[2014] JMSC Civ 68

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV01292

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT

IN THE MATTER OF THE CHILDREN (GUARDIANSHIP AND CUSTODY) ACT

IN THE MATTER OF THE CUSTODY AND MAINTENANCE OF JEH

IN THE MATTER OF THE MAINTENANCE OF AH

BETWEEN	**AH**	**CLAIMANT**
A N D	**JH**	**DEFENDANT**

Mr. Allan Wood QC and Mrs. Daniella Gentles-Silvera instructed by Mr. Mikhail Jackson of Livingston, Alexander & Levy for the claimant

Mrs. Pamela Benka-Coker QC instructed by Mrs. Debra McDonald for the defendant

October 1, 2, 3, 2012; January 23, 24, 25, 28, 29, 30, 31, 2013; June 27, 2013; February 5, 2014; and May7, 2014

Application for Custody – Governing principle: the welfare of the child is the first and paramount consideration – Impact of allegations of sexual molestation, substance abuse and physical violence on the determination of the best interests of the child – Application for Maintenance – Validity of post-nuptial Agreements – Whether proceeds from Trust in respect of which defendant is not the settlor, but is one of a number of beneficiaries, should be included in defendant's means for the purpose of determining his capacity to pay maintenance

FRASER J

INTRODUCTION

[1] Throughout this judgment the parties will be referred to by the initials of their first and last names. The child of the parties will be referred to by the initial of his first and last names and one of his middle names, given the similarity in the initials of his first and last names and those of his father. This approach is being taken to protect the privacy of the individuals who are central to this case.

THE APPLICATIONS

[2] By way of a Fixed Date Claim Form filed on March 21, 2011 the claimant, AH, sought the following orders:

(a) sole custody of JEH the only child of the marriage between AH and JH.

(b) an order that JH continues to pay maintenance in the sum of US$3,500.00 per month for JEH and AH. (This was later increased to a claim for US$4662 per month).

(c) an order that all passports including JEH's British Passport that is held by JH be delivered to the claimant.

(d) JH be restrained from coming within 50 yards of the residence of AH and JEH and be restrained from coming within 50 yards of them or otherwise harassing, molesting or interfering with them.

(e) an order that JH continues to provide accommodation, educational, medical, optical and dental expenses and one-half of the clothing expenses for JEH as set out in Deed of Arrangements made between AH and JH in October 2008.

[3] By affidavit dated April 5, 2011, JH himself sought sole custody of JEH and proposed that the sum of maintenance paid by him be reduced to US$1,000.00 for the sole maintenance of JEH.

[4] On February 5, 2014 the court made the following orders:

1. Sole custody of JEH the only child of the marriage between AH and JH is awarded to AH.
2. The defendant is granted supervised access to JEH as follows:
    a. The defendant shall be allowed to have JEH with him three times per month for a period of six hours on each occasion, the dates and times to be agreed in writing between the parties. Failing agreement the dates and times to be determined by the court;
    b. The supervised access must always be in the company and visual presence of an adult over twenty-one years of age who has some training in counseling, psychology or dispute resolution and who has been approved by an agency such as Family Life Ministries or some other similar agency approved by the court;
    c. The periods of supervised access must always be in public places agreed to in writing by the parties. Failing agreement, the access shall take place in places approved by the person designated to supervise the access. The claimant should always be aware of the public place or places at which the supervised access will occur on each occasion;
    d. The costs associated with supervised access shall be borne by the defendant.
3. Commencing February 15, 2014 the defendant, JH, to pay maintenance in the sum of US$1,250.00 per month for JEH until he attains the age of 18 years old or if he undertakes tertiary education until he completes his tertiary education or attains the age of 23 years old, whichever event occurs first.
4. Commencing February 15, 2014 the defendant, JH, to pay maintenance in the sum of US$2,250.00 per month for AH, the last payment to be on August 15, 2015.
5. The defendant shall continue to provide accommodation, educational, medical, optical and dental expenses and one-half of the clothing

expenses for JEH as set out in Deed of Arrangements made between AH and JH in October 2008.

6. All passports belonging to JEH including JEH's British Passport that are held by the defendant be delivered to the claimant through her attorneys-at-law on or before February 15, 2014.
7. The defendant is restrained from coming within 50 metres of the residence of AH and JEH.
8. Liberty to Apply.
9. The time within which an appeal may be made from this decision will commence with the delivery of the written reasons for Judgment.
10. Each party to bear her/his own costs.

[5] These are the reasons for the orders made.

THE BACKGROUND

[6] AH and JH got married in November 2003. The only child of the marriage, JEH was born on June 8, 2006. The parties separated between March and June 2008 and by Deed of Arrangements dated October 1, 2008, AH and JH agreed to have joint custody of JEH with day-to-day care and control of JEH to be given to AH.

[7] By the same Deed of Arrangements JH agreed to pay US$4,000.00 per month for the maintenance of JEH and AH, to provide them with accommodation and to pay all of JEH's medical, dental, optical and educational expenses plus one-half of his clothing costs. The parties subsequently agreed that the figure of US$4,000.00 be reduced to US$3,500.00 which is presently being paid.

[8] In late 2010 on the evidence of AH, JEH first made allegations against JH of sexual molestation. JEH made other allegations of sexual molestation by JH in August and September 2012. Upon application by AH, the initial allegations lead to the Court ordering that all access by JH to JEH be supervised. This was eventually liberalized to allow overnight supervised

access. After the further allegations in August and September 2012 all access was suspended by order of this Court on September 12, 2012.

[9] Divorce proceedings were initiated by JH on May 3, 2012.

A – CUSTODY AND ACCESS

The Paramount Consideration

[10] The Children (Guardianship and Custody) Act governs the power of the court to make orders for custody and access in relation to a child. Sections 7 and 18 are of particular relevance. Section 7 provides that:

> **7.** (1) The Court may, upon the application of the father or mother of a child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, ***having regard to the welfare of the child, and to the conduct of the parents, and to the wishes as well of the mother as of the father***, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act; and in every case may make such order respecting costs as it may think just…
>
> (3) Where the Court under subsection (1) makes an order giving the custody of the child to the mother, then, whether or not the mother is then residing with the father ***the Court may further order that the father shall pay to the mother towards the maintenance of the child such weekly or other periodic sum as the Court, having regard to the means of the father may think reasonable***…
>
> (5) Any order so made may, on the application of either of the father or mother of the child, be varied or discharged by a subsequent order. (Emphasis added).

[11] Section 18 of the Act provides that:

> ***Where in any proceeding before any Court the custody or upbringing of a child*** or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, ***is in question, the Court in deciding that question, shall regard the welfare of the child as the first and***

> ***paramount consideration***, and shall not take into consideration whether from any other point of view the claim of 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.

[12] An extract from the case of ***Dennis Forsythe v Idealin Jones*** SCCA 49/1999 (April 6, 2001) was relied on by counsel for the claimant to demonstrate how our Court of Appeal has interpreted section 18 of the Children (Guardianship and Custody) Act. At pages 7 – 8 Harrison JA (as he then was) said,

> Despite the wishes and desires of the parents, the welfare of the child is "the first and paramount consideration."
>
> This emphasis on the welfare of the child should therefore be the primary focus of a court considering a custody application. However, the court is required to take into consideration, in determining that primary question, the conduct of the parties in all the circumstances of the case. In the case of **In re McGrath (infants)** [1893] 1 Ch 143**,** in dismissing a summons to appoint new guardians for four young children, the Court of Appeal, per Lindley, LJ, commenting on the principle by which the court is guided said, at page 148:
>
> > **'**The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.'
>
> In **R v Gyngall** [1893] 2 QB 232**,** the mother of a child at about 15 years old, sought by habeas corpus, the custody of her child who had been living with the defendant at a convalescent home for several years, because her mother was unable to keep her. The court refused to grant her custody.
>
> Lord Esher, MR after quoting the above words of Lindley, LJ **In re McGrath (supra)** said, at page 243:

> 'The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, so far is it can be said to have any religion, and the happiness of the child… Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought to be taken away from its parent merely because its pecuniary position will be thereby bettered.'

A Court which is considering the custody of the child, mindful that its welfare is of paramount importance must consider the child's happiness, its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings, all of which go towards its true welfare. These considerations, although the primary ones, must also be considered along with the conduct of the parents, as influencing factors in the life of the child, and its welfare.

In ***J. v C.*** [1969] 1 ALL ER 788**,** Lord McDermott in placing perspective, all factors to be considered in the welfare of the child said:

> 'It seems to me that … the child's welfare is to be treated as the top item in a list of items relevant to the matter in question…' (Emphasis added)

[13] Counsel for the defendant fully embraced the "paramountcy principle". However counsel made the point, which is universally accepted, that each case turns on its own facts. The principles to be extracted from the various cases relied on will therefore have to be applied, where relevant, to the peculiar circumstances of this case.

[14] The Children (Guardianship and Custody) Act and case law require that the court take into account all relevant factors that touch and concern the welfare of JEH; welfare being understood in its widest sense encompassing all facets, competencies and needs of this particular child.

In the context of this case, the conduct of the parties in so far as that conduct has or may in future impact on JEH's welfare, necessarily weighed heavily in the court's deliberations. The claimant and defendant have each raised concerns about the fitness of the other to have custody of JEH. In the claimant's case the concern was so great that her application sought not only sole custody but also to exclude the defendant JH from access to JEH. The defendant on the other hand while he sought sole custody did not wish to exclude the claimant AH from access to JEH.

The Conduct of the Parties

[15] There are three main issues which have been raised concerning the conduct of the parties: a) allegations of sexual abuse of JEH by JH; b) displays of aggression and the use of physical violence by both parties; and c) evidence of alcohol and drug use by both parties. Each issue will be addressed in turn and the relevant law applied to the findings of fact made by the court. The determination on these issues significantly informed the court's ultimate decisions reflected in the orders made and outlined at paragraph 4.

The Allegations of Sexual Abuse of JEH by JH

[16] By far this is the most troubling aspect of this case. Sexual abuse of a child is a most reprehensible act clearly inimical to the child's welfare. The allegations of sexual abuse in this case involve JH the father of JEH. He strenuously denies these allegations. Allegations of sexual abuse, by the nature of the circumstances in which they usually occur, (and in which they allegedly occurred in this case), are easy to make but hard to disprove, even if untrue. There are three main alleged incidents of sexual molestation. However, the expert report of Dr. Salter, to be addressed later, suggests at least one additional allegation. The issue of alleged sexual molestation is set in the context that prior to the report of the first alleged incident, AH stated in her affidavit of March 16, 2011 that in the

latter part of 2010 she became increasingly concerned about JEH's behavior as he was saying things and committing acts of a sexual nature she considered wholly inappropriate for a four year old male child. The evidence in relation to the alleged sexual abuse emanates from three family members and a number of experts.

The Accounts of AH, Paul Salter and Diana Lloyd

[17] The first person JEH is alleged to have told about the alleged sexual molestation is his mother the claimant AH. In the same affidavit dated March 16, 2011 AH indicated that in the latter part of 2010, JEH told her that his father JH had put his hand down in his pants and touched his penis. When asked by AH to show her exactly what his father had done he responded by masturbating his penis. This led to her taking JEH to Dr. Kai Morgan, clinical psychologist in December 2010, in respect of which Dr, Morgan generated her first report.

[18] After this first visit to Dr. Morgan AH indicated that on one occasion JEH came into her room, touched her breasts and asked why they were so "squooshy". She also stated that he said his father had told him that he could suck his (his father's) breast. Additionally, in this first affidavit AH maintained that JEH told her that there was a ten year old female he played with while at his father's house who would force him to "do things that big boys and girls do".

[19] The second alleged incident as reported by AH in her affidavit dated August 29, 2012 came to her attention after the defendant JH dropped JEH back at home on August 20, 2012. This was after JEH had spent an overnight weekend with JH from Saturday August 18, 2012. AH indicated that JEH told her that whilst at Newcastle with the defendant JH in a room, the supervisor Nurse Junor being outside at this time, the defendant had put his hand up his pants and began touching and caressing underneath his pants beside his testicles and then edging up towards his penis. JEH

demonstrated what had been done and indicated, when asked, that JH was not applying any medication or ointment. She said JEH indicated he kept telling the defendant to stop and eventually slipped out of the defendant's sweaty grasp and ran out of the room.

