



Civil Appeal No. 10 of 2026

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
DIVORCE JURISDICTION
BEFORE THE HON. ACTING JUSTICE ALEXANDRA WHEATLEY
CASE NUMBER 2024: No. 26**

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 24 September 2026

Before:

**THE PRESIDENT, JUSTICE OF APPEAL IAN KAWALEY
JUSTICE OF APPEAL RT HON DAME ELIZABETH GLOSTER
-and-
JUSTICE OF APPEAL RT HON SIR JULIAN FLAUX**

Between:

MM

Appellant

- and -

KM

Respondent

Appearances: Ms Sarah Bailey-Munroe of Richards Limited on behalf of the Appellant
Mrs Georgia Marshall of Marshall Diel & Myers Limited on behalf of
the Respondent

Hearing date(s): 17-18 June 2026
Draft Judgment circulated: 14 September 2026
Date of Judgment: 24 September 2026

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Findings in fact-finding hearing set aside on grounds of unfairness and irregularity in the proceedings

JUDGMENT

FLAUX JA:

Introduction

1. This judgment sets out the reasons for allowing the appeal of the Appellant (to whom I will refer as “the Father”) against the order and findings of Assistant Justice Hon. Alexandra Wheatley (“the judge”) dated 2 February 2026 and her findings dated 20 April 2026. The Court heard a rolled-up hearing on 17 and 18 June 2026 for leave to appeal (following refusal of leave to appeal by the judge) with the appeal following *de bene esse*. At the conclusion of the hearing the Court considered that the parties should know where matters stood as soon as possible. Accordingly, we held a further short hearing on 19 June when we handed down an order giving leave to appeal on all the grounds of appeal and stating that the order and findings of the judge dated 2 February 2026 and the further findings dated 20 April 2026 would be set aside to the extent set out in the reasons of the Court which would follow subsequently. This judgment sets out those reasons.

Background

2. The parties met in the United Kingdom (where the Respondent, to whom I will refer as “the Mother”, was born) in 2005 when the Father was studying for an LLM at Cambridge University. The Father is an American citizen. They married in 2008 and lived in Atlanta where the only child of the marriage, to whom I will refer as “M”, was born in 2016. In 2020 during the Covid pandemic, they took advantage of remote working arrangements to move to Bermuda temporarily, returning to Atlanta ahead of M starting school in the summer of 2021. They returned to Bermuda shortly thereafter on a Digital Nomad visa scheme, continuing to live there as a family until they separated in November 2023, when the Father returned to Atlanta where he continues to reside. The Mother had acquired American citizenship in 2021. She is an attorney with an international law firm specializing in labour law. The firm has an office in Atlanta, but the Mother works remotely from Bermuda, where she has lived since her return to the island in 2021. M has dual British and American nationality.
3. The parties filed for divorce in March 2024. They reached a Consent Order in respect of the divorce, finances and child arrangements dated 31 May 2024. Under the terms of that order the parties operated a so-called “nesting” arrangement for M’s care whereby each parent looked after her for two weeks each month, initially on alternate weeks then when the Father moved back to Atlanta alternating each fortnight using the former matrimonial home (“FMH”) as M’s base. The Mother undertook payment of the rent on the FMH better to facilitate financially the Father’s travel expenses.

4. The Father's case (which is refuted by the Mother) is that the intention had always been for the family to resume living in Atlanta and that he only agreed to M remaining in Bermuda following the separation on a temporary basis, although he accepts that he agreed that her 2024/2025 school year should not be interrupted. His case is that, on or around 8 December 2024, he became concerned that the Mother was causing M distress by telling her that Atlanta was dangerous and that she would no longer see her maternal family, including her Mother, if she moved there. He asserts that he raised his concerns with the Mother, which resulted in her retaliating by making mirror allegations.
5. The Mother's case, on the other hand, is that she and M had been the subject of the Father's coercive control and domestic abuse for years and this had caused the marriage to break down. Her case is that, in the winter of 2024-25 she became concerned that he was seeking to influence M so that she would return to Atlanta. These concerns were expressed in a letter from her attorneys on 19 December 2024.
6. In February 2025, the parties attended a roundtable meeting to discuss a number of concerns including arrangements for M. It was agreed (as confirmed in a memorandum of agreement) that both parties would refrain from involving M in adult issues including the ongoing litigation and where she should live, including a move to Atlanta. Paragraph 2 of the memorandum of agreement provided:

“2. The parties agree not to involve [M] in adult issues, including but not limited to:

- (i) The ongoing litigation between the parties
- (ii) Where [M] shall live, including any move to [the United States]
- (iii) The parties' relationship
- (iv) The parties further agree so far as they are able to restrict any third party of discussing the same with [M].
- (v) Should [M] wish to discuss an adult issue, the parties agree that the narrative should be that “it is an issue for mummy and daddy and we love you very much”.
- (vi) In the event that [M] specifically asks the Father about [the United States] or going to [the United States] at some point in the future, the Father will not speak to [M] in relation to the issue or his position in relation to wanting to relocate [M], and instead will say that “daddy is speaking to mummy about it”. In the event that [M] speaks to the Mother about it, she may state that “mummy is speaking to daddy about it”.
- (vii) It is agreed that neither party will record the other without express agreement, nor record [M] in relation to the ongoing dispute between the parties.”

Reciprocal undertakings to the Court were given by the parties in essentially the same terms on 16 July 2025.

7. The Father issued an application for permission to remove M from Bermuda on 29 April 2025, supported by affidavit. The Mother then issued an application dated 2 May 2025 seeking sole custody and care and control of M. The matter was first heard by Richards J on 2 May 2025. His order recorded that the Mother intended to make allegations of

domestic abuse and parental alienation. It also recorded that the parties agreed to instruct an expert psychologist and a social worker to conduct reports on the family. He noted that the Mother was seeking a fact-finding hearing to determine her allegations. He was leaving over to the next hearing in July 2025 whether to hold a fact-finding hearing first or a composite hearing dealing with all issues, although he recorded that his current inclination was for a composite hearing. A further hearing took place before Richards J on 19 June 2025, when he dismissed the Father's application that an expert psychologist and social worker be instructed to prepare a holistic child and parent report forthwith.

