EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIMT9 of 2014
BETWEEN:

M

Petitioner

And

M

Respondent

Appearances:
Tamara Cameron for the Petitioner
Asha Johnson for the Respondent

2015: February 18th

JUDGMENT

[1] **Ellis J:** The Parties herein were married on 20th December 2008. The sole child of the marriage (a girl) was born on 4th December 2010 (the Child). Shortly after the Child's birth, the Parties began to experience marital discord which resulted in Petitioner filing a petition for the dissolution of the marriage on 10th February 2014. On 19th June 2014, a decree nisi was granted after the Court found that the marriage between the Parties had irretrievably broken down on the ground that the Respondent behaved in such a way that the Petitioner could not reasonably be expected to live with him.

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[2] Prior to the Decree (December 2013), the Respondent moved out of the matrimonial home leaving the Child in the primary care and control of Petitioner. The Parties had agreed for the Respondent to visit with the Child every week from 3:30 p.m. to 7 p.m. on Wednesdays and one day each weekend. The Respondent later sought to vary those arrangements to allow for overnight visits with the Child, but this was rejected by the Petitioner.

[3] The basis for the Petitioner position was revealed in the urgent Application filed on 9th April 2014 in which she sought an interim order that the respondent's visits with the Child be supervised by an authorised professional or such other person as the Court shall approve pending the outcome of an application for custody or until further order of the court. The grounds of the Application are set out in the Petitioner's affidavit in support filed on 9th April 2014, in which she states that she reasonably believes that the Child has suffered harm and is at risk of suffering harm while in the Respondent's care. She highlights (1) the Respondent's habitual marijuana use in the presence of the Child and (2) the Child's change behaviour which hinted at sexual abuse.

[4] On 11th April 2014, the Court made an interim order giving the Respondent access to the Child every Wednesday from 3:15 to 6 p.m. and every other Saturday from 9 a.m. to 1p.m. such access to be supervised by a Social Development Officer. The Social Development Department was also ordered to provide a preliminary social inquiry report following an investigation of the allegations.

[5] By Order dated 15th May 2014, the Court ordered that the social inquiry report include a psychological assessment of the Parties by Dr June Samuel. A further order made on 28th July 2014 varied the Order of 11th April 2014 in the following way: (1) discontinuing supervised access; and (2) granting the Respondent access to the Child on Saturday and Sundays from 9 am to 6 pm with a return no later than 6:15 p.m.

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[6] Shortly after the 11th April 2014 Order, the Respondent filed a Notice of Intention to Proceed with an Application for Ancillary relief seeking sole custody of the Child or alternatively joint custody with primary care and control to the Petitioner and access to the Respondent every other weekend from Friday to Monday as well as every Wednesday from 3:30 p.m. to 7 p.m. The Respondent also sought an order that he pay the monthly sum of $300.00 towards the maintenance of the Child in addition to half of her educational and medical expenses until she reached the age of 18 or thereafter 21 years providing she is pursuing tertiary education.

[7] On 16th June 2014, the Petitioner filed an Application (later amended on 24th June 2014) in which she seeks an order of joint custody of the Child with primary care and control to her and reasonable visitation to the respondent. The Petitioner however opposes the Respondent proposed access arrangements to the extent that it includes overnight visits. The Petitioner also asks that the respondent pays the monthly sum of $500.00 as maintenance for the Child as well as half of her educational and medical expenses. She also asks that the Respondent provide her with access to her email account.

[8] During the course of the hearing, the Respondent withdrew his application for sole custody and indicated that he was content with an order for Joint custody with primary care and control to the Petitioner. In the premises, the Court is not required to consider any issues related to custody of the Child. Having read all of the evidence including the Social Inquiry Report provided by Ms Freeman of the Social Services Department, the Court is content to order that the Parties have joint custody of the Child with primary care and control to the Petitioner.

[9] The remaining matters for the Court's consideration relate to (1) access; (2) maintenance; and (3) access to the email account.

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ACCESS/VISITATION

[10] Section 44 of the **Matrimonial Proceedings and Property Act 1995** gives the Court a wide discretion to make any order it sees fit in the circumstances of the case in respect of custody, access, or financial provision. This provision reinforces section 11 of the **Guardianship of Minors Act Cap 270** which also makes clear that the Court may make such orders as it thinks fit regarding custody of an infant and the right of access of either parent. However, section 3 of that Act provides that in exercising its discretion, the Court shall regard the welfare of the child as the first and paramount consideration. It provides as follows:

> "Where in any proceeding before the Court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

[11] The import of the term "*shall regard the welfare of the infant as the first and paramount consideration"* has been judicially considered. The classic construction of this provision is found in the judgment of Lord MacDermott in **J v C**[1] where he stated:

> "The second question of construction is as to the scope of meaning of the words '... shall regard the welfare of the infant as the first and paramount consideration.' Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that **they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts,**

[1] [1970] A.C.668

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> **relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood.** That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed." Emphasis mine

[12] On the specific issue of access, this position was expounded by Sir John Arnold P in **Hereford and Worcester County Council v J.A.H**[2] where he stated:

> "**The function of a court trying a contested access application must always be to put the interests of the child first and to consider whether, in the particular circumstances of the case, it is favourable from the child's point of view that there should be an order for access, and only if that is the case should the court come to a conclusion in favour of access.** This is not a matter which should be influenced by the conception that the natural parent has a right to that access to the child. That right is a right which is the product of the court's decision, and **that decision should only be made if it is demonstrated that the access asked for is favourable to the child and, in order to come to a conclusion upon that matter, the court is bound to pay regard, and substantial regard, in the balancing exercise to those factors which are relevantly put forward as factors militating against the conclusion that, in the particular case, access to the child is a desirable development in the interests of the child**." Emphasis mine

[13] Both **J v C** and **Hereford and Worcester County Council v J.A.H** were considered in the House of Lords decision **In Re K. D. (A Minor) (Ward: Termination of Access).**[3] After considering whether a natural parent can be said to have a right to access, Lord Oliver made the following critical observations:

> "Parenthood, in most civilised societies, is generally conceived of as conferring upon parents the exclusive privilege of ordering, within the family, the upbringing

[2] [1985] F.L.R. 530 at 533-534
[3] [1988] 2 W.L.R. 398

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> of children of tender age, with all that that entails. That is a privilege which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities upon whom the legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say, the welfare of the child."

And later,

> "I do not find it possible to conceive of any circumstances which could occur in practice in which the paramount consideration of the welfare of the child would not indicate one way or the other whether access should be had or should continue. Whatever the position of the parent may be as a matter of law - and it matters not whether he or she is described as having a "right" in law or a "claim" by the law of nature or as a matter of common sense - it is perfectly clear that any "right" vested in him or her must yield to the dictates of the welfare of the child."

[14] It therefore follows that it is the welfare of the child which is to be regarded as paramount. In considering the question of access, the Court has noted that the Parties are generally *ad idem* that access to the Child should be granted to the Respondent. This is laudable since it is clear that to deprive a parent of access is to deprive a child of an important contribution to his/her emotional and material wellbeing in the long term.[4]

[15] However, while the Petitioner proposes reasonable visitation for the Respondent, she is adamant that this must not include overnight access.[5] The Petitioner asks that the Court restrict the Respondent's access on these terms on the basis that she is concerned about the Child's welfare, safety and health. In her Affidavit filed

[4] per Latey J M v M (Child: Access) [1973] 2 All E. R. 81 at 88
[5] Paragraph 22 of the Petitioner's affidavit of 16th April 2014

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on 16th April 2014, she sets out areas of concern. The Court will now consider these in turn.

Accommodation

[16] At paragraph 23 of her affidavit of 16th April 2014, the Petitioner avers that when the Respondent left the matrimonial home, he moved in with his parents. He did not at the time have a bedroom and had to sleep on the couch in the living area. She opined that it would be inappropriate for the Child to have overnight visits in those circumstances.

[17] The Respondent's answer to this contention is set out in his affidavits filed on the 1st May 2014 and 7th July 2014. The Respondent agrees that he moved into his parents' home when he left the matrimonial home. In his earlier affidavit, he stated that he had contacted a real estate agent and was currently searching for a two bedroom apartment which he hoped to secure in the near future. In his later affidavit, he admitted that he sleeps on the couch in his parents' living room but he stated that this was only a temporary measure as he was at that time trying to remove items which were stored in his room so that he could occupy it. He stated that he expected to start occupying his room in the next few weeks. Interestingly, when he was cross-examined during the hearing of 4th December 2014, the Respondent testified that he was still in the process of looking for an apartment. Because of this he had abandoned the earlier plan to clear out the storage in his room so that he could occupy it. It became clear to the Court that the Respondent continued after a period of at least 7 months and certainly since he moved from the matrimonial home to occupy his parents' couch rather than secure appropriate accommodation.