[20] The third alleged incident of sexual molestation was outlined by AH in her affidavit dated September 10, 2012. It was alleged to have taken place at the defendant's home at Caymanas. She indicated that on September 9, 2012 JEH told her that on that afternoon while he was lying down with the defendant JH on the couch watching television, JH put his hand on his JEH's leg and tried to touch his "privates". She further reported that JEH told her that he put his hand on the defendant's hand, moved it off his leg and said no. JEH she said indicated that at this time Nurse Junor had gone to the kitchen to prepare dinner.

[21] When AH was cross-examined she stated that the first allegation was made by JEH at the end of November early December 2010, one morning before school at their home at Airdrie. She asked JEH questions which established that the incident had not occurred while he was being bathed nor while diaper cream was being applied. After the allegation was made she called her father Mr. Paul Salter and told him what JEH had said.

[22] Subsequently through referrals from other specialists she was put onto Dr. Kai Morgan. She indicated that between the time JEH told her about the allegation and her first taking him to see Dr Morgan, he told her a few more times and she wasn't sure if it was the same incident he was relating. Given her uncertainty that was why she needed to see the doctor. Prior to JEH seeing Dr. Morgan, she told him that she was going to take him to see a doctor and he should tell the doctor what he had told her about his dad and him. She further said that she spoke to Dr. Morgan about what JEH had told her prior to Dr. Morgan speaking to JEH.

[23] Concerning the sexually inappropriate conduct she noticed in JEH prior to the first report, she related that JEH had at different times at home said "suck my penis" to a guest of hers, Adam Burke, and also to his former nanny Marci. However she admitted that she never really heard what he said to Adam and in the case of Marci she said she only vaguely heard him say it to her once. Neither Adam nor Marci provided affidavits. The value of this evidence is therefore marginal at best and only in relation to the allegation involving Marci.

[24] Though AH said JEH told her what he and the 10 year old girl would do this was not revealed to the court. She indicated that Jonah said when the 10 year old girl spoke to him he would just run away. In her affidavit dated April 10, 2012, AH indicated other instances of sexually inappropriate conduct by JEH. One such was on a particular night after his bath JEH had been naked on the bed with a string wrapped around his penis gyrating up and down in a sexual manner. She told him to stop immediately and get dressed.

[25] She indicated that in the week commencing January 31, 2011 JEH said his father was treating him badly and he didn't want to go to stay with his father. There appeared to be some anxiety in Jonah about being taken out of her custody and this was when he said he was now ready to tell the doctor about what he had told her about his daddy touching his penis. This was when she arranged for JEH to see Dr. Morgan again on February 2, 2011, which led to the generation of Dr. Morgan's second report.

[26] She indicated that she left the island with JEH on February 4, 2011 and returned April 23, 2011 pursuant to the order of Brooks J (as he then was) on April 8, 2011.

[27] On the evidence of AH, JEH's inappropriate sexual behaviour manifested even when they were out of the jurisdiction. She maintained that on February 21, 2011 while at her aunt in Florida on the sofa watching TV

with JEH, JEH put a Ken Barbie doll face down with the head facing his penis, in her words, “mimicking the action of oral sex” and asked her to look at what the doll was doing. When she asked him what the doll was doing he said it was something his daddy told him about that was ok to do, but it was a big secret.

[28] She admitted to showing the first and second reports of Dr. Morgan to her father Paul Salter and to discussing the allegations JEH had made against JH with her father’s partner Ms. Diana Lloyd as well as with her brother Jamie Salter. She also admitted that between May 2011 when supervised visits first started and July 9, 2012 when the order was made to include supervised overnight visits, there were no further allegations of sexual abuse.

[29] In relation to the second alleged incident she stated that she believed JEH returned home in the morning but he never said anything to her about the alleged molestation until in the afternoon when she woke up. His report was in relation to a question she had asked him. He however did not specify at what time it occurred. Concerning the third allegation she indicated she asked JEH if there were other persons in the TV room and he said yes but he never gave a number.

[30] AH’s father Paul Salter also gave evidence that JEH told him of sexual molestation. In his affidavit dated 19th May 2011 he maintained that after JEH’s return to Jamaica on April 23, 2011, while in the living room of his house, without him raising the subject with JEH, JEH told him that JH had put his hands down his pants, squeezed his bottom and felt up his penis. He stated that JEH told him the same thing more than once.

[31] Cross-examined he couldn’t say in which month he was told about the molestation but knew that it was in 2011. He thought it could have been three times he was told; twice at his house and once at JEH’s house when he did not want to go to visit his father. He also indicated that on each

occasion he was alone with JEH and he never heard JEH telling these allegations to anyone else.

[32] Diana Lloyd, Paul Salter's partner, in her affidavit dated September 23, 2011 indicated that around the middle of 2011, JEH told her that his daddy had told him that he could suck his daddy's breasts. She stated that JEH made the comment in the context of them watching a video clip together and her explaining to JEH that two baby baboons could die as they needed their mother, who had just been killed by a leopard, to suckle.

[33] Cross-examined she indicated that it was a youtube video clip they were watching on her laptop. She could not recall if JEH had made the comment to her before or after AH told her of the allegations.

The Expert Reports

[34] Dr. Kai Morgan Clinical Psychologist in her first report dated December 17, 2010 indicated that JEH was tested on December 10 and 13, 2010. She concluded that the *"Axis I diagnosis of sexual abuse was ruled out because of the inconclusive nature of the tests findings in confirming sexual abuse"*. She noted that, *"A rule out indicates that additional information is necessary to conclusively determine the presence of sexual abuse."* Among the recommendations made was that a physical examination by a medical doctor must be done. There is no indication whether or not JEH did see a doctor at any point during the investigations into the allegations. However the nature of the allegations are such that it is unlikely that any physical manifestations would exist for medical observation, even if the allegations were true.

[35] Dr. Morgan's second report was dated February 8, 2011. It was precipitated by the indication from AH that JEH was reluctant to go on his scheduled visit to his father and was ready to tell the doctor what had happened between himself and his father. On this occasion he stated, *"my*

daddy put his hands down my pants and feel up my penis". He stated it had happened a number of times but could not say how many and when it occurred. While Dr. Morgan opined that the information received gave greater credence to the previous report, she did not have enough information to conclude that sexual abuse had taken place. She however recommended further investigations and that unsupervised visits of JH should cease.

[36] Report 3 of Dr. Morgan dated June 4, 2011 was primarily focused on an assessment of JH. However it contained an admission of a lie told by JEH to AH that JH had thrown him into a car. JEH subsequently admitted this was an untruth. The report also referenced the fact that JEH had reported an incident of molestation by an older playmate *(though not stated from previous evidence this would appear to refer to the ten year old girl)*, with the comment that one could not be absolutely sure how that incident also played into JEH's behaviour and reports. Dr. Morgan did not make a diagnosis of paedophilia in respect of JH, noting that he did not display any of the symptoms that indicate paedophilia. She noted that JH was 48 at the time of interview and that typically individuals who are paedophilic start having urges under 45 and so the first incidence would have already occurred. She further noted that JH had a teenage son who vouched for his father that he had never touched him inappropriately. One of her recommendations was increased supervised visitation rights occurring concurrently with family therapy and individual psychotherapy for JEH. If these went well then there could gradually be a move to unsupervised visitations.

[37] The report of Tracey-Ann Coley, psychotherapist dated July 27, 2011 indicated that she had seen JEH for 8 weekly play therapy sessions due to reports of increased aggressiveness at school and home. Her sessions did not address the allegations of sexual abuse but she indicated that JEH demonstrated independently in two sessions how *"my daddy stomped my*

mommy and rolled her down the stairs". Among the things she noted was that exposure to violence between his parents had caused JH to internalize feelings of fear, helplessness and anger. He experienced anger and guilt as a result of feeling helpless to protect his mother. As part of JEH's treatment plan Ms. Coley recommended that his parents engage in parenting sessions to assist them to understand how their unresolved animosity was affecting JH.

[38] On August 2, 2011, Dr. Morgan provided a psychological evaluation of AH. Under the heading Summary and Diagnostic Impressions, among Dr. Morgan's findings were that, "*Her projective profile shows that she has problems with processing/interpretation of information and she signs based on her response of some paranoia and impaired reality testing. Impaired reality testing sometimes causes ineffective, inappropriate, and deviant everyday behaviour which is not in response to reality demands. These findings should be taken into consideration when interpreting the actions of Mrs. Saulter. This is not an indication that she is an unfit parent: rather, these findings suggest that she may be misinterpreting events or relying on simple or concrete interpretations. She may not take the time to investigate situations contextually before drawing conclusions. Despite her drinking habit there have been no claims or evidence that she is an unfit mother."*

[39] Among her recommendations were that AH refrain from discussing details of the case in JEH's presence as that could lead to acting out behaviours. She also recommended family therapy and individual therapy for JEH.

[40] Dr. Wendel Abel, consultant psychiatrist provided a report on AH dated October 5, 2011 even though it is indicated in the report that he saw her on October 5, 10 and 20, 2011. He also interviewed JEH who, when asked if he wanted to live with his father, said no as his father did something bad to him and that his father wanted to take him away from his

mommy. Having indicated he didn't remember what it was, when asked if his father had touched him he said "He touched me here", pointing to his genitalia. JH also alleged that his father tripped him and that he was also in a canoe with him which capsized. Dr. Abel recommended that mother and child not be separated given their strong attachment as this would cause emotional devastation to the mother and long term adjustment problems and emotional issues for the child.

[41] Dr Kai Morgan re-entered the picture with a report dated August 25, 2012 after the 2nd allegation of molestation. The interview which led to this report was video-recorded on an iPad. In summary, JEH indicates that his father tickled him on his penis while on a trip to Newcastle and that despite his indication that it should stop, this request was ignored and he had to slip away from his father and run out of the room. Based on the interview and her prior knowledge of the case Dr. Morgan's opinion was that there appeared to be corroboration between what JEH had said to his mother with what he stated to her. Further that it was clear that though JH appears to have been playing/tickling JEH, given the nature of the case, the ongoing court proceedings and JEH's discomfort with same, it appeared to have been an unwise decision on JH's part. She suggested mediation between JH and JEH. After outlining other opinions, lastly she stated that until the recent revelation/accusation by JEH was fully investigated and family therapy accessed, overnight visits should be curtailed and the schedule for supervised visits reinstated.

[42] On 6th September 2012 JEH was seen by Veronica Salter Phd. for a psychological assessment. Interviewing him alone she used a teddy bear to make him comfortable and naked dolls that included genitalia, one male and one female, to assist in the interview. She indicated that during the interview without prompting JEH said, "My dad touched me here" pointing to the boy doll's bottom. When questioned, JEH said it happened when they were sitting in the car at his dad's factory. He also stated that his

father had put his finger here – (pushing his finger into the crack of the buttocks on the doll). When further questioned as to whether or not this had happened on other times JEH took the teddy's paw, placed it on the penis of the doll and rubbed it harshly up and down. He also said it happened in his dad's bed but seemed confused as to whether it was in his dad's bed or his own. JEH also stated that he loved his dad, but did not like what he does and that he liked visiting him, noting that his father had his favourite magic markers.

[43] Dr. Salter indicated that in her opinion JEH had been inappropriately fondled and molested (surface penetration of anus by the finger) and that such inappropriate acts could happen in what would be considered safe places without bystanders being aware. She cited research that showed that false allegations of child sexual abuse by children are rare in the nature of 1% of the total cases. (Jones, D.P.H. and J.M. McGraw: **Reliable and Fictitious Accounts of Sexual Abuse to Children**. Journal of Interpersonal Violence, 2, 27-45, 1987). The figure was 2% of such reports by pre-school and kindergarten children and for ages 6-12 the figure was 4.3%. She also indicated that false allegations may not mean a child has lied but could indicate a misunderstanding of what had occurred. She also opined that pre-school children are very difficult to coach or program into giving intentionally false disclosures. She cited, **Parenting the young sexually abused child** http://danenet.wicip.org/dcccrasa/saissues/parent/4html.

[44] Dr Salter criticized the fact that Dr. Morgan had not given JH the diagnostic test for paedophilia although he exhibited two of the three traits used to establish that condition, namely sexual activity over a period of at least six months and that JH was more than 5 years older than JEH. She also concluded that JH had sociopathic tendencies. Among her recommendations were separate psychotherapy sessions for JEH and JH

and that the only contact JH should have with JEH when absolutely necessary, was in public places under strict supervision.

