COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
CLAIM NO. 2022/CLE/GEN/00978

IN THE MATTER OF A CHILD, A.B.,
AND
IN THE MATTER OF AN APPLICATION UNDER SECTION 22 (1) OF THE CHILD PROTECTION ACT, CHAPTER 132
AND
IN THE MATTER OF AN APPLICATION UNDER SECTION 21 (1) OF THE SUPREME COURT ACT, CHAPTER 53

BETWEEN:

C.D.

Plaintiff

AND

E. F.

Defendant

Before:	Mr. Justice Loren Klein
Appearances:	Mr. Robert Adams KC, Edward Marshall II for the Plaintiff
	Mrs. Krystal Rolle KC, Darron Cash for the Defendant
Hearing Dates:	6, 15 December 2023, 8, 24 March 2024, 22 July 2024

RULING

Child Protection Act (CPA)—Section 22(1)(c)—"Any other matter affecting the child"—Parenting Schedule made Order of the Court—Whether a determination of custody or access rights—Jurisdiction of the Court—Welfare/Best Interests of the Child—Definition of parent within the CPA—Child not biological child of the defendant—Defendant engaging in social media campaign as a result of dispute with plaintiff over contact/access to child—Emotional harm by internet postings—Suspension of contact/access rights—Voice of the Child in matters concerning him—Right to Privacy—Rights of the Child Convention—Matrimonial Causes Act (MCA)—Concurrent Proceedings Under the MCA and CPA regarding access to/contact with child—Liberty to Apply—Scope of liberty to apply in family law proceedings—Interlocutory Orders involving children— Stay of proceedings—Overlapping claims

INTRODUCTION AND BACKGROUND

1. The applications before the Court raise several principles that are of considerable importance in cases involving children. They include the welfare principle, the right of a child's voice to be heard in proceedings concerning him or her, and the right of a child to privacy. There is also the issue of the parallel but different jurisdiction that exists in respect of children under the *Child Protection Act 2009* ("CPA") and the *Matrimonial Causes Act 1879* ("MCA").

2. To protect the identity of the minor child with whom these applications are primarily concerned, the names of the parties and the children involved have been anonymized using the letters of the alphabet in sequence, and the names of affiants or expert witnesses have been abbreviated using their initials.

3. As is explained in greater detail below, the action out of which these applications arise was commenced in June of 2022 by Originating Summons ("OS") filed by the plaintiff, CD. In the main, the OS sought an Order pursuant to s. 21 of the CPA giving effect to a parenting schedule agreed by the parties after their relationship broke down and they began living in separate residences ("the CPA Proceedings"). There were also claims for injunctive relief to restrain the removal of AB from the community in which he lived and from The Bahamas.

4. The Order that was originally made provided for the defendant to "continue" to have equal care and control of AB, but this was later revised after the defendant returned to Canada and the equal-access arrangement was no longer practical. Further, the summons filed by CD seeking a variation of the Order also alleged that complaints had been made by AB to Dr. MN of physical/emotional abuse by GH and EF in August 2022, giving rise to a reluctance to extend further access by AB to them without the intervention of a court-appointed expert in parental alienation and reunification therapy to investigate the circumstances and make recommendations for repairing any relationship damage. The revised Order has led to a protracted contact/access dispute which spawned several collateral applications, including applications for injunctions to restrain certain behaviors of the defendant, contempt proceedings against her, an application for suspension of her contact with/access to AB, and an application by the defendant for a stay of the CPA proceedings. This Ruling is concerned with the latter two applications.

5. These proceedings have unfolded within the context of a deeply contentious parental dispute, one that has been marked by parallel family and matrimonial proceedings within this jurisdiction and before the Ontario Superior Court of Justice in Canada. The defendant initially brought matrimonial proceedings in Canada in May of 2022 (which were later dismissed), and subsequently brought matrimonial proceedings by Petition filed 30 August 2022 in Supreme Court Action No. 2022/FAM/div/00507 ("the MCA Action"), which are currently ongoing. The backdrop to this dispute is a huge disparity in wealth between the claimant (a principal in a private equity firm) and the defendant (a housewife).

Essential factual and procedural background

6. Only the barest of facts relating to the parties' personal details are necessary for the disposition of the applications before the Court. The parties are both Canadian citizens and were married on 24 December 2016 in Canada, where they initially lived until they took up residence in The Bahamas at some point in 2020. AB is the biological child of CD, born via a surrogacy arrangement in 2014. He is not the biological child of EF. EF has a child from a previous marriage, a girl now age 14, GH, who also lived with the parties.

7. They lived together until sometime in April 2022, when the parties' relationship deteriorated and the defendant moved into the guest house of the residence which they shared. To retain AB's contact with both parties during the separation, they developed a parenting schedule based on what is typically called the 2:2:3 model. That provided for both parties to have care, control and access to AB on a 50:50 split, with equal weekends and the same distribution of weekdays.

8. It is necessary to set out the procedural history in some detail to put the current applications in context. As indicated, the action was commenced by OS filed 24 June 2022, seeking relief under s. 22(1) of the CPA. The main relief sought by the OS was as follows:

> "1. An Order that, subject at all times to the wishes of the Plaintiff and of the child, AB, and subject to such safeguards and conditions the Plaintiff, as AB's parent, may from time to time impose, the Defendant shall hereinafter be at liberty to remain involved in the care of AB for so long as he shall be a minor, such involvement to be set out in a parenting schedule.
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> 2. An Order that pending such parenting agreement, the present schedule shall remain in place namely:
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> i. The Plaintiff shall have the care and control of AB from Monday 8:00 a.m. – Wednesday 8:00 a.m., the Defendant shall have the care and control of AB from Wednesday 8:00 a.m. – Friday 8:00 a.m. and the Plaintiff shall have care and control of AB from Friday 8:00 a.m. – to the following Monday 8:00 a.m.
> ii. The times of the Plaintiff and the Defendant shall reverse in Week 2. Then the process shall restart in Week 3 with the result that both the Plaintiff and the Defendant shall each have had the care and control of AB 50% of the time with equal weekends and the same distribution of weekdays.
>
> […]
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> 4. An Order that the Defendant shall be and is hereby restrained and prohibited from removing AB from the [X] Community on the Island of New Providence, or causing him to be so removed, without the prior written consent of the Plaintiff.
>
> 5. An Order that the Defendant shall be and is hereby restrained and prohibited from removing AB from the jurisdiction of The Bahamas or causing him to be so removed, without the prior written consent of the Plaintiff.
>
> 6. That all documents filed in these proceedings be sealed until further Order of the Court and that all proceedings in this Action be heard in camera."

9. An accompanying *ex parte* summons, supported by a certificate of urgency, was filed contemporaneously with the OS. This was supported by the affidavit of the plaintiff filed 27 June 2022. That application came before this Court on the emergency civil list, and was heard on 30 June 2022. The evidence was that the defendant had removed GH, her biological child, to the Turks and Caicos Islands and then to Canada without informing the plaintiff and he feared that the defendant might also spirit away AB. As noted, GH had been a part of the family unit and had been cared for by the plaintiff since 2014. The evidence led in support of the application for the injunction was that in April 2022, a packed suitcase had been found for AB containing warm-weather clothing which, coupled with other behavior of the defendant,

had raised the suspicion that she might have been seeking to flee to Canada with both children, where she had instituted divorce proceedings.

10. The Court made an interim Order providing for the continuation of the parenting schedule that had been agreed privately by the parties, and granted the injunctive relief, subject to the usual undertaking in damages ("the Injunction and Parenting Schedule Order"). A return date was set for 13 July 2022. The Order, which was filed on 1 July 2022, also gave liberty to the defendant to apply to have it set aside on two days' notice.

11. The defendant entered an appearance to the OS on 13 July 2022, and at this point she was represented by a pair of senior counsel: Lady Sharon Wilson, KC, of Sharon Wilson and Co., and Gail Lockhart-Charles, KC, of Gail Lockhart-Charles and Co. The defendant subsequently applied by summons filed 12 August 2022, to vary or set aside the Injunction and Parenting Schedule Order. That application was supported by affidavit evidence and a Notice of Grounds filed on 31 August 2022, which alleged, *inter alia*, material non-disclosure and procedural unfairness during the *ex parte* hearing.

12. On the return date (13 July 2022), the Court gave directions for both parties to file additional evidence and submissions and the full hearing of the application was adjourned to 5 September 2022. The plaintiff responded to the defendant's summons with several affidavits, including sworn evidence from himself, Mr. DD, R. SB, Counsel SM and Counsel TM, as well as the expert reports of Dr. DM, dated 1 September and 17 October 2022. The plaintiff also filed a further application seeking revisions to the Injunction and Parenting Schedule Order to further protect AB's wellbeing and best interest, in light of the significant change of circumstances that had occurred since the Injunction and Parenting Schedule Order was entered. That application was similarly supported by the affidavit evidence mentioned. At this point, it appeared that the defendant had moved to another location in New Providence until September 2022, at which time she returned to Canada and was no longer primarily resident here.