[18] Given the fact that the Respondent's residential arrangements are so inadequate, it is critical for the Court to determine what arrangements were proposed for the Child. The Respondent's proposal is that the Child would sleep on a Princess bed

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which he had purchased for her use. This would be set up in his mother's room (his parents occupy separate bedrooms) in order to facilitate overnight visits. At the hearing, he described his mother's bedroom as a master bedroom with sufficient space to accommodate the Child. The Respondent suggested that this was adequate in the circumstances because the Child currently lives with the Petitioner in a tiny one bedroom apartment unit where she sleeps together with the Petitioner. According to the Social Inquiry Report, the apartment is located upstairs the Petitioner's home in Albion Estate. There is a separate bedroom and bathroom but the kitchen dining and living are in an open plan. Notwithstanding this, it has all modern amenities and offers sufficient play space for the Child.

[19] Courts will often make child custody and access decisions based on a parent's living accommodations. It is critical that during access time (including overnight visits) that the access parent have suitable residential accommodations for the child. However, it also clear that the standard for acceptable living accommodation is based on the child's and the parent's individual circumstances. A court must be flexible and take into consideration each parent's unique situation.

[20] A Court must also consider the child's existing accommodation. In considering the child's welfare, a court must consider whether the child would have trouble adjusting to a drastic change to his/her environment. A court must also consider that a child will be happy, even with less space, as long as the child has the opportunity to spend time with his/her parent.

[21] In the case at bar, while the Court is concerned about the apparent apathy of the Respondent in seeking to secure appropriate accommodation for himself and the Child, in the Court's view the accommodation proposed within the grand parent's home does not represent a drastic change to the Child's environment such as would adversely impact her. The Social Inquiry Report reveals that the house has three bedrooms and bathrooms, yard space, a kitchen and dining area and a separate living area. The home enjoys all modern amenities. The three residents

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include the grandparents and the Respondent. The Child is familiar with the home and its residents. Moreover, from all accounts, the proposed sleeping quarters appear to be *on par* with her current accommodation. Given the Child's age, her present living arrangements and the relative circumstances of the Parties, the Court is not satisfied the Respondent's proposed accommodation for the Child would militate against the grant of overnight access.

Habitual smoking and marijuana use

[22] At paragraphs 24 – 29 of her affidavit, the Petitioner details her concerns about the Respondent's habit of smoking in the presence of the Child. It is her evidence that such exposure has endangered the Child's health. She avers that several times she has had to take the Child to the doctor for respiratory illnesses. The Child has had to undergo medical treatment for the same which included steroid medication and nebulization. The Petitioner contends that notwithstanding this, the Respondent has refused to curb his habit or to make adjustments which would minimize the risk to the Child.

[23] She also indicated that the Respondent has also willfully ignored her concerns about his recreational and illegal use of marijuana. Instead, she avers that he actively tried to engage in the business of growing marijuana which is contrary to the laws of the British Virgin Islands.

[24] The Court heard from the Child's attending physician, Dr. Tangutoori, who reported when he saw the Child on two occasions in November 2014, she had a history of the chesty cough for almost one month which could have been triggered by exposure to smoke. During the hearing, he testified that upon examining the Child, he surmised that her condition stemmed from exposure to dust or smoke allergy and not due to an infection.

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[25] In responding, Counsel for the Respondent submitted that his smoking habit has only been raised as an attempt to restrict his access to the Child. She reminds the Court that during the course of the marriage, the Child was left in the Respondent's care for a period of 6 months and there was no evidence of harm. She alleges further that the Petitioner has failed to prove that the Respondent's smoking has affected the Child's health. She referred the Court to Dr. Tangutoori's evidence that the Child is in good health and that her cough is now under control. Counsel submitted that the doctor could not definitively state the cause of the cough.

[26] The Court is not persuaded by the Respondent's trivialization of the evidence.[6] Certainly, it is now widely accepted that exposure to environmental tobacco smoke may significantly increase a child's risks of developing, either as a child or as an adult, asthma, coronary artery disease, lung cancer, and certain chronic respiratory disorders. It is clear that in considering access, a court must inquire as to the safety of the non-custodial parent's home and neighborhood. If there's a potential chance of harm to a child, a court might limit visits to the non-custodial parent's home. In the Court's view, where there is some evidence that a personal habit such as smoking may be directly or indirectly related to a current and ongoing malady suffered by a child, that is a critical matter to be taken into account when considering custody and access.

[27] In the case at bar, there is medical evidence that the Child has a respiratory condition which is not due to infection but which may well be due to or aggravated by environmental factors. Regardless of whether the Respondent's smoking habit caused that condition, in the Court's view it behooves both parents to ensure that the Child's environment is devoid of triggers which may possibly exacerbate her condition. To do otherwise would clearly not be in the best long term interests of the Child.

[6] Medical Report of Dr, Evet Benjamin, consultant paediatrician dated 7th May 2014 also noted a mild bronchitis which was treated with oral medication.