[45] On September 26, 2012 Dr. Morgan provided another report in response to that of Dr. Salter. Her report was highly critical of Dr. Salter's methodologies and limited source material. She considered that to diagnose JH with paedophilia and sociopathy without even interviewing him was improper. She deplored the use of the findings of her report – lateness with a smile, frequent denial of flaws and maintaining a façade – to label JH as sociopathic; a diagnosis she termed "premature". She noted that both AH and JH had maintained façades and denied flaws (for example cocaine use). This behaviour she interpreted not as sociopathic but as coping strategies they both used to present themselves in the best light; very common behaviour in forensic cases of this nature.

[46] Further, the question whether or not JH had perpetrated the alleged abuses upon JEH was still a debatable issue — therefore she considered the diagnosis of paedophilia premature. Such a diagnosis would depend on confirmation that JH had perpetrated such abuses, was attracted to pre-pubertal children and therefore had fantasies about same, none of which she had been able to conclusively prove.

[47] Dr. Morgan also expressed concern that Dr. Salter was the fourth mental health professional who had interviewed JEH concerning alleged sexual molestation and that he had also inadvertently become privy to the details of different persons' perceptions of incidents. This gave her grave concerns about the "tainting" of his testimony and the possibility of the creation of "false" or "planted" memories.

[48] Her report also pointed out that meta-analysis of data, (where a compilation is done of studies on the topic area to give a more comprehensive picture), showed that instances of children lying about sexual molestation have been reported as high as 10%. (Mikkelsen EJ,

Gutheil TG, Emens M (October 1992). **"False sexual-abuse allegations by children and adolescents: contextual factors and clinical subtypes".** American Journal of Psychotherapy, v. 46 (4): 556-70). Additionally that research on the error rates (false positives and negatives) of mental professional's judgment on these cases exceeded 24% because of the lack of an accepted "gold standard" in interviewing techniques. She pointed to studies that showed that the use of suggestive or leading questions could introduce serious distortions into children's recollections and that a significant number of pre-school children can be induced to create detailed narrative recollections of events that never happened.

[49] Significantly, Dr. Morgan also highlighted that the use of anatomical dolls for questioning or determining whether molestation had occurred was controversial, enjoying both supporters and detractors. Detractors have noted that the novelty of the dolls may cause children to act out sexually explicit behaviors even if they have not been abused and further that there was no definitive and significant difference between how abused and non-abused children play with such dolls.

[50] Dr. Morgan noted that despite the fact that JEH continued to accuse his father, he admittedly loved him and expressed a wish to continue to spend time with him. Therefore she stood by her earlier findings, and, despite the dangers associated with a further interview of JEH, recommended that he be seen by an experienced forensic interviewer or mental health professional to help to decipher the details.

[51] Pursuant to an order of this court on the application of JH, Dr. Pauline Milbourn was requested to conduct a recorded interview with JEH. The request from the court was for an interview recorded on DVD. However the recording of the interview that was done on December 12, 2012 and provided for the court, though useful, only captured audio.

[52] In her written report dated January 13, 2013 which accompanied the audio recording, Dr. Milbourn highlighted that JEH at first said he "forgets like every day" why he does not see his Dad anymore. Then later he said the reasons had to do with something bad that took place in his Dad's bed in the early morning which made him feel "mad". Dr. Milbourn further points out that he stated that his Dad was telling a lie that he never did that. She noted that JEH clearly stated that his father "was troubling down there" and pointed to his groin area. She adverted to the fact that this statement was in agreement with others JEH had made during previous evaluations and that he had coped with his concerns by trying to suppress the memory…"I forget like every day". In her concluding paragraph Dr. Milbourn stated that, *"Jonah is a very troubled child who is fearful, anxious, hyper vigilant, tense and reports that he has difficulty sleeping. Continued psychological care is vital to ensure Jonah's normal physical and mental growth and development and contact with his Father at this time cannot be recommended."*

The Defendant's Account

[53] The defendant JH has from day one strenuously denied all allegations of molestation. He however admitted that his hand did come in contact with JEH's penis on one occasion but has maintained that it did so in an entirely innocent manner. In his redacted affidavit re-filed June 14, 2012 in response to the affidavit of AH dated March 21, 2011, he outlines how in email communication he explained to AH how it occurred. In paragraph 28 he states:

> JEH (name replaced) had come into my room very early one morning and wanted me to get up. I told him it was much too early, but he jumped on the bed and started to haul me up, so I started tickling him. He had taken off his pull-up disposable underwear and put back on his pyjama bottoms or some soft shorts, I am not sure. He was on his stomach and I tickled him under both arms and right down his ribcage and into his shorts and lightly pinched the very top of his bottom. He rolled over

> suddenly and my hand brushed his penis. I very quickly removed my hand and we made a joke of it.

[54] Cross-examined about this incident he indicated it took place in October 2010. He was challenged that if he was touching JEH at the top of his buttocks it could not cause him to touch his penis when he rolled over. His explanation was that his hands were down (and he demonstrated) inside JEH's pants. He indicated that JEH had rolled to get away from the tickling. His hands were now in front and they grazed JEH's penis. He could not say where on his penis. His evidence was that, *"I said oooh and pulled my hands up as if in shock and I laughed and he did too as it was meant as a joke."* He testified that he was just joking around with JEH and he did not consider it particularly inappropriate.

[55] He admitted that he had a telephone conversation with AH in the presence of JEH concerning the alleged molestation 3 – 4 weeks after that incident in the bedroom. JEH was staying with him at Caymanas and AH called and wanted to speak to JEH. AH spoke to him and then JEH said, *"Daddy put his hands down my pants and touched my penis"*. JEH handed the phone to him and then AH spoke to him JH. JH however indicated in evidence that he had not touched his penis on that day nor played with him.

[56] In relation to the second allegation of abuse alleged to have occurred at Hollywell, under cross-examination JH admitted that in breach of the court order he, JEH and the supervisor Nurse Junor were sharing a room. He testified that during the night Nurse Junor received 3 – 4 calls concerning her mother who was ill. She took these calls on the porch in sight of the room. The porch was lit but the room was not. JEH never got up for snacks during the night. In the morning about 6:15 JEH woke him up. Nurse Junor got another call about 6:30 and was out of the room for about 20 minutes. JEH was however not then in the room, being outside playing with other children on the lawn, while he JH was in the bathroom. He

however could not say if the children were within eyesight of Nurse Junor. He denied that JEH came into the room, was molested by him and was able to slip away from his grasp.

[57] Concerning the third allegation of an incident at Caymanas estate on September 9, 2012, during cross-examination he disclosed that he was alone in the TV room for about 3-5 minutes while Nurse Junor was in the kitchen cooking. He confirmed that one could not see into the TV room from the kitchen, so that for a while he was not under observation. He agreed that as JEH said, tennis was on TV (the US Open). He however denied that JEH ever came into the TV room while he JH was there alone. He further denied that he JH put his hand on JEH's leg and tried to put his hands on JEH's privates.

[58] Monica DaSilva in her affidavit supported the defendant's denial of any impropriety in respect of the third alleged incident. She states that on September 9, 2013, she visited the defendant at his home in Caymanas Estates along with her twelve year old granddaughter Amber. She was there watching the television with the defendant and others including Jonathan Greenland and his two children between the hours of 3.15 p.m. to 7 p.m. The children were playing with JEH. She did not see any inappropriate behaviour on the part of the defendant towards JEH.

[59] He also denied the alleged instances of improper sexual conduct with another four year old child and improper conversation with JEH. In that regard he stated it was not true as alleged by Diosa Sleem that he had sprayed whipped cream on the nipple of her 4 year old daughter, laughed and said he could lick it off. He agreed that if spraying whipped cream on the nipple of a 4 year old child had occurred, that would have been highly inappropriate conduct and that licking it off would be even worse. He denied that he had ever told JEH that he could suck his JH's breasts, and

then commented, *"It is a stretch to link licking cream off titties to suck breasts"*.

Summary of Submissions and Analysis

[60] The submissions of counsel for the claimant highlighted the fact that hearsay evidence or evidence as to the state of mind of the child was admissible in cases of this nature without the child being called to give evidence. See ***Re W (Minors) (WARDSHIP: Evidence)*** [1990] 1 FLR 203 (CA). Counsel relied on the principle from that case which indicates that if there was a real risk to the child's well-being the court should act and it was not necessary to find that molestation had in fact occurred. What had to be weighed was the risk to the child's future well being. Clearly if molestation is proven to have occurred custody should not be awarded to the offending party.

[61] Counsel also submitted that the statements of the child and other surrounding factors such as a web of unusual behaviour can operate together to establish the allegations. See ***Re W (Children) (Family Proceedings: Evidence)*** [2010] 1 WLR 701 (UKSC). See also ***Re N (A Minor) (Sexual Abuse: Video Evidence*** [1997] 1 W.L.R 153, an English Court of Appeal case on the use of video evidence from a child.

[62] On the question of access, counsel submitted that although a court is not compelled to make any findings that molestation has actually occurred in making a supervised access order, if there is such a finding, the welfare of the child dictates that access should not be allowed at all as although access is important it pales into insignificance when one considers the possibility of sexual abuse of a child. See ***Re R (A Minor) (Child Abuse: Access)*** [1988] 1 FLR 206.

[63] While parental access is a right of the child which is normally in the child's best interest, such access would not be granted if it was not in the welfare

of the child. ***M v M (Child: Access)*** 1973 2 All ER 81. Given the submission that molestation had occurred, access it was submitted was not in JEH's welfare and in fact might prove devastating.

[64] Counsel also advanced that even if the court was of the view that there was no risk of molestation, a supervised access order was still warranted to protect the defendant from further allegations of molestation and to give reassurance to the claimant as mother. Such an arrangement would be in the best interest and welfare of the child. See ***Re G (A Minor) (Child Abuse: Evidence)*** [1987] 1 FLR 310 and ***Stockhausen v Willis*** 2004HCV02920 (July 16, 2008).

[65] Counsel submitted that there was ample proof of the cogency of the allegations against JH. The submissions pointed to the instances of sexualized behaviour of JEH, the admission of JH of the first incident, though it was categorized on the suggestion of his mother as "romping", and the fact that the opportunities existed for the second and third instances to occur as there were some times when JH admitted being alone and not in view of the supervisor. Counsel also highlighted the fact that JH had proffered no explanation for why JEH would be telling lies. Reliance was placed on the report of Dr. Salter which suggested that children are unlikely to lie in making such allegations.

[66] Counsel pointed out that though Dr. Morgan did not come to a conclusive finding concerning the allegations of sexual abuse, in her final report she only recommended supervised visits. Dr. Milbourn, appointed at the request of the defendant, indicated in her report that contact between JEH and JH could not be recommended at the time of her report January 13, 2013. Dr. Salter was of the view that when it was absolutely necessary for JEH to be in the company of his father it should be in public settings under strict supervision.

[67] Counsel urged that Dr. Salter's report should be preferred over the response to her report from Dr. Morgan as Dr. Morgan herself thought that JEH's behavior was indicative of sexual abuse but she felt it was inconclusive. Counsel also prayed in aid the principle in ***Browne v Dunn*** (1894) 6 R 67 maintaining that as Dr. Salter was made available for, but was not cross-examined, the defendant should be taken to have accepted her findings. Counsel pointed out that this principle had been applied in a number of cases such as ***R v Kevin Fenlon***; ***R v Raymon Frank Neal***; ***R v Gary Steven Neal*** (1980) 71 Cr. App. R. 307 and ***Reid v Kerr*** (1974) 9 SASR 367. Counsel also cited **Phipson on Evidence**, 14th Ed. at paragraph 12-13, page 245 on this point. Counsel further relied on **Expert Evidence: Law and Practice** by Hodgkinson London Sweet & Maxwell 1990 at page 112, which indicates that the principle is also applicable to expert evidence and not just the evidence of lay witnesses.

[68] Overall in the view of counsel the evidence supporting sexual abuse was strong. However counsel submitted that if the court found it to be inconclusive, as none of the doctors had recommended that JEH be with JH, it was in the best interest of JEH for custody to be awarded to AH. Further counsel submitted that on the state of the evidence from all the experts, JH should be excluded from access to JEH.

