

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.

1 **IN THE GRAND COURT FOR THE CAYMAN ISLANDS**

2
3 **CAUSE NO. FAM 123 OF 2014**

4
5 **BETWEEN:**

6 **KN**

7 **PETITIONER**

8 **AND**

9 **MN**

10 **RESPONDENT**

11
12
13 **Appearances:** Mrs. Karin Thompson, Attorney-at-Law for the Petitioner
14 Ms. Denise Owen of Travers Thorp Alberga for the Respondent

15 **Before:** The Hon. Justice Ingrid Mangatal

16 **Heard:** 18 February 2016

17 **Delivered:** 23 February 2016

18
19 *Re M. (a Child) Fact-Finding Hearing (No. 2)*

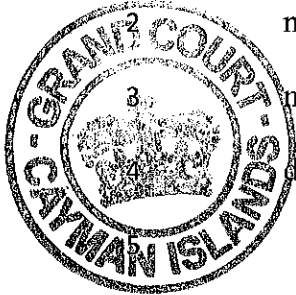
20 **IN CHAMBERS**



21
22 **EX TEMPORE JUDGMENT**

23 **Mangatal J:**

24 1. In April 2015 I conducted a fact-finding hearing in respect of certain allegations
25 made by the Petitioner/ Mother ("KN") against the Respondent/Father ("MN") in
26 respect of their young child "M". I handed down a written judgment on 16 June
27 2015, in which I found two of the allegations that were made had been proven,
28 and I also found a number of other allegations not proven.



1 2. MN's Counsel sought and was granted permission to appeal my decision. The
matter came before the Court of Appeal on the 20 November 2015, but for a
number of reasons, was not then heard. The appeal is now rescheduled for hearing
during the April 2016 Session of the Court of Appeal.

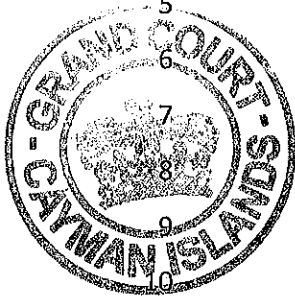
6 3. As I discussed in my earlier written judgment, at paragraph 11, when fact-finding
7 hearings are held, it is expected that save in exceptional circumstances, the judge
8 who conducted the fact-finding hearing should conduct the final or resumed
9 hearing, and the case is really after the fact-finding hearing has taken place, in
10 essence part-heard.

11
12 4. This case initially came back before me in December 2015, because of a direction
13 by the Court of Appeal, which it made during the November hearing, for the
14 matter to be mentioned in the Family Court at the earliest opportunity.

15
16 5. The President of the Court Chadwick P., at paragraphs 6, 7, and 8, of the Court's
17 Ruling, explained the reasons as follows:

18 *"6. The practical problem is that the husband's work permit is*
19 *expected to expire at the beginning of February 2016. There will*
20 *then be a period of some ten months, between the beginning of*
21 *February and the end of November 2016, when the child will be on*
22 *the island with the mother- who has the right to remain until*
23 *November 2016-during which the opportunity for the father to*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27



have contact with his daughter will depend on his ability to travel to the island from time to time for that purpose.

7. That, plainly, is a change in circumstances which needs consideration by the Family Court. It will be for that court to decide what contact regime should be put in place during that ten-month period so as to enable meaningful contact to be maintained between the child and her father.....

8. In those circumstances, we direct that the matter be listed before the Family Court for a mention at an early opportunity; so that that court can decide how best to deal with the situation that I have described before the husband leaves the island at the beginning of February 2016.”

6. The matter was mentioned before me on the 17 December 2015. There was much discussion between Counsel as to the terms of the Order, MN was present, but KN was not. Counsel for KN indicated that whilst she was not in a position to consent to the draft Order presented by Counsel for MN, she was not opposing it.

7. I made an Order as follows:

“IT IS ORDERED AS FOLLOWS:

1. *The Department of Children and Family Services (DCFS) shall by 15 January 2016 file and serve a report setting out their recommendations for interim contact between when the Respondent leaves the Cayman Islands and when the Court next considers contact, and an update of contact to date.*
2. *The Respondent’s Affidavit shall be provided to the DCFS to assist in the preparation of that report. The Petitioner may*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

prepare an affidavit if she chooses within 3 working days from the date of this order.