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[28] Indeed, this position has not essentially been opposed by the Respondent. His evidence before the Court is that he has voluntarily taken several precautions to minimize the Child's exposure, including smoking outdoors and outside of her presence and changing his clothes after he has indulged and before he interacts with her physically. In fact, he denies "categorically" that he has ever smoked in the Child's presence or exposed her to smoke. At paragraphs 31 and 32 of his affidavit filed on 7th July 2014, he details the precautionary steps taken to minimize her exposure. In the Court's view such actions are consistent with prudent parenting and the Respondent could have no objection if this was formally crystallized by way of court order.

[29] The Respondent has also not denied his recreational marijuana use. This is corroborated by Dr. June Samuel who reported on his admissions. She also indicated the potential impact which such use may have, noting that "*he demonstrates less appropriate adjustment to the situation and his life situation and this is compounded by his marijuana use.*" Further, she makes it clear that Respondent's feelings of mistrust and oversensitivity may be heightened by his recreational use of marijuana which is well known to increase feelings of personalization and suspiciousness.

[30] There can be no doubt that under the laws of the Virgin Islands, marijuana possession and use is illegal. That the Respondent would concede to such possession and use in the face of the Court speaks volumes about his lack of judgment and would give rise to concerns regarding his capacity to effectively parent this Child in the long term. Parents who admittedly indulge in illegal activities will inevitably encounter the "long arm of the law" and this could never be in a child's best interest.

[31] Given all of these circumstances, if any access is to be granted at all, it will therefore be on condition that the Respondent maintains a completely smoke-free

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environment while the Child is in his physical custody. In regards to his marijuana possession and use, the Court does not need to express what the law of this Territory already does in the clearest of terms.[7] The Respondent must immediately desist from this practice which is contrary to the laws of this Territory and which carries significant criminal penalties up to and including imprisonment.

Sexual Abuse Allegations

[32] At paragraphs 30 – 48 of the Petitioner's affidavit filed on 16th June 2014, she records her observation of the Child over a course of time commencing in **September 2013**. Her evidence indicates that the Child began to demonstrate highly sexualized language and behaviour which gave rise to a concern that she had been sexually abused or molested while she was in the Respondent's care. This behaviour was sufficiently acute that the Petitioner began to keep a journal. The Petitioner's evidence is that the Child (1) groped the Petitioner's genitals and that of her aunt; (2) rubbed the Petitioner's breast and licked her ears; (3) licked the genital area of her doll; (4) kissed a mannequin head; (5) bend over in suggestive poses referencing a bum bum or belly button game; (6) instructed the Petitioner to rub her vagina "like a backhoe"; and (6) licked and sucked on her bottle in a suggestive way. The Petitioner also alleges that Child had complained that her vagina and anus were hurting.

[33] She thereafter carried out regular visual examinations of the Child's genitalia when she would return from visits with her father. The Petitioner notes that she observed changes in the Child's genitalia which confirmed her suspicions. She also observed changes in the Child's behaviour. She noted that the Child became uncharacteristically uncommunicative and withdrawn, curling up in a fetal position in a corner. Although potty trained, the Child started to urinate on herself and regressed to baby talk.

[7] See: sections 7, 10 and 11 Drugs (Prevention and Misuse) Act, Cap 178

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[34] She brought these concerns and suspicions to the attention of the Respondent who responded that she was overreacting. When she insisted that the counselor be retained, she stated that the Respondent got angry, cursed her and proceeded to tell his family that she had accused them of molesting the Child. The respondent also suggested that she was projecting her experiences onto the Child because she had been abused when she younger. She described his willingness to ignore her concerns as insensitive and careless.

[35] The Petitioner states that based on her observations, she reasonably believed that the Child has suffered physical harm. As these changes only occurred after her visits with the respondent, she says that she "*reasonably believed that the Child was at grave risk of suffering harm while she was in his care and unless the visits with her were supervised she was likely to suffer harm again*."

[36] Counsel in the matter conceded that the Petitioner bears the burden of proving the allegations which have been advanced. They also agreed that in cases where sexual abuse is alleged, a court must decide the issue based on facts and not suspicions or mere doubts.[8]

[37] They also agree that the standard of proof is the civil standard so that a court must be satisfied on a balance of probabilities that there has been harm or a real possibility of future harm.[9] The judgment of Lord Nicholls of Birkenhead is instructive. At page 586 of the judgment, he stated:

> "The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is

[8] Per Lord Hoffman in Re B (Children) (Sexual Abuse: standard of proof) [2008] UKHL 35; [2009] 1 A.C. 11; [2008] 4 All E.R. 1

[9] Re H and R (Minors) (Child sexual abuse : Standard of Proof) [1996] AC 563; [1996] 1 All ER 1 in which the House of Lords considered an application for a care order or supervision order under section 31(2) of the UK Children Act 1989

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that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in In re Dellow's Will Trusts [1964] 1 WLR 451,455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'"

[38] Although the Court recognizes that the authorities cited concern statutory provisions which have no application in this Territory, in the Court's view the legal principles adumbrated are pertinent and should be applied in this case. It follows that the Petitioner carried the burden of proof in this case. To discharge this burden she must advance cogent proof and not mere allegations and unsubstantiated suspicions. The Court must therefore consider the evidence advanced.

