical attention.

51. The Grandmother also gave evidence in an affidavit of 7th November 2014. In her affidavit, the Grandmother had stated that she is a qualified teacher with training in psychology, extensive training and experience in all levels of education, most recently kindergarten. She also indicated that she attended adult education counselling courses and worked as a family counsellor while living in Randburg and Johannesburg in South Africa. Ms. Owen had raised a concern that the Grandmother only be allowed to give evidence on the understanding that she was not giving expert evidence. I agreed to treat the Grandmother's evidence strictly as that of a lay person, as despite her alleged qualifications, she would not be sufficiently independent to dispose the Court to treat her evidence as that of an expert.



52. The Grandmother stated that on her arrival the Mother and Father and M seemed like a normal, happy family initially. However, within a matter of days she could see that her daughter was living in an extremely abusive and unhappy relationship.

53. At paragraph 6 of her affidavit, the Grandmother indicated that during the Mother's pregnancy the Father made it clear in no uncertain terms that he was looking forward to the birth of a son. Following the birth, she continued, he made it clear that he was going to teach his daughter survival skills of a military nature including the use of weapons. She claimed that as a mother and grandmother she was astounded by the strong views expressed in this regard and the extent of his hostility towards her. I also note that in the Original Social Enquiry Report prepared by Keisha Smith, at paragraph 18, she stated that she spoke with the Grandmother who shared with her that when M was a baby the Father would deliberately wake her up and stated that he was preparing her for survival. The Grandmother told Ms. Smith, she indicated, that she is fearful of what the Father would do if he was alone with M and does not feel unsupervised contact at this stage of her life would be in M's best interest.

54. At paragraphs 13 and 15 of her affidavit, the Grandmother stated that one evening while she was visiting with her daughter, the Father was changing M's nappy upstairs and she and the Mother were downstairs. They suddenly heard the baby give an agonizing cry and dashed upstairs. The Father was holding the baby to his right shoulder, pressing her face into his shirt and muffling the sound. In the aftermath of this incident, the Grandmother said that she could not pick M up in the usual way, i.e. with her hands

under her arms without her beginning to cry. It was also difficult to change her diapers, as lifting her bottom seemed to cause serious pain and discomfort. Within a week or two M appeared to have recovered although she seemed to take a long time to relax whenever they picked her up or laid her on her back.

55. The Grandmother also stated that she saw the Father kick one of the family dogs whilst wearing a pair of heavy army boots in an unprovoked rage, brutally, and without any conceivable justification.

56. At paragraph 9 of his affidavit, the Father stated that he could not recall any incident such as that described in the Mother's affidavit in respect of Allegation 2. He testified that there was only one incident that he could vaguely recall when M cried out. He, the mother and the Grandmother were all seated downstairs. He was the first to go upstairs and he picked M up and soothed her, while the Mother and Grandmother followed behind him. He claims that the incident was nothing out of the ordinary and that M soon returned to sleep. He denied that they ran upstairs and claims that M was not in extreme distress. The Father denied that he ever pushed her head into his shoulder, claiming that he always supported her head and neck and made sure that she could breathe freely, particularly when she was crying.

57. At paragraphs 10 and 11 it was the Father's evidence that the Mother never told him that he would never be alone with M again, and that it was only after they had separated that the Mother started to state that she did not want him to see M. He indicated that M was

alone in his care right up to the day the Mother took her away on 17th March 2013, which was over a month after the incident is alleged to have occurred.

58. The Father indicated that he never noticed M having any difficulty lifting up her legs or screaming when she did so. If he had noticed this to be the case, or that M was suffering from acute pain in the lower part of her body he would immediately have taken her to be seen by a doctor.

59. The Father denied the allegation made by the Grandmother about the dog, saying he was never abusive to the family's dogs. He also stated that before he knew about the gender of the baby he was excited about having a boy. However, he stated that he was delighted when he heard that they were having a healthy baby girl and has always doted on his daughter. At paragraph 36 of his affidavit, he stated as follows:

> *"36. K and myself discussed how we would raise our children. We agreed that we would like them to be able to take care of themselves. We both grew up in South Africa, myself on a farm in the country. I wanted to teach my children camping skills, outdoor sports and how to take care of themselves and those around them. I hoped that one day M would be interested in the same sports I liked such as karate, archery, fencing and SCUBA diving. These were skills that I had grown up with and I wanted to pass on the knowledge. K was supportive of this, in particular she was concerned to protect our daughter's safety. All of these were joint ideas that we had as a couple; if K was ever unhappy with an idea I would have accepted that. I can never remember having a conversation about this with my mother in law, perhaps something was said in passing but there was never an argument and I never recall her expressing strong views about this."*

60. Ms. Owen performed the same exercise of analyzing inconsistencies in respect of Allegation 2. Some of these were as follows:-

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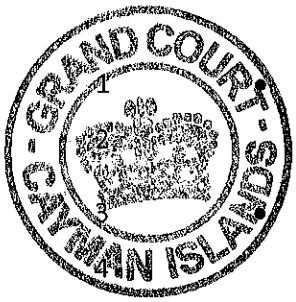
(i) What did Petitioner see of this incident:

- Letter from Dr. Chen at The Children's Clinic – the Father looks at Mother as she enters the room *"then quickly picked up the baby."*;
- Outpatient Physician Notes – *"When mum rushed to room found baby cuddled by dad with no reason given for screaming."*;
- Reporting Officer Narrative – Mother *"found Mr. Neethling holding the child almost smothered her against his shoulder/chest with a weird look on his face"*;
- Scott Schedule - Mother was downstairs when M screamed she ran upstairs where the Respondent was holding M and she *"saw the father pushing M's face into his shoulder as if to soothe her or stifle her cries"*;
- Petition – *"The Petitioner dashed upstairs and saw the Respondent pick the baby up and press her into his shoulder as if to soothe her."*;
- RCIPS Statement of Witness – *"I saw that my baby was on the changing pad on the bed and she was screaming. My husband immediately picked her up and pressed her face against his chest trying to calm her."*

(ii) What was the injury suffered:

- Letter from Dr. Chen at The Children's Clinic – *"Mom noticed that M's lower back looked a little red and that she seemed tender in her lower back as every time she picked her up or changed her diaper she seemed to be in pain for the next few days. There was no bruising or swelling noticed."*;
- RCIPS Statement of Witness – Mother knew this was a back injury as she cries on lifting and diaper changing. No mention of visible injury or redness;



Scott Schedule – Non-specific but picking M up under her arms makes her cry. M's bottom also caused severe discomfort on diaper changes;

Oral evidence – Mother stated that the injury was to the lower body but there was no visible injury like bruising or redness.

61. Ms. Owen also pointed to inconsistencies and discrepancies between the Mother's evidence and that of the Grandmother as to the length of time during which M was injured.

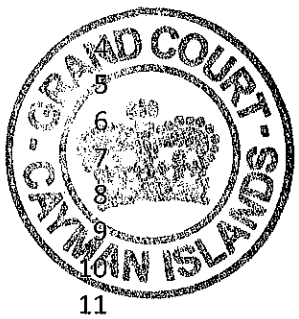
- Affidavit of the Grandmother – *"Within a week or two, M appeared to have recovered..."* but in her RCIPS Statement of Witness she stated *"In about three to four days, I could lift her or change her without it hurting her"*.

ALLEGATION 3 – GENERAL ALLEGATIONS ABOUT ABUSIVE BEHAVIOUR AT BATH TIME

62. At paragraphs 7 and 8 of her affidavit, the Mother states that during the period around the time that the second incident occurred, M's bathing routine was rapidly becoming what could best be described as a living nightmare. Without fail, the Father would become angry and act in any angry manner towards her. Every night he would lean over and yell at her whilst at the same time verbally abusing and berating her. The mother says that this led to M being noticeably anxious and traumatized and she would frequently cry during the bath time routine.

63. The mother indicated that during the marriage she found the Father to have a very unpredictable and volatile temperament. He would be extremely energetic and upbeat

one moment and the next he would lapse into deep depression coupled many times with an inexplicable rage towards her as well as towards her mother during the six weeks that she visited with them. At paragraph 8, the Mother stated as follows: -



> *"I do not believe that her father meant to hurt her. He simply is a man that possesses an extremely volatile and unpredictable temperament. The father and I frequently argued as a result of his frequent mood swings coupled with the escalation of his volatility and uncontrollable rages, I was left in no doubt that it was going to be a matter of time before his wrath which had already been directed towards our two pet dogs would be extended to little M…".*

64. The Grandmother in her affidavit stated that often times the Father would be pre-occupied with his computer games and only answer the Mother perfunctorily. However, at M's evening bath time, he would "perk-up". Together he and the Mother would bathe the baby. The same procedure was followed every evening. The Grandmother says that initially, during bath time she would remain downstairs or in her room but she would nevertheless hear the Father's incessant calling of the Mother's name. His level of control would inevitably escalate, becoming more and more insistent. During this time, she would not hear her daughter's reply. Initially the baby's crying would start quietly and then she would begin to cry more loudly in a fearful manner. On hearing the baby's crying at first she would go upstairs and enquire whether she could help, but she says that her offer was always declined. Finally, on the third or fourth evening of her visit, she went up to the bathroom, and saw the Father holding M without looking at her, staring at the Mother whilst trying to get the Mother to stop bathing M and to look at and listen to him instead. She would overhear the Mother softly refusing to do so, whilst asking for help in lifting or turning the baby as needed. The Father appeared to do so mechanically

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and notably without a break in his abusive raised voice while staring at the Mother with fixed eyes. In the meantime M would continue to cry incessantly and appeared extremely distressed and fearful.

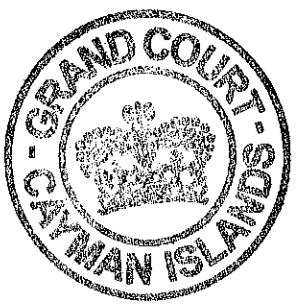
65. At paragraphs 12 and 13 of his affidavit, the Father exhibited photographs taken which showed himself and the Mother working together at bath time. He said that M enjoyed her bath time generally and that bath time was fun. His evidence was that the first few times they bathed M she was crying and fussing and then they realized they had to turn the fan and air conditioning off in order to keep her warm. He indicated that the only time he remembers M particularly crying was once when she emptied her bowels in the bath.

66. He denied that he ever argued with, abused or berated his wife at bath time or at any other time. At paragraphs 38, 39, and 40 he stated that on the first day that the Grandmother arrived he offered for her to take his place in bathing M. He said that she politely declined and responded that she did not want to interfere with the way they were doing things. He claimed that he continued to repeat this offer and said that it was also not true that he declined her offer to help at bath time. He denied that he would ever take his eye off M for more than a glance as he was always concerned not to get water in her face. His evidence further was that, as he and the Mother worked together in bathing M, there may have been occasions when he called out her name to get her attention, but that he never did so incessantly or in an aggressive way. The Father indicated that he never did anything to cause M to be fearful at bath time or otherwise.