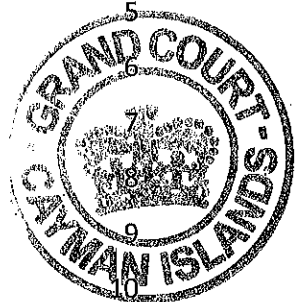
- 3. *The matter shall be listed for an interim contact hearing no later than 29 January 2016 (before 3 February 2016 when the Respondent must leave the Cayman Islands) for a time estimate of 2 hours.*
- 4. *The parties shall notify the DCFS if they require the author of the report to attend at the hearing referred to in paragraph 3 herein within 2 days of receipt of the report.*
- 5. *The Petitioner shall not be present at any further contact sessions between M and her father but shall be responsible for transporting M to and from these sessions.*
- 6. *Interim contact shall continue in accordance with the Order of the Honourable Chief Magistrate Nova Hall dated 2 May 2014, as varied by the Order of the Honourable Justice Williams dated 2 October 2014 until the Respondent leaves the Cayman Islands.*
- 7. *All contact sessions shall be activity based and occur outside of the DCFS offices, save where the supervising Social Worker feels there are exceptional circumstances warranting contact taking place at the DCFS offices. Contact shall take place at a time that best allows it to be activity based."*



8. The matter next came before me on the 21 January 2016. At that time, much to my surprise, I was now being asked to deal with wholly new matters. Counsel advised that on the 18 January 2016, KN had made new allegations against MN of sexual abuse of M. This now required me to go through yet another fact-finding

1 exercise, all in urgent circumstances, where MN is scheduled to leave the island
2 tomorrow, 24 February 2016. On 21 January, I made the following Order, with
3 the input of Counsel for both parties:

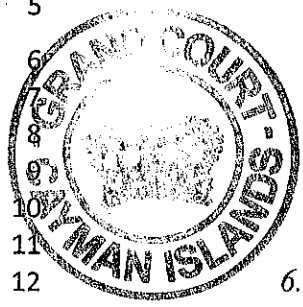
4 *"IT IS ORDERED AS FOLLOWS:*



- 6
1. *The Petitioner shall by 4pm on 5 February 2016 file and serve a Scott Schedule outlining her allegation of sexual abuse against the Respondent and her affidavit evidence in support from herself and C.O. ["the Grandmother"].*
 2. *The Respondent shall by 4pm on 9 February 2016 file and serve his response in the same Scott Schedule and his affidavit evidence in support.*
 3. *The DCFS and the RCIPS shall by 5 February 2016 file and serve all of the evidence they hold that does not already form part of the DCFS Addendum to Updated Report dated 20 January 2016, relating to their joint investigation into the allegation of sexual abuse against the Respondent made by the Petitioner, to include the original report or referral, any statements made by witnesses, any medical report produced by Dr Lamsey-Ebanks, and the Petitioner's letter of complaint to DCFS against Ms Tempora Wesley. The Respondent's attorney shall serve a copy of this order upon them.*
 4. *Dr Robertson shall by 5 February 2016 send to the parties' representatives a letter detailing any attendance upon him by M in January 2016, and including any contemporaneously made notes, details of any conversations that took place and the results of any examination undertaken on M. The Respondent's attorney shall serve a copy of this order upon him.*
- 11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

5. The matter shall be listed for a fact finding hearing to deal with allegation of sexual abuse made by the Petitioner against the Respondent, on 18 February 2016, with a time estimate of 1 day. The following witnesses shall give evidence in the following order:



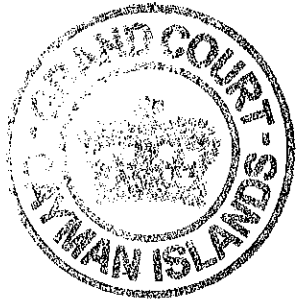
- (1) The Petitioner;
- (2) The Grandmother;
- (3) The Respondent;
- (4) Miss Tempora Wesley, Social worker with DCFS;
- (5) Miss Genevieve Tomlinson, Social worker with DCFS.

6. The Respondent's attorney shall prepare a trial bundle for the hearing referred to at paragraph 5 herein, the same to be agreed with the attorney for the Petitioner if possible and shall provide the same to the Court no later than 2 clear days before the commencement of the fact finding hearing."