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[39] The Petitioner's evidence is that she consulted Dr. MacAnaney, a child psychologist who recommended that she have the Child assessed by the pediatrician as well as a child psychiatrist.

[40] It appears that the Child was seen by more than one medical practitioner. There is a report from consultant pediatrician, Dr. Evet Benjamin dated 7th May 2014 which discloses that he examined the Child on 2nd October 2013, 10th January 2014, and 4th February 2014. He reports that the Child was initially brought in by the petitioner who complained that she had been exposed to some inappropriate adult sexual activity due to certain changes in her behavior. He notes that clinical examination was noncontributory. In January 2014, the complaint persisted and the Child was again examined. Again the Doctor concludes that the examination was noncontributory. In fact, he indicates that the Child's examinations never revealed any clinical evidence of sexual abuse. He did however refer the parents to a pediatric psychologist due to "ongoing marital strife".

[41] There is a further report from Dr Christian Ugwuagu, employed at the Peeble's Hospital. His examination revealed an active playful child in no distress, quite verbal and able to express herself well.[10] He notes that the Child went onto the exam couch and removed her underwear herself and positioned herself on her own, completely exposing her genitals for examination. The Doctors' physical examination of all the systems was essentially normal. He reported no physical signs of tearing or bruising or trauma in the vulva area and confirmed that the Child had a normal vulvovagina with intact hymen; vulvovaginitis –likely non in-infectious. Both her anus and anal sphincter also appeared normal.

[42] Neither of these attending physicians was called as a witness in this case. Their reports were therefore untested in cross-examination.

[43] In fact, the only medical practitioner called by the Petitioner in support of her case was Dr. Tangutoori who in his oral evidence before this Court testified that upon

[10] Report of Dr Christian Ugwuagu dated 17th September 2014

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examination of the Child on the first visit, he found vaginal rash which he thought was a regular rash. He prescribed a cortisone cream. However, in a follow up visit, he noted that the rash had not cleared up. As a result, he recommended that the Child be seen by a gynecologist. He was not able to draw any conclusion in regard to the allegations of sexual abuse because as he indicated this is not his field.

[44] The Petitioner was referred to a child psychologist. The Petitioner eventually contacted Dr. Lori Thompson in St. Thomas, USVI who has continued to see the Child on a regular basis. Although she was not called to give evidence Dr. Thompson's prepared a report which was not challenged by the Respondent.[11] In it, she states that she saw the Child on at least 6 occasions for at least 35 – 40 minutes for individual play therapy (intended to provide her with a safe environment to allow her to discuss or express through play any concerns which may be bothering her).

[45] In the first session she noted that there were no concerns noted. On the second occasion she stated that the Child's behaviour was developmentally and behaviourally appropriate and again no significant concerns were noted. In the third session (5th April 2014), Dr. Thompson noted that the Child talked about a "bum bum game" which she later demonstrated with provocative gyrations on all fours. She also used a Barbie sized closed umbrella into the hole under the tail of the Barbie dog, moving the umbrella in an out of the hole, referring to it as a "*gina*". She then became unusually hyper and disorganized, throwing the Barbies and accessories around. The Doctor notes that the Child was redirected several times but declined to follow directions which was unusual. Although Dr. Thompson stated that it was unclear what the Child's behaviour signified, she recommended that it be brought to the attention of the social worker involved in the case.

[46] During the next three sessions, Dr. Thompson noted that the Child chose not to play with the Barbies again. Rather, she chose to play with games which did not

[11] Report dated 12th May 2014

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prompt any topics that cause distress. The Doctor's impression is that the Child was pulling back from her earlier disclosure. Dr. Thompson's recommendation is set out in the following terms:

> "It is unclear what [the Child's] behaviour on 5th April 2014 indicates. However, the behaviours demonstrated are unusual for a child her age and indicates that further investigation should be undertaken to ensure that [the Child] is safe in all settings. It was recommended to both [parents] that in additions to the social services department in Tortola completing an evaluation, a full custody evaluation should be completed…"

[47] Later in a Progress Note dated 30th May 2014, Dr. Thompson noted that in a follow-up session during which the Child played, she indicated that "My Daddy plays the "bum bum game…I don't like the bum bum game …It's nasty." An attempt was made to further the discussion but the Child did not respond. Dr. Thompson's original recommendations remained unchanged.