[69] Counsel for the defendant on the other hand asked the court to find that there was no sexual molestation as alleged or at all by the father and that he poses absolutely no risk to the child. This in the context of counsel's acknowledgement that the effect of the applicable legal principles is that the court need not find that the incident(s) did take place, but needs to be mindful of any attendant risk to the child even if the court cannot make any finding one way or the other concerning the allegations of molestation.

[70] Counsel cited on her own accord the cases of ***M and M*** 1988 12 Fam LR 606 and ***B and B*** 1988 12 Fam LR 613, two Australian High Court cases

heard together, in which the issue of how allegations of sexual molestation are to be handled by the courts was addressed. At paragraph 25 of ***M and M*** the principle was expressed in this fashion:

> [T]o achieve a balance between the risk of detriment to the child from parental access…the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

[71] In respect of the evidence counsel highlighted the following in her submissions:

(a) For the first two years of JEH's life while AH and JH were living together there was no allegation of molestation;

(b) The issue first arose when the parents were living separate and apart and JEH was four years old;

(c) There was no evidence that the sexualized behavior manifested by JEH around the middle of 2010 was a result of anything done by JH;

(d) In or around November 2010 JEH made the first allegation against JH following which in February 2011 AH took JEH out of the jurisdiction. In email communication JH indicated he had accidentally touched JEH's penis while playing with him

(e) From May 2011 – July 2012 JH had supervised access to JEH, including increased access from October 2011. In July 2012 JH was granted overnight access.

(f) In August 2012 there was an allegation of molestation on an overnight visit to Hollywell. The last allegation concerned an incident in September 2012 in the TV room at Caymanas with other persons present which counsel submitted was incredible.

[72] Counsel submitted that there was only one incident of innocent play between JEH and JH which in counsel's words had been allowed to assume "epic proportions" with each repetition. The numerous interventions by several persons counsel maintained may have implanted the alleged events in JEH's psyche.

[73] Further counsel submitted that the actions of AH seemed designed to disrupt the relationship JEH had with JH and create emotional distance between them. Tellingly counsel submitted that the allegations surfaced in 2010, the year JH should have ceased financial responsibility for AH. Further, that in the very month (August 2012) that the court granted overnight access to JH, in counsel's words, AH engineered the Newcastle allegation, put forward in the vaguest terms, which led to overnight access being immediately suspended. In counsel's view, still not satisfied and seeking to deprive JH of all access to JEH, AH returned to court with the TV room allegation. All these counsel maintained were instances of clever exploitation of the court system by AH to achieve her own ends — ends which in counsel's submission she enlisted the assistance of her family and friend Graham Campbell to accomplish.

[74] Concerning the principle in ***Browne v Dunn*** counsel submitted that there was no need for cross-examination of either Dr. Abel or Dr. Salter in light of the conduct of this particular case. She pointed out that none of the experts in the matter had been cross-examined though there were 12 reports which had all been subject to detailed review. In her opinion the reports of Drs. Abel and Salter displayed a lack of professionalism as they were compiled based on hearsay, with conclusions not based on fact. Counsel therefore submitted that on the reports themselves the credibility of these two doctors was impugned.

[75] Counsel relied on Lord Morris' opinion in ***Browne v Dunn*** that it was unnecessary to confront a witness in cross-examination to impeach that

witness' credit when the story told by the witness was of an "incredible and romancing a character." The reports of Drs. Abel and Salter she maintained fell into that category.

[76] The legal principles the court needs to apply to this aspect of the case are accepted by both sides. In ***Re W (Minors) (WARDSHIP: Evidence)*** it was *held: if there was a real risk to the child's well-being the court should act and it was not necessary to find that molestation had in fact occurred*. In ***M and M*** the formulation of the principle was that *a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse*. Though the language used in both cases is slightly different, essentially the governing consideration seems to be that if there is a real or unacceptable risk of sexual abuse custody or access should not be granted. Counsel for the claimant also submitted, which I accept, that even if the court was of the view that there was no risk of molestation, a supervised access order could still be warranted to protect the defendant from further allegations of molestation and to give reassurance to the claimant as mother.

[77] On the facts, the only uncontroversial point in the unfortunate issue of alleged sexual molestation is the fact that in November 2010 JH's hand came in contact with JEH's penis. On the defendant's case it was innocent and entirely playful; on the claimant's case it was the first incident in what would turn out to be repeated incidents of abuse. From the claimant's perspective the defendant is a paedophile from whom JEH needs protection. From the defendant's perspective the claimant has seized upon an innocent chance encounter to create a basis for excluding him from JEH's life while living off his largesse.

[78] In keeping with accepted practice as discussed in ***Re W (Minors) (WARDSHIP: Evidence)*** and ***Re W (Children) (Family Proceedings: Evidence)*** JEH was not called to testify. I also did not consider it

necessary to myself interview him, given his age, the number of interviews to which he had already been subject by experts and the concerns of "implantation" associated with so many repeated interviews. I have however observed and listened to JEH on the video made by Dr. Morgan and listened to him on the recording made by Dr. Milbourn. I have also considered the evidence of the parties themselves and their witnesses. AH spent a long time on the stand and was thoroughly cross-examined by counsel for the defendant. At times she did appear to be highly strung and quite combative. It was clear that she currently has a low opinion of the defendant and appeared to be hostile towards him. Having viewed her I concur with the opinion expressed by Dr. Morgan in paragraph 8 of her report dated September 26, 2012 that AH did not plant the thoughts or suggestions of molestation or coach JEH.

[79] However that does not remove the fact that AH formed a view from the report of the first incident sufficient to cause her to flee the jurisdiction with JEH in breach of the Deed of Arrangements and without even first discussing the matter with JH. That initial view would no doubt have thereafter been in her mind and could well have influenced her interpretation of subsequent statements by JEH. This especially in light of the findings of Dr. Morgan when she did her psychological analysis of AH. AH's witnesses would also have heard the allegations from her before allegedly hearing them from JEH. The issue therefore is not just whether or not JEH made particular statements to all these persons. The court also has to consider if those statements were made what would have actuated him to make them? Was it as a result of molestation by JH or some other reason? Could those statements have been subject to any unwarranted interpretation by the hearers?

[80] JH was himself subject to searching cross-examination by counsel for the claimant. In contrast to AH he was quite laid back, at times appearing even a bit casual given the gravity of the matters being addressed; for

example when he volunteered and commented that, *"It is a stretch to link licking cream off titties to suck breasts".* The explanation given by JH for how his hand came in contact with JEH's penis during the first incident could be plausible, though concerns may remain about the nature of play he would have been engaged in. I say may, as while a parent can appropriately play with a child in a variety of morally and legally acceptable ways, what might be appropriate when the child is at a younger age may not be appropriate as the child grows older. JEH was four years old at the time. If as JH maintains it was all innocent, playful and accidental all would be well. The fact is however something about that encounter caused JEH to report it to his mother AH. Was it just a child sharing one of the things that had occurred while he was away from his mother or was there something more and sinister to it? Further there are other allegations of inappropriate contact and other surrounding circumstances such as JEH's sexualized conduct and increased aggressiveness that give cause for concern.

[81] In respect of the second allegation it was acknowledged by the defendant that he was in breach of the order of Sykes J when he stayed in the same room with Nurse Junor and JEH at Holywell. This breach coupled with the fact that, if true, the second and third allegations would have occurred when the matter was before the court and the defendant under the cloud of the first allegation, would leave open the interpretation that the defendant could not help himself and was a clear danger to JEH. The interpretation placed by Dr. Morgan on the alleged second encounter that JH appeared to have been playing/tickling JEH, is more favourable to JH. However as she noted given the nature of the case, the ongoing court proceedings and JEH's discomfort with same, it appeared to have been an unwise decision on JH's part. Unlike the first allegation however JH has not admitted that any such incident occurred at all at Holywell. It is therefore difficult to accept Dr. Morgan's interpretation unless the court were to take the view that an "innocent" incident happened but JH did not

wish to acknowledge it for fear he would be seen to be admitting to molestation.

[82] The allegations of sexual abuse have also occurred in the context of JEH manifesting over time sexualized behaviour as previously outlined. There are however questions as to the source of that behaviour. JEH spoke of coming under the influence of a ten year old girl while at his father's house who forced him to "do things big boys and girls do". This raises the issue of lack of adequate supervision when JEH was in his father's custody, a factor which is also relevant to the issue of custody. However on the narrow issue of the sexualized behaviour of JEH, Dr. Morgan was of the view, which this court accepts, that the interaction JEH had with this ten year old girl could well have accounted for his behaviour rather than any actions of his father.

[83] The allegations that JH had sprayed whipped cream on the breasts of a little girl and laughingly offered to lick it off are very very serious. I have already indicated, that while JH denied the allegations, the court found the comment made by him while being cross-examined in this area somewhat casual in the circumstances. Ms. Diosa Sleem who made this allegation was never cross-examined. AH who was alleged to be present was also not cross-examined about this. No indication was given as to why Ms. Sleem would not speak the truth on this issue. Despite the defendant's denial I am constrained to hold that this incident appears to have been established.

[84] Further complicating these troubling circumstances and very serious allegations are the fact that JEH was found to have lied about other non-sexual allegations. In her June 4, 2011 report Dr. Morgan points out that JEH told AH that JH had thrown him into a car which JEH subsequently admitted was an untruth. Also JEH told Ms. Coley (supported by demonstration) that JH stomped his mother and rolled her down the stairs

which AH admitted never happened; though she alleged “he tried to throw her down the stairs”. Was this an instance of JEH’s “memory” manifesting implantation from what he had heard? Also of significance is the fact that while everyone to whom a report of alleged molestation has been made has been told by JEH about the first incident in the bed there is another allegation which was not told to anyone before it surfaced during the interview by Dr. Salter. The allegation of surface penetration of JEH’s anus by JH’s finger while they were in JH’s car at JH’s factory. Was this a revelation of even more abuse or was this a false report precipitated by the use of anatomic dolls? No mention was made by JEH in the interview with Dr. Salter of the alleged molestation at Hollywell or in the TV room at Caymanas.

[85] The difficult nature of determining what really has happened in this matter is poignantly demonstrated by the divergence in expert opinion. This divergence is most significant between Dr. Salter and Dr. Morgan. The expert reports are tools which the court may use to arrive at a determination (***BP v RP*** SCCA 51/08 (July 30, 2009)). The court may however accept or reject any part of an expert witness’ report, though due regard should be had to the opinion of the expert based on their training and experience in the area in which they provide their opinion.

[86] The absence of cross-examination especially of Dr. Salter was relied on by counsel for the claimant as requiring acceptance of her opinion while counsel for the defendant submitted that an examination of her report itself revealed significant flaws. The principle in ***Browne v Dunn*** is succinctly stated in the headnote as follows:

> If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it be otherwise perfectly clear that he has full notice

> beforehand that there is intention to impeach the credibility of his story or (per Lord Morris) the story is of an incredible and romancing character.

[87] It is perhaps a stretch to say that the report of Dr. Salter is of an "incredible and romancing character". It is at least to some extent founded on established practice, though that practice is controversial. Also, while it is correct as submitted by counsel for the defendant that all the reports have been subject to review, without the doctors having been cross-examined, it is mainly the report of Dr. Salter and to a slightly lesser extent that of Dr. Abel that have been the subject of significant disagreement. Given the way the matter has proceeded, I do however find that it must have been perfectly clear to Dr. Salter and the claimant, that there was the intention to impeach the credibility of Dr. Salter's report given the fact that a comprehensive critique of her report was sought and obtained from Dr. Morgan by the defendant and formed part of the papers in this matter. Accordingly I am of the view that the principle in ***Browne v Dunn*** has been sufficiently observed and counsel for the defendant was therefore entitled to comment adversely on Dr. Salter's report. Based on the way the case was presented I also find counsel was properly able to comment on the report of Dr. Abel.

[88] Having carefully considered the expert reports of Dr. Salter and Dr. Morgan, I am attracted to Dr. Morgan's and counsel for the defendant's criticisms of Dr. Salter's methods and conclusions. I accept that without interviewing JH for herself it was premature for Dr. Salter to label JH a sociopath and a paedophile — diagnoses which Dr. Morgan herself who interviewed him did not find appropriate to make. JH's age and previous unblemished record where paedophilia is concerned as vouched for by his teenaged son and previous partner, plus other potential causes for JEH's sexualized behaviour are factors which have to be taken into account in the defendant's favour. I also consider significant the risk of implantation of false memories, despite the 18 month gap between the first and the

second allegations, based on the number of persons lay and expert who discussed allegations of molestation with JEH. Further the controversy surrounding the appropriateness of using anatomic dolls given the view of detractors that their use may lead to false positives, has to be considered especially in light of the interpretation by Dr. Salter from the actions of JEH with the doll, that there had been surface penetration of the JEH's anus by JH. This said by JEH to be on an occasion in JH's car at his factory, an allegation which was made to no one else.