13. During the hearing on 5 September 2022, the Court heard *viva voce* evidence from Dr. MN, who was cross-examined by counsel for the defendant. At the conclusion of the hearing, the Court was not satisfied that any grounds had been made out for the discharge of the Injunction and Parenting Schedule Order, and invited the parties to seek to agree a consent order with respect to their access to and contact with AB. The parties submitted separate draft orders, and a mention hearing was set for 7 December 2022, to attempt to settle the terms of the order to be made based on the competing drafts.

14. On 6 December 2022, one day before that hearing was due to take place, the Court received a summons supported by the affidavit of Counsel BW, filed 1 December 2022, seeking leave for both counsel for the defendant to withdraw. The Court heard the application for withdrawal, which it granted, but indicated to counsel for the defendant that the withdrawal of counsel would not take effect until the order providing for that was filed and served on the defendant, and directed counsel to remain and participate in the hearing to revise the draft Order. During the hearing, the court went through the terms of the draft Order and made revisions based on the competing drafts. This led to a revised Parenting Order that was entered

on 7 December 2022 ("the Revised Parenting Order"). That Order also granted liberty to apply to both parties.

15. It is useful to set out the main terms of the Revised Parenting Order, which provided as follows:

> "That pending the parties entering into a parenting agreement and/or a further Order, the present parenting schedule in place between the parties in relation to AB and set out in the Injunction Order dated 30 June 2022 be and is hereby varied and replaced by the following parenting schedule whereby the Plaintiff shall have the care and control of AB at all material times save and except that when circumstances allow and when physically possible the Defendant shall see AB for dinner once midweek on a Tuesday unless otherwise agreed and shall have visits with AB on the weekends with prior arrangement with the Plaintiff and subject to an arrangement that suits both parties and AB. At all times, including if AB should wish to have a sleepover at the Defendant's home, the following conditions shall apply.
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> (a) The Defendant shall allow AB access to his phone and allow him to use his Facetime App/WhatsApp video App to call the Plaintiff for up to 15 minutes in the morning and evening and such calls shall be in private. During the period that the Defendant does not have access to AB the Defendant shall have a time in the morning and the evening when she may talk to AB on the phone by Facetime App/WhatsApp video App or otherwise. Morning calls shall be at approximately 7:30 a.m. on school days and 8:30 a.m. on weekdays. Evening calls shall be at approximately 8 p.m. on school days and 8:30 p.m. on Friday and Saturday nights.
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> (b)
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> (i) Neither party shall denigrate the other in front of, to, or in the hearing of AB or GH.
> (ii) The defendant shall not sleep with AB.
> (iii) Each party shall keep AB safe from emotional harm and physical harm.
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> (c) The access by AB to the defendant shall
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> (i) If occurring at the Plaintiff's home in The Bahamas be monitored by the Plaintiff or by a professional person appointed by the Plaintiff.
> (ii) If occurring in The Bahamas but away from the Plaintiff's care be supervised by a professional person being a member of the body engaged jointly by the parties.
> (iii) If occurring in Canada at property occupied by the Plaintiff be monitored by the Plaintiff or a professional person appointed by the Plaintiff.
> (iv) If occurring in Canada but away from the Plaintiff's care be supervised by a professional person being a member of a regulated body (such as a registered social worker) engaged jointly by the parties."

16. The following paragraphs of the Revised Parenting Order provided for the parties to either agree on the selection of a single joint expert ("SJE") in parental alienation reunification therapy, or failing agreement, for the parties to submit a list to the court for its selection. The SJE was to be engaged to assess the parties and children involved (AB and GH) based on certain agreed questions and criteria and submit a report to the Court containing, *inter alia*, recommendations for reunification and a protocol for visitations with AB. The process for the selection of the SJE was never agreed and this remains a point of contention.

17. In the period following the entry of the Revised Parenting Order, the defendant engaged in an online social media campaign, which she styled a "Love Campaign". This consisted of posting images of AB and other commentary regarding, *inter alia*, his home and school address on social media, which the plaintiff later took legal steps to prohibit, on the grounds that it was an invasion of the right to privacy and caused AB emotional harm. That social media campaign elicited online support, in which attacks were made on the administration of justice in this jurisdiction, which was said to be influenced by the immensely superior wealth of the plaintiff. Further, in filings made with the Canadian Court, the defendant herself portrayed the Courts in this jurisdiction in a negative light, and these comments were relied on by CD in a later action for committal for scandalizing the court. That committal application has been heard and a ruling reserved.

18. Before leaving the Orders made, it is important to set out the s. 21 jurisdiction, as it is of some significance to these proceedings, and because there seems to be some confusion as to the nature of the jurisdiction exercised by the Court. Section 22(1) of the *Child Protection Act* provides as follow:

> "22. (1) A Court may, upon the application of any of the parents of a child or in the course of the hearing of any such application by one parent make such order as it may think fit regarding—
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> (a) the custody of the child; and
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> (b) the right of access to the child mentioned in section 14 by either parent; and
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> (c) any other matter affecting the child, having regard to the age and best interests of the child and taking into consideration the conduct and wishes of the parents and child."

19. Counsel for the plaintiff, who at this point was Meta McMillan Hughes, KC, of Lennox Paton & Co., made it plain that the application was being made under limb "c" of s. 22(1) of the CPA—i.e., "*any other matter affecting the child*"—and that it was neither an application for custody, nor for the right of access to the child. This was because the plaintiff is AB's 'parent', indeed his only legal parent, who had both legal custody and care and control. The defendant was neither a parent, nor the biological mother, nor a guardian or foster parent, and not liable by law to maintain AB, as those terms are defined in the CPA.

20. For example, parent is defined in the CPA as "…*the biological mother or father or adoptive mother or father of a child and includes any person liable by law to maintain a child or entitled to his custody*." Thus, the application was made the plaintiff, as the parent of AB, under "c" in respect of any other matter affecting the child, namely, the continued implementation of the parenting schedule, subject to the safeguards which the plaintiff was seeking to impose, and taking into consideration the other factors imposed by the statute.

21. Once the claim is understood in this light, it becomes clear that the CPA proceedings were in the main an approach to the Court to enter a Consent Order intended to continue AB's rights of access and contact to the defendant, and for the plaintiff to maintain contact with the defendant's daughter (GH), who was included as part of the therapeutic protocols for reunification. The Court was never asked to, and never exercised any jurisdiction, to determine or grant legal custody or rights of access to any of the parties. In fact, it must be borne in mind

that the main relief sought by the OS was an order for the "*defendant to remain at liberty",* subject to the wishes of the plaintiff, as AB's 'parent', and the wishes of AB, to maintain access to and contact with AB.

22. On 7 November 2023, a Notice of Change of Attorney was filed substituting Messrs. Delaney Partners as counsel for the plaintiff. On 4 December 2023, a Notice of Appointment of Attorney was filed appointing Messrs. Rolle & Rolle as counsel for the defendant.

The Current Application

23. By Notice of Application filed 21 November 2023, pursuant to s. 22(1) of the CPA and s. 21(1) of the Supreme Court Act ("SCA"), the plaintiff (claimant in the application) sought, *inter alia*: (i) a temporary stay of all contact and communication between AB and the defendant pending the latter's compliance with a therapeutic protocol to be jointly developed by Dr. DM and Mrs. MMH; (ii) an injunction restraining the defendant from disseminating information or images concerning A.B. on social media platforms; and (iii) costs of the application.

24. The Notice of Application was accompanied by a Certificate of Urgency, which relied on the following grounds: (i) AB would be subjected to continuing harm and damage by the defendant's social media campaign unless there was urgent intervention by the Court; (ii) there was a burgeoning risk of exposing the claimant and AB to physical risk because of the social media campaign; (iii) it had been confirmed by three (3) experts in child psychology that the defendant's behavior was harmful to AB's emotional welfare; and (iv) the defendant was determined to continue to engage in those activities and refused to give an undertaking to discontinue her conduct (except for a limited period of 60 days).

25. The basis for the relief sought is a series of alleged violations by the defendant of the terms and spirit of the Revised Parenting Order, including: (i) non-compliance with therapeutic recommendations; (ii) the initiation of false and injurious complaints to Canadian child protection authorities (iii); unauthorized publication of images and personal information about AB across multiple social media platforms; and (iv) direct communications and contact with AB which, according to professional evaluations, have exacerbated emotional distress and hindered any prospect of reunification.