[48] The Social Services Department carried out a social inquiry investigation and prepared a report which was filed and served on the Parties. In addition, the author, Social Worker, Ms. Freeman attended the hearing and was examined under oath. The Department recommended joint custody of the Child with physical custody to the Petitioner and access to the Respondent inclusive of half of all school holidays and vacations. It also recommended family counseling sessions for both parents in order to address conflict resolution, effective communication, and co-parenting.

[49] This recommendation follows interviews with the parents, grandparents and the relevant educational institution. The critical observations are set out on page 10 of the Report. Ms. Freeman notes that the Child's pediatrician found no clinical evidence to support sexual misconduct. She posits that it is possible that she may

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have witnesses some type of sexual indiscretion and she noted that both Parties have admitted that she slept in their bed throughout the marriage.

[50] According to Ms. Freeman, the Child has not identified any particular individual in regard to the alleged indiscretions. Ms. Freeman also noted that by Dr. Thompson's own admission, her conclusions are inconclusive. Notwithstanding the Petitioner's contentions, she stated that there has been no definite conclusion as to what may or may not have occurred regarding the allegations. In fact, the school personnel who were interviewed openly expressed their opinion that the allegations regarding the sexual allegations regarding the Child were "unfounded". With their extensive experience as educators, they indicated that they have not observed any discrepancies in her behavior.

[51] Ms. Freeman noted that the Child currently enjoys the company of her father, uncle, paternal grandparents and other extended family. Moreover, both in her report and in oral testimony, she has highlighted her concerns with the Petitioner's behavior; in particular, the several photographs taken of the Child's genitalia, the several visits to multiple doctors, the taping of Child's conversations and her restriction of access to the father. The implication in the Report is that this behavior is excessive (in her own words "not normal") and may stem from the Petitioner own traumatic history of abuse.

[52] Interestingly, this view was supported by the evaluating psychiatrist, Dr. June Samuel who observed in her report that "…[the mother] *demonstrate behaviors in keeping with addressing her own personal challenges and on testing and observation appears to benefitting from interventions. There is a history of trauma in her past but there were no symptoms suggestive of personality dysfunction which could sometimes be seen with this type of history. The reaction to her daughter's unusual behaviors was initially appropriate but may have become excessive given the circumstances of the challenges in the relationship at the time combined with her personality traits demonstrated on testing*."

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[53] When she was examined under oath, Ms. Freeman told the Court that from her observations, the Child's behavior is not indicative of sexual abuse. According to Ms Freeman, the Child displayed no reticence with her paternal relatives and appeared to be happy to interact with them. She further told the Court that she had no concerns regarding joint custody of access/visitation by the Respondent. Given the Child's tender age however, she recommended that the status quo (where the Petitioner has primary care and control) be maintained.

[54] When she was cross- examined about whether the Child's alleged language would without more be indicative of child abuse, Ms. Freeman response was that "*It depends. Children pick up language from school or from home. So not because they use sexual language means that something has necessarily happened. They can pick it up from friends; they can pick it up from home.*"

[55] However, Ms. Freeman later agreed that it would not be prudent to ignore such language and behavior which were clearly a cause of concern. This position was mirrored by Dr. Samuel. Although she could not speak to the allegations of sexual abuse, when she was examined under oath, she told the Court that parental concern was warranted in the circumstances and that it would be sensible to monitor the future behavior of the Child.

[56] Counsel for the Petitioner strongly criticized the Social Inquiry Report. She submitted that it discloses that no thorough investigation of the allegations was conducted and that it would be unsafe for the Court to "hand over the child to an environment that has not been properly assessed given the seriousness of the allegations". Counsel posited that there was sufficient evidence for the court to conclude that it would be an unacceptable risk and not in the Child's best interest to be placed in the Respondent's home.

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[57] Ultimately, the evidence upon which the Court is asked to restrict the Respondent's access consists of the Petitioner's allegations, the transcript of the Petitioner's conversation with the Child, and the untested report of Dr Thompson which draws no definitive conclusions. In the Court's view, none of these approaches the standard of proof required. The transcript of the audio recordings constitutes hearsay evidence which has not been analyzed or assessed in expert testimony advanced by the Claimant.