8. The matter came before Richards J again on 7 July and 16 and 17 July 2025 when he heard arguments as to the need for a fact-finding hearing. The Mother contended that such a hearing should be conducted prior to any independent reports being prepared by an expert psychologist and by a social worker. The Father resisted the necessity of a fact-finding hearing. Richards J reserved judgment. Whilst judgment was awaited, the Mother's attorneys produced a Scott Schedule of the allegations they intended to invite the Court to make at a fact-finding hearing which they sent to the Father on 9 September 2025. He responded on 14 September indicating which allegations he considered should be tested at the fact-finding hearing and which were better suited to be dealt with at the welfare disposal stage. The Mother's attorneys did not respond, despite being sent reminders.
9. The matter next came before Wheatley AJ on 13 November 2025. She advised the parties that Richards J had informed her that he was ordering a fact-finding hearing and would provide his reasons for doing so in due course. Unfortunately, those reasons remain outstanding. Wheatley AJ gave directions for the filing of further evidence and directed the parties to complete and file a Scott Schedule by 23 January 2026, ahead of the contested fact-finding hearing which was listed to be heard in the week of 26 January 2026.
10. On 23 January 2026, not having had a response from the Mother's attorneys as to whether the original Scott schedule circulated previously was agreed, the Father filed the document as drafted with his comments. I will refer to this as "the original Scott Schedule".
11. Also on 23 January 2026 the Mother's attorneys filed a Notice of Motion seeking to commit the Father to prison for contempt of Court for breaching the reciprocal undertakings given to the Court on 16 July 2025. They invited the court to list it for hearing on the next working day at 9.30. The Father received the Mother's short affidavit in support later the same day.
12. On Monday 26 January 2026, the Court advised the parties that the matter would not be heard until Wednesday 28 January. On Tuesday 27 January the Mother's attorneys filed unilaterally a Scott Schedule ("the Mother's Scott Schedule") which had not been discussed with the Father. It was sent to him in the early afternoon of 27 January. That Scott Schedule did not set out any of his evidence or comments in the column provided for that purpose and only made reference to his evidence where the Mother's attorneys relied upon it for the findings sought. The Father objected to the late filing of an unagreed Scott Schedule and invited the Court not to allow reliance on it. The Mother's attorneys simply said the Schedule was not evidence but "an aid to assist the Court". The judge allowed the Mother's Scott Schedule to be used and appended a fuller version of it

(produced by the Mother's attorneys with their written Closing Submissions) to her eventual judgment.

13. The matter was heard on 28 to 30 January with closing submissions on 2 February 2026. The Father represented himself. Both he and the Mother gave oral evidence and were cross-examined. On the morning of the second day of his cross-examination by Mrs Georgia Marshall on behalf of the Mother, the Father conceded three of the items on the Mother's Scott Schedule. These were:

- (1) "Item 13 – "Team Dad":

Actively creating an impression in M that he and M are a team and that the Mother is not a member of that team and is not a team player. By so doing he has created an "us against her" mentality which has become extremely damaging to the relationship between the Mother and M."

- (2) "Item 16 – "relentless badgering", "unaccompanied minor travel attempt": The Father is relentless in his badgering of both the Mother and M, refusing to accept their view or position and badgering them until they are emotionally exhausted and relent. This has caused M great frustration which she is not equipped to deal with as well as causing both her and the Mother psychological harm. This category also included a concession regarding the behaviour that the Father exhibited when the Mother withheld her consent for M traveling as an unaccompanied minor."

- (3) "Item 17 – "poor me": The Father systematically plays on M's emotions by presenting himself as "poor me" blaming the Mother for causing him unhappiness or harm (including suggesting to M that the Mother wants to "put him in jail"). As a result, causing M to feel she must protect him or bend to his wishes so that he can be happy and she can protect him. This is a huge emotional weight placed on a young child when the Father is saying cause of that unhappiness is the Mother."

14. It is important to note the context in which the Father made these concessions. When Mrs Marshall indicated to the judge (who had asked her just before a morning break on day two of her cross-examination how much longer she would be cross-examining the Father) that she still had to deal with these three topics, then coercive control and recent behaviour, the Father said:

"Your Honour. If I say I will concede whatever they want to say on "Team Dad", relentless badgering, "poor me", can we just focus on the alienating, berating and coercive control? I will concede whatever points you want to submit on everything around "Team Dad", everything around relentless badgering and "poor me.""

15. At the conclusion of the hearing, the judge delivered an ex tempore ruling and made an order dated 2 February 2026. The judge found that she preferred the evidence of the Mother to that of the Father in relation to the matters of fact summarised in the Mother's Scott Schedule. She found that there had been domestic abuse inflicted by the Father, including coercive and controlling behaviour and that there had been parental alienation.

She ordered that M should be placed in the interim sole custody and care and control of the Mother until further order and that M was prohibited from leaving Bermuda with the Father only until further order.

16. The judge also ordered that the Father's access to M should be restricted to supervised access by audio and/or video calls, commencing on 4 February 2026 at 7pm for 20 minutes duration. This access was to be every other day at 7pm. The supervision was to be by a third party agreed between the parties or failing agreement determined by the Court. The judge ordered that the Father should not attempt to contact M directly or indirectly save as provided by the order, including utilising a third party to contact her on his behalf. The matter was to be mentioned on 19 February 2026 when the Court would consider whether physical contact may be permitted, to review the position in relation to letters of instruction to the social worker and psychologist and to consider if a Litigation Guardian should be appointed.
17. In the ex tempore ruling the judge found, in relation to the Notice of Motion for committal of the Father for contempt of Court, that a breach by the Father of the Undertaking to the Court dated 16 July 2025 was considered a breach of a Court order in committal proceedings and that the criminal burden of proof applied. The judge found that it was beyond reasonable doubt that the Father was in contempt of Court based on numerous breaches of the undertaking. The judge passed a suspended sentence of imprisonment on the Father.
18. The Father issued a Notice of Motion seeking leave to appeal to this Court on 16 February 2026, exhibiting a draft Notice of Appeal to the affidavit of his attorney, Mr Adam Richards.
19. The hearing scheduled for 19 February 2026 was adjourned by consent to 12 March 2026. On 11 March 2026 the Father filed two summonses seeking to set aside the 2 February 2026 order, to resume direct access to M and to set aside the judge's finding that he was in contempt of Court. At the hearing on 12 March 2026, both parties were represented by counsel. The judge ordered service of affidavit evidence and that the matter should be listed for a two-day hearing on 16 and 17 April 2026 to determine the Father's applications and the issues which the 2 February order had indicated should be determined at the later hearing (as set out in [16] above).
20. The Father's application to set aside the judge's committal order listed a number of complaints regarding the order amounting to procedural irregularities, the most significant of which for present purposes were the following: that the undertaking did not explain the consequences of breach nor did Richards J when the undertakings were given; the Notice of Motion for committal was deficient in that it did not specify clearly on its face the alleged breaches; the Notice of Motion was served late for tactical reasons; the Father was not afforded the opportunity to prepare or respond nor advised of his right to do so; he was not afforded the opportunity to take legal advice nor advised of his right to do so; he was not advised of the right to remain silent and the privilege against self-incrimination; he was not advised that his concessions during the hearing, clearly made to move matters forward expeditiously, could be relied upon in the context of the committal application; the Court did not conduct separate hearings; and the judgment does not refer to the specific allegations and confirm what was proved to the criminal standard, how it breached the undertaking and on what evidential basis.