[89] It cannot be denied however that serious allegations have been made. The first incident is admitted by the defendant though on his account subject to an innocent explanation. Cross-examination of the defendant revealed at least the opportunity for the second and third incidents to have occurred. Further it is without question that JEH on occasion manifested stress at having to be with his father even though he admittedly loves him and at times expressed a desire to spend time with him. Significantly however none of the medical experts recommended that JEH should be with JH.

[90] Having closely and carefully considered all the relevant material I find I am in no better position that Dr. Morgan. I cannot conclusively say one way or another that I find the allegations of sexual molestation established or not. The state of affairs however discloses a degree of suspicion that one or more of the alleged incidents could have occurred. The court therefore made the appropriate orders as to custody and access based on the risk that JEH could be exposed to, balanced against the value to his welfare of having his father being a part of his life, in circumstances where no conclusive finding of sexual molestation has been made. The order as to access was modeled on that made by Anderson J in ***Stockhausen v Willis.*** It was designed to protect JEH against any risk of molestation that may exist, provide a degree of comfort to the claimant concerning JEH's

safety as well as protection for the defendant against any further allegations which might be spurious.

Displays of Aggression and the Use of Physical Violence by Both Parties

[91] There are three incidents of physical violent confrontations that have occurred between the parties since their separation. The first was around May/June 2008 at Caymanas when AH drove there early one morning to discuss with the defendant an unpaid electricity bill which led to the electricity being turned off at Airdrie where she lives with their son JEH. The defendant maintains it was early 5:30 – 6 a.m. and that AH might have gained entrance to the house as the door could have been unlocked. The claimant AH however indicates that it was about 8:30 a.m. Nothing much turns on the time, save that if it was indeed 5:30 – 6 a.m. that would have been an unreasonable time to go to the defendant's house in the circumstances that then existed between the parties.

[92] AH alleges that she found him in bed with a young woman named Tash. He became very angry and pinned her to a chair, placed his hands around her throat and straddled her with his legs. She asked him if he was going to kill her at which time he released her. She then left. The defendant on the other hand indicates that he woke up to hear AH screaming and shouting at him and his girlfriend saying, "how could you how could you?", and making derogatory remarks about his girlfriend. He stated that she scraped his body with her fingernails and that he didn't respond as JEH was there. He asked her to go downstairs so that he could get dressed, which she did. When she came downstairs she began to attack him again by hitting him and he held her hands to stop her and tried talking to her to settle her down.

[93] In cross-examination AH admitted that she had not characterized this incident as an assault until she put it in her affidavit to try to get an injunction. Having reviewed and listened to the evidence of this incident I

find that it was the claimant AH who was the instigator on this occasion having gone to the defendant's home and made the discovery of him in the bedroom with Tash. Significantly, on her own admission this incident was not characterized by her as an assault, until it was included in her affidavit in support of the grant of an injunction.

[94] The second incident occurred in Greece on August 31, 2009. AH alleges that she went into JH's room to pick up JEH and JH got angry. He tried to throw her out of the room and then started to hit her and bang her body and head into the wall and floor. He then tried to throw her down the stairs. She indicates that she called for help and persons staying with them intervened and separated them.

[95] JH paints a totally different picture. He alleges that having come in from dinner AH tried to pick a fight with him by greeting him with the remark, "I can see where your loyalties lie." Seeking to prevent an escalation he repaired to his room where JEH was sleeping. Shortly after AH burst into his room screaming loudly which woke JEH. JH asked her to leave and she started hitting him with her arms. He tried to hold down her arms and get her out of the room, but AH resisted his efforts. During the struggle he indicated he held her down on the bed to restrain her and he thought they both fell against a wall. He thought she was drunk as she had been drinking heavily the whole holiday. He denied hitting her. He maneuvered AH to the doorway then left the room closing it behind him. AH continued screaming which was terrifying JEH. AH not having calmed down JH went back into the room and put AH through the doorway. AH put her foot in the doorway to prevent JH closing the door and the door slammed on her foot. When he was finally able to get her out of the room, AH screamed to their friends who had come to see what was happening that JH had tried to throw her down adjacent stairs. He denied doing any such thing. He indicates that he went back into his room and barricaded the door so that AH could not come back in.

[96] In cross-examination the claimant admitted to having been drunk on the first night of the holiday and apologized to their hosts Tatjana Ivkovic and her husband the following morning. She also admitted to screaming at the defendant one morning and using foul language. These events were recounted by Ms Ivkovic who swore an affidavit filed on behalf of the defendant. Ms Ivkovic was however not there on the night of the fight. AH denied the version of events put forward by JH.

[97] In cross-examination JH admitted saying in an email to AH that at one moment he "snapped" because she pushed it too far. He indicated that he held AH with some force and pushed her up against a wall and also subdued her on the bed. He said wherever he put pressure on her she bruised. He maintained that she bruises easily, a fact which he knew being married to her. He could not account for the injury to her knee but indicated she may have knocked it. He also could not account for the bruise to her shin. He indicated that she pushed the door on her ankle twice. He however denied trying to throw her down stairs. She had to use a wheelchair at the airport returning from Greece as she couldn't walk due to her ankle. He indicated he was aware that on return home from Greece she sought physiotherapy. He stated that she generally had problems with her back and that the incident could have aggravated it.

[98] In viewing the defendant over the course of the hearing, which took several days across a number of months, I did not form the view that the defendant was inherently violent. In fact the natural temperament of the defendant I find to be laid back and easy going. The claimant on the other hand at times appeared quite "high strung". The defendant is taller and stronger than the claimant, though it is clear from the evidence she can be quite spirited and feisty. I have discounted the first incident when the claimant went to Caymanas early in the morning and provocatively ended up at one point in the defendant's bedroom. I find he did not assault the claimant on that occasion, a finding which is in keeping with the fact that

the claimant herself admittedly did not initially describe the encounter as an assault.

[99] In respect of the second incident it was again precipitated by the claimant coming into the defendant's space. Whether the claimant came to the defendant's bedroom to shout at him as the defendant maintains or to collect JEH as the claimant alleges, what is clear is that the defendant sought to put her out of the room. I find that a fight developed between the claimant and defendant. I find the claimant was being loud and abusive and the defendant as he said in a subsequent email "snapped". I accept his evidence that he did not hit her. I find the injuries that she sustained occurred as he forcefully sought to subdue her on the bed, when they hit into the wall and when he pushed the door against her ankle as he sought to put her out of the room. I specifically find that he did not try to throw her down the stairs.

[100] The injuries suffered by the claimant in Greece are the most serious. However the third incident because of its location and nature has given the court great cause for concern. The claimant alleges that in or about December 2010 because JEH had told her about the alleged incident of molestation she did not want him to go with JH. However fearing JH would get angry and violent if she told him that directly, she instead reminded him of the outstanding maintenance and insurance due for the townhouse (Airdrie) and told him that until he made the necessary arrangements to correct the situation she did not think he should take JEH. The claimant's evidence is that JH attacked her and she ended up on the ground with him on top of her, while JEH ran off to a neighbour. To avoid further attack she allowed JH to take JEH on that occasion. She sustained bruising to her arms as a result of the incident.

[101] The defendant's version is that when he arrived at the house the claimant was very angry about the unpaid maintenance. He explained that he had

found it difficult to meet all the financial commitments in the agreement. The claimant having raised these concerns, on her invitation he went inside to have a discussion. Inside he realised she had been drinking. She demanded an apology for “beating her up” in Greece. When he refused she said he could not have JEH for the weekend. He then picked up JEH at which point the claimant stood up with hands crossed inside the front door blocking it indicating she was not going to allow the defendant to leave with JEH. Several times he asked her please just to let him leave with JEH, but she said he did not know when to apologise and he was not going to take JEH. He then put JEH down and tried to push her into an adjoining passage so he could open the front door. The complainant began hitting out at him and he held her hands to stop her. He could not recall, the claimant may have fallen but he was never on top of her and he never hit her. During the altercation, while close to the claimant in his words she “reeked of alcohol”. He eventually went into his car and drove a short distance away and waited while a friend who was with him spoke to the claimant. JEH eventually came and got into the car.

[102] Subhadra Bowman gave evidence on behalf of the defendant having been present at the time of the 3rd incident. This witness as conceded by counsel for the defendant was highly excitable and melodramatic in her testimony. Her affidavit evidence was that she went to meet the defendant JH at Airdrie Mews. While parking she heard a scream and saw a little boy run from the house screaming, shaking violently and saying mommy and daddy are fighting!”A neighbour took the child. She later said both the complainant and defendant stumbled out of the house. JH went and sat in the car and she went and spoke to AH who told her many negative things about her relationship with the defendant. AH smelt of alcohol. After speaking to AH she went and spoke to JH who also told her his version of how things went.

[103] In cross-examination her credibility was somewhat shaken as she spoke to seeing scratches on JH which he never spoke to and that AH told her about an incident with JEH and a boat. However that incident, on other evidence occurred later that day and hence could not have been discussed at that time. I however accept that she saw the child running out of the house that she spoke with both AH and JH and that she smelled alcohol on AH.

[104] In respect of this third incident I accept that the defendant picked up JEH to leave and when AH blocked his path, he tried to push her out of the way and she resisted hitting out at him. In effect they started to fight. I also accept that though AH may have fallen, the defendant was not "on top of her". I also accept JH's view that AH had been drinking which was supported by Subhadra Bowman.

[105] There was also an altercation between AH and Ms. Winsome Walford a nanny for JEH on August 25, 2007. AH in her affidavit evidence indicated that Ms. Walford was not ready to take care of JEH at the time specified nor after waiting for some time. She returned to her room with JEH and JH went to speak to Ms. Walford after which he returned to advise her that Ms. Walford was packing her bags to leave. On the insistence of JH she went to speak to Ms. Walford. Ms. Walford having told her that she was leaving, AH spoke in a sharp tone to her telling her it was fine for her to go. In her oral evidence she indicated she told her to "get out".

[106] The affidavit of Winsome Walford was struck out as she declined to make herself available for cross-examination. The version of events in opposition to those outlined by AH therefore come from JH and Everett McLean. Mr. Mclean indicated that AH had gone out and come home about 6 a.m. and when she came in JEH was awake and fussy. Ms. Walford was in the bathroom with the shower on. AH was knocking on the bathroom door after a few minutes insisting that Ms. Walford take JEH. An

altercation developed and Ms. Walford said she was leaving the job and AH called her a bitch and said she was to “get out of my house”. AH came close to Ms. Walford and made gestures with her hand which caught Mrs Walford in her face. Ms. Walford became very upset and hit AH in her head with a flashlight. The two women grabbed up and began to fight and were separated by JH and Mr. McLean, by which time AH had grabbed out some of Ms. Walford’s hair. JH in his evidence indicated that the claimant AH had come in close to 5 a.m. and was inebriated. That she loudly abused Ms. Walford and told her to get out. Ms. Walford decided to leave, AH slapped Ms. Walford who turned back and in the ensuing fight Ms Walford used a flashlight to hit the claimant on the head. AH was holding a bunch of Ms. Walford’s hair. JH and Mr. McLean separated the two. In cross-examination it emerged that Mr, McLean could not read and that he was a stranger to some of the language in the affidavit. He also in his evidence suggested that AH grabbed Ms. Walford’s hair before Ms. Walford hit her.

[107] I accept that the incident started because AH who was inebriated and would have been tired given the fact that she had returned home in the morning hours, was insistent on Ms. Walford coming out of the shower to take charge of JEH. Otherwise it does not make sense why Ms. Walford would suddenly declare her intention to leave. I accept the first account of Mr. McLean that while making gestures AH’s hand caught Ms. Walford in the face and then Ms. Walford hit her with the flash light which led to the fight and AH grabbing Ms. Walford’s hair and both JH and AH separating them.