26. The claimant contends that since the entry of the Revised Parenting Order, the defendant has systematically failed to comply with her obligations under its terms. Specifically, it is alleged that:

(i) The defendant has declined to cooperate with the development of a reunification protocol as contemplated by paragraphs 4 through 8 of the Revised Parenting Order;

(ii) The defendant has made false and injurious reports to Canadian child protection authorities, triggering a two-hour interview of AB during his holiday in Ontario, which concluded without findings of abuse;

(iii) The defendant has launched and abandoned multiple proceedings in the Ontario Superior Court of Justice, which have all been either dismissed or withdrawn, two with costs awarded against her;

(iv) The defendant has left over 300 voice messages for AB between September 2022 and July 2023, all without any explanation as to her prolonged absence since the Injunction and Parenting Order was made, or acknowledgment of AB's repeated requests for clarity and apology;

(v) The defendant has published numerous posts on Instagram, Facebook, and TikTok disclosing AB's identity, school, residence, and involvement in these proceedings.

27. The claimant asserts that the cumulative effect of the defendant's "bad conduct" led to AB terminating a supervised visitation with her on 23 September 2023 within less than four (4) minutes. According to Dr. HF, the professional appointed to supervise that visitation, and reports from Dr. DM, AB expressed that the defendant had failed to offer an apology, provide an explanation for her prior absence, or respond authentically to his emotional cues.

28. In her reports dated 17 September 2023 and 15 October 2023, Dr. DM opined that AB's emotional welfare had been compromised, that he had been placed at risk of public embarrassment, and that the defendant's conduct reflected a lack of empathy and a pattern of "impression management" at AB's expense.

29. Notably, AB, who is described as resilient and emotionally well by Dr. DM, stated that he was no longer interested in seeing the defendant unless she could offer a sincere apology and explanation. These views were reinforced by his therapist, Mrs. MMH.

30. As indicated, following the entry of the 7 December 2022 Order and the appointment of Delaney Partners as counsel in November 2023, the defendant carried on what she described as a "Love Campaign," comprising the publication of social media content, voice messages, telephone calls, and roadside signage targeting AB and the claimant.

31. After repeated correspondence between the parties' counsel failed to resolve the matter, the claimant filed the present application on 22 November 2023. In support thereof, affidavits were filed by Counsel MD, a former associate at Delaney Partners, and Ms. DS, a legal assistant with the claimant's Canadian attorneys.

32. By Notice of Application filed 22 November 2023, the claimant sought the following relief (quoted from Notice with abbreviations for anonymity inserted):

"(i) An Order restraining the Defendant herein, EF, and her agents, from publishing, causing to be published or otherwise sharing or discussing any information concerning AB and/or images of AB, including his name, any information about him and any issues regarding parenting on any social media platform or any other format, or medium in any jurisdiction.

(ii) An Order directing the Defendant to remove all existing publications made by her, and her agents, on social media containing information concerning or discussing AB and/or images of AB, including all of the publications as set out in the Schedule 1 exhibited to the Affidavit of DS, filed on even date herein and the publications listed in Schedule 1 of the Affidavit of MD, also filed herein on even date ("the Publications").

(iii) An Order requiring the Defendant to contact all third parties who have republished the Publications, including but not limited to the re-publishers of the Publications set out in the Schedule 3 exhibited to the said Affidavit of MD filed herein, to demand that they also remove all existing publications made by her, or her agents, on social media containing information and/or images of AB and/or discussing matters concerning AB and should they refuse defendant to provide said with a copy of this Order requiring them to so remove the said publications.

(iv) An Order requiring the Defendant, her agents and and/all third parties to remove any and all posts to any social media accounts operated by the defendant, her agents, and any/all third parties that include information concerning or discussing AB and/or images of AB, including any posts in existence now and any that may be published in future.

(v) An Order restraining the Defendant, her agents and any/all third parties from publishing or causing to be published on any billboard, posters or similar media targeted at or concerning AB, whether directly or indirectly.

(vi) An Order directing the Defendant, her agent and any/all third parties to not share or cause to be shared any information concerning or discussing AB and/or images of AB with the media in any jurisdiction, whether directly or indirectly.

(vii) An Order directing the Defendant to enter into discussions with the Claimant, via their counsel herein, within 60 days of this Order, to agree a protocol to enable the parties and AB to obtain from Dr. DM and AB's Therapist, Mrs. MMH, such professional advice, counselling, assessment and/or protocol(s) as required to facilitate a safe visitation by the Defendant with AB, failing such agreement, Dr. DM and Mrs. MMH together provide a report to this Honourable Court, within 14 days thereafter, as to the recommended protocol required to facilitate a safe visitation by the defendant with AB.

(viii) An Order, in the meantime, staying, until further order, that part of paragraph 1 of the December, 2022 Order allowing the Defendant *'to see AB for dinner once midweek on a Tuesday unless otherwise agreed'* and *'to have visits with AB on the weekends with prior arrangement with the*

Plaintiff and subject to an arrangement that suits both parties and A.B.', pending implementation of the terms of protocol recommended by Dr. DM and Mrs. MMH under paragraph 1 (vii) hereof.

(ix) An order staying until further order, that part of paragraph 1(a) of the December 2022 Order that provides '*During the time that the Defendant does not have access to AB the Defendant shall have a time in the morning and the evening when she may talk to AB on the phone by FaceTime App/WhatsApp video App or otherwise. Morning calls shall be at approximately 7:30 am on school days and 8:30 am on weekend days. Evening calls shall be at approximately 8pm on school days and 8:30 pm on Friday and Saturday evenings*.'

(x) An order restraining the Defendant, her agents and any/all third parties acting directly or indirectly on behalf of the Defendant (with or without the Defendant's knowledge or consent) from communicating with AB in any manner, directly or indirectly, unless such has the prior written consent of the Claimant, AB's custodial parent, pending the Defendant's compliance with paragraphs 4–8 of the December 2022 Order.

(xi) An Order that the Defendant pay to the Claimant the costs of and occasioned by this application.

(xi) Such further or other relief that the Court deems fit."

33. The first part of this Ruling pertains to the relief sought by the claimant between paragraphs (vii) to (xii) above.

34. At the date of filing, several publications remained online across various social media platforms, despite the claimant's repeated demands for their removal. The claimant contended that the continuation of these behaviors, if unchecked, posed a substantial risk of further emotional harm and potential exposure to external threats.

35. On 6 December 2023, having reviewed the affidavit evidence and heard submissions, this Court granted the claimant the relief sought, including: (i) an injunction restraining all social media publications concerning AB an directing the defendant to remove all existing publications concerning him (the relief sought in paragraphs (i) – (vi) above) ("the SMI Order"). As to the relief sought at (vii) to (xii), the Court adjourned the substantive hearing to the 15 December 2023, and gave directions for the filing of evidence and any additional submissions. However, it granted an Interim Order for a temporary stay of access between the defendant and AB, as well as for a temporary stay of communications between the defendant and AB, pending the implementation of the terms of the protocol recommended by Dr. DM and Mrs. MMH ("the Interim Stay of Access Order"). The hearing was on notice to the defendant, whose attorney was present, but who chose not to make any substantive submissions on the application. The Court set a return date for 15 December 2023, to enable the defendant to file affidavit evidence and make submissions (written and oral).

36. Both sides lodged comprehensive written submissions and advanced oral arguments. As for evidence, the claimant relied primarily on the Affidavit of MD filed 22 November 2023, the First Affidavit of MS. DS, filed 23 November 2023, and the Second Affidavit of Ms. DS, filed 20 December 2023. The defendant relied mainly on the Affidavit of one of her attorneys, Counsel WR, filed 13 December 2023, which exhibited the Fourth Affidavit sworn by the defendant.

37. During the course of the hearing on 15 December 2023, the Court inquired of counsel as to whether it ought to consider AB's wishes and feelings regarding the resumption of access between him and the defendant, as opposed to just hearing from the parties, who were now engaged in a full-blown matrimonial dispute. The Court invited the parties to make brief legal submissions on this issue, and the procedure that should be followed if the Court were minded to hear directly from AB, and heard submissions on 8 March 2024. The defendant "vehemently" objected to this proposal, but for reasons given below, the Court was of the view that it was beneficial and in accordance with justice to hear the views of the minor child. On 22 March 2024, this Court interviewed AB to ascertain his wishes and feelings in respect of resuming contact with the defendant, and the Court's observations are recorded below.

38. Notwithstanding the hearings, the Court encouraged the parties to try to agree a compromise on the protocols and therapeutic regime set out in the Interim Stay of Access Order that would facilitate the restoration of access between AB and the defendant. However, this did not happen, and in fact it seems the defendant in particular took the view that the issues raised in the CPA should now be determined in the MCA proceedings.