21. The judge circulated her draft detailed Reasons for her 2 February 2026 order on 15 April 2026. We were told by Ms Bailey-Munroe for the Father that the further hearing on 16 and 17 April 2026 took place without prejudice to the rights of the parties on this appeal. At that hearing, it was accepted on behalf of the Mother that there were some procedural irregularities in relation to the finding of contempt and related sentencing so that the order finding that the Father was in contempt of Court had to be set aside. On 14 May 2026 the Acting Registrar sent an email to the parties' attorneys passing on a request from the judge to Mr Richards asking him to draw up an order that (1) the application to set aside the order of 2 February 2026 in relation to the fact-finding decision was dismissed; (2) the application to set-aside the order of 2 February 2026 in relation to the finding of contempt and relevant sentencing was allowed based on the Mother's concession (subject to the proviso that the number of alleged procedural irregularities was not accepted in full) and accordingly that order was set aside; (3) counsel would be asked to make submissions on the issue of costs subsequent to the issuing of the Court's Reasons. Unfortunately, no judgment or Reasons for the decision reflected in that email have yet been issued by the judge, nor had the order been drawn up or sealed at the time of the hearing of this appeal.
22. On 20 April 2026, the judge issued the detailed Reasons for the order of 2 February 2026 which had been circulated in draft on 15 April 2026. I will refer to those Reasons and the 2 February order hereafter compendiously as "the judgment", Thereafter the Father served an amended Notice of Appeal dated 12 May 2026 and pursued the present application for leave to appeal.
23. Given the concession at the hearing on 16 and 17 April 2026 that there had been procedural irregularities in relation to the committal application and sentencing so that that aspect of the order of 2 February 2026 was set aside, the committal order was not part of the grounds of appeal before us. However, for reasons set out in the Discussion section of this judgment, I agree with Ms Bailey-Munroe that the judge's decision to allow the committal application to proceed and the procedural irregularities listed in [19] above infected the whole hearing before the judge and rendered it unfair.

The judgment below

24. Having set out the background and procedural history, the judge set out at [14] to [27] of the judgment a Summary of her brief ex tempore reasons and at [28] the terms of the 2 February 2026 Order. She then devoted a Section of the judgment to the law. First, in relation to a fact-finding hearing she cited the decision in *A v B (Fact-Finding Hearing)* [2024] SC (Bda) 66 at [13] and noted that the purpose of such a hearing is to establish what has occurred between the parties, so that the Court can approach future welfare decisions with clarity and insight. The Court applies the civil standard of proof of the balance of probabilities. She then cited the decision of the Court of Appeal of England and Wales in *Re H-N and others (children) (Domestic abuse: fact finding hearings)* [2021] EWCA Civ 448, noting that the Court must have at the forefront of its mind that the child's welfare is the paramount consideration.
25. The judge noted at [33] that Mrs Marshall relied on that case as supporting the notion that in cases involving allegations of domestic abuse, the Court must consider both individual incidents and patterns of behaviour that exert pressure, control or emotional

harm. The judge cites the UK Practice Direction 12J (which does not have an equivalent in Bermuda) referred to in *Re H-N* and its definitions of “domestic abuse”, “coercive behaviour” and “controlling behaviour”. She also noted that *H-N* emphasises the need for the Court to act with diligence where alienation and abuse are established. Mrs Marshall had also relied on what Peter Jackson LJ said in the case of *Re S (Parental Alienation: Cult)* [2020] EWCA Civ 58 at [13]:

“13. In summary, in a situation of parental alienation the obligation on the court is to respond with exceptional diligence and take whatever effective measures are available. The situation calls for judicial resolve because the line of least resistance is likely to be less stressful for the child and for the court in the short term. But it does not represent a solution to a problem. Inaction will probably reinforce the position of the stronger party at the expense of the weaker party and the bar will be raised for the next attempt at intervention. Above all, the obligation of the court is to keep the child’s medium to long term welfare at the forefront of its mind and wherever possible to uphold the child and parent’s right to respect for family life before it is breached. In making its overall welfare decision the court must therefore be alert to early signs of alienation. What will amount to effective action will be a matter of judgment, but it is emphatically not necessary to wait for serious, worse still irreparable, harm to be done before appropriate action is taken, it is easier to conclude that decisive action was needed after it has become too late to take it.” [Emphasis added by the judge]

26. The judge also cited what Sir Andrew McFarlane P said about the court making findings in relation to parental alienation in *Re C (‘Parental Alienation’; Instruction of Expert)* [2023] EWHC 345 (Fam) at [103]:

“103. Before leaving this part of the appeal, one particular paragraph in the [Association of Child Psychotherapists] skeleton argument deserves to be widely understood and, I would strongly urge, accepted:

‘Much like an allegation of domestic abuse; the decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist. For these purposes, the ACP-UK wishes to emphasise that “parental alienation” is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetuated by one parent against the other through, what are termed as, “alienating behaviours”. It is fundamentally a question of fact.’

It is not the purpose of the judgment to go further into the topic of alienation. Most Family judges have, for some time, regarded the label of ‘parental alienation’, and the suggestion that there may be a diagnosable syndrome of that name, as being unhelpful. What is important, as with domestic abuse, is the particular behaviour that is found to have taken place within the individual family before the court, and the impact that that behaviour may have had on the relationship of a child with either or both of his/her parents. In this regard, the identification of ‘alienating behaviour’ should be the court’s focus, rather than any quest to determine whether the label ‘parental alienation’ can be applied.” [Emphasis added by the judge]

27. At [37] the judge noted that the Father relied on the UK Family Justice Council (“FJC”) Guidance which defines “*alienating behaviours*” as those “*which have resulted in the child’s reluctance, resistance or refusal to spend time with the other parent*” and sets out three elements which have to be established for a court to make a finding of parental alienation:
- “1) the child is reluctant, resisting or refusing to engage in, a relationship with a parent or carer; and
 - 2) the reluctance, resistance or refusal is not consequent on the actions of that parent towards the child or the other parent, which may therefore be an appropriate justified rejection by the child (AJR – see Glossary above), or is not caused by any other factor such as the child’s alignment, affinity or attachment (AAA – see Glossary above); and
 - 3) the other parent has engaged in behaviours that have directly or indirectly impacted on the child, leading to the child’s reluctance, resistance or refusal to engage in a relationship with that parent.”
28. The judge also cited page 21 of that Guidance which provides suggestions as to how a Court can apply the UK Welfare Checklist in cases where parental alienation has been found.
29. In the next Section of the judgment headed “The Parties’ Positions” the judge noted that it would be disproportionate to address every allegation in granular detail. Instead, she had relied on the Mother’s Scott Schedule (which she refers to as “the Final Scott Schedule”) as the principal analytical framework. She exhibited that document at Appendix II and the three conceded allegations at Appendix I.
30. At [44] the judge set out the Mother’s position:
- “She says that the cumulative effect of the Father’s conduct amounts to domestic abuse, including coercive and controlling behaviour and has resulted in parental alienation. Mrs Marshall submitted that these findings necessitate immediate protective measures. In particular, the Mother seeks that the child be placed in her sole custody and care on an interim basis, with the Father’s contact being restricted and supervised. She contends that such measures are necessary to prevent further harm and to allow for the restoration of a healthy relationship between the Mother and M.”
31. The judge then referred to the Consent Order of 31 May 2024. She noted that prior to its filing, the Father had informed the Mother that his financial advisor had advised him that he could not afford to continue living in Bermuda and that he intended to return to the United States. The Mother’s evidence was that, in negotiations for the Consent Order, she was prepared to compromise her position in relation to finances but that where M lived was not negotiable. She had undertaken payment of the rent on the FMH and the nesting arrangement was agreed.
32. The judge noted at [49] that the Mother stated that her concern regarding the Father’s

involvement of M in adult matters first arose at the time of their separation in 2024. This had informed her attorneys' insistence upon the inclusion of explicit protections in the negotiation of subsequent agreements. During the roundtable meeting in February 2025, the Father expressed an intention to alter M's ordinary place of residence to the United States. It was apparent that he had already begun discussing relocation and related adult issues, placing M in an inappropriate decision-making role.