[108] Having considered all this evidence the reason I made an order restraining the defendant from coming within 50M of the house at Airdrie is not because I believe he is generally of any danger to the claimant or JEH owing to physical violence. However as the incidents in Greece and at Airdrie reveal, the defendant is susceptible to being provoked by the

claimant and to responding with force to achieve his ends. While those ends could be viewed as reasonable in each instance, the fact is the claimant ended up with injuries and JEH was present and traumatized by each incident. It would be best in the judgment of the court for the defendant to stay away from the home of the claimant and JEH. This will avoid any other incidents occurring at their home which might cause injury to the claimant and/or trauma to JEH. The order operates to protect all parties.

[109] The claimant is clearly not blameless. She provoked the defendant in the second and third instances (Greece and Airdrie) as well as in the first incident at Caymanas which I have concluded did not constitute an assault. Based on my findings she also embellished the incidents. I accept that in the incident in Greece she may have been drunk while with regard to the incident at Airdrie I accept that alcohol was smelt on her breath. She has also been involved in an altercation with Ms. Winsome Walford where I find she was also under the influence of alcohol and spoke and acted disparagingly towards Ms. Walford provoking her, which led to the fight that ensued. While in all these incidents it is the claimant who came away with injuries, her statements, actions and alcohol consumption clearly contributed to and fueled them.

[110] It is also noteworthy that at one point there was an order against both the claimant and the defendant as well as their respective servants or agents restraining them from harassing, molesting interfering or coming within 50M of the other. In the substantive hearing the defendant did not seek a restraining order against the claimant. However the claimant would be well advised in the prevailing circumstances to also stay away from the defendant's home in particular, to avoid the possibility of another unfortunate confrontation.

[111] Neither party in this matter was of the view that joint custody should be continued. Each sought sole custody. Counsel for the defendant however recognised that a joint custody order could have recommended itself to the court. Counsel therefore submitted that if that was preferred, and was deemed to be in the best interests of the child, the court should make orders for family therapy to ensure that with the passage of time the father and mother would enjoy a more amicable relationship and that the child's best interests would be given priority. Counsel for the claimant on the other hand submitted that the incidents of violence demonstrated that a joint custodial relationship between the parties was practically unworkable and not in the best interests of the child. He relied on the case of ***Robert Fish v Fenella Victoria Kennedy*** 2003HCV0373 (February 2, 2007) in which Marsh J at page 13 after citing the cases of the marriage of Foster, GG and Foster K.M. Full Court of the Family Court of Australia at Parramatta. Money v Money (1977) FLC 76 90-284 stated that:

> It cannot be in the child's best interest to have the order for joint custody continue when the relationship currently existing between his parents is such that communication, where it takes place between them is acrimonious and agreement on matters relating to the child so hard to achieve.

[112] I accept the principle thus stated. However while it is clear that at present the relationship between the parties suffers from significant discord, exacerbated by the partisan nature and rigors of litigation, I agree with the observations made by counsel for the defendant that the parties have achieved substantial agreement on the care of JEH. They agree on the school he attends, that he should have extra-curricular activities and any bills that the defendant is obligated to pay, he pays. Further there is no great physical distance between the parties as was the situation in ***Robert Fish v Fenella Victoria Kennedy***.

[113] Had the issue of alleged sexual molestation not loomed large in this case, a joint custody order would likely have commended itself to this court.

However the possibility of risk of harm to JEH, coupled with the need to provide reassurance to the claimant and protection of the defendant from potentially spurious allegations, made a joint custody order inappropriate. While not making it an order, I exhort the parties after passions have cooled somewhat, to agree to engage in some family therapy sessions. No human being is perfect. The evidence, some of which is to be recounted later in this judgment, reveals that there are personal and relational benefits which the three central figures in this case, the claimant, defendant and JEH could obtain from such intervention. In that regard I endorse the repeated recommendation for family therapy made by Dr. Kai Morgan in her reports. I make a recommendation and not an order, as therapy will only be useful if the parties both commit to that process and agree voluntarily to pursue it.

Evidence of Alcohol and Illegal Drug Use by Both Parties

[114] This case has a number of disturbing features. Evidence of substance abuse is one of them. There are concerns in that regard in relation to both the claimant and the defendant.

[115] With regard to the claimant, in her affidavit evidence she categorically denied being an alcoholic or a user of illegal drugs, indicating that her consumption of alcohol was social only. She denied being intoxicated on the occasions where she alleged she was assaulted by the defendant in Greece and at Airdrie and at the time of the altercation with Ms. Walford. She exhibited to her third affidavit dated April 10, 2012 medical certificates with respect to tests done at Oxford Medical Centre which indicated that she was drug free.

[116] However in the report of Dr. Salter attached to Dr. Salter's affidavit dated September 28, 2012 AH for the first time admitted having used cocaine with the defendant once. Further she went on to admit that she resorts to alcohol to alleviate stress and has had binge drinking episodes. This

admission accords with evidence from the defendant, Audrey Hyde, Everett Mclean, Tatjana Ivkovic, Suhadra Bowman and the claimant's own brother Jamie who indicated they all have seen her drunk. Her father and his partner indicated they have seen her tipsy. Her brother Jamie also indicated he had seen her smoke ganja as well as AH's friend Graham Campbell who indicated that he had smoked ganja together with both the claimant and defendant.

[117] In cross examination, AH admitted that she had used ganja and cocaine. Confronted with her affidavit evidence denying the use of these drugs, in the view of counsel for the defendant, she disingenuously sought to parse the sentence by stating that she used the present tense in the affidavit evidence, namely, she does not use illegal drugs and that she did not mean that she had never used illegal drugs. The court was asked to should reject this as a facile explanation employed to cover her lies in her affidavit evidence. This suppression of the fact of her drug and alcohol use counsel for the defendant submitted should be very important in the court's consideration of what is in the best interests of the child. This in a context where the deception impacts not only on her character but also on her ability to take care of JEH, with whom she lives alone, when she consumes alcohol in quantities that may reduce her ability to function normally.

[118] The defendant has also had his fair share of drug use, though he maintains he no longer uses drugs. One immediate difference between the claimant and the defendant on this point however, is that the defendant was a lot more open about his drug use than the claimant. The defendant admitted using ganja from he was a teenager into his thirties and up to meeting the claimant. He had also used opium, acid, and mushrooms. He had additionally used cocaine more than once in Miami and New York. He had used cocaine with AH in Miami. He also used ecstasy at parties, but not together with alcohol as alcohol takes away

from extasy. His evidence was that he drinks “in mediation” rum and pepsi or Redstripe. He drinks vodka if there is no rum and will drink champagne, but doesn’t like brandy or whisky.

[119] Concerning the taking of drugs in his testimony the defendant said, *“it’s no big deal I am responsible to myself. It’s like some people take coffee to get a little buzz. Some people drink, some people smoke.”* Counsel for the claimant submitted that the defendant’s demeanor demonstrated evident relish and pleasure when he spoke of his drug use and in the words of counsel “lectured the court on the various drugs and their effects”.

[120] Counsel submitted it could not be in the best interest of a child to be brought up with someone who even if it is true which is unlikely, that he no longer uses drugs, has the belief that consumption of drugs such as cocaine, ganja, opium, hallucinogenic mushrooms, acid and ecstasy equates to drinking coffee. The defendant he submitted would have no moral authority to convince JEH not to indulge in drug use and JEH’s presence around the defendant could lead to the distinct possibility that JEH would one day use drugs, especially since for the defendant drug use is “no big deal”.

[121] Both the claimant and the defendant have admitted to using illegal drugs. The claimant I find at first sought to conceal her drug and alcohol use from the court, no doubt to cast herself in a more positive light to influence the courts judgment in her favour. I also agree with the submission of counsel for the defendant that the medical certificates relied on by the claimant which purport to confirm that she is drug and alcohol free are of little or no evidential value. There is no evidence indicating the conditions under which these samples were secured and tested so as to preserve the integrity of the process. Further, the claimant could have ensured that these tests were done at a time when she knew that any use of these substances would not be disclosed by these tests.

[122] Dr. Salter in her report indicated that AH was undergoing therapy for the underlying causes of her drinking. The court encourages the claimant to continue such therapy as may be required, in her own interest and in the interest of the best welfare of JEH. It is without question that both parties love JEH. However substance abuse whether of legal or illegal substances may impair the ability of a parent to make proper judgments and to adequately care for a child. It is significant that the physical altercations that have featured in this case in which the claimant has suffered injury, have all been contributed to by the claimant's consumption of alcohol. The court looks with great disfavour at the attempt made to mislead the court by the initial denial of substance abuse by the claimant. It is however not a sufficient basis on which custody could be denied to her, especially as the court has to balance her actions against the uncertainty surrounding the allegations of sexual molestation leveled against the defendant.

[123] The defendant for his part has displayed a greater range, knowledge duration of, and affinity for drug use. This court was concerned by the seemingly casual, matter of fact manner in which the defendant spoke of his quite extensive illegal drug use. The claimant indicated that the first and only time she used cocaine was with the defendant in Miami. Whether that is true or not it appears the defendant would have been the one who introduced cocaine to the claimant. The casual nature of the defendant's attitude to drugs fits into his general laid back demeanor. While as indicated before I have no doubt he too loves JEH, this casual approach would likely have led to the lack of supervision enabling JEH to be negatively influenced by the ten year old girl who forced him to "do things big boys and girls do".

[124] The defendant has indicated that he no longer uses drugs. If that is so that would be good. However if any challenge in that area remains I recommend the defendant pursue treatment. The nature of the order I

have made regarding access for the defendant to JEH should protect against JEH being improperly exposed to illegal substances. Had the issue of sexual molestation not been live, I would not have denied the defendant joint custody, but in all the circumstances including the issue of the defendant's drug history and wider familial arrangements, compared to those of the claimant, I would not have vested sole custody in him.

"The Mother Factor"

[125] Counsel for the claimant submitted that it is generally understood that a young child needs his mother and that the practical considerations and understanding of that need has been reflected in a number of English decisions reviewed in **Bromley's Family Law** 7th Edn (1987) at 323-325. Cited on those pages are decisions such as ***Greer v Greer***, (1974) 4 Fam. Law 187, CA. and ***Ives v Ives*** (1973) 4 Fam Law 16, CA in which the Court of Appeal granted custody of two girls in each case to mothers who had left them with their respective fathers for two and four years respectively before thereafter seeking custody of them. At the time custody was awarded to the mothers in each case, both the respective mothers and fathers were seeking and suitable to be awarded custody.

[126] Actually in a number of cases in England, decided under the Guardianship and Minors Act 1971, (as prospectively amended by the Family Law Reform Act 1987), the view has been expressed that "all things being equal young children are better off with their mother". The governing principle that the welfare of the child is the sole and paramount consideration is the same under our Children (Guardianship and Custody) Act as the English Statute referred to. In ***Re W (A Minor) (Custody)*** (1983) 4 FLR 492 CA the point was however made that while it was a matter of general experience that that might have been the approach of the courts, it was not wise to make such a generalization given that a

number of factors concerning individual circumstances had to be considered in each case.

[127] Counsel for the defendant criticized the decisions in ***Greer*** and ***Ives'*** cases and submitted that on their facts they perhaps would not be decided that way today. I agree. They do appear to contradict the fundamental principle of the welfare of the child. Counsel relied on the Australian High Court case of ***Gronow v Gronow*** (1979) 144 LLR 513 as embodying the appropriate approach. In that case particularly in the judgment of Stephen J and the joint judgment of Mason and Wilson JJ the court clearly indicated that the "mother factor" though an important factor was not a principle and that the precise weight to be given to it would depend upon the circumstances of the particular case. In ***Gronow and Gronow*** the High Court, overturning the decision of the Court of Appeal, reinstated the decision of the court of first instance where the father of a young girl aged four and a half was granted custody. Importantly there was little to separate the two parents in suitability to have sole custody, as both were loving parents with adequate material assets and human support to raise their daughter. The High Court found there was no principle of a mother factor sufficient to displace the exercise of the discretion of the first instance judge to grant custody to the father, in a case where in the words of Stephen J at paragraph 5 of his judgment there was *"the fine balance of competing circumstances".*

[128] The "mother factor" was considered by the Jamaican Court of Appeal in ***Christopher Buckeridge v Donna Shaw*** in RMCA No. 5/98 (July 30, 1999) in which the issue of the custody of two young children had to be determined. Citing the "mother factor" the learned Resident Magistrate had awarded custody of the son Christopher Junior aged 13 months to the mother. While the award of custody of the older daughter Yendi was also made to the mother, this was not based on the so called "mother factor", but so as not to separate the children who were not born far apart. Walker

JA writing on behalf of the court in relation to the "mother factor" relied on ***Re S (A Minor) Custody)*** (1991) 2 F.L.R. 388 in which Butler-Sloss, LJ set out the modern position. Butler-Sloss LJ reiterated that the welfare of the child is the first and paramount principle and noted that under the Guardianship of Minors Act 1971 there was no presumption that one parent should be preferred over another at a particular age. Further, those presumptions that girls approaching puberty should be with their mothers and that boys over a certain age should be with their fathers no longer existed. When there was a dispute as to custody, the view that it was natural for young children to be with mothers was a consideration not a presumption.