Defendant's application for a stay

39. On 25 June 2024, the defendant filed a Notice of Application for an Order staying these proceedings including, but not limited to, the claimant's Notice of Application filed on 22 November 2023, pending the final determination of the issue of custody and access concerning AB in the MCA proceedings. A second affidavit by WR was filed on 19 July 2024 relating to the stay application. This application for the stay was heard on the 22 July 2024.

Issues to be determined by the Court

40. Among the main issues to be determined by the Court on the interim stay of access application are the following: (i) whether the claimant has made out a case for the temporary suspension or restraint of the contact/access rights pending compliance by the defendant with the terms of the Interim Stay Order; (ii) whether the restoration of contact/access is in the best interest of the child, in light of the uncontroverted expert evidence; (iii) what weight is to be placed on the views expressed by the child; (iv) whether this court should defer the issue of contact/access raised under the CPA to the MCA proceedings.

DISCUSSION AND ANALYSIS

Legal principles

41. Counsel for the claimant relied mainly on the leading case of **Re C (Direct Contact: Suspension)** [2011] EWCA Civ 521 for the principles governing suspension of access rights between a parent and a child. Summarized, it is that contact between a parent and child is almost always in the best interests of the child and should only be terminated in exceptional circumstances and where there are cogent reasons. A summary of the jurisprudence on the point was provided at para. 47 of the Court of Appeal's decision in the cited judgment by Munby LJ as follows:

> "47: I do not propose to add to the jurisprudence or to attempt to state in my own words what has already been so clearly said by others. All I need do is to extract from the case-law to which I have referred the propositions upon which Mr. Scott-Manderson places particular reliance:
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> - Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
> - Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
> - There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
> - The court should take a medium-term and long-term view and not accord excessive weight to what appears likely to be short-term or transient problems.
> - The key question, which requires "stricter scrutiny", is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
> - All that said, at the end of the day the welfare of the child is paramount; "the child's interest must have precedence over any other consideration."

Summary of the Arguments

42. The claimant's main argument in support of the claim for temporary suspension of the access and communication regime outlined in the Revised Parenting Order is that the defendant's behaviour has inflicted emotional harm on AB and will continue to do so if not prevented. In this regard, the claimant relied, *inter alia*, on the following: (i) the reports of three child psychology experts who were all of the opinion that the defendant's online media campaign and publications on social media had caused and continues to cause emotional harm to AB; (ii) the apparent expressed wishes of AB himself; (iii) and the risk of exposure to physical harm because of the publicity brought to AB and the claimant by the defendant's social media campaign.

Evidence of Emotional harm

43. AB was assessed by three child experts in the last quarter of 2023, who all opined that contact between AB and the defendant should not occur and that before any visitation or contact was resumed the defendant should obtain professional assistance or counselling. The evidence of the experts, exhibited in the affidavit of MD filed 22 November 2023, is summarized below.

44. The first was Dr. DM, a clinical psychologist, who examined AB on 8 July and 13 August 2023, and generated a 40-page report based on her assessment. In her report dated 17 October, she posed the following question under sub-head "J": "*Is it in the child's interest to continue to receive telephone calls from EF given her consistent failure since mid-September 2022 to have contact in compliance with the Court Orders or not at all and should the Contact Order remain in place?*" She answered this as follows:

> "It is time for the current situation to end and the telephone calls to stop as they are not benefitting AB. Ms. EF [the defendant] is not modelling appropriate behaviors to AB and has not shown a willingness to respect and comply with the Court Orders for contact. Overall, Ms. EF has not been telling AB how or when she is going to see him, which is what he asked for many times, and she has not demonstrated engagement with, or respect for the Court Orders, which is a poor model of adulthood for AB. It is almost always my recommendation that visitation should occur between a child and parent, unless there is a threat of harm to the child, for example, if the parent is not engaging with professionals and is not serious about seeing the child, or if they have a history of violence, child cruelty, neglect etc. In this case, I am not recommending contact because Ms. EF has not behaved like AB's parent, and she has introduced the possibility of his being harmed by her behavior. Her lack of compliance since mid-September 2022 with The Bahamas Court Orders for contact, her failure to engage with legal professionals for the benefit of the child, as well as recent untrue allegations made in the Ontario Court proceedings, instigated by Ms. EF without notice to Mr. CD in the context of proposing that AB should not be permitted to return to his home in The Bahamas and should remain with her, indicates that Ms. EF has not prioritized AB and is not trying to meet his needs. […]
>
> Overall, EF has rejected AB by failing to see him, or engage in a process to have regular contact with him by travelling to The Bahamas. His view of her as caring only about herself and not about him is sometimes referred to as 'undifferentiated parental rejection'. In EF's case, it is reflected by her 'indifference/neglect' of AB since mid-September 2022. She did not see him even when it was more convenient for her in Muskoka. EF has also rejected AB by minimizing their past relationship, e.g., telling him he was 'welcome' to visit her in Canada and noting that she might 'bump into him'. There is a high risk of disturbance associated with rejection of a child by a parent [*Citation of Source*]. Although AB has shown himself to be a resilient child, it is not fair to continue to expose him to this risk when EF has not shown herself willing to comply with the Court Orders providing full contact and to engage with legal professionals to agree the logistics of implementing such contact."

45. The psychiatrist, Dr. MN, who was familiar with AB and had submitted earlier reports based on several visits and assessments, in a report dated 7 November 2023 stated:

> "The length of time that had passed before Ms. EF had visited AB was such that professional help should have been sought to enable Ms. EF to understand how best to approach the meeting. It would have also helped if adequate time had been given so that AB's therapist could have

> prepared him for what clearly was going to be a difficult meeting for a young child. The social media posts and lack of understanding of AB's feelings convince me that it is in AB's best interest that visitation should be stopped until Ms. EF can receive appropriate professional assistance in how best to safely behave towards AB"

46. Then there was the report of the licensed mental health counsellor and therapist or AB, Mrs. MMH, who had been providing professional care to AB since late 2022, dated 9 November 2023, in which she stated:

> "Based on what happened on 23 September 2023, forcing AB to meeting with Ms. EF can result in more resistance from him to do so. I strongly recommend for Ms. EF to seek individual counselling to include parenting skills before there could be a reconciliation and there should always be a mediation to make sure AB's emotional health is always addressed in his best interest. I have, in the past, offered my time to meet with Ms. EF to provide clinical feedback and an understanding of how AB has been emotionally affected by the events during the past year."

The Meeting of 23 September 2023

47. It appears that after no contact with AB from September of 2022, a meeting was arranged by the claimant and defendant for her to visit AB on 23 September 2023. This meeting was conducted in the presence of Dr. HF, the independent psychologist who was appointed to supervise the meetings at the claimant's home pursuant to paragraph 1(c)(i) of the Revised Parenting Order. After a few exchanges and a few questions from AB to EF as to why she did not make any earlier attempts to see him, AB abruptly terminated the meeting and said to the supervising psychologist, "Let's leave."

48. Curiously, a transcript of that meeting was included in the Fourth Affidavit of EF, which was exhibited to the Affidavit of WR filed 13 December 2023, and which was sworn in opposition to the application to suspend access and communication rights. It is not necessary to set out the entire exchange, but I will set out parts of the transcripts of that meeting to provide a flavor of it.

> "AB: Why weren't you trying to see me for the year?
> EF: I think these are, that's an important question and I have been. I have been.
> …
> AB: You could have actually seen me if you obeyed by the court order. But you weren't.
> EF: Well, I, I can see how you would see it that way and that's an adult conversation. And I can see how you would have a lot of questions around that. I can see that.
> AB: But why did you put my picture on Instagram?
> EF: Because I was dying…I was doing everything I possible could to see you. And look, I am seeing you right now.
> AB: But isn't that dangerous?
> EF: Hah. Not at all. Lots of friends are on…M. [a friend of A.B.] has a whole thing on his golf Instagram that I look at.
> AB: Because his parents just let him…My dad didn't let you.
> EF: Well, I'm your mom too.
> AB: No, you're not.
> EF: Ya, baby, I am. I will always be.

AB: Nah, Nah.
EF: I am sweetie. Remember I always said you came from my heart and not my belly. Since you've been a baby.
AB: [*Looking at Dr. HF*] Let's leave."

Creating risk of physical harm

49. The claimant also contends that the online social media campaign and the conduct of the defendant in casting the claimant in a negative light has increased the risk of physical harm to both AB and the claimant. In this regard, they refer to online posts where persons identified only by their usernames, excoriated the claimant and made veiled threats or suggestions that they would take matters into their own hands or somehow intervene in the situation (Affidavit of DS). For example, set out below is one of the responses to a 37-second video posted by the defendant in which overlaid text claimed that she was denied access to her son "*and unless I give over all my freedom of speech and agree to a gag order permanently I am not allowed to see my son AB*". It received some 220,000 views and had 2,406 likes and 216 comments.