[58] The Court is therefore asked to consider the same on face value. In doing so, the Court is guided by the approach recommended by Ward LJ in **Re N (A Minor) (Sexual Abuse: Video Recording) [1996] 4 All ER 225** where at page 231 he stated:

> "The judge approaching a recording like that should remind himself of the following.
>
> > 1. The recording is admitted as a form of hearsay evidence. It is for the judge to decide its weight and credibility. He will accordingly have regard to the fact that the evidence from the child is elicited in response to leading questions, under some pressure. He will judge the internal consistency and inconsistency of the story. He will look for any inherent improbabilities in the truth of what the child relates and will decide what part, if any, he can believe and whether stripped of embellishments of fancy or exaggeration, there remains, none the less, a hard core of truth.
> >
> > 2. The judge will also receive expert evidence to explain and interpret the video. This expert evidence will cover such things as the nuances of emotion and behaviour, the gestures and the body movements, the use or non-use of language and its imagery, the vocal inflections and intonations, the pace and pressure of the interview, the child's intellectual and verbal abilities, or lack of them, and any signs or the absence of signs of fantasising.
> >
> > It is the judge's duty to decide and only the judge's duty to decide whether or not the child should be believed."

[59] The recommended approach to be adopted in such interviews is also prescribed in that case at page 230. This Court is concerned that the interview was not

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conducted by an independent professional but rather by the Petitioner/Mother who is untrained and emotionally affected; the Court is also concerned that the approach to the interview does not accord with an attempt to encourage free recall by the Child. In the premises, this Court is persuaded on the submissions of Counsel for the Respondent that this evidence is unreliable and without more would be insufficient for the Court to be satisfied to the requisite standard of proof that sexual abuse had occurred.

[60] It follows that the Petitioner has failed to discharge her burden. While the Court agrees evidence of Dr. Samuel and Dr. Thompson that the purported conduct of the Child warrants continued monitoring, investigation and counselling, the Court cannot definitively conclude at this time that there is a serious threat to the welfare of this Child.

[61] In fact, Counsel for the Petitioner was at pains to point out to the Court that in the absence of such a finding, this Court should not make any orders which would restrict the Respondent's access. Counsel referred to the case of **Re F (Minors) (Sexual Abuse: Discretionary Jurisdiction in Wardship).**[12] In that case three children were made the subject of place of safety orders following a diagnosis of sexual abuse on E. Further examinations of all three took place. The matter came before a judge and after a lengthy hearing, the judge found that the diagnosis of abuse was derived from clinical examination alone but that the children had not had a deprived upbringing, none showed signs of being disturbed and all appeared to have led normal lives. He concluded that there had been no sexual abuse but he continued the wardship because he was a "little concerned" about E. The parents appealed contending that there was no evidence to justify continuing wardship and that the judge had failed to take into account the deleterious effect on the parents of wardship being continued.

[12] [1988] 2 F.L.R. 123

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[62] In allowing the appeal, the English Court of Appeal noted that although the discretion was a wide one, it had to be based upon some evidence. There was no significant evidence to justify the continuation of wardship and the judge had failed to carry out a proper balancing exercise in disregarding the effect on the children of the pressure put on the parents by continuing the wardship.

[63] Ultimately in considering this application, the Court must put the interests of the Child first. From all accounts, the Child has a good relationship with her father and this is to be encouraged. It is favourable from the child's point of view that there should be an order for access and this is a matter of common ground between the Parties. The Court has considered the Petitioner's grounds for objecting to overnight access and the Court is not satisfied that she has sufficiently discharged her burden. The Court is prepared to award overnight access but on the basis which is consistent with the Child's tender age and her physical, emotional and educational needs.

Lack of Anger Management

[64] At paragraphs 50 – 54 of her Affidavit filed on 16th April 2014, the Petitioner expresses her concerns about what she terms "the Respondent's anger issues". She stated that the Respondent is hot tempered and would quickly get into a rage over simple things. She then details a number of examples of such behaviour. This is corroborated by the evidence of Petitioner's sister who testified that the Respondent is quick tempered. She described his personality as consistently hostile and she expressed her view that he had assaulted the Petitioner in the past. The Petitioner's evidence however does not support this.

[65] The Court had the benefit of expert psychiatric testimony from Dr June Samuel. Her Report filed on 14th January 2015 noted that the Respondent had personality characteristics such as oversensitivity, mistrust and suspiciousness. She stated that these make him vulnerable to developing psychological symptoms under

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stress. However, she noted that the Respondent is sociable and displayed no evidence of overt psychopathology. Her report did not allude to anger management problem but she raised the concern that there is a potential risk for developing paranoia.