[129] Walker JA then approved the award of custody of the two children to the mother by the learned Resident Magistrate who had properly considered the welfare of both children. In concluding observations on the issue of the "mother factor" the learned judge of appeal had this to say at page 10-11:

> As has already been observed where the "mother factor" is concerned it seems to me that the judge considered that principle, ***if principle it be***, in relation only to Christopher Junior. However even assuming that she did consider that matter in relation to both children, there is, in my opinion, no basis for saying that she accorded to that consideration undue importance and pre-eminence in such a manner as to distort her judgment having regard to the clear provisions of section 18 of the Act. (emphasis added).

[130] The effect of section 18 of the Children (Guardianship and Custody) Act is that in a dispute as to custody neither the rights of the mother nor those of the father are to supersede the rights of the other parent simply by virtue of their gender and status as mother or father. As the cases have repeatedly emphasized, the governing principle is the welfare of the child. I have already indicated that were it not for the thorny issue of the alleged sexual molestation I would have continued joint custody arrangements quite possibly in keeping with those outlined in the Deed of Arrangements.

The consideration that the claimant is the mother of JEH was not given undue importance by this court and was not the basis on which sole custody was awarded to the claimant.

The Status Quo

[131] Counsel for the claimant submitted that as the claimant has been the primary custodian and caregiver of JEH since the separation of the parents in July 2008 the permanent and settled home of JEH has been with the claimant at Airdrie. In counsel's submission there was nothing to suggest that that arrangement was not in the best interest of JEH. This in the context where access to the defendant had been by way of visits on weekends when JEH and the defendant would engage in recreational activities, until September 2012 when all access to the defendant ceased. Counsel accused the defendant of complete selfishness in seeking sole custody especially in circumstances where the professionals recommended that he have no access to JEH and that in the long term JEH would get over the effect of separation from the claimant. Counsel cited **Bromley's Family Law** 7th Edn (1987) at 326 – 327 as emphasizing that with modern understanding of child psychology great importance should be placed on the maintenance of the child's status quo.

[132] On the other hand counsel for the defendant in her submission on this point reiterated the critical importance of the determination of what was in the best interest of the child. Therefore status quo was not to be seen as an overriding principle but only one among many to be taken into account. She therefore deplored what she styled as the *"ad hominem attack"* on the defendant accusing him of being selfish in seeking to have custody of his own son. The defendant had the right to seek to protect the welfare of the child no less than the claimant.

[133] On the evidence it is clear that the claimant has to date borne the burden of the majority of the child care responsibilities for JEH. That was the case

when the parties were residing together and that was the situation perpetuated by the arrangements established in the Deed of Arrangements. Easy access to school and daily extracurricular activities, have been built around the primary residence of JEH being with the claimant and him spending most of his time there. There was a telling piece of evidence which came from the defendant in cross-examination. In answer to the question whether if AH had accepted his explanations on the issue of the alleged sexual molestation the custodial arrangements as set out in the Deed of Arrangements would have been questioned by him, his answer was, “probably not no”.

[134] Having heard all the evidence and viewed the parties, I have no doubt that the joint custody arrangements, with primary care and control vested in the claimant as set out in the Deed of Arrangements, were, up to the point of the emergence of the allegations of sexual molestation, working in the best interests of JEH. All other things being equal the “status quo” as established by the Deed of Arrangements would have been allowed to continue. Unfortunately in the circumstances that was not possible. Therefore for the reasons outlined, the orders as to custody and access set out at paragraph 4 of this judgment were made.

B – MAINTENANCE

[135] Section 7(3) of the **Children (Guardianship and Custody) Act** empowers the Court to make an order for payment of maintenance of the child where an order is made granting custody of the child to the mother.

[136] The defendant JH acknowledged that maintenance should be paid for JEH. It was however submitted on his behalf that based on his reasonable needs the sum that should be paid for his maintenance should be US$1000 per month. I awarded $1250 for JEH per month. The basis of this award will be outlined subsequently when a review of the expenses claimed for is undertaken.

[137] The claimant relied on the provisions in the **Maintenance Act** in respect of the application for maintenance for herself. Though jurisdiction to apply the **Maintenance Act** usually resides in the Family or Resident Magistrate's Courts, in this case the Supreme Court has jurisdiction to apply the **Maintenance Act** by virtue of sections 23 (1) and (2) and 10 of the **Matrimonial Causes Act**.

[138] Under section 4 of the **Maintenance Act** each spouse has an obligation to maintain the other spouse to the extent that such maintenance is necessary to meet his/her reasonable needs where the other spouse cannot practicably meet the whole or part of those needs. Regard must be had to the circumstances specified in sections 14(4) and 5(2) of the said Act.

[139] Sections 5(2) and 14(4) set out various matters that the court should consider in making its determination on the question of maintenance. The emphasis and importance to be placed on any individual factor depends on the facts of the particular case. In outlining the provisions the factors which counsel for the claimant submitted ought to be emphasized by the court in the claimant's favour in arriving at the determination are highlighted.

[140] Section 5(2) of the **Maintenance Act** provides:

> In determining the amount and duration of support to be given to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4) –
>
> (a) the length of time of the marriage or cohabitation;
>
> (b) the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;
>
> (c) the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity;

(**d**) **the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;**

(e) whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;

(f) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support;

(g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;

(h) the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties;

(i) the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit.

[141] Section 14(4) of the **Maintenance Act** provides:

In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in sections 5(2), 9(2) or 10(2), as the case may require, and

(a) the respondent's and the dependant's assets and means;

(b) the assets and means that the dependant and the respondent are likely to have in the future;

(c) the dependant's capacity to contribute to the dependant's own support;

(d) the capacity of the respondent to provide support;

(e) the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;

(**f) the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures;**

(g) any legal obligation of the respondent or the dependant to provide support for another person;

(h) the desirability of the dependant or respondent staying at home to care for a child;

(i) any contribution made by the dependant to the realization of the respondent's career potential;

(j) any other legal right of the dependant to support other than out of public funds;

(k) the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(l) the quality of the relationship between the dependant and the respondent;

(m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

[142] The parties were married on November 8, 2003 and separated somewhere between March and June 2008. Though they are still married with divorce proceedings not yet concluded, the marriage effectively came to an end after four years and seven months. JEH was born on June 8, 2006. During the subsistence of the marriage AH provided childcare services for JEH though assisted by paid helpers.

[143] The claimant's evidence which was not challenged was that during the marriage herself and the defendant received approximately US$7,000.00 per month from the Trust (The Strathleven Trust) and had unlimited use of a credit card issued by the Bank of Scotland for their normal living expenses. That standard of living, save the fact that the credit card was cancelled after their separation, was continued by agreement between the parties after they parted by the Deed of Arrangements whereby JH through the Trust provides accommodation for AH and JEH and pays all maintenance expenses associated with its upkeep. Additionally all of JEH's medical, dental, optical and educational expenses and half of his reasonable clothing expenses are paid for by JH. AH's medical and dental expenses were also paid for two years after the date of the Deed and a car was provided for her. Further she was given US$4,000.00 per month for the maintenance of JEH and a contribution towards her personal expenses which was subsequently reduced to US$3,500.00 per month. This sum by virtue of clause 14 should have been reduced after two years to such sum as was reasonably required for JEH's maintenance only, subject to clause 18 which allowed AH to apply for the financing of her reasonable expenses after the expiry of the initial period of two years, having regard to her financial circumstances.

[144] The evidence is that when AH and JH were working out the terms of the Deed of Arrangements Paul Drake, a representative of the Trust came to Jamaica and discussed with them their respective financial needs to settle on the terms of the Deed.

[145] In evidence AH indicated that she was of the view that she should be maintained indefinitely by the Trust, though she did not think she would be entitled to be so maintained for the rest of her life.

The Means of the Parties

[146] AH has a bachelors in fine arts in painting, a printmaking degree and a cosmetologist licence. Since marriage AH has not had consistent employment. She has variously done hairdressing, sought to sell art and made attempts at designing furniture, but none of these activities generated enough income for her to make a living. She gave evidence of trying to build up her clientele in hairdressing which she presently does working out of her home at Airdrie. She works with another hairstylist on occasion.

[147] AH's evidence was that her annual income for the three years (2010-2012) has been $45,718.00, $25,155.00 and $55,000.00 respectively. The 2012 income being from her hairdressing business. Counsel for the defendant submitted that AH had made very little effort to secure employment for herself despite her degree and cosmetology skills. In counsel's submission, AH should make a genuine effort to become financially independent.

[148] Concerning the means of the defendant, counsel for the claimant submitted that as recognized in section 14(4) (a) and (b) of the **Maintenance Act,** the circumstances which the Court must take into account in determining the amount and duration of support include the present assets and means of the parties, as well as what they are likely to have in the future. The interest which a beneficiary has under a Trust is therefore a resource to be looked to if the trustees are likely to advance capital or pay income, whether immediately or in the future to the beneficiary: ***Whaley v Whaley*** **[2011] EWCA Civ 617** and ***Charman v Charman (no.4)*** [2007] 1 FLR 1246. In determining if the Trust is indeed a resource, past payments are a guide to the likelihood of future benefits. See ***Browne v Browne*** [1989] 1 FLR 291 referred to in **Unlocking**

Matrimonial Assets in Divorce (3rd ed) by Simon Sugar & Andrzej Bojarski at paragraph 15.37.

[149] Counsel for the defendant in opposition to the proceeds of the Trust being viewed as relevant to JH's ability to maintain AH, submitted that ***Whaley v Whaley*** did not apply as while in that case the court was able to review in law and fact the relevant trust deeds and compute the entitlement of the husband, that was not possible in the instant case. Concerning ***Charman v Charman (no.4)*** counsel submitted it was wholly distinguishable from the case being determined as a) the substantive applications are different one being for division of assets under the Matrimonial Causes Act (UK) and the other for maintenance under the Maintenance Act; b) there was admissible evidence before the courts in England of the relevant trust and its express provisions were interpreted. On the other hand in the instant case the proper law of the subject trust is that of the Cayman Islands and so there is no evidence before this court as to the financial entitlement of JH under the trust; c) the husband in the English case was the settlor of the trust whereas in the instant case JH is one of many beneficiaries and did not establish the trust; d) the short duration of the marriage in the instant case compromises any claim AH has to being maintained and she is not entitled to be maintained from the trust.

[150] In respect of ***Browne v Browne***, counsel submitted that like ***Charman v Charman*** this was an application under the Matrimonial Causes Act (UK) for division of assets brought by a husband against his wife. Her financial means were greater than the husband and she was the sole beneficiary under discretionary trusts. Otherwise counsel repeated the submissions made in respect of ***Charman v Charman.***

[151] While I note the points of distinction raised by counsel for the defendant I find that the cases cited by counsel for the claimant are of some assistance. I accept that this court cannot legally review the Trust, it being

subject to the law of the Cayman Islands. While the details of the settlement of the Trust and its full value are unknown, the history of its administration is relevant. Also of relevance is the evidence from the defendant of the land holdings of the Trust from which an inference can be drawn as to its value, relative to the sums of money being sought as maintenance by the claimant. The fact that the cases of ***Charman v Charman*** and ***Browne v Browne*** concern division of matrimonial property as opposed to maintenance I find does not in any way affect the utility of using the history of payments as a guide. In fact, the argument could it seems be better made in reverse; that a history of maintenance payments may not have been the best guide to determining division of property, if that had been the nature of the application. But it is not. The application is for maintenance.