ALLEGATION 4 – SCALDING BATH WATER ALLEGATION

67. The Scott Schedule details a very serious incident which amounted to *"the climax of these excruciating bath times"*. The allegation was that *"the water run by father was too hot and mother had to quickly lift M out of the scalding hot water, while holding M to soothe her."* The inescapable implication of this is that M had been placed into the scalding hot water. Despite the gravity of this allegation it is recorded only in one source of evidence – the Grandmother's affidavit dated 7th November 2014. The Grandmother does not however refer to this incident at all in her own RCIPS Statement. The Mother does not refer to this incident in any of her affidavits to the Court, her Petition or her RCIPS Statement of Witness. Ms. Wesley was asked about whether this allegation had been raised with her whilst she conducted her investigation or in the approximately one and a half years that she had worked with the family, but she confirmed that she had never heard of it before. She also confirmed that it had never been raised with her by RCIPS whilst they were conducting their investigation, and it can be seen from the disclosure they provided in relation to their investigation that it is not mentioned.

68. The Father has denied that M was placed in scalding water. At paragraph 41 he recalls that there was one occasion when he had started to lower M into the bath when he realized it was too warm. He said it is untrue that the water was scalding hot or that M was placed fully into the water.



NEW ALLEGATION - PHYSICAL ABUSE DURING SUPERVISED CONTACT

69. In her oral evidence under cross-examination the Petitioner made an allegation that the Respondent physically abused M during a contact session supervised by DCFS. On questioning she stated that she did not recall either the date or even the month that this incident is said to have occurred. She could not recall whether any further contact sessions had occurred since this incident. She thought it might have occurred around one to two months ago. Her evidence was that she was present at contact and noticed the Father go into *"an icy rage"*. She stated that M was outside the office when she heard her gasp suddenly, as the Mother said she does when she is really hurt, and then turned around and looked at her and noticed redness and the Father's finger marks on M's arm. She claimed that she could see these red marks from across the room and this was indicative of their severity. She agreed that she regarded this as physical abuse and stated that the Father must have pulled on her arm to make her sit her down. She continued by saying that during contact the Father will *"push her where he wants her to be and drag her by the hand"*. She confirmed that Ms. Wesley was with the family and supervising contact at this time but had not seen this occur. The Mother stated that she had chosen not to mention it to her. The Mother said she wanted to see what Ms. Wesley would observe or do, advised that she had not yet made a complaint to DCFS against Ms. Wesley but that she intended to do so as soon as the fact finding hearing was completed.

NEW ALLEGATION - HISTORIC ALLEGATION OF SEXUAL ABUSE

70. The Mother was recalled to be asked about an inconsistency between information that she had given to the social worker that she had never experienced any form of abuse and her

admission to the psychiatrist that she was molested as a very small child. Also, separate and apart from any inconsistency, in my view this was relevant to my assessment of credibility of the Mother as well as my assessment of her character and her ability to make impartial observations. She gave evidence this incident happened once when she was somewhere between 18 months to two years old, she did not remember much of it but was told about it. It happened with a family member. It was dealt with and handled by her parents. She was treated with play therapy and further evaluations were made of her. The Mother gave evidence that she did not think that this has affected her ability to differentiate between fiction and truth. She indicated that it did not influence her decision to separate from the Father, but she said that it has made her very aware of the need to keep her daughter M safe from anyone, irrespective of whether they are a family member or not. Not in direct response to the question she was asked, the Mother brought up a new allegation that the Father had told her that he had *"molested his cousin when she was small"*. This was the second allegation that the Mother had made for the first time during her oral evidence without any explanation as to why it had not been made at any earlier stage to allow it to be responded to and properly considered by the Court and the Father, the first being that there was physical abuse during one of the recent supervised contacts.

71. The Father was re-called and explained that around 30 years previously when he was approximately 15 years old and his female cousin was approximately 10 years old there had been some inappropriate touching of her by him. He explained that this was dealt with severely by his grandmother and did not occur again. He claimed that he had gained an understanding of the gravity and inappropriateness of this as he grew from a child into

a man. He confirmed that he had not been directly asked about this, and it did not cross his mind, when being interviewed by the psychiatrist Dr. McGill. His evidence was that he did not purposely conceal it from professionals, but rather that he did not regard it as being relevant to the investigation into M's clavicle fracture.

THE PSYCHIATRY REPORTS ON THE PARENTS

72. Dr. McGill, the Psychiatrist, who saw both parties at the request of DCFS, in her report dated 29th November 2013 in relation to the Mother described some of the background which she gleaned as follows: -

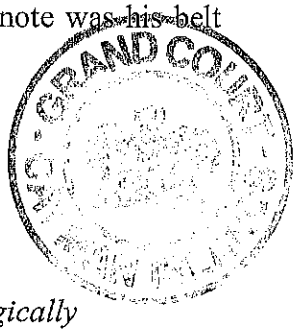
> *"Mrs. N gave an account of the events leading to the separation from her husband. She describes frustration with their living circumstance and some amount of passivity in confronting problems. There is some evidence of naivety in the way she viewed events in the marriage and some obsessiveness noted in her approach to problems. She operates more on principles which are held fairly rigidly, suggesting that they were developed in childhood, rather than by mature evaluation (e.g. her acquiescence to her husband's habits in spite of the perceived difficulties associated with them."*

Dr. McGill stated her impression to be as follows:-

> *"This is an early middle aged woman, who has a tendency to non-assertiveness in her marital relationship which may be due to her family of origin's culture or her religious beliefs. She has no major psychiatric disorder. Based on her passivity, it is my professional opinion, that an analysis of Mrs. N's parenting skills be referred to the psychologist."*

73. In her report with regard to the Father, dated 4th December 2013, Dr. McGill recounted the fact, amongst others, that the Father told him that after finishing high school he did two years of military training. The first year was compulsory. The second was by choice. He also was in the citizens' force for a further 17 years. Dr. McGill also

described the Father as casually but very neatly dressed and said "of note was his belt with its Superman clasp."