[66] Counsel for the Respondent submitted that the Petitioner has failed to provide any proof to substantiate this claim. She points instead to the Petitioner's own evidence that as regards the Child, she is the disciplinarian while the Respondent tends to be more permissive. This evidence was not disputed by the Respondent. Counsel submitted in the premises that this contention is without merit and should be disregarded.

[67] Given the state of the medical evidence and in the absence of more cogent proof that the Respondent would pose a danger to the Child, the Court cannot make a finding that the allegations advanced would warrant a restriction of his access and visitation.[13] It is clear to the Court that these Parties have experienced the full gamut of marital discord over the course of some time. Their relationship is acrimonious to say the least and this is a major source of concern for the Court. This continued disharmony has no doubt led to unfortunate exchanges and encounters which could never be in the Child's best interest. Immediate intervention is therefore necessary.

Counselling

[68] Notwithstanding the conclusion reached herein, the Court has serious concerns about the Respondent's general response to the concerns raised by the Petitioner in respect of the Child's behavior. In the Court's view, he has not demonstrated the level of concern which would be expected in the circumstances. The Respondent's general apathy was clearly evident and the Court was not at all surprised by the observations made by Dr. Samuel in her Report.

[13] In the matter of Y-M (A Child) [2013] EWCA Civ. 143

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[69] Appropriate personal and parenting counseling is in the Court's view mandatory in all the circumstances. The general consensus of the all of the experts in this case was that the Parties would benefit from professional counselling and this is wholly endorsed by the Court. Mandatory orders compelling such counselling are in Court's view critical for ensuring the welfare of this Child.

Maintenance for the Child

[70] There can be no doubt that both parents have a duty and are liable according to their respective financial resources to maintain their children who are unmarried and have not attained the age of 18. The Parties agree that the educational and uninsured living expenses of the Child should be shared equally between them. It also appears that the Respondent has no difficulty bearing the entire costs of the Child's medical insurance coverage.

[71] The Parties differ when it comes to the periodic (monthly) payment which Respondent should make towards the maintenance of the Child. The Petitioner seeks $500.00 per month while the Respondent contends that his finances only allow for a payment of $300.00.

[72] The Court has considered the evidence of Parties and the submissions advanced by Counsel. Based on the same, the Court is satisfied that the periodic payment of $400.00 is appropriate. In the premises, the Court's order is as follows:

1. The Respondent will pay to the Petitioner the sum of $400.00 per month towards the maintenance of the Child. Such sum is to be paid into a bank account set up for that purpose.

2. The Parties will equally share all of the educational and uninsured expenses incurred in respect of the Child. Proof of such expenses is to be provided in writing to the Respondent and upon presentation of the same, the Respondent will pay the same within 20 working days.

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3. The Respondent will also bear the entire cost of the Child's medical insurance coverage.

4. This Order to take effect from 1st March 2015 and will continue in effect until the Child attains the age of 18 years or until she attained the age of 21 provided that she is pursuing tertiary education.

Access to Email Address

[73] This claim for relief was not pursued with any enthusiasm during the course of the hearing. Save for the Petitioner's bare contention that the Respondent has unreasonably withheld access to her personal email account despite repeated demands; no further evidence has been presented in support of this claim.

[74] The Court is not satisfied that this claim can be maintained in these proceedings and will refuse the relief sought.

Summary of Order

[75] **The Court's Order is therefore as follows:**

1. The Parties will have joint custody of the Child with primary care and control to the Petitioner.

2. The Respondent will have access to the Child including overnight access, conditional upon him maintaining a completely smoke-free environment during the periods of access. The terms of such access are to be agreed between the Parties and reflected in a draft order submitted for the approval of the Court within 14 days of today's date.

3. The Parties are to attend mandatory (1) parenting; (2) co-parenting; and (3) family counselling supervised by the Social Development

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Department. A programme must be presented to the Court for approval within 14 days of today's date.

4. **The Child is to continue with the current counselling arrangements already in place. Regular quarterly reports are to be submitted to the Parties and to the Social Development Department which will continue to monitor the Child's behavior and general welfare until further order of this Court.**

5. **The Respondent will pay to the Petitioner the sum of $400.00 per month towards the maintenance of the Child. Such sum is to be paid into a bank account set up for that purpose.**

6. **The Parties will equally share all of the educational and uninsured medical expenses incurred in respect of the Child. Proof of such expenses is to be provided in writing to the Respondent and upon presentation of the same, the Respondent will pay the same within 20 working days.**

7. **The Respondent will also bear the entire cost of the Child's medical insurance coverage.**

8. **The Order to take effect from 1st March 2015 and will continue in effect until the Child attains the age of 18 years or until she completes tertiary education.**

9. **The Parties will each bear their own costs.**

Vicki Ann Ellis
High Court Judge

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