33. The roundtable meeting resulted in the memorandum of agreement. The judge quoted [2] which I have set out at [6] above. The judge recorded that the Mother's evidence was that, in reliance on those provisions, she consented to M's travel to the United States with the Father between 8 and 15 February 2025. Central to the Mother's case was the allegation that he continued to involve M in discussions concerning possible relocation and related matters. She relied on the correspondence including emails from her attorneys and texts between the parties between 19 December 2024 and 20 January 2025 which demonstrated the Father's conduct pre-dating the memorandum of agreement and reflected a pattern of behaviour rather than isolated lapses. This was conduct which was persistent, repetitive and cumulative, intended to exert influence over the Mother's decision making.
34. The Mother alleged that the Father engaged in relentless badgering, attempts to revisit settled issues until she relented, which was emotionally exhausting. She asserted that the behaviour extended to M, exposing her to repeated questioning and persuasion, causing frustration and emotional distress. M lacked the emotional capacity to endure this which was harmful to her wellbeing.
35. At [57] the judge referred to the Mother's allegation that the Father breached [2] of the memorandum of agreement by discussing relocation and litigation with M, placing her in a position where she felt required to engage with those issues. The judge noted his evidence that he was not "*involving in adult issues*" when she was conducting online searches with him for houses and dogs. He was simply "*following her curiosity*".
36. The judge recorded at [59]:

"It is further contended by the Mother that the Father has engaged in conduct designed to manipulate situations so as to portray her negatively to M. She provides examples in which the Father is said to have created circumstances that would lead M to believe that the Mother was responsible for denying her opportunities or experiences."
37. She noted that in addition to the references in the Mother's Scott Schedule, the Mother said it was clear that he had shared with M more than just the letter from MDM of 19 December 2024 including a paragraph in her first affidavit which he had put to her in cross-examination caused M's opposition to her which Mrs Marshall had submitted meant the Father had shown or read it to M. The judge also referred to the Mother's allegation that the Father created a dynamic where he and the child were aligned against her, the "Team Dad" allegation. This was actively fostered by him and had a corrosive effect on her relationship with M.
38. At [63] the judge also referred to the Mother's evidence that he engaged in emotional manipulation of M, presenting himself as the victim and attributing his unhappiness and

distress to the Mother, the “poor me” allegation. This placed an emotional burden on M and encouraged her to adopt a protective stance towards him, putting the child in a position of emotional conflict, feeling that she must choose between her parents. The judge referred at [64] to the changes in M’s behaviour, more oppositional, resistant and at times hostile towards the Mother, a marked change from their previously warm and loving relationship. Mrs Marshall submitted that these changes were the direct result of the Father’s sustained campaign of influence and manipulation, including acts of parental alienation of the Mother.

39. At [65] the judge referred to the Mother’s concerns that the Father had deliberately breached the Undertaking to the Court by continuing to involve M in prohibited discussions. Mrs Marshall submitted that the committal motion was founded on these breaches and that his conduct demonstrated a disregard for the authority of the Court, warranting a finding of contempt. She reiterated that portions of his own affidavit and oral evidence admit several breaches.
40. Mrs Marshall submitted that he had denied matters he later accepted in cross-examination and sought to present a narrative which is inconsistent with the evidence. The Mother’s evidence was to be preferred to that of the Father.
41. At [68] the judge turned to his case that the Mother’s sole care application was not genuinely concerned with the welfare of M but part of a broader strategy to prevent the Court from determining his application for leave to remove M from Bermuda. He submitted that the primary issue for the Court should be M’s relocation to the United States which he describes as her home, contending that M has expressed the desire to return there for many years since she was 6 years old. He submitted that the Mother’s approach had resulted in unnecessary litigation and misuse of Court resources. He said that he is a committed and loving parent and that there is no basis for restricting his relationship with M which would be harmful to her.
42. The judge noted that, throughout his affidavit evidence, he denied the allegations of domestic abuse, coercive and controlling behaviour and parental alienation, which he said were exaggerated, unfounded or strategically advanced, albeit he made concessions in cross-examination. He said that the Mother had initially relied upon allegations of abuse and neglect which were not substantiated, but subsequently shifted her case to one of parental alienation only after he provided the FJC Guidance. He contended that the necessary elements were not present for the Court to make a finding of parental alienation. There was no objective evidence that M has developed reluctance, resistance or refusal to spend time with her Mother. He contends that M maintains a loving relationship with both parents.
43. The Father submitted that the Mother had advanced a case designed to prevent independent scrutiny of her allegations and exclude professional assessment by a psychologist and/or social worker of M’s wishes and feelings. He asserted that this created an irreconcilable dilemma for the Court. On his case the Mother alleges alienation without objective evidence and then relies on that allegation to argue that the child’s voice is unreliable and should not be heard. This undermines the Court’s ability to test the allegations which circumvents the statutory framework and is inconsistent with the welfare principle. He also says that, having achieved significant postponement of assessment, the Mother relied upon the passage of time to argue that the child’s views

were no longer reliable. He submitted that this was designed to prevent independent evaluation.

44. He stated that he was unable to give direct evidence regarding the dynamics of the Mother's household when M was in her care, but relied upon the evidence in the Mother's first affidavit of a warm and loving relationship between her and M. That evidence made no mention of reluctance, resistance or refusal of the child to spend time together ("RRR"). He contended that these allegations of alienation only emerged after he identified the constituent elements of such claims.
45. At [79] the judge noted that the Father did not dispute that, at times M expressed anger and frustration towards the Mother, but contended such behaviour was developmentally normal and reflective of the complexity of parent child relationships. To the extent that tensions had been directed towards the Mother, he attributed this to what M perceived as inconsistencies rather than influence by him.
46. At [84] the judge noted that in relation to the Undertaking to the Court, the Father disputed that any breaches warranted a finding of contempt. He characterised the Mother's application as an attempt to project her own conduct onto him and to seek punitive measures that were not justified.
47. He submitted that her assertion that he posed a risk to M was undermined by her own actions. He relied on the Consent Order of 31 May 2024 which provided for joint custody and equal care and control. This agreement was reached after the period of alleged abusive behaviour now relied upon and the Mother would not have consented to that agreement if he had posed a danger to the child. The judge noted at [86] that the Father asserted that claims that he was absent or neglectful are inconsistent with contemporaneous evidence. Prior to his return to the United States, he was the primary caregiver for the majority of the time.
48. The judge noted at [89] the Father's submission that the Court could not safely assess M's welfare where, he alleged, the Mother has given false or misleading evidence to gain a tactical advantage. He gave some examples of misrepresentation by the Mother of her professional status, her responsibility for M's education and for nannies. He submitted that if the Court was satisfied that the Mother was willing to mislead the Court on such matters, her uncorroborated allegations of abuse must be approached with caution.
49. At [96] the judge noted the Father's assertion that the Mother was the initial source of the child's distress about relocation. She had allegedly made statements to M in December 2024 describing extreme consequences if the child moved to the United States. It was M's reaction to those statements which prompted him to write to the Mother and request such language not be used. He submitted that this correspondence marked the beginning of the subsequent disputes.
50. The judge set out her Findings and Analysis in the next section of the judgment. She began by praising the Mother's affidavit as a comprehensive and detailed document which provided an important evidential foundation for the Court's analysis. She noted at [100] that the purpose of the fact-finding exercise was to determine, on the balance of probabilities, what has happened between the parties so any subsequent welfare determination could be made with clarity and with the Court's eyes open to the realities

of M's lived experience.