> "Mitchell_5557- "I'm praying for you. Someone needs to pick this story up! What a sick man to keep his son away from his mother.
> Keep posting but Becareful!
> Watch your back & who you trust. He seems to b extreme and obviously knows someone in The Bahamas. I hope this resolve before his 18th birthday but if it doesn't don't think for 1 second that he won't come looking for his mom regardless what he is told to believe. To the Mr. F… [*profanity*] hiding behind a keyboard reading all these messages as your ex wife begs to see her son that she birthed. Excuse my language but You are a sick F… a…… [*profanity*]. I hope you rot in hell and your son turns on you for what you are doing! Karma is a b….! [*profanity*] Your day is coming. Sooner than you think! You are such a little P…y B…h [*profanity*] for doing this to your son, daughter and their mom. You are harming your son. You obviously don't love him or you would not do something like this. Regardless how you feel about your ex. It's her right just as much as yours to see the innocent child that you are brainwashing. F… [*profanity*] the political game in the Bahamas and f… [*profanity*] the people that are helping you. I can't wait till this story goes viral on a national scale. The tables will turn and you Mr. F..k [*profanity*] or your $ won't matter. I pray that day comes soon! Keep posting mama! I will send you a DM on someone that has the power! Bahamas or Mr. F..k [*profanity*] have no idea what is coming! Wrong is wrong!"

50. The Affidavit of DS concluded, *inter alia*, as follows:

> "59. …[T]he Defendant's publications of AB's images, location and full name on numerous social media platforms provides strangers with the requisite information to physically harm or abduct AB themselves and which postings may attract individuals seeking to gain financially from the abduction of AB…."

51. Commenting on this, Dr. MN (in the report referred to) said:

> "I am very concerned that EF's behavior continues to be damaging to both AB and Mr. CD. The social media posts and the signs are not only inaccurate but are mentally damaging for AB. They are also dangerous as the publication of images, names, addresses and the suggestion of wealth coupled with a plea for help creates the potential for a kidnapping for ransom. This along

with the enormous embarrassment for a young boy at school cannot be regarded as in his best interest."

Defendant's submissions

52. As far as may be gleaned from written submissions and oral arguments, counsel for the defendant made three main arguments opposing the application for suspension of access and contact rights. The first was a procedural objection that the jurisdiction engaged by the claimant's Notice of Application did not provide for the variation of the order or the grant of any additional relief under the CPA. The second argument was that in any event, suspension of rights of access/contact was a draconian measure and the case law established that a high threshold had to be surmounted for such suspension, even on an interim basis. Thirdly, it was said that the claimant had not met the evidentiary threshold for the suspension of rights. Further, and as indicated, the defendant opposed the request to interview the child (which dovetails with the arguments opposing the current application), but this will be dealt with separately below.

Jurisdictional issues

53. The application of 22 November 2023 was made on several jurisdictional bases: (i) the "liberty to apply" jurisdiction contained in the December 2022 Order; (ii) the inherent jurisdiction of the Court; (iii) Rule 17.1 (b) of the Civil Procedure Rules 2022 ("the CPR"); and (iv) in accordance with Part 1, Rule 1.1 (2) of the overriding objectives of the CPR.

54. As I understand it, the main argument of the defendant on this point is that the application did not invoke any enabling provision or power under the CPA so as to clothe the Court with jurisdiction to suspend the defendant's access. In this regard, it was said to be "*trite that the liberty to apply jurisdiction relates solely and exclusively to applications to the Court for assistance in carrying out the terms of the Order*". Further, it was said that the Court's inherent jurisdiction and the procedural Rules are separate and distinct from the statutory jurisdiction created under the CPA.

Suspension of contact/access draconian

55. Secondly, the defendant argued that the jurisdiction to suspend access/contact is a draconian measure and ought not to be exercised unless the high evidentiary threshold is met. In this regard, the defendant relied on the authority of **Re C**, cited by the claimant, to the effect that there should be exceptional circumstances and cogent reasons for doing so (see passage excerpted above).

No cogent reasons

56. Lastly, it was said that there were no cogent reasons adduced for suspension of access and communication with AB, as the claimant had not shown that the defendant's conduct had caused any emotional or other harm to AB. In this regard, counsel for EF submitted in her written case that:

> "…[T]he Court approved cessation of her access is premised on the notion that visitation with AB is unsafe or harmful to him.
> There is a clear distinction between a proposition that EF's social media postings caused AB harm and the proposition that AB seeing or speaking to EF is or has been harmful or unsafe for him.
> CD has presented no evidence at all that AB's visit with EF caused him emotional harmful (*sic*)."

The Defendant's affidavit

57. As noted, counsel filed the Affidavit of WR on 13 December 2023, which exhibited the Fourth Affidavit of EF in response to the claimant's application. That affidavit dealt disparately with the issues raised in the claimant's application. For example, it begins by setting out the status of the matrimonial proceedings and the issues of custody raised therein (of which more will be said later). A large part of the affidavit is dedicated to explaining (and attempting to justify) the social media postings, and it sets out, in detail, the attempts the defendant says she made to visit and have contact with AB. Lastly, it explains the abortive meeting of 23 September 2023, disputes that she breached the Revised Parenting Order, and makes counter-allegations that CD also breached the Revised Parenting Order.

58. With respect to issues of custody, the affidavit relates that EF in her amended Petition had sought an order "*for custody of the minor children of the family, pursuant to s. 74 of the Matrimonial Causes Act*", which included a request for "*final custody*" of AB, and that CD was seeking an order (by way of cross-petition) that "*…the respondent be awarded sole custody, care and control of AB in accordance with the California Judgment*."

59. On the social media campaign, EF does not deny posting the material, but she disputes their alleged negative affect on AB and claims that the material was taken down after the SMI Order (which is disputed by the claimant). She deposed as follows:

> "33. After a period of months of having my lawyers write to try to get visitation with AB as I set out in detail below and after having received responses which made it clear to me that CD had no intention of allowing me to see AB, I started documenting my experience on social media.
> 34. My intention with my social media postings about my experience was to express my love for AB and my commitment to never give up on my efforts to see AB despite the obstacles that were clearly being thrown at me.
> 35. I actually referred to my social media postings as a 'Love Campaign'."

60. With respect to the question of emotional harm caused by the social media campaign, EF stated that:

> "125. [T]he harm alleged to have been caused to AB was finally set out in CD's letter of 7th November 2023.
> 126. It was that 'AB was very distressed at seeing the billboards. They caused him significant upset, embarrassment (as his peers saw them too) and emotional harm.'
> 127. I've noted that CD via his letter of 7th November 2023, stated, 'Dr. DM records that AB informed her that, during his very brief meeting with your client on 23 September, 2023, AB

himself told your client that he does not want his images to be shared online. She also records that AB expressed to her that the publications make him angry.'
128. I do not accept that my social media postings have caused harm to AB as alleged by CD. I do not accept for many reasons including the fact that even CD's own expert said that AB was angry but confirmed that he was emotionally well.
129. I have carefully read the report of Dr. DM dated 15th October 2023 and she said, 'At the time of assessment, AB was well emotionally. He is a resilient child and has coped well with the 'adult issues', as he calls them relating to his contact with Ms. EF."

Attempts at visitation

61. The affidavit of EF also relates what she says were numerous attempts by her to visit AB and maintain contact in accordance with the Revised Parenting Order, via letters of request to the lawyers for the claimant following the abortive 23 September 2023 meeting. These overtures, she claims, were generally met with resistance, on the basis that the defendant's social media postings were said to breach the Revised Parenting Order as they were causing AB emotional harm and the claimant was therefore demanding an undertaking to remove the social meeting posts as a condition for the visitation. In one case, it appears that a visit was scheduled for 11 November 2023, but was cancelled by letter from counsel for the claimant, which was in the following form to counsel for the defendant:

> "Your client has not agreed to provide the undertakings as required. Accordingly, the visitation scheduled for tomorrow, 11 November 2023, will not be accommodated by our client. It has been cancelled. Our client's decision is protective of AB's emotional welfare."

62. The defendant stated that she in fact travelled to the Bahamas to see AB on that day, as was confirmed by BC on 19 October 2023, but "*CD refused to let me see AB even though I had agreed to take down my social media postings for a period of at least 60 days while we sought to resolve our issues*." She contended that the imposition of these pre-conditions were a breach of the Revised Parenting Order, and that there was no connection between the access and the issue of the social media campaign.

Interview to Ascertain Views of the Child

63. As indicated, the Court at the hearing on 15 December 2023 raised the issue of whether the wishes and feelings of AB should be ascertained in the circumstance of the case, and invited short submissions on the issue.