[152] It will be useful therefore to quote a part of the passage from **Unlocking Matrimonial Assets in Divorce** at paragraph 15.37 relied on by counsel for the claimant:

> The historical pattern of trustees' responses to requests by beneficiaries for distribution will of course be important evidence in determining whether trust funds are likely to be advanced to a beneficiary. The principle that regard can be paid to past payments as a guide to the likelihood of future benefits is well established. In the Court of Appeal case of **Browne v Browne [1989] 1FLR 291** the evidence before the court was that every application for funds made by the wife up to separation was met. Bearing in mind the wife's ability to obtain immediate access to the funds held on trust, the reality was that the discretion of the trustees would be exercised in her favour if she made a reasonable request for payment. This was an unsurprising conclusion given that the wife was the sole beneficiary of at least one large offshore trust. Improper pressure was not therefore being placed on the trustees to exercise their discretion in favour of the wife.

[153] It is noted that unlike the situation in ***Browne v Browne*** the defendant is not the sole beneficiary of the Trust. The fact is however that the Trust has

been maintaining the claimant for eleven years, both while she was with the defendant and since their separation. A clear history has developed. The appropriate question of course is whether in all the circumstances AH should obtain any further maintenance from JH, it being likely that Trust funds will be advanced to JH to cover any such obligation he may have. I find therefore that JH's interest as a beneficiary under the Trust is a resource that can be looked to, in determining the ability of JH to make any payments ordered.

[154] The defendant in his evidence explained that the monthly sums paid to him by the Trust are advances which will be taken from the amount which he will ultimately receive upon the death of his father. After he makes payments out to AH on average he would end up with US$1000 though he indicated there were times he did not end up with any. It is known that the Trust owns the Airdrie townhouse and a property in Scotland, Lowood Estates. In cross-examination the defendant indicated that Lowood estate comprises 400 to 500 acres most of which are rented save for 10 acres which forms the curtilage to the great house in which the defendant's father Alexander Hamilton and his wife reside for half the year. I agree with counsel for the claimant that it is reasonable to infer that the rental income from this estate is substantial and maintains the lifestyle enjoyed by all the beneficiaries of the Trust. The Trust pays for the maintenance of JEH and AH and the rent for the Airdrie townhouse where they live, out of the advance for the defendant as negotiated in the Deed of Arrangements.

[155] The defendant is also a director of Caymanas Estates Limited in Jamaica, which manages the Caymanas estate comprising approximately 800 acres owned by his father. Caymanas Estates Limited provides the house in which the defendant JH lives, a maintained motor vehicle, an income of approximately $22,000.00 per month and also covers his utility bills and medical expenses. Counsel for the claimant submitted that in all likelihood the defendant will benefit from the Caymanas estate on his father's

passing. While that may be so, at this point the court will not speculate on that, but takes into account the present support the defendant enjoys from the estate.

[156] The defendant also owns a bamboo factory. However the evidence clearly disclosed that the company has consistently been run on overdraft facilities and cannot be said to be a profitable going concern. The reliable resources of the defendant therefore stem from the Trust and the Caymanas estate.

The Reasonable Expenses of the Parties

[157] AH provided a schedule of monthly expenses appended to her seventh affidavit filed May 6, 2012. That schedule was prepared by her father who is an accountant. In cross-examination she agreed that the monthly figure for the cost of her domestic helper should be reduced from $45,000 to $24,000 and that the sum of $3000 for contents insurance should be deleted. The claimant indicated that included in the sum of $90,000 stated for groceries were cleaning supplies for about $12,000. The claimant's father in cross-examination however agreed that the sum of $90,000 seemed high given that it was just AH and JEH who live at the house and the helper comes three days per week. The sum of $11,000 for cell phone use does appear to be excessive even though the claimant indicated in her evidence that she had only just re-installed the landline. Additionally $1000 for cooking gas also seems to be higher than necessary. AH's clothing bill of $20,000 per month also appears to be above what is reasonable. Further in arriving at the total figure of US$4662 which was the global maintenance claim, the monthly expenses of JEH that the claimant was responsible for in the sum of $32,400 was included. This should not have been so. Using the exchange rate of J$86 to 1$US, that was used to convert the expenses of AH and JEH to US$ that would immediately reduce the claim by approximately US$376.

[158] I also find that the estimate of household expenditure attributed to JEH was too high. On the expenditure sheet, JEH's share of household expenditure was calculated as one-half. As a then six year old boy he would not generate half the cost of expenses such as groceries, phone bills and repair costs.

[159] Concerning the expenses of the defendant he provides the accommodation at Airdrie which in his affidavit evidence he indicates costs US$3000 per month as well as repairs and maintenance, plus the educational, medical, dental and optical expenses of JEH along with the maintenance of US$3500 which he has been paying. His personal expenses were not revealed, but in his evidence as previously indicated, these are covered by Caymanas estate.

[160] Counsel for the claimant submitted that the claimant should continue to be maintained by the defendant as for a number of years the claimant has been his primary care giver, including during this period of problems, which has left little time for her to pursue permanent gainful employment. Her qualifications counsel submitted were unlikely to place her in a financial position to continue to enjoy the standard of living which she has enjoyed from her marriage to the defendant and which JEH has also been enjoying. Clearly the welfare of the child also required that the claimant receive adequate provision by way of maintenance for her own support, failing which, her welfare and with that the welfare of JEH who she supports would be impaired. Recently the claimant has had a little more time to pursue her career as a hairdresser but it would take some time for her to build up her clientele. In keeping with the table of expenses submitted by AH counsel asked that the court order maintenance for JEH and AH of US$4662 per month.

[161] Counsel for the defendant on the other hand submitted that no award for maintenance should be made for AH as she was not suffering from any

disability, had a degree in fine arts and was skilled in cosmetology. JEH was no longer a baby and so she could be gainfully employed. AH had already been maintained by the Trust from 2003 to date in a context where the marriage only lasted less than five years. Despite that, accommodation would be provided for her until JEH became an adult provided he lived with her. She further submitted that the claimant had engineered circumstances so that she could live off the defendant and his father; claiming sums which were highly inflated and unreasonable, while seeking to exclude JEH from his father's life. It was time for the claimant to make an effort to become financially independent and provide for herself. If however the court was minded to make an award for the claimant it should be for no more that US$1000 per month, for no longer than six months from the date of the order.

[162] In the view of the court the Deed of Arrangements quite adequately provided for AH and JEH to ensure that they maintained the standard of living to which they had become accustomed during the currency of the marriage and cohabitation between the parties. For the most part, from the evidence, the defendant has been exemplary in meeting his payments in accordance with the Deed. The case of ***MacLeod v MacLeod*** [2010] 1 AC 298 PC, recognises the validity of such post-nuptial agreements, though counsel for both parties acknowledge the power of the court to stipulate new arrangements if deemed appropriate.

[163] Counsel for the defendant submitted that the maintenance for JEH and AH should be disaggregated. I agree. It is clear that the intention of the parties and indeed the justice of the situation require that JEH's maintenance be until the end of his minority or up to twenty-three if he is in tertiary education. AH's maintenance however was always contemplated to end long before that time. Counsel for the defendant submitted that US$1000 would be adequate for JEH in light of his age, his reasonable expenses and all the other items of maintenance already provided for him by his

father JH. Though I have already accepted that the estimate of expenditure in relation to JEH was too high I take into account the fact that he is growing older and likely to become involved in an increasing number of activities requiring additional financial outlay. With sole custody having been awarded to the claimant he will spend more time with and incur more costs to the claimant than under the initial joint custody arrangements. In those circumstances I find that US$1,250 is the appropriate monthly sum for JEH's maintenance. A monthly sum which unless subsequently varied, should sustain him throughout the period of his minority or until twenty-three should he be in tertiary education.

[164] Concerning whether or not AH should receive any maintenance at all, or if so only a significantly reduced amount for a short period, both counsel have highlighted a number of important factors. I have after consideration in keeping with provisions of section 5(2) and 14(4) of the Maintenance Act decided that maintenance for AH disaggregated from that of JEH should be continued until August 2015. It should be noted that I have considered all the factors listed in the two cited sections of the **Maintenance Act** though for convenience based on the amount of analysis required, I have used discrete headings for the discussion of the means and the reasonable expenses of the parties.

[165] Considering the great disparity in access to means between the parties it was reasonable upon separation for provision to be made for AH to continue to enjoy the standard of living to which she had become accustomed in the marriage. The purpose of maintenance for AH was also to enable her to establish herself and obtain financial independence, which was not the case during the currency of marriage and co-habitation. That has not yet occurred. The Deed of Arrangements contemplated that the period of maintenance could be extended beyond the initial two years. Even if it had not so stipulated, the court would have had the power to consider the claimant's application. I have found that through the Trust the

defendant has the ongoing means to continue to maintain the claimant, whose own resources remain minimal.

[166] The last three years have been ones of turbulence given the ongoing court proceedings. Counsel for the defendant has maintained that the court proceedings and in particular the allegations of sexual molestation were calculated and timed to facilitate the use of the court system by AH to extend her period of maintenance. Given my findings on the issue of molestation, I cannot say that theory has been established. Further I accept that as primary care giver, the time spent with JEH when he was younger would have militated against the development by the claimant of her earning potential. JEH is however older now, more settled and should be achieving increasing independence. There should be nothing to prevent the claimant from fully pursuing all steps to engage in full time gainful employment. It will however take some time for her to sufficiently develop her hairdressing clientele, which is the business which she indicates has appeared most promising.

[167] There is another factor which has contributed to the decision made by the court. This factor played a significant role in the court's decision given the fact that the marriage only lasted four years and seven months and the length of time the claimant has already been maintained by the Trust. Section 14(4) (m) indicates that in making the decision as to maintenance the court should have regard to *"any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account."* A critical fact in this case is that JEH, the sole child of the marriage, has been since September 2012 excluded from being with his father. By virtue of the order made by this court, contact in person should have been reestablished between father and son in February of this year. It will take time for the relationship to be re-solidified, especially as the order only allows contact for eighteen hours per month. If no maintenance or a greatly reduced maintenance were ordered by the court for the claimant, there likely would

be a sharp diminution in the standard of living of the claimant which would undoubtedly affect JEH as well. It is I find, in the best interest of JEH for matters to remain as they have been for some time yet, while his father once again becomes a regular part of his life. I make the order while conscious of the fact that in many respects the claimant as I indicated earlier in this judgment, has not been blameless in her conduct.

[168] With reductions in the listed amount for the items I identified earlier, the expenses outlined for AH would be reasonable and fit within the sum of US$2,250 awarded as maintenance for AH. The maintenance amounts for JEH and AH together total US$3500, which the defendant has already been managing to pay since the initial sum of US$4000 was reduced to US$3500. While I acknowledge that over time there have been price increases, as the sums for maintenance are denominated in US dollars, this provides a hedge against inflation, especially in an environment where history and the current reality shows the Jamaican currency has been subject to significant devaluation.

[169] The court is however constrained to observe that the claimant cannot reasonably expect any further extension in her maintenance beyond August 2015, which will be seven years after the first payment made in August 2008 as indicated by paragraph 14 of the Deed of Arrangements. After August 2015 she will still benefit from accommodation during JEH's minority or until he attains the age of twenty-three if he is engaged in a course of tertiary education, unless she remarries. She will also continue to profit from not having to bear any financial responsibility for JEH, except a half contribution to his reasonable expenses for clothing. AH will by August 2015 have received almost a 5 year extension on the initially agreed 2 year maintenance period. JEH is now an older child, almost eight years old, requiring less direct care and supervision. By August 2015 he will be nine. There should now be no impediment preventing AH from taking all steps to establish her hairdressing clientele and/or from pursuing

any other employment or business venture, to replace the income from her maintenance when that ends. Even if she is unable to fully replace that income she cannot live off the defendant forever. It will then be incumbent on the claimant in the adapted words of the well known idiom to *"cut her suit to fit her cloth".*

[170] The terms of the court's maintenance orders will no doubt be taken into account in the defendant's favour, when divorce proceedings are finally concluded.

CONCLUSION

[171] This has been a difficult case for all concerned. Chords between the parties that once vibrated with love now resonate with hurt and distrust. In the midst of this has been JEH; undoubtedly loved by both parties, but an unwitting pawn in a larger drama. The court exhorts the parties to accord the welfare of JEH the priority it deserves and to tailor such interactions as they will have accordingly. Where recommendations for therapy have been made, it is hoped they will be pursued where and for as long as necessary. Hopefully the years of turbulence are at an end.