51. In relation to the evaluation of the totality of the evidence, the judge preferred the Mother's evidence where there was conflict. This conclusion was the cumulative effect of several considerations. First her evidence was detailed, structured and internally consistent, supported by documentary material and evidence of third parties. The specificity of her account lent it significant weight.
52. Secondly and of considerable significance, aspects of her evidence were confirmed by the Father. Matters previously denied in affidavit were subsequently accepted. These concessions were not peripheral or minor, but related directly to the core allegations advanced by the Mother of coercive and controlling behaviour and parental alienation. They materially reinforced the Mother's case.
53. Thirdly, the Court found aspects of the Father's evidence inconsistent and at times evasive. Answers shifted in response to challenge and explanations appeared to be constructed to address the immediate difficulty rather than reflecting a consistent and reliable recollection of events.
54. At [108] the judge made a series of eighteen findings which effectively tracked the Items in the Mother's Scott Schedule.
55. In relation to the three Items which were conceded by the Father in cross-examination, the judge said at [109]:

“In relation to the Conceded Allegations, the Court has taken into account not only the substance of those concessions but also the manner in which they arose and were previously categorized by the Father. It is of note that those items in the Father's Scott Schedule which overlapped with the Mother's allegations were, in large part, categorized by him as “not material” to the determination of sole custody, care and control, or the relocation application, and were instead said to be matters for consideration at a later welfare stage if required. In those circumstances, it is neither surprising nor persuasive that the Father ultimately conceded those same allegations when confronted with them in the Mother's Scott Schedule. The Court considers that this prior categorization undermines any suggestion that the concessions were made inadvertently or without understanding. Rather, it supports the conclusion that the Father appreciated the nature of the allegations but sought to minimize their significance, a position which he was unable to maintain under cross-examination.”

56. The judge noted that the only matters identified by the Father in his response in the original Scott Schedule as requiring determination at the fact-finding stage were limited in scope and did not engage with the broader pattern of conduct alleged by the Mother. Those issues, whilst not irrelevant, did not address the central themes of coercive and controlling behaviour and alienating conduct. The judge considered that his approach to the original Scott Schedule was selective and at times strategically framed in a manner which did not fully reflect the substance of the issues requiring determination.
57. At [111] the judge said she had considered in some detail the Father's interpretation of the Consent Order and his interpretation that on the expiry of the Digital Nomad Permit,

he was effectively present in Bermuda “illegally” which had implications for his ability to remain on the island and maintain contact with M. The Court found this interpretation unreasonable and unsupported by the evidence. It demonstrated a willingness to rely upon an interpretation which advanced his position without proper regard to its accuracy or consequences. Of particular concern was the fact that he communicated this interpretation to M, introducing into her understanding a narrative that, if she remained in Bermuda, she might no longer be able to see her Father. This was inaccurate and also likely to cause her significant emotional distress. Whilst this might not fall squarely within the strict definition of parental alienation, it constituted a form of emotional manipulation, encouraging M to favour relocation.

58. At [113] the judge said that the Father created and reinforced an expectation in M that the outcome of the proceedings would be determined by her expressed wishes. By engaging her in discussions about where she wanted to live, he placed her in an inappropriate and emotionally burdensome position, creating a risk that she might feel either responsible for the outcome or conflicted in her loyalties, both of which are detrimental to her emotional wellbeing.
59. At [115] the judge placed significant weight on the Mother’s timeline which demonstrated that concerns regarding the Father’s conduct arose well before the execution of the memorandum of agreement and the giving of the Undertaking to the Court, as early as December 2024, continuing through January 2025 and ultimately resulting in the memorandum of agreement and thereafter the Undertaking. Despite these formal agreements, his behaviour did not materially change but demonstrated a continued pattern of behaviour which disregarded agreed boundaries and failed to respect the purpose of those arrangements.
60. The judge said at [116] that his lack of insight was illustrated by the Father’s email of 7 December 2024 advocating that M have a “seat at the table” in decisions concerning her living arrangements. While it was appropriate to consider a child’s wishes and feelings in an age-appropriate manner, his position reflected a fundamental misunderstanding of the appropriate role of a child in such decision-making processes. The judge said the Father’s evidence that M has, from a young age, expressed a desire to return to the United States must be considered in this broader context. When the child was exposed to discussions, suggestions and expectations of this nature, it was difficult to disentangle genuine preference from influenced views.
61. The judge considered that his response when reminded of the obligation not to discuss the proceedings in M’s presence, that it would result in his “isolation” was revealing. It demonstrated a focus on his own circumstances rather than the purpose of the restriction, which is to shield M from exposure to adult conflict.
62. The Father’s conduct in unilaterally raising issues such as travel arrangements with M, particularly when she was in the Mother’s care, was illustrative of a broader pattern of behaviour, creating situations where she would perceive that opportunities were being offered by the Father but denied by the Mother, fostering resentment and conflict. The judge was satisfied that this was part of a pattern in which circumstances were created or manipulated in a manner to cast the Mother in a negative light.
63. The judge said at [119] that, having regard to the totality of the evidence, she was satisfied

that the cumulative effect of the Father's conduct was properly characterised as parental alienation. The judge accepted the Mother's evidence that there has been a noticeable and significant change in M's behaviour towards her, including increased resistance, oppositional conduct and at times hostility, a departure from the previous warm and positive relationship. The judge accepted that children of M's age may exhibit a range of behaviours associated with developmental changes, she did not accept the Father's submission that such factors alone account for the change in behaviour. The evidence demonstrated a clear and compelling link between his conduct and the behavioural changes in M. The judge noted that his own affidavit evidence contained admissions that he had discussed the potential move to the United States with M, admissions which were inconsistent with his broader position and further support the findings by the Court about his involvement of M in adult matters.

64. At [123] the judge found, in relation to the committal motion, that the Father had breached the Undertaking, the terms of which were clear and unambiguous. The Father was fully aware of his obligations. The judge said:

“The evidence establishes that he continued to involve M in adult matters and failed to adhere to agreed communication boundaries. These breaches cannot be characterised as inadvertent or trivial; rather, they were deliberate and formed part of an ongoing pattern of conduct.”