64. Counsel for the claimant submitted that s. 3(3) of the CPA (which mirrors s. 1(3) of the Children's Act 1989 in England), imposes a duty on the Court to have regard to the matters enumerated therein when determining any question relating to, *inter alia*, the upbringing of a child. In this regard, the court is to have regard in particular to "(a) *the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding*."

65. The claimant also relied on the principles set out in the case of **Re D (a child) (abduction: rights to custody)** [2006] UKHL 51, where the House of Lords stressed the

importance of ascertaining the wishes and feelings of children in proceedings involving them. The Court said [at 57]:

> "It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

66. As to the procedure to be followed, the claimant submitted that the method of ascertaining the wishes and feelings of a child involved in CPA proceedings in this jurisdiction has been approached in two ways: (i) by the judge interviewing the child directly (**JNF v CCF** [2016] 1 BHS J No. 10; **RGH v JFN** [2016] 1 BHS J. No. 19); and (ii) by directing an enquiry to be carried out by the Department of Social Services and the report thereafter provided to the Court [**Mackey v The Hon. Melanie Griffin** [2017] 2 BHS J. No. 53.

67. The claimant further contended that the cases and principles clearly indicate that there is a duty on the court to ascertain the wishes and feelings of the child in appropriate circumstances, and once embarked upon must be considered sufficiently and afforded proper weight. Thus, in light of A.B.'s current understanding of his family's circumstances, as expressed in the reports of Dr. DM on 17 September 2023 and 15 October 2023, the Court should ascertain AB's wishes and feelings before a decision was rendered as to whether the interim stay of access ought to be continued.

68. For her part, the defendant submitted that she "*vehemently opposes*" the application for the Court to ascertain the wishes of AB. As far as can be discerned, the objection was made on two bases. The first was said to be a jurisdictional one, which was that the Court was not being asked to make any order under the CPA, and in any event s. 99 of the CPA set out the provisions regulating the approach where a court was required to take evidence from a child. Section 99 of the CPA provides:

> "99. (1) In any proceedings in which a court is hearing an application for an order under this Act, or is considering whether to make such an order, the court may summon the child concerned to attend such stages of the proceedings as may be specified in the summons.
> (2) The power conferred by subsection (1) shall be exercised in accordance with any rules of court."

69. The second point was an evidential one, with two limbs. Counsel for the defendant first submitted that there was no point in ascertaining the views of AB because in the report of Dr. DM is was indicated as follows:

> "When I last saw AB he said he would give EF another 'chance', however, if she is not prepared to apologize for not seeing him, and will not explain to him why she did not see him for such a very long time, it is not possible to recommend that contact should happen again."

70. Based on this, counsel argued that the state of the claimant's own evidence was that "*he* [AB] *would give EF another chance*," provided she explained her absence, and that this has

not been impugned. Next, it was submitted that because AB was in the custody of CD with no contact by EF, any "…*such evidence could be attributed little if any weight because of the likelihood that the child's views would be heavily influenced by the custodial parent*".

71. With respect, the Court was somewhat puzzled by the staunch resistance to ascertaining the views of the child, but in any event the objections were meritless. Firstly, for reasons that are further elaborated below, I find that the objections on jurisdictional grounds are misplaced. The application was under the CPA which clearly gives the Court jurisdiction to ascertain the wishes of the child. In fact, it should be recalled that the main relief sought in the OS itself recognized that this was "*subject to the wishes of the plaintiff and the child*". As to AB expressing a willingness to give EF another chance, that has nothing to do with the point of whether or not his views regarding the matter should be taken into account, and requires no further discussion.

72. Secondly, it seems that the defendant confuses the ability of the Court to ascertain the wishes and feelings of a child as part of the judicial decision-making process with the process for adducing evidence in a matter. The court's jurisdiction and the growing jurisprudence on hearing the voice of the child in proceedings concerning them is separate and apart from the taking of the evidence of children, subject to their maturity and understanding. This right, which is recognized in the Rights of the Child Convention ("the Child Convention"), reflects the principle that children should have a say in what happens to them and on issues which affect their lives.

73. The CPA gives effect to many of the principles in the Child Convention (to which The Bahamas is a party), and s. 3 of the Act as well as s. 21 incorporates the right of the child's voice to be heard. Further, s. 4 of the CPA specifically grants to the child a right to exercise "…*in addition to all the rights stated in this Act, all the rights set out in the United Nations Convention on the Rights of the Child (the Convention) subject to any reservations that apply to The Bahamas and with appropriate modifications to suit the circumstances that exist in The Bahamas with due regard to its laws*." The Bahamas only entered a reservation to art. 2 of the Convention, which relates to the conferment of citizenship, when it signed and later ratified the Convention on 20 February 1991.

74. Article 12 of the Convention provides as follows:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

75. In relation to similar provisions in the UK Children Act 1989, the UK Court of Appeal said in **Re A (A child)** [2013] EWCA Civ 1104 [at 37]:

> "There is a substantial body of case law relating to the role that the wishes and feelings of a child may have in a court's overall welfare determination. These cases, which underline the importance of having regard to a child's views, and stress that the importance of this factor will increase as the child's age and/or level of understanding increases, are also plain that the extent to which 'wishes and feelings' may be a, or even the, determinative factor will vary with the facts of each case."

76. Having heard counsel on the point, I therefore decided to conduct the interview, in the presence of an independent supervising psychologist, with whom AB was familiar. That interview was conducted on the 22 March 2024, and the Court's notes of that interview were provided to both parties. Therefore, in determining the issue of the temporary suspension of contact/access rights, the child's wishes and feelings were also taken into consideration.

Court's discussion and conclusions on the suspension of contact/access

The jurisdictional issues

77. I deal first with the technical objections to jurisdiction. In my judgment, they are not well founded and can be disposed of shortly. Firstly, it is clear that the procedural rules were invoked not as the source of jurisdiction, but simply as the applicable procedural guidelines having regard to the nature of the application (for example, Part 17 deals with interim relief, including stays and injunctive relief, and the overriding objective simply refers to matters to be taken into consideration in dealing with a case justly). Nothing needs to be said as to the Court's inherent jurisdiction, as it is trite that the Court has an inherent jurisdiction to compel compliance with its Orders, and this was a part of the relief being sought. It is also trite that the court may, in certain circumstances, exercise inherent jurisdiction in respect of children, although such circumstances do not arise on the facts of the instant case.

78. As to the argument that "liberty to apply" did not give the Court jurisdiction to make the suspension of contact/access order, I also find that this is without substance. I accept, as counsel for the defendant points out, that the scope of liberty to apply is not unlimited. For example, it was famously stated in **Fritz v Hobson** (1879) 14 Ch. D 542, that "*Liberty to apply does not include an application to vary the order; it only authorizes applications to enforce it.*" See, also, **Kaye v Kingstars Ltd. and Others** [2010] EWCA Civ. 159 for a more recent statement of the principle.

79. However, it is equally clear that the concept of liberty to apply is applied differently depending on the nature of the order and the legal context. In family law cases, involving children, and in the case of interlocutory orders, the principle does not apply with the same rigidity. In **Re H (A Child) Abduction: Rights of custody)** [2000] 2 All ER 1, the UK Court of Appeal observed that "*orders in relation to children are rarely final*" and that the phrase "liberty to apply" in non-final orders indicated that the court would remain seized of those matters, and further applications could be made in existing proceedings. In fact, this principle is codified at s. 74 of the MCA. Therefore, I am of the view that the claimant has properly invoked the Court's jurisdiction under the Order to seek its variation or further relief.

80. Further, and for completeness, the Notice is intituled "In the matter of an application under s. 22(1) of the Child Protection Act". Thus, it is fairly clear that this is the operative provision of the Act being relied on.

Whether the claimant has made out a case for suspension of contact rights and whether in the best interest of the child

81. As indicated, the primary case for the temporary suspension of contact/access was that the behavior of the defendant in her social media campaign and the attempts to engage with AB after a prolonged absence without explanation created emotional harm to AB. Further, it was the view of three experts that it would be in the best interests of AB that contact should be suspended and not re-engaged until the therapeutic framework for re-engagement was developed and followed.

82. It is useful to remind myself of the gist of what the experts said. Dr. DM said that:

> "It is almost always my recommendation that visitation should occur between a child and parent, unless there is a threat of harm to the child, for example, if the parent is not engaging with professionals and is not serious about seeing the child, or if they have a history of violence, child cruelty, neglect etc. In this case, I am not recommending contact because Ms. EF has not behaved like AB's parent, and she has introduced the possibility of his being harmed by her behavior."