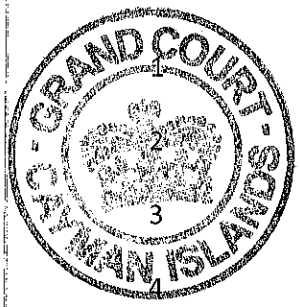
74. Dr. McGill stated her impression to be as follows: -

> *"Mr. N. is a middle aged man who appears to be psychologically young for his age in spite of having a relatively good intelligence. His emotional intelligence seems to be below average and he also may have some attention deficit. These would limit his ability to empathize and possibly respond appropriately to interpersonal challenges. There is no evidence of a major psychiatric disorder. Any further assessment as to parenting ability will require a psychological evaluation."*

DISCUSSION OF SUBMISSIONS AS TO FACT FINDING HEARING

75. Before going on to a resolution of the issues, it is necessary to address some of the submissions made in detail. This is particularly so since, as previously indicated, there have not been reported decisions on hearings of this kind.

76. Reference was made within the Mother's closing submissions to the *"unequivocal provisions"* of section 40 of the *Children Law*. The Mother's Counsel asserts that this section deals with interim orders *"of the nature now in place"*. I agree with Ms. Owen that no section 40 order has ever been applied for or been granted in this case. Section 40 is contained within Part IV of the Children Law which applies expressly to interim ***care and supervision orders*** granted to DFCS. The test of 'significant harm attributable to a care giver' is applicable only to applications made by the DCFS for those public law orders (as is stated specifically within the statute at section 33(1) of the *Children Law*), it is not applicable to private law orders in the form of contact or residence orders. This test



matches section 31(2) of the *Children Act 1989* in England and Wales, referred to as the 'threshold criteria' and applies only to public law cases where care and supervision orders are sought, not private law cases.

77. See per Lady Hale in the case of ***Re J*** [2013] UKSC 9 as to why the Court requires public law cases to meet this statutory threshold test before a care or supervision order may be granted. That test is not applicable in private law cases.

78. Private law orders, including contact orders are dealt with at Part II of the *Children Law* and are defined at 10(2) as 'section 10 orders'. The power to make an interim section 10 order is provided by section 13(3). The only statutory matters that the Court is obliged to have regard to in determining whether to grant a section 10 order is the welfare principle set out at section 3. In any event in my judgment it is plain that at this fact finding hearing the Court is determining facts, not granting Children Law orders, which will be dealt with at the next or continued hearing.

79. Throughout the Mother's closing submissions, and specifically at paragraph 20 it is stated that the welfare of the child is paramount *"for present purposes"*. As argued by Ms. Owen, this is not an accurate statement of the law. In ordering a discrete fact finding hearing the Court has divided the final hearing of this matter and separated issues of fact (to be determined at the fact finding) from issues of welfare (to be determined at what is referred to as the 'welfare stage' or second stage of the final hearing, where the issue of contact itself is to be determined, based upon the facts found). At the fact finding hearing

the Court solely undertakes a forensic assessment of the evidence to determine whether the standard of proof has been discharged by the party bearing the burden of proof, in order to establish a factual matrix.

80. I agree with Ms. Owen's submission that the welfare circumstances stipulated within section 3(3) of the *Children Law* (the welfare test) will not assist the Court in determining factual issues. In the instant case M's wishes and feelings, her physical, educational or emotional needs, age, or the parties parenting capacity will not assist the Court in determining, for example, how or by whom her clavicle fracture was inflicted. The welfare checklist will only become relevant at the second 'welfare stage' of the final hearing where the Court will decide what orders to make under the *Children Law*.

81. The Mother's submissions quotes dicta from the local unreported judgment ***DE v. NE*** Cause No. FAM 237 of 2010, a decision of Williams J. delivered 27th May 2014. However, that case dealt with interim supervision orders and was a public law case. As such, the section 33(2) threshold criteria were relevant to those proceedings, but are not relevant or applicable on a section 10 fact finding hearing. As I understand it, Williams J. was not conducting a fact-finding hearing. The judgment and the principles so lucidly therein set out do not therefore assist with the principles and considerations to be applied in the present hearing.

82. Further at paragraph 23.3 of her written closing submissions, the Mother's Counsel concludes that Chief Magistrate Hall must have found the threshold criteria at section

33(2) to have been proven at the Summary Court hearing, and therefore this proves that harm has been suffered by M due to one of her parents. That is not at all so. As stated previously, no section 40 order has ever been made within these proceedings, and DCFS have never even been a party, let alone applied for a supervision or care order. As such the section 40 threshold criteria have never been relevant to the Court and no such finding of significant harm has ever been made.

83. I have gone to the trouble of addressing these points because I think that in this fairly untrodden area of law in this jurisdiction, it is vital not to confuse the governing principles.

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RESOLUTION OF THE ISSUES

FAILURE TO SEEK CONTEMPORANEOUS MEDICAL ASSISTANCE

84. It is apparent from the evidence before the Court that concerns have been expressed about the Mother's failure to access proper medical care for M following her separation from the Respondent - see in particular the comments of Dr. Robinson. Dr. Chen noted that M had missed two check-ups prior to attending on 3rd July 2013. The Mother blamed the Father for this saying that she was unsure whether he had hurt M. However, following this attendance the Mother also failed to attend for a well-child check-up and 4 and 6 month vaccines. The Mother's explanation for this at the hearing was that she disagreed with vaccinations and would not take her daughter to the doctor unless she was unwell.

THE DELAY IN REPORTING ALLEGATIONS

85. The Mother's delay in reporting her allegations is one of the most marked features of this case and provides the reason why it has not been possible for the medical experts, RCIPS or DCFS to make an assessment of when or how the clavicle fracture was sustained by M. There was no attempt to take M to be seen by a doctor after the alleged second incident either. Subject to the above inconsistencies as to the date, the Mother's case at the fact finding hearing was that the first allegation occurred in January 2013 and the second allegation occurred a few weeks later in February. The first time that these allegations were reported was to Dr. Chen on 3rd July 2013, some 6 months after they were said to have occurred and 4 months after she separated from the Father and moved with M to live elsewhere. Her explanation for this delay was that this was the first time that she had been able to see a Pediatrician. She stated that she did not take M to see a doctor as she was afraid that she would bump into the Father. She did however confirm that she was working full-time at this point so she was clearly venturing outside of her home.

86. A further delay occurred in between the Mother reporting her allegations to Dr. Chen and presenting M at hospital for x-rays and further assessment. Dr. Chen reported the Mother's allegation to RCIPS on the same day that the Mother made the allegations to her. She provided her with a request form for a full skeletal survey to be completed by the hospital. The Mother then delayed for nearly a further 2 months before presenting at the Family Resource Center on 26th August 2013 when she was then accompanied to the George Town Hospital where x-rays were finally undertaken. The Mother blamed her

work as an assistant at a funeral home for this further delay. She stated that her work was *"of a very pressing nature and the injuries would not go anywhere. I have to ask permission to leave the office. I had no chance to take my daughter to the hospital. I ordinarily work 5-6 days per week between 8-5 p.m."* However, her working hours are not unusual and ought not in my view to have precluded her, or indeed, the Grandmother from taking M for a very important skeletal survey earlier.

THE MEDICAL EVIDENCE AND CONTEMPORANEOUS REPORTS

87. At the end of the day, for the reasons outlined above, the medical evidence was inconclusive and does not assist with allegation one. There is also no medical evidence in relation to allegation two, or allegation four. By its nature, allegation number three, would not have attracted medical evidence. There are also no contemporaneous reports to the police, doctors, DCFS or any other independent body capable of corroborating in the general sense of the word, or supporting the allegations made by the Mother in relation to Allegation 4.

<u>ASSESSMENT OF THE EVIDENCE</u>

THE MOTHER

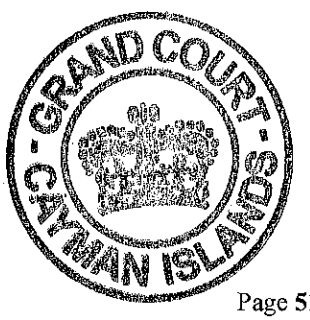
88. I found the mother to be a very quiet, but yet intense and somewhat anxious witness. I also had the impression that she operates upon some fairly rigid lines, that may affect her ability to consider situations rationally, objectively and with balance and due discretion.

I must say, I found the contents of the Mother's Affidavit at paragraph 13, quite remarkable, particularly the fact that she felt that M's allergies warranted a trip to the

doctor but that the allegations of injury which she makes against the Father did not. I also share Dr. Robinson's concern that M did not receive medical attention at the time of the two incidents described by her to him when she took the view that they were serious enough to cause her to separate from the Father. The Mother states:

> *"13. By mid-August 2013, M's allergies became such that I had to take her to the doctor. It was during this visit that I asked her doctor (Dr. Chen) to give M a full physical examination to make sure that she was healthy, apart from the allergies. I explained to the doctor about the incidences [sic] that lead [sic] to my concerns for M's safety and the circumstances giving rise to my leaving of the apartment that I had shared with M's father. Dr. Chen did her examination and found M healthy. Approximately a half hour after the examination concluded...Dr. Chen called to let me know that she had contacted the RCIPS and they advised that she needed to file a statement with DCFS explaining exactly what had happened during the period when M would have sustained the injury to her collar bone. The social worker that my mother and I saw was Mrs. Cindy Dilbert (Ms. Dilbert). Ms. Dilbert took M for examination and x-rays after I had discussed everything with her. The hospital then requested an investigation as well as psychiatric evaluations in respect to both the father and myself. My mother and I were asked by Detective Howell to make statements regarding the matter and the Police contacted DCFS per recommendation that M see her father once a week during supervised visits. I was told that no evidence from my friends were [sic] allowed since same would be prejudiced. They did however interview Mrs. Pansy Anderson (Mrs. Anderson) at her home. Mrs. Anderson was the friend and a part of the Bodden family business which whom I am employed. She helped me look after M during the first weeks after I returned back to work and the week I left to go to South Africa for my father's funeral.*

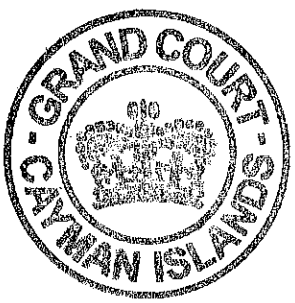
In short, my general concern with the Mother was that she may not be the most reliable witness by herself, not so much because she is not speaking the truth as she sees it, but rather that her view and perspective might not be balanced and objective.



THE MOTHER'S ATTITUDE TOWARDS CONTACT

89. A variety of sources of evidence demonstrate that the Mother does appear to have a certain degree of hostility towards both the Father himself and in particular towards him having contact with M and processes aimed at facilitating contact. I would not go as far as Counsel for the Father and say that this hostility provides a reason why the allegations were fabricated. I would more say that, coupled with the other matters such as delay in seeking medical attention for M, I do not think that the Mother is taking a balanced approach to the Father and hence that may have jaundiced her view of things. She certainly seems to be of a suspicious disposition, as demonstrated in relation to the allegation which arose for the first time in cross-examination in relation to alleged physical abuse occurring recently during contact.

90. The Mother made a complaint about Ms. Wesley in December 2013 and relied upon this as a reason to terminate contact. In her oral evidence Ms. Wesley confirmed that this led her to step back from the case. During the course of her oral evidence the Mother made an allegation that Ms. Wesley had failed to observe physical abuse by the Father on the child during one of the contact sessions she supervised. The Mother explained that her dissatisfaction with Ms. Wesley was linked to her support of the Father during contact and the fact that *"Ms. Wesley is not acting in the interests of the child. She told me how wonderful my husband is and that he acts in the best interests of the child."* The Mother stated that she does not want to and never wanted to keep M away from the Father; she



just wanted another social worker to be allocated to the case who was unbiased and more experienced.

91. The tension between the Mother and DCFS when they facilitate contact still continues. The Addendum Report produced by Ms. Tiffany Myles (DCFS Social Work Supervisor) and Ms. Wesley (allocated Social Worker) on 22nd April 2015 details emails sent by the Mother bearing further criticisms of Ms. Wesley in relation to the organisation of contact. It also details that the Mother carried out video recordings of a contact session on 29th April 2015. When asked why she was videoing contact she simply advised that it was for her own purposes.

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THE FATHER

92. I found the Father to be well-spoken, highly intelligent, but intense. It appeared to me that he did appear somewhat militaristic in his approach and outlook. I formed the impression that he was controlling and domineering in his relationship with the Mother and that he was quite capable of exhibiting bouts of moodiness and coercive behavior.

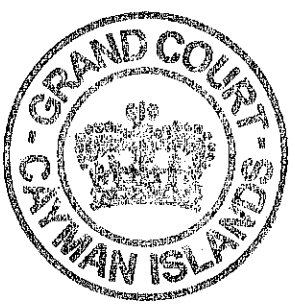
THE GRANDMOTHER

93. The witness whose credibility impressed me very much was the Grandmother. I thought that she was a very convincing and perceptive witness and I was quite persuaded that she was speaking the truth when it came to her impression of the relationship between the Mother and the Father and her fears for M. In her cross-examination, she stated that one of the reasons why she gave such a long affidavit was that she feels very strongly about

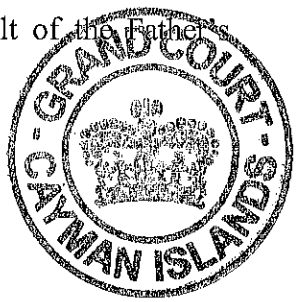
the situation and cares very much about her granddaughter M and her daughter the Mother. She stated in a way that I thought very candid and frank, that she does not dislike the Father and she does not think that he dislikes her. When it was suggested to her that bath time was a happy, cooperative time, between the parents and an enjoyable activity for M, she responded that, it was never like that during the six weeks that she spent with the family. She went on to say, "That comes from a fairy story of happy parents". It is to be noted that the allegations in respect of which her evidence is capable of lending support to that of the Mother are Allegations 2-4, and not Allegation 1.

ALLEGATION 1 - THE ARM INJURY

94. Ms. Owen submitted that one of the first points to consider when assessing the veracity of these reports by the Mother is their consistency both over time and as between the versions given to different people. There are a number of inconsistencies in the evidence of the Mother in relation to the arm injury. In answer to these inconsistencies the Petitioner repeatedly asserted that the various professionals who had recorded her allegations had made errors in doing so. None of those errors were questioned by the Petitioner before the fact finding hearing despite the evidence having been served many months prior. It is to be noted that the individuals who recorded these allegations were professionals acting in the course of their employment. I accept Miss Owens submissions that professionals such as RCIPS Officers, doctors and social workers would treat the recording of allegations of child abuse very seriously and be very conscientious in accurately recording such allegations.



95. I agree that when one considers the various inconsistencies, not all of them by themselves being massive, when taken together, coupled with the lack of medical evidence and delay in seeking medical attention in respect of the matters in Allegation 1, I cannot say on a balance of probabilities that I am satisfied that the Allegation 1, the arm injury, was non-accidental. This is particularly so because no precise or assistive timeline can be established for the injury, in the period between birth 19th December 2012 and 26th August 2013 (although the medical report speaks of possible old fracture, suggesting less likely to be close in time to date when X-rays taken). Further, the medical report states that a fractured clavicle can occur at birth. In so far as the burden of proof rests on the Mother, in my judgment she has not proven the case on the balance of probabilities that this alleged injury was non-accidental or that it occurred as a result of the Father's actions.

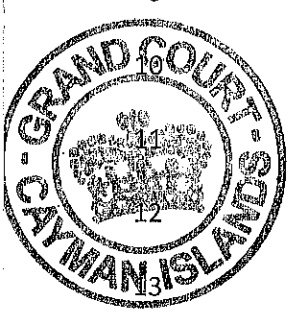


ALLEGATION 2 - THE LOWER BODY INJURY

96. I must say, that if the evidence on this point and this allegation had depended upon the Mother alone, I would have found the evidence and circumstances far more problematic. However, I have found that the evidence of the Grandmother has been of great assistance, particularly when it comes to resolving matters of credibility as I have to do, where the accounts given by the Father on the one hand, and by the Mother and Grandmother, cannot both be true. This is particularly so in relation to Allegations 2 and 3. I found her to be a credible and convincing witness. Her evidence supporting the Mother on Allegation 2 is as a factor enhancing the credibility of the allegations and has ultimately tipped the balance.

97. Ms. Owen has submitted that "regard should be had to the unusually dependent relationship between these two witnesses and their complicity, which was noted by Ms. Wesley, "*This worker has noticed that any interaction or any communication from Mrs. N she is always looking for approval from her mother, who is always present during the home visit.*" Further, that the Court should note the inconsistencies in the detail of the evidence given by the Mother and the Grandmother, as noted above.

98. In my judgment, the inconsistencies between the Mother and the Grandmother are not significant and do not go to the root of Allegation 2. Further, whilst I do have the impression that the Grandmother is thoroughly devoted to the Mother and is naturally interested in protecting her and is plainly not an independent witness, I found her reliable and convincing. Her evidence and demeanour have convinced me that she is speaking the truth.



99. In relation to Allegation 2, though it is of concern that this second incident was not contemporaneously reported and nor was M taken to be seen by a doctor as one would reasonably expect, unlike Allegation 1 where there is no support for the Mother's account, the Grandmother's evidence does support the Mother's evidence on Allegation 2.

100. I accept and find as a fact that M was at the time of the alleged second incident in the care of the Father alone upstairs and that she did scream out intensely causing alarm to the Mother and Grandmother who were downstairs. I reject the Father's evidence that he was

downstairs with the Mother and the Grandmother when they all heard M cry out and further that it was in those circumstances that he was the first to go upstairs, pick up M and soothe her, followed by the Mother and Grandmother.

101. I also accept and find as a fact that there was some discomfort to M after this incident which she did not show signs of having previously, whereby she had discomfort when her diaper was being changed and when she was lifted up under her arms. I find that there was some injury to her lower back or lower body. I accept that it took some time to heal but that it was not extremely serious.

102. I accept as true the Grandmother's evidence as to the Father's discussions with her about how he wished to raise M and as to his intense and militaristic approach. I am of the view that it is reasonable to draw the inference that this injury was caused by the Father as the Father was the only one in the room with her when the incident occurred and M was not suffering before. This is a reasonable inference in my view and is not based upon mere suspicion or speculation.

103. I therefore believe that the Father has lied in relation to whether he was upstairs at the time of the incident and as to the adverse effect on M. I give myself the ***R v Lucas*** warning that it is common to have witnesses lie for many reasons, including shame, misplaced loyalty, panic, distress or to bolster a true defence and the fact that a witness has lied about some matters does not mean he has lied about everything. However, I am satisfied that these are material matters upon which the Father has lied and I am satisfied

on a balance of probabilities that his reason for lying is that he is guilty of some intentional and/or non-accidental conduct in relation to M in respect of the incident in question.

ALLEGATION 3 - GENERAL ALLEGATIONS ABOUT ABUSIVE BEHAVIOUR AT BATH TIME

104. I am entirely satisfied on a balance of probabilities that the bath time routine was a very distressing time for both the Mother and M and that this was due to the Father's controlling and unreasonable behaviour. Again, I accepted the Grandmother's evidence over the Father's and found that it supported the Mother's account in material respects that the Father would exhibit controlling behavior and get into a rage causing the Mother and M to become fearful, anxious and distressed. Again, I am satisfied, taking into account the considerations in ***R v Lucas*** that the Father lied to cover up his behaviour and not for any innocent reason or for any other reason but that he is culpable.

ALLEGATION 4 - SCALDING BATH WATER ALLEGATION

105. The allegation as contained within the Scott Schedule, that M was placed in a bath of scalding hot water, is somewhat implausible. There is no accompanying allegation that M suffered any burns, or any injury at all, as would be likely if a young baby had been placed in scalding hot water as alleged. Indeed the allegation refers to the bath continuing once the water temperature had been adjusted, which does not fit with the gravity of the incident alleged.

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106. The Petitioner herself was first cross-examined about this allegation and was asked why she had made no reference to it within any of her evidence. She was not able to provide an explanation other than to say that she was concentrating on the arm injury when she produced her evidence. It is to be noted that her affidavit produced specifically for the fact finding hearing at the same time as the Scott Schedule carrying Allegation 4, runs to 8 pages in length and details relatively minor and peripheral criticisms such as the Respondent's use of video games and Facebook, but omits any reference to this very serious allegation which is of utmost importance to the Court. The Petitioner has also produced a seven page Statement of Witness to RCIPS which does not reference this allegation.

107. I agree with Ms. Owen that the substance of this allegation changed dramatically during the course of cross-examination of the Grandmother. Despite the allegation as contained in the Scott Schedule and paragraph 9 of the affidavit of the Grandmother that *"K had to quickly lift the baby out of the scalding water, calm her down..."* under cross-examination the Grandmother stated that she did not think that any part of the baby had been placed in the water. She indicated that her criticism of the Father in fact related to the verbal argument that she alleges occurred after it was realised that the bath water was hot.

108. I therefore do not accept on a balance of probabilities that M was placed in scalding bath water by the Father. If it did happen, I would not be satisfied in the circumstances as described that it was anything other than accidental.

NEW ALLEGATION - PHYSICAL ABUSE DURING SUPERVISED CONTACT

109. The Mother's failure to report this allegation contemporaneously, despite a number of appropriate opportunities to do so is indicative of the unreliability of this allegation. The first time that this allegation was disclosed was during her cross-examination. The evidence provided by the Mother was that this injury occurred during a contact session supervised by the allocated social worker and resulted in a visible injury to M's arm. The Mother was in my view unable to give a proper explanation as to why she would not have pointed out that injury to the supervising social worker at a time when she could herself have witnessed the redness and finger marks on the child's arm and properly investigated what had occurred. The Mother's evidence was that *"it was apparent that the safety of the baby was not the primary issue and Ms. Wesley was not protecting her safety, so I left it."* Not only did the Mother fail to report the allegation contemporaneously to the contact supervisor, she has failed to report it to any member of DCFS or RCIPS. When pressed on this point during cross examination the Mother stated that she did not really understand how these matters should be dealt with. However the Mother should reasonably have been aware of the importance of making a contemporaneous report of allegations given her delay in reporting the allegations relating to the clavicle injury meant that no proper investigation could be carried out. Despite this the Mother once again chose to delay in reporting her allegations of physical abuse.

110. The allegation was in my view really not made appropriately within these proceedings. No attempt was made to amend the Scott Schedule or file additional affidavit evidence before the fact finding hearing to allow this allegation to be responded to or properly

tried. Ms. Wesley herself gave evidence on day one of the fact finding hearing and was cross-examined by the attorney for the Mother but at no stage was this additional allegation put to her to allow her to provide evidence to the Court about what was alleged to have occurred in her presence. The Mother herself was granted leave to provide oral evidence in chief to clarify her affidavit evidence and although she gave evidence on peripheral issues such as her work commitments, she did not raise this allegation until she was being cross-examined.

111. This allegation is also in my view inherently implausible. The Court received evidence from Ms. Wesley and the DCFS progress notes have been disclosed within proceedings. Her evidence was that she has been a social worker for eight years and she must be taken to have some experience and diligence in performing her professional duties. For this allegation to be true, she would not only have had to fail to witness a physical assault on a child under her supervision, but also fail to hear a gasp or see a visible arm injury, both of which were alleged to be obvious to the Mother sitting on the other side of the room. In all of the circumstances, I am not satisfied on a balance of probabilities that this allegation has been made out at all.

NEW ALLEGATION - HISTORIC ALLEGATION OF SEXUAL ABUSE

112. I accept that inappropriate touching between children is not uncommon and may not itself be relevant to the contact that an adult will have with their own child. It is notable that the disparity of age of the persons involved was not great, and the Father was himself a teenager, a minor at the time. Further, the evidence was that no force was used, and that

after an explanation and reprimand was provided by the Father's Grandmother the behaviour ceased and the Father exhibited appropriate responses as an adult now with an understanding of the inappropriateness of the behaviour. The Father did not attempt to minimize or excuse what had occurred, save to say that "he was just a punk kid at the time", and his demeanour evidenced genuine remorse on his part in my view.

113. This matter is really more relevant, if at all, to the final hearing and the overall evidence, and I do not see this as an issue upon which it would be appropriate to carry out a fact-finding exercise. This is particularly so as the Mother did not raise it initially and does not appear to be making any allegation of sexual abuse or the potential for sexual abuse by the Father of his daughter M. She herself assessed the Father as being genuinely remorseful and embarrassed about this matter when he spoke to her about it some years before they were married.

CONCLUSION

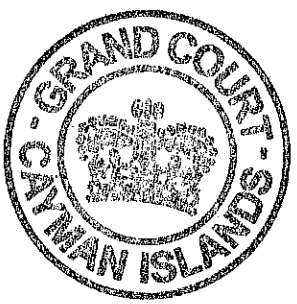
114. In conclusion I have found that the Mother has failed to prove Allegation 1 - The arm injury, against the Father. It is simply not possible to determine, when or how the fracture to M's clavicle was caused, primarily because of the Mother's delay in seeking medical attention. I am also unable to say that I find the Allegation 4, the scalding bath water allegation proved. In addition, the account of the new allegation of physical abuse during contact and the reason for not bringing it up before, or with Ms. Wesley, at the time that it is alleged to have occurred during her presence, are just not credible or plausible to me.

That is also not proved. I also do not find it suitable or appropriate for me to make any finding about the new allegation, the historic allegation of sexual abuse.

115. In relation to both Allegation 2 - the lower body injury, and Allegation 3, the general allegations about abusive behavior at bath time, I find that these injuries did occur and that they were non-accidental. I also find that the Father caused, was responsible for and was the perpetrator of both injuries.

FURTHER AND CONSEQUENTIAL ORDERS

116. The parties have advised me that the final continued hearing has, in consultation with the Listing Officer been fixed before me for 20th July 2015 at 9:30 a.m. for the day. I intend to provide a copy of this report to DCFS and direct that they provide a Welfare Report taking into account this fact finding decision for consideration at the continued hearing. I will also of course consider any applications for consequential orders that the parties would wish to make.



THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT

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

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