65. She was satisfied to the requisite criminal standard that the Father was in contempt of Court. She had considered carefully whether she could have confidence in his ability to comply with future orders, particularly those relating to restrictions on discussions with M. Having regard to his conduct throughout the proceedings, she had no such confidence. In the light of her findings, she considered that the restriction of his contact with M to supervised audio-visual communication was both necessary and proportionate. It was not punitive but designed to protect M from further exposure to inappropriate discussions and behaviours. It sought to preserve the relationship between the Father and the child while ensuring such contact took place within a controlled and safe environment.
66. Strict compliance with these orders was essential, not just as a matter of legal obligation but as fundamental to safeguarding M's welfare. The judge underscored the importance of therapeutic support as M had been exposed to relational dynamics which required careful and professional intervention in order to mitigate their impact and support her emotional development.
67. Finally in relation to costs at [127] the Court had awarded the Mother the costs both of the fact-finding hearing and the committal motion based on the Father's litigation conduct, in particular the concessions he made to a significant portion of the allegations he had denied in his affidavit evidence. In relation to the committal motion the judge was clear that the Father did not deny the breaches but attempted to justify them in various ways.
68. In her Concluding Remarks at [129] to [133] the judge said:

129. It is not in dispute that both parents love M and wish to play a meaningful role in her life. However, the Court is required to look beyond expressions of

intent and to examine the manner in which parental behaviour is experienced by the child and the effect it has on her emotional wellbeing and developmental stability.

130. Having assessed the totality of the evidence, the Court is satisfied that the Father's conduct has had a harmful impact upon M. That conduct includes patterns of coercive and controlling behaviour and the fostering of relational dynamics that have undermined and destabilized M's relationship with the Mother. These behaviours have placed M in an inappropriate position and have exposed her to emotional pressures that she is not equipped to manage.

131. In light of those findings, the Court has taken protective steps to safeguard M and to stabilize her circumstances. The orders made are interim in nature and are carefully calibrated to address immediate risks while preserving the opportunity for therapeutic intervention, professional assessment, and further evaluation of longer-term arrangements.

132. The Court emphasizes that these measures are protective, not punitive. They are directed solely to promoting M's welfare and to creating a framework in which her relationships may be supported and, where possible, repaired. The Court expects that all future conduct by the parties will be guided by insight into the impact of their actions on M and by a commitment to acting in her best interests.

133. The matter will return for further review, at which stage the Court will consider progress made, compliance with the existing orders, and whether additional steps are required. In the interim, the paramount consideration remains M's welfare, which must prevail over all other interests.

The grounds of appeal

69. The grounds of appeal pursued by the Father are as follows:

- (1) The judge applied the law on parental alienation incorrectly by failing to consider the three-stage test set out in *Re Y* [2026] EWFC 38 in a sequential and linear fashion.
- (2) Further or alternatively, she erred in making a finding of parental alienation in circumstances where (a) there was insufficient independent evidence to support a finding of RRR necessary to establish stage one of the test; and/or (b) insufficient weight was given to the evidence available at stages two and three of the test, in particular the judge failed properly to assess the Father's evidence of historical difficulties in the Mother's relationship with the child and the child's long-standing affinity for him and desire to move to Atlanta.
- (3) The judge erred in permitting the committal application to proceed as a consolidated hearing together with the fact-finding, thereby infringing the Father's right to a fair trial. In particular the Court erred by relying on his answers to the alleged breaches of the Undertakings in respect of the

committal to make a finding about his credibility in relation to the fact-finding, in circumstances where the Court had denied him his fundamental right to silence in the face of those allegations and where the Mother was required to prove both the meaning of the Undertakings and that his conduct amounted to a breach to the criminal standard of proof.

- (4) The judge erred by treating the Father's concessions to the cross-examination themes identified orally by Mrs Marshall as an admission of all the factual allegations set out at Items 13, 16 and 17 of the Mother's Scott Schedule in their totality and further erred in treating the concessions as an admission that the allegations amounted to domestic abuse, coercive control and/or parental alienation. The grounds then identify various problems with the concessions and the Mother's Scott Schedule.
- (5) The judge failed properly to analyse the evidence and make key findings about the events in dispute, placing improper and undue weight on the parties' credibility and the Father's voluntary concessions alone. Examples are given in the grounds of various failings in the judge's assessment of the evidence.
- (6) The judge failed to conduct any or any sufficient welfare assessment which rendered the decision to suspend immediately all direct contact and to transfer care to the Mother fundamentally flawed and disproportionate.
- (7) The judge's ruling is fundamentally flawed as a result of several procedural irregularities which denied the Father's right to a fair trial and failed to ensure fairness between the parties given that he was a litigant in person. Grounds (4) and (5) were repeated and a number of other matters were relied upon: The Mother's Scott Schedule as relied upon was only provided to him at 1.57pm the day before the hearing commenced and was materially different from the previous Scott Schedule served on him four months earlier and which he had filed with the Court; the Mother's Scott Schedule reorganized the allegations into groups not matching those in the previous Scott Schedule and failed to identify which groups of allegations were relied upon in support of the three over-arching findings being sought, domestic abuse, coercive control and/or parental alienation; the judge permitted the Mother to proceed simultaneously with a committal application served just three working days before the hearing, without allowing the Father time to obtain legal counsel, affording him a right of reply or explaining his right to silence; the Father was denied the opportunity to present evidence in chief despite expressing a wish to do so, as a result of intervention by the Mother's counsel; the judge failed to ensure the Father was permitted a proper opportunity to present his evidence, free of unnecessary intervention by the Mother's counsel; the judge failed to ensure that the Father was permitted a proper opportunity to put his case to the Mother robustly and free from interference by the Mother's counsel, the judge erred in sentencing the Father to a suspended term of imprisonment on the committal application in circumstances where he was not permitted the opportunity to obtain legal advice as to sentencing and was not invited to make submissions as to mitigation and

where the Court did not consider relevant sentencing authorities.

- (8) The judge erred in making an order for costs in circumstances where the parties were not afforded the opportunity to make submissions on the issue of costs, the judge relied on the Father's concessions when they were given voluntarily and were treated improperly for the reasons given in the Grounds and the judge failed to have regard to the relevant test, namely the need for some exceptionality and unreasonable or reprehensible litigation conduct to justify an adverse costs order.