83. Dr. MN stated that "*The social media posts and lack of understanding of AB's feelings convince me that it is in AB's best interest that visitation should be stopped until EF can receive appropriate professional assistance in how best to safely behave towards AB*." The mental health counselor and therapist for AB, Mrs. MMH said that "…*forcing AB to meet with EF can result in more resistance from him to do so. I strongly recommend for EF to seek individual counselling to include parenting skills before there could be a reconciliation...".*

84. The defendant's response to these reports indicating that emotional harm was being inflicted on AB by her actions, and that it was likely to be exacerbated by further contact in the absence of a protective framework, was simply to dismiss them by reference to the observations in the reports which said that the child was "emotionally well" and "resilient".

85. As indicated, counsel for the defendant denied that any emotional harm had been caused by the social media posting, but contended that even if that were arguably the case, a distinction was to be drawn between that and the risk of any harm said to be posed by EF's communication or visitation with AB. She went so far as to assert that the "…*Court approved cessation of access [the interim order] is premised on the notion that visitation with A.B. was unsafe or harmful to him*." This appears to be predicated on paragraph 1(iv) of the claimant's Notice of Application, which sought an Order to direct the defendant to enter into discussions to agree a protocol, *inter alia*, to facilitate a "*safe visitation*" by the defendant with AB.

86. It is true that the terms of the order sought by the claimant specifically mentioned "safe visitation", but the basis for counsel for the defendant's submission that this was the basis for the interim suspension of contact is speculative and unfounded. Of course, at that point, no

reasons had been provided for the interim suspension of access/contact. However, it was the Court that specifically raised with counsel for the claimant that the term "safe visitation" connoted that the visitations may not have been safe, and that there was no evidence suggesting this. It was therefore suggested to counsel that "effective visitation" might be a more neutral and objective term, which was accepted by counsel for the claimant. In fact, this prompted counsel for the defendant to make the following submissions before the Court on 24 March 2024, as follows:

> "29. Additionally, the Court during the hearing suggested to counsel for the Claimant that the phrase "effective visitation" might be more appropriate for the purpose of Paragraph 1(vii) of the Claimant's Notice of Application and Counsel for the Claimant agreed with this suggestion.
>
> 30. The Court and the Claimant's stated preference for the term "effective visitation" for the pleaded "safe visitation" is overwhelmingly significant."

87. Thus, this betrays counsel for the defendant's suggestion that the Court was concerned that any visitation was unsafe or harmful to AB in and of itself. But all of the expert evidence pointed in one direction, which was that in light of, *inter alia*, the social media campaign and the associated behavior, further contact with EF in the absence of some behavioural modification or professional structure, might (or would) cause further emotional harm to AB.

The voice of the child

88. The proposition that the social media campaign created emotional harm is supported by the information and views of AB on the issue himself. For example, when contact was resumed after a long period of absence, during the meeting of 23 September 2023, AB chose to terminate it after only a few minutes. He had questions about EF's prolonged absence and the posting of his pictures on Instagram. The defendant attempts to explain this away by saying that the claimant had most likely coached AB on the issues relating to the Court orders and that the meeting was in fact precipitously terminated because she referred to herself as AB's mother, "*in circumstances where CD had clearly drilled into AB that I was not his mother*".

89. I will not venture into what may or may not be the possible emotional effect of AB being aware that EF is not his biological mother, as there was no evidence before me on this. However, it is difficult to reconcile the defendant's assertion (at para. 27 of her affidavit) that CD has been telling AB and others that she is not his mother *in the course of the breakdown of the relationship* and *since separation* with her own words that she has been telling AB that "*you came from my heart and not my belly…since you've been a baby*."

90. But apart from any issue as to the brevity of the meeting, the notes of this interaction and the informal transcription provided by the defendant (which suggests that the meeting was recorded by her in breach of the ground rules that there was to be no recording of any sort), do not in my view portray a child who was eager to be reunited with a person who had stood in *loco parentis* to him. Counsel for the defendant attempts to make much of Dr. DM's report which records AB saying he would give EF "another chance", if she was prepared to apologize to him and explain why she did not see him for such a long time, to suggest that AB may have

experienced a change of heart in respect of reuniting with EF. But this cannot be read *in vacuo*. In her executive summary, Dr. DM stated:

> "Over the period September 2022 to July 2023, EF left AB over 300 voice messages (some of which were pictures or short videos). In these messages, EF did not tell AB: a) why she had not visited; b) if and/or when, she would visit. In the absence of contact, in December 2022, EF's contact level was changed under Court Order from half the week, to twice weekly. EF continued not to exercise any contact.
>
> Parenting is a privilege and not a position of convenience. EF has not focused on meeting AB's needs. AB is now 8 years old, and he was 7 years' old when she last saw him. He states that he does not want to see EF and that his feelings about her changed over time. This is usual in a healthy individual and to be expected.
>
> EF states that she suffers from post-traumatic stress disorder (PTSD), and in my opinion, this should be considered prior to any contact, to ensure that anger and irritability are not prevalent. I suggest this could be done by perusal of any documents associated with diagnosis and treatment of PTSD, produced by professionals. AB would also benefit from an opportunity to talk about his thoughts about meeting EF after such a long period of time. He has told me that he does not want to see EF. If he were required by law to see her, he could be advised that one visit with her did not constitute a commitment (if this is appropriate from a legal point of view). He may need a little time to think about his options and may have some questions for her. If AB is required to see EF (and he has told me he does not want to see her), they could meet for one hour, with some discussion afterwards about whether he wished to pursue it, and if he were legally obliged to see her, or if he wanted to see her, this could be increased to two hours on the following occasion. Contact should take place at a venue that AB is comfortable in, and where CD is assured of his safety. It is my experience with CD that he always has AB's best interest at heart, whereas sadly there is no history of the same level of care and consideration from EF.
>
> As AB has stated that he is no longer interested in meeting with EF, then as her (EF's) relationship with CD has ended, and she has shown insufficient interest in maintaining regular face-to-face contact with AB, it is in his best interest for the telephone calls to stop and her attempts to engage in contact to end. EF should know that the focus of the court is on meeting the child's needs and not the parents."

91. During the Court's interview, in the presence of the psychologist, when asked whether he wished to continue seeing EF and GH, AB again indicated that he did not want to continue seeing EF or spending time with GH. Again, he referenced the Instagram postings and posters put up near his school, and said that EF had "lied" to him about taking these items down. He said that he did not want to maintain social media contact, but added that it was "his choice" if he wanted to talk to them or not. He admitted to missing EF and GH a "tad bit", but said "then he thinks of the 'things' they had done to him".

92. As indicated, the child's voice, like expert evidence, is never determinative of the issues the Court has to decide. But the jurisprudence is clear that the Court is able to consider and incorporate these views into the judicial decision-making process, having regard to his age and maturity. Indeed, the best interests of the child demands hearing from the child where circumstances permit. AB was nine years' old at the time of the interview and is clearly an

intelligent child capable of expressing his feelings. Indeed, he was quite proud to indicate that he had some "choice" or a say in the matter with respect to maintaining contact through social media. So I have given some consideration to his views, some of which were clearly consistent with what the experts have reported. But I also add the caveat that the Court is clearly aware that a child, especially of tender years, is impressionable, and I make it clear that my decision below is not based in any significant way on the views of AB.

Legal principles

93. Before coming to any conclusion based on the evidence and other material, the Court reminds itself of two important principles. The first is the overriding principle that decisions taken under the CPA involving, *inter alia*, the upbringing of a child must be based on the child's welfare (sometimes expressed as the "best interest" of the child): see s. 3 of the CPA. **In B (A Child)** [2009] UKSC 5, the UK Supreme Court expressed the principle as follows:

> "37. […] All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interest. This is the paramount consideration. It is only as a contributor to the child's welfare that parenthood assumes any significance. In common with all factors bearing on what is in the best interest of the child, it must be examined for its potential to fulfill that aim."

94. The second case illustrates the key considerations the court will have regard to in suspending contact rights (see above) as well as the evidence and other material the court may consider (**Re C,** *supra*). In **Re C**, Henderson J. refused to order interim contact between the mother and C (the child) for a period of several months based on the expert report as to the mother's mental/emotional state, which was upheld on appeal. He relied largely on the report of a Doctor, a consultant psychiatrist, who had interviewed the mother and concluded that while she was mentally stable, and had deep affection for her daughter, she was liable to emotional and behavioural outbursts which if C were to witness them, might have a potential to harm her.

95. In upholding the exercise of the judge's discretion to refuse to order contact, Munby LJ said in the Court of Appeal:

> "65. As is evident both from the course of the proceedings and from his judgment, Judge Henderson approached this anxious case with great care, giving it the strict and anxious scrutiny that every such case demands. His conclusions were firmly and securely founded in the evidence, including but not limited to the evidence of the experts and the evidence and expert advice of an experienced guardian. By the end of Mrs. Chapman's oral evidence, the expert evidence was really all pointing in the same direction. Expert evidence is, of course, never determinative, but in a case such as this a judge, if he is to depart from it, has to be able to identify appropriate reasons for doing so."