9. A Scott Schedule was duly produced and filed with the Court and reads as follows:

No.	Description and Date of Incident/Allegation	Resume of Evidence	Respondent's Response	Reserved for Judge's Use
1.	Approximately a week prior to the incident that happened with my mother on the 15 th January, 2016, I was dressing M after her bath in the evening. When I went to dry her she said that her father had dried her as well after going to the potty. I asked her if Ms. Tempora was there with them and she said no. I waited a couple of seconds and asked her again and she answered the same. I made a note of it and when I saw Ms. Tomlinson on the evening after one of the following visits I asked her if she knew anything about it or if she had seen M.N. take M into the bathroom by himself.	See M's affidavit dated 8 th February 2016 at paragraph 10.	The Respondent denies having had unsupervised contact with M and specifically denies going into the bathroom with her without a contact supervisor. When M required the bathroom on 5 and 11 January 2016, the Respondent accompanied her together with the social worker Ms Wesley. At her request he wiped M after she had urinated. The Respondent is unable to respond about any conversations that took place when he was not present.	
2.	As I returned from work on the evening of the 15 th of January, 2016, my mother related to me that M had told her that her father had "hurt her bunky". She said that M pointed to her clitoral area when she asked her to show her where. My mother and I reluctantly agreed that we would mention it to the Child Psychologist when we saw her.	See M's affidavit dated 8 th February 2016 at paragraph 10 See also Second Affidavit of M dated 8 th February 2016 at paragraphs 4 & 5.	This is not an allegation against the Respondent and is hearsay. The only contact of this nature that the Respondent has had with M is as set out above. He denies that such contact from a parent, was inappropriate or that it caused M any injury.	

19



No.	Description and Date of Incident/Allegation	Resume of Evidence	Respondent's Response	Reserved for Judge's Use
9.	On Sunday evening the 17 th of January when M displayed great fear in the bathroom I knew I needed to contact someone who could assist us both.	See M's affidavit dated 8 th February 2018 at paragraph 11. See also Second Affidavit of the Grandmother dated 8 th February 2018 at paragraph 8.	This is not an allegation against the Respondent.	
	<p>In addition to requesting a finding that the above alleged facts were not proven, the Respondent himself requests the following findings:</p> <p>1) That the above disclosures alleged to have been made by M were not made and have been fabricated by the Petitioner and the Grandmother due to their hostility towards contact between M and her father and in an attempt to frustrate that contact;</p> <p>2) Following on from the above, that the Petitioner caused M to undergo a number of unnecessary intimate genital examinations resulting from her allegations, knowing such examinations to be unnecessary. These examinations were contrary to M's welfare and were harmful.</p>			

I believe that the facts I have stated in this Scott Schedule are true.

I believe that the facts I have stated in this Scott Schedule are true.

(Signed)

K.N.

(Signed)

M.N.

1

2 10. This is not the first time that KN has attempted to make allegations that there was
 3 abuse during supervised contact. At the fact finding hearing in April last year, in
 4 her oral evidence in cross-examination, completely unmentioned in the Scott
 5 Schedule for that hearing, KN claimed that there was physical abuse carried out
 6 by MN in the presence of social worker Ms. Wesley.

7

8 11. KN also, in her oral evidence on that occasion, raised for the first time, an
 9 allegation that MN had molested his cousin. It turned out that at the time (and this
 10 was not disputed by KN) MN was 15, and the cousin was 10, and MN admitted
 11 that there had been some inappropriate touching by him of the cousin. In finding

1 the new allegation of physical abuse during contact not made out, and finding it
2 inappropriate to make any finding about what was referred to as a “historic
3 allegation of sexual abuse, I said the following, at paragraphs 111 (in respect of
4 physical abuse allegation) and paragraphs 112 and 113 regarding historic
5 allegation of sexual abuse:

6 ***“NEW ALLEGATION - PHYSICAL ABUSE DURING
SUPERVISED CONTACT...”***

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.*

12
13
14
15
16
17
18
19
20
21 ***NEW ALLEGATION - HISTORIC ALLEGATION OF SEXUAL
22 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*



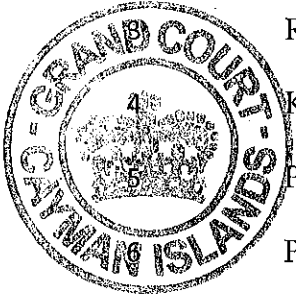
1 *reprimand was provided by the Father's Grandmother the*
2 *behaviour ceased and the Father exhibited appropriate responses*
3 *as an adult now with an understanding of the inappropriateness of*
4 *the behaviour. The Father did not attempt to minimize or excuse*
5 *what had occurred, save to say that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

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

17
18 12. In the Fact-Finding Hearing conducted by me last week, I heard evidence from
19 the following persons in this order:

- 20 (a) KN;
- 21 (b) C.O. ("the Grandmother");
- 22 (c) MN;
- 23 (d) Ms. Tempora Wesley, Social Worker, DCFS; and
- 24 (e) Ms. Genevieve Tomlinson, Social Worker, DCFS.





1 13. There has also been evidence provided in the form of police reports as well as a
2 report from a medical Doctor who examined M at the request of KN. Dr.
Robertson examined M at KN's request on 8 January 2016, including checking, at
KN's request, M's genitalia, for redness, and there was found to be none. The
Police Report indicates that M was examined at the hospital by Dr. Ebanks,
Paediatrician and that the doctor examined M and noted that everything was
7 normal with her.

8

9 14. As can be seen from the Scott Schedule, and throughout his affidavit evidence and
10 evidence in cross-examination, MN completely denies the allegations. Both he
11 and Miss Wesley say that M only went to the bathroom twice that they are aware
12 of, that each time, both MN and Ms. Wesley went to the bathroom with M. Ms.
13 Tempora was present throughout, they both say, and each have indicated that they
14 saw nothing untoward or unusual. On both occasions Ms. Wesley says she was
15 right at the door when MN seated M on the toilet, the door was and remained
16 open, and she saw when MN wiped his daughter.

17

18 15. MN gave evidence that on the first occasion, he asked Ms. Wesley if she could
19 take M and help her, because he did not want any allegations to be made by KN
20 against him, he being full aware of the many allegations which KN has made
21 against him. However, he said that Ms. Wesley said he must help M, because it's
22 perfectly normal for a parent to help their child.

1 16. MN says that on the second occasion, when he placed M on toilet seat she cried
2 out, and he thought that the toilet seat may have pinched her leg. Ms. Wesley also
3 gave evidence that she heard her cry out, but when they both asked her what
4 happened, M didn't say anything, and they did not see any mark on her leg or
5 anything out of the ordinary. M urinated, MN wiped her, and the process was
6 completed without anything out of the ordinary happening.

7

8 17. Both MN and Ms. Wesley deny that there has been any occasion whatsoever or
9 time when MN has been with M unsupervised.

10

11 18. Time does not permit a long discourse, but I find on a balance of probabilities that
12 the allegations have not been proven, for a number of reasons, including the
13 following:

14 (1) I thought that both MN and Ms. Wesley gave their evidence in a credible
15 manner on these issues;

16

17 (2) It is highly implausible that MN would, or could have hurt or abused his
18 child right in the presence and face of the social worker, knowing full well
19 all of the allegations that KN has been making against him over some
20 years now;

21



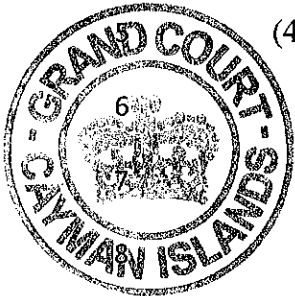
1
2
3
4
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

- (3) At the last hearing I was firmly of the view that KN did not have a concern that MN would be capable of, or would sexually abuse or molest their own child M;

- (4) KN is making these allegations all of a sudden, right after the contact order was varied in December to say that she must not stay or be present at the contact visits being supervised by DCFS. This strikes me as an odd coincidence and quite self-serving;

- (5) Both in her oral evidence and in her Updated Report of January 15 2016, Ms. Wesley said that she has herself previously heard KN asking little M, in her presence whether her father MN had hurt her. Further, she said that her Supervisor Ms. Tomlinson has on occasion provided supervised access, and that on one of those occasions, KN terminated the contact because she claimed MN had hurt M;

- (6) The visit of M to Dr. Roberts on the 8 January 2016 was one which KN claims came about because she just wanted to make sure that M was fully healthy in every way. She agrees that this visit was before she had any suspicion of sexual or physical hurt of M, or before the conversation which allegedly occurred with herself and M or M and the Grandmother had allegedly taken place. It is in my view very strange that KN would ask the doctor to check M's genitalia, (three year old M's genitalia) at a



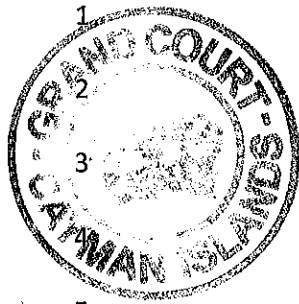
1 time when there had not yet been any disclosure, or alleged disclosure by
2 M about any touching.

3
4 (7) There is a curious statement by KN in her affidavit where she, after saying
5 that she has the greatest respect for Ms. Tomlinson, apologizes if Ms.
6 Tomlinson may be under the impression that she has misquoted her. In
7 her evidence before the Court Miss Tomlinson said she had actually seen
8 when MN and Ms. Wesley passed her with M, with all three taking M to
9 the bathroom. Curiously, in a conversation with a Social Worker
10 conducting investigation on behalf of DCFS, Ms. Melissa Anderson, Ms.
11 Anderson says that KN added that *“on one occasion, she spoke with SWS
12 Tomlinson, who informed that she saw M and her father going into the
13 bathroom without SW Wesley.”* In evidence, KN says she doesn’t know
14 how that could have been since Ms. Tomlinson never told her that.



15 (My emphasis).

16
17 (8) Both KN and the Grandmother have said things about MN’s propensities
18 which they never said at the first fact-finding hearing. Though they do
19 claim that they subsequently to that hearing, received email information
20 from MN’s cousin, the one he had been involved in the historic incident
21 with. They both agree that what they are referring to is the same time
22 when MN was 15 and the cousin 10. However, for example, in a report by
23 Social Worker Keisha Smith dated 20 January 2016, Ms. Smith reports



1 that the Grandmother said that: "*Dad was accused of molesting a five year*
2 *old back in South Africa.*" Grandmother also said: "*He is subtle in how he*
3 *harms children.*"

(My emphasis).

5

6 19. All of the above reasons and others that time does not permit me to expand upon,
7 have caused me to find that the allegations have not been proven.

8

9 20. I must say that I have found this case very unique, and disturbing. MN and his
10 Counsel Ms. Owen have all along, throughout the last Fact-Finding Hearing and
11 this one, argued that the allegations and alleged disclosures have been fabricated
12 due to KN and the Grandmother's hostility towards contact between M and her
13 father and in attempt to frustrate that contact. KN and the Grandmother's
14 persistence in making new allegations, indeed that MN is behaving sexually and
15 inappropriately with M in front of, and in the presence of an experienced DCFS
16 Social Worker has caused me to feel some amount of reservation, and is causing
17 me to reflect upon my earlier findings at the First Fact-Finding Hearing.

18

19 21. In short, I am not satisfied on a balance of probabilities, that MN has touched or
20 handled or interacted with M in a sexually inappropriate, or abusive or hurtful
21 manner during the times alleged by KN.

22

1 22. Because of M's tender age, and with the concurrence of Counsel for the parties, it
2 was agreed that it would not be appropriate for me to interview or speak to M as
3 part of my fact-finding function as Judge. I go on to indicate that I am also not
4 satisfied that M said any of the things that KN and the Grandmother say that she
5 said. Alternatively, if she did say anything like what they claim that she disclosed,
6 it would have been after prompting or suggestive questioning on the part of KN
7 and the Grandmother.

8

9 23. I also wish to note this Court's grave concern that as a result of these allegations
10 made by KN, M has now undergone what have proven to be, at least three
11 unnecessary intimate genital examinations. The Grandmother claimed that the
12 FSU Officer and the doctor indicated that these types of examinations can cause
13 harm to young children mentally. That is quite true.

14

15 24. I am not prepared to go as far as MN's Counsel has asked me to go in the Scott's
16 Schedule. Suffice it to say that the allegations have not been proven, and that
17 these unnecessary intimate genital examinations of M were contrary to M's
18 welfare and may well have been harmful.

19

20

21

22 
23 THE HON. JUSTICE INGRID MANGATAL
24 JUDGE OF THE GRAND COURT