The parties' submissions

70. On behalf of the Father Ms Bailey-Munroe submitted that the 2 February 2026 order was extraordinary and exceptional. It was at the outer limits, particularly on an interim basis, to suspend contact between the Father and the child other than twenty minutes supervised audio-visual contact every other day. The harm the child may be suffering had to be balanced with what the judge was proposing to do. The order had been made without any independent examination of the child by a psychologist or a social worker. She submitted that there was very little evidence to support a finding of parental alienation. There was no independent expert evidence and the finding was almost entirely dependent on the Mother's evidence. She submitted that the judge should not have found parental alienation and that, even if the judge was justified in doing so, the order she made was disproportionate.
71. Ms Bailey-Munroe submitted in relation to the procedural irregularities identified in ground (7) that allowing the simultaneous pursuit of the committal application with the fact-finding exercise had tainted the Father's evidence and the judge's view of it. The judge had not considered the inequality of arms this entailed given that he was a litigant in person, even though he had law degrees. Since the committal application was made on short notice, he had no opportunity to seek legal advice. The judge failed to appreciate the significance of the lateness of the committal application and failed to advise him of the right to seek legal advice.
72. Ms Bailey-Munroe submitted that he was given no opportunity to file written evidence in response to the committal application and the judge did not advise him of his right to do so or advise him of the right to remain silent, of the privilege against self-incrimination or of the consequences of breach of the Undertaking. The hearing simply went straight into his cross-examination. Early in the cross-examination, the judge asked him whether he had been provided with the committal application the previous Friday 23 January, but the judge did not refer to it further or give him any advice about it. Ms. Bailey-Munroe referred to Order 52 rule 6(4) of the Rules of the Supreme Court 1985 which provides:

“(4) If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so.”

This is obviously a reference to giving evidence on a contempt application as opposed to finding himself held in contempt for evidence he was giving in a fact-finding hearing.

73. Ms Bailey-Munroe submitted that the Rules do require the breaches of the Court order (or in this case Undertaking) to be set out within the four corners of the affidavit in support of the committal application. The Mother's fifth affidavit dated 23 January 2026 in support of the committal application gave as an example of the Father's admission that he had breached the Undertaking [158] of his third affidavit. That affidavit was in fact dated 4 July 2025, before the Undertaking was given on 16 July 2025 so it cannot have contained admissions of breaches of the Undertaking. In any event, what was being referred to was his response in that affidavit to what the Mother had said in [158] of her first affidavit of 9 June 2025 about searches on M's i-pad for houses and dogs in Atlanta made in May 2025, before the Undertaking was given.
74. The other example given in the Mother's fifth affidavit of admission of breach of the Undertaking was of [7] of the Father's affidavit of 24 December 2025. This related to the dispute about M travelling as an unaccompanied minor. Ms Bailey-Munroe submitted that this was not prohibited by the Undertaking. She submitted that in making the finding of contempt the judge had not engaged with any specific breaches of the Undertaking. This was relevant to how culpable the Father was for the purposes of sentencing. His case was that all the searches complained of were all before the Undertaking was given and so could not be a breach of it.
75. Ms. Bailey-Munroe submitted that the judge's general approach to the committal application was of general concern. The judge had a positive duty to ensure that justice was taking place, which she had failed to comply with. The unfairness which had resulted bled into the judge's approach to the Father's evidence generally, including her use of the Mother's Scott Schedule which the Father had no realistic opportunity to challenge. Contrary to what the judge said, this document did not simply amount to a rearrangement of the allegations in the original Scott Schedule, but included new allegations and bundle references. There was no time allowed for the Father to respond to the Mother's Scott Schedule and he was not invited by the judge to do so. As a consequence, as Gloster JA pointed out in argument, the judge did not have the benefit of the Father's responses to the Mother's Scott Schedule.
76. Ms. Bailey-Munroe pointed out that the final version of the Mother's Scott Schedule was produced by Mrs Marshall in her closing submissions. She had said that six new allegations were essentially the same as three allegations in the Father's Scott Schedule but the matters relied on in the case of every single one of the six were not referred to in the original Scott Schedule. Ms Bailey-Munroe gave the example of Item 11 in the Mother's Scott Schedule: "[The Father] becomes physically menacing and intimidating when [the Mother] or [M] do not agree to his demands including yelling at them and threatening to 'destroy' [the Mother]". In the original Scott Schedule, the comparable allegations were at Items 10 and 14:

"Item 10: [The Father] would berate and verbally abuse [the Mother] throughout the marriage and subsequently" and
 Item 14: [The Father] told [the Mother] that he would "destroy" her"

Ms Bailey-Munroe submitted that the allegations in the Mother's Scott Schedule about him being "physically menacing and intimidating" were completely different allegations from those in the original Scott Schedule.

77. She submitted that the version of the Mother's Scott Schedule which Mrs Marshall handed in on day one of the hearing (the version sent to the Father the previous day) just had page numbers referring to the hearing bundles. The version the judge used and appended at Appendix II to her judgment was handed in by Mrs Marshall on the last day of the hearing with her written Closing Submissions. It contained far more detail and the Father had no opportunity to respond to it or to seek legal advice on its contents. As Ms Bailey-Munroe pointed out by reference to his evidence at the outset of his cross-examination, he assumed that the original Scott Schedule had been agreed.
78. In relation to the judge's decision to allow the committal application to proceed at the same time as the fact-finding hearing, Ms Bailey-Munroe relied upon the decision of the Court of Appeal of England and Wales in *Hammerton v Hammerton* [2007] 2 FLR 1133 where, in similar circumstances, Moses LJ said at [16]:

“Thus, the decision of the judge to hear both applications at the same time placed Mr Hammerton in an impossible position. There was no means of reconciling the need for him to establish his case for contact, in the course of which he would have to deal with the alleged breaches of undertakings and of the order, and defending himself, at the same time, in the committal proceedings. There is no hint at any stage of the transcript of anyone advising Mr Hammerton of his rights in respect of the committal proceedings, nor of the judge reminding himself of the different burden and standard of proof in the two applications.”

Ms Bailey-Munroe submitted that the Father could not answer both applications fairly at the same time.

79. Ms Bailey-Munroe said, in answer to a question from the President as to whether the concessions made by the Father were free and fair or made with one eye to being locked up for contempt, that they were not free and fair concessions and this infected the judge's whole assessment of his credibility.
80. She pointed out that the Undertaking was: “not to discuss with [M] the ongoing dispute including but not limited to... (ii) where [M] shall live, including any move to Atlanta”. The most recent complaint by the Mother was about discussion of a sushi restaurant in Atlanta. She submitted that it could not be intended that there should be no discussion of Atlanta at all, since M visited her Father in Atlanta.
81. In relation to the other aspects of ground (7) there was a general fairness point. The way in which the Father was able to put his case in cross-examination was hampered by the way in which questions were put to him. There was a great deal of interruption to which he was subjected during both his own cross-examination and his cross-examination of the Mother. He was a litigant in person. Ms Bailey-Munroe referred to what was said by Lord Wilson JSC about judges ensuring litigants in person had a fair trial in *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 WLR 2455 at [46]:

“No authority has been cited to us in which the conduct of the trial was alleged to have been unfair towards a litigant in person. The appearance of a litigant in person presents the court with well-known challenges. When, at an early stage of his judgment, the judge said that, for a number of reasons, conduct of the trial

had been difficult, his first reason was that the claimant had appeared in person. The appearance of the defendants by leading counsel will no doubt in one sense have assisted the judge but in another sense will have made his task even more difficult. For Mr Metzger's appearance made the imbalance of forensic resources all the more stark. Every judge will have experienced difficulty at trial in divining the line between helping the litigant in person to the extent necessary for the adequate articulation of his case, on the one hand, and becoming his advocate, on the other. The Judicial College, charged with providing training for the judges of England and Wales, has issued an Equal Treatment Bench Book. In chapter one of the edition issued in February 2018 and revised in March 2020, the college advises the judges as follows:

“8. Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.

...

59. The judge is a facilitator of justice and may need to assist the litigant in person in ways that would not be appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:

...

Not interrupting, engaging in dialogue, indicating a preliminary view or cutting short an argument in the same way that might be done with a qualified lawyer.”

Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly.”

82. Ms Bailey-Munroe submitted that improper pressure had been put on the Father. Mrs Marshall had on a number of occasions shushed him which was not appropriate. An example given was when in the second day of being cross-examined, he sought to refer to text messages between himself and the Mother in December 2024 and January 2025, copies of which he had produced overnight. He had been interrupted repeatedly and the judge had failed to stop it.
83. In relation to the law on parental alienation, Ms Bailey-Munroe submitted that the decision of Sir Andrew McFarlane P in *Re Y (Experts and Alienating Behaviour: The Modern Approach)* [2026] EWFC 38, although not published until slightly after the fact-finding hearing in the present case, was simply summarising the existing law, not making new law. She relied on the decision of Poole J in *A Mother v A Father and another* [2026] EWHC 783 (Fam) at [39] where the judge said *Re Y* was simply applying the FJC Guidance. At [41] of *Re Y* Sir Andrew McFarlane P cited [10] of that Guidance and the three elements which have to be established before there can be a finding of parental

alienation. The judge had referred to these in the present case, as quoted at [27] above. Sir Andrew McFarlane P then summarised the modern approach to parental alienation at [75]. For present purposes, it is only necessary to cite the first four points:

“Turning to alienating behaviour, having set out the ground in the early parts of this judgment, it is possible to summarise the modern approach in short terms:

i) As the full title to the FJC guidance makes plain, the reason for the court's investigation should be 'a child's unexplained reluctance, resistance or refusal to spend time with a parent', rather than the allegations that one or other parent may be making against the other;

ii) Where a child is reluctant, resisting or refusing to engage in a relationship with a parent or carer (element (i) of the three elements in paragraph 10 of the guidance), then the court's focus will move to element (ii) to consider whether that reluctance, resistance or refusal is a consequence of the action of the estranged parent, where it is alleged that that parent has been abusive to the child and/or caring parent;

iii) If it is found that the estranged parent has not behaved in a way in which the child's reaction can be seen as an 'appropriate justified reaction' [AJR] to such behaviour, or, for other reasons, it is found that the child's reaction is not caused by any factor such as a child's ordinary alignment, affinity or attachment [AAA] to the parent with care, then the court will move on to element (iii);

iv) It is only at the stage of element (iii) that the court will focus on whether the caring parent has engaged in alienating behaviours that have directly or indirectly impacted on the child, leading to the child's reluctance, resistance or refusal to engage with the estranged parent.”

84. Ms Bailey-Munroe submitted that this demonstrated that a sequential approach was required in relation to the three elements. If element (i): “a child's unexplained reluctance, resistance or refusal to spend time with a parent” (“RRR”) is not shown, then the Court does not move on to elements (ii) or (iii). There is simply not parental alienation without RRR, otherwise every case could be one of alienating behaviour. In the present case the evidence simply did not establish RRR, so this was not a case of alienation. Accordingly, there was no justification for the order the judge made.
85. In answer to a question from Gloster JA as to what order she was inviting the Court of Appeal to make, Ms Bailey-Munroe said she was asking for restoration of the previous joint care arrangements, including waiver of the restriction on travel. In the alternative there should be a hearing at which the expert psychologist, social worker and Litigation Guardian give evidence as to what was best in the child’s interest. The Father certainly agreed that there should not be another full fact-finding hearing. The question whether any further fact-finding was needed should be looked at afresh. She cited *H-N* as an example where the Court of Appeal of England and Wales set aside the findings made by the judge at a fact-finding hearing and remitted the case to the Designated Family Judge at the Central Family Court to determine whether there should be a further fact-finding hearing and, if so, its scope.
86. In relation to the judge’s reliance on the Father’s three concessions, Ms Bailey-Munroe agreed that, as the President put to her in argument, the Father had accepted these three

points but he had done so in unfair circumstances. Her real point was that the scope of the concessions could not be fairly evaluated. It was clear from what the Father had said when making the concessions, quoted at [14] above, that he was not conceding coercive control. Also, the Father had not understood that, in making the concessions, he was conceding everything in relation to those three Items on the Scott Schedule.

87. Ms Bailey-Munroe submitted that parental alienation was first pleaded by the Mother at the time of the hearing before Richards J on 2 May 2025, after the Father's application dated 29 April 2025 to remove M to the United States and then elaborated on in the Mother's affidavit dated 9 June 2025. She submitted that the allegations of parental alienation were essentially retaliatory to the Father's application.
88. Ms Bailey-Munroe submitted that it was well-established that where the Court is concerned with the welfare of a child, costs will only be ordered in exceptional cases where there is evidence of reprehensible and unreasonable litigation conduct. She relied on a number of English authorities to that effect.
89. On behalf of the Mother Mrs Marshall began her oral submissions by referring to the decision of Hayden J in *F v M* [2021] EWFC 4 (Fam) at [108]-[109] in relation to coercive behaviour:

"108...Whenever Judges are called upon to resolve issues of fact, we do so by evaluating separate strands of evidence and then considering them in the context of the whole. Some features of the evidence will weigh more heavily than others and evidence which may not be significant, in isolation, may gain greater relevance when placed in the context of the wider evidential canvas. It seems to me that the definition in the FPR (see para 101 above) provides some useful guidance, when it is broken down:

Coercive Behaviour:

- i. a pattern of acts;
- ii. such acts will be characterised by assault, threats, humiliation and intimidation but are not confined to this and may appear in other guises;
- iii. the objective of these acts is to harm, punish or frighten the victim.

109. The overall approach to the assessment of evidence here is the same as in any other case. What requires to be factored into the process is the recognition of the insidious scope and manner of this particular type of domestic abuse. The emphasis in Section 76 of the Serious Crime Act 2015, is on "repetition" and "continuous engagement" in patterns of behaviour which are controlling and coercive. Behaviour, it seems to me, requires, logically and by definition, more than a single act. The wording of FPD 2010 12J is therefore potentially misleading in so far as it appears to contemplate establishing behaviour by reference to "an act or a pattern of acts". Key to assessing abuse in the context of coercive control is recognising that the significance of individual acts may only be understood properly within the context of wider behaviour. I emphasise it is the behaviour and not simply the repetition of individual acts which reveals the real objectives of the perpetrator and thus the true nature of the abuse."

90. Mrs Marshall submitted that there was coercive behaviour here. At the time of the Consent Order in May 2024, the Mother had made clear that she would never concede

that the child should live elsewhere than Bermuda. The Father had then obtained financial advice that he could not afford to live in Bermuda. From then on, he had engaged in a systematic course of conduct to mould M's views. He had actively sought to drive a wedge between M and her Mother. Therefore, when he applied to remove M from the jurisdiction, he pitched it that the only place where they could all live together was Atlanta. Saying "I