96. In my view, I am not able to identify any appropriate (or any reasons at all) to depart from the views of the experts and the other information and evidence to which I have been referred. I am not of the opinion that the evidence of three eminently qualified experts, who have had more than one contact with AB, can be dismissed so out of hand, as the defendant seeks to do. They all indicated that the actions of the defendant have caused emotional harm to AB, and that this could be exacerbated by further contact without a protective protocol. In

light of this, they all recommended that further contact/access should be suspended pending some form of behavioral adjustment by EF, including professional help. In fact, Dr. DM indicated that EF's admission that she was suffering from PTSD added an additional layer of concern of the risk of "anger and irritability" manifesting during visitations, much like the situation in **Re C**.

97. However well-meaning and noble her motivation for the social media campaign might be (she described it as a "love campaign"), it appears that EF did not take into consideration the likely harm that could result to AB from this intrusion on his privacy, including emotional and possible physical harm, and that it could have a deleterious effect on his perception of her and their relationship. To my mind, this shows a callous disregard for the position or welfare of the child, and seeks to champion EF's alleged parental rights over the welfare of AB. This is clearly counter-intuitive to the welfare and best interests of the child philosophy which underpins the CPA.

98. In the circumstances, and taking into account all of the evidence and the information available to the Court, I am of the view that the interim order made to suspend contact/access should continue until further Order (by this Court, or the Court seized of the MCA proceedings), or pending compliance by the defendant with the terms of the Interim Stay of Access Order. My conclusion and Order in this regard are also subject to the observations made below.

Issues relating to Stay

99. As indicated, by Notice of Application filed 25 June 2024, the defendant applied for a stay of the CPA Proceedings, namely (i) the OS filed 24 June 2022; (ii) the Notice of Application filed 22 November 2023, seeking various reliefs (including the suspension of contact order); and (iii) all other related proceedings in this matter.

100. The defendant has argued for a stay of the CPA Proceedings mainly on the grounds that to the extent that it deals with custody and access, these will be finally determined under the MCA Proceedings. As put in her written submissions:

> "This Court should defer to the Court in the Matrimonial Proceedings for the determination of the access issue for a myriad of reasons including but not limited to the fact that the Court in the Matrimonial Proceedings will invariably have to determine the issue of access, the same issue as between the same parties ought not be simultaneously adjudicated upon in different courts and the Matrimonial Proceedings given inter alia the broader scope and all-encompassing nature is the more appropriate forum for the determination of the issue."

101. The claimant opposed the application for a stay, relying on a number of reasons. Firstly, the claimant emphasized (as already mentioned by the Court) that the action was commenced prior to the MCA proceedings, and that the jurisdiction being exercised was completely different from the considerations under the MCA. In this case, the CPA proceedings were commenced to enforce a parenting agreement between the parties and prevent AB's "abduction by the Defendant". It was pointed out that following the commencement of the action, the defendant continued to participate in the CPA proceedings,

and even provided her consent to certain parts of the Revised Parenting Order entered on 7 December 2022. As stated in their written submissions:

> "12. The statutory framework of the CPA was introduced to provide a mechanism for protection of children in addition to the provisions within the MCA. There is nothing in the statutory framework of either the CPA or the MCA to support the position that proceedings under both enactments may not properly co-exist and/or offends public policy.
> 13. The CPA Action has been initiated by CD for the protection of AB. After giving due consideration to credible evidence and mature legal argument and submissions, this Honourable Court has made several interim orders for the protection of AB. The value and importance of the CPA Action has not been diminished, in any way, by reason of the MCA Action having been instituted by the Defendant."

103. Next, it is argued that there would be no prejudice to the defendant if a stay is refused, and in any event the defendant has failed to show how she would be disadvantaged. This is because if a stay were refused, the following position would obtain: (i) the defendant will be required to continue to abide by the Court's orders, including the legal prohibition against the publication of AB's image on social media and elsewhere consistent with s. 146 of the CPA; and (ii) the defendant would have to cooperate with the professionals for assessment and for them to develop a protocol as a precondition for the restoration of visitation rights in accordance with, *inter alia*, the Interim Stay of Access Order. None of these outcomes is said to be prejudicial to the defendant, as they are protective of AB. But, even if they were prejudicial, the welfare/best interest of the child is the paramount consideration under the CPA.

104. Further, it is contended that the imposition of a stay would render the parties' attendance and many submissions before the court a waste of time and resources, which would not be a just or proportionate use of court's resources. Finally, it is contended that one cannot lose sight of the fact that the defendant has herself to blame for certain applications, following compelling evidence by the claimant that the defendant was engaging in a pattern of behaviour that was contrary to the best interest of the child and refusing to obey the orders of the Court.

Court's conclusion on stay

105. The parties were agreed on the wide jurisdiction of the Court to grant a stay under s. 16 (3) of the SCA, the procedural rules (CPR 26.1), and the Court's inherent jurisdiction to prevent an abuse of its process. Counsel for the claimant referred the Court to the case of **Hosking and another v Apax Partners LLP** [2016] EWHC 1986, where the English High Court considered the approach applicable to case management stay applications under Rule 3.1(2) (f) of the English CPR, which is analogous to 26.1. There the Court said:

> "27. The court has jurisdiction pursuant to CPR Rule 3.1(2)(f) to "stay the whole or part of any proceedings or judgment either generally or until a specified date or event" under the general powers of case management. The court also has an inherent jurisdiction to stay proceedings preserved in s. 49(3) of the Senior Court Act 1981.
>
> 28. The burden lies on the applicant seeking a stay to demonstrate thoroughly by cogent evidence that there are sound reasons for a stay. In the normal type of case, the application for

> a stay is made by the defendant who will be concerned at the costs and difficulties of dealing at the same time with two sets of overlapping proceedings."

106. With respect, I prefer the submissions of the claimant on the issue of the stay. Firstly, I accept that the CPA provides a mechanism for the protection of children that is in addition to any rights contemplated in or under the MCA. The CPA is a child-centric statute which reflects rights of children recognized in the modern international jurisprudence, including the right of the child to be heard (as has been expressed here) and the right of a child to privacy, which also arises in this application. For example, art. 16 of the Convention protects the privacy of children as follows:

> "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
> 2. The child has the right to the protection of the law against such interference or attacks."

107. It is important to note, and the Court must emphasize it, that these are individual rights which are accorded to the child himself, and do not exist as adjuncts to any parental rights. Indeed, these are rights that may be enforced as against parents, and there is a duty on the State, including judges, to enforce these rights. In the Canadian case of **Yenovkian v Gulian** [2019] ONSC 7279, where one parent posted significant personal information about the children on the internet during a parental dispute which the court concluded was cyberbullying, the Court said:

> "55. In the family law sphere, the heightened vulnerability of children is a concern when parents use public internet postings in a way that intrudes on the privacy of children, as is the case here."

108. In my judgment, the submission that there is overlapping jurisdiction being exercised is based on a fundamental misunderstanding of the applications before this Court and the jurisdiction under the CPA. As illustrated by several of the cases referred to (**Re A**, **Re C**), the CPA focuses on the best interest and rights of the child, not those of the parent. These proceedings were primarily concerned with giving judicial *imprimatur* to an agreed parenting schedule intended to maintain contact between a child and a parent or parent figure, and not with the legal parental rights to custody or access. Those are matters properly for the MCA proceedings, whether on an interim or final basis, and when they are decided they will have been determined for the first time between the parties. Any final Orders regarding custody and/or access will naturally supplant any interim or interlocutory protective orders made by this Court, but there is no conflict.

109. In this regard, there is therefore really nothing to commend a stay of the CPA proceedings. In fact, having regard to the Court's reasons given here, there is nothing remaining to be stayed. As indicated, this Court has already heard committal proceedings against the defendant, which is a discrete application, and there is no basis on which a stay can be sought in relation to that application. The main relief sought in the OS, which was to allow the defendant to remain at liberty to remain "involved in the care of AB" while he remained a

minor, has now been overtaken by the claim made by the defendant in the MCA proceedings for custody. The interim protective Orders remain in effect until those matters are determined by the matrimonial court, or until further Order.

CONCLUSION AND DISPOSITION

110. For all of the above reasons, the interim suspension of contact/access order is to remain in place until the issue of custody and or access are finally determined in the MCA proceedings, or until further Order. The application by the defendant to vary or set aside the Order is dismissed. The application for the stay is also dismissed.

104. I will hear the parties on costs.

Klein J.,

30 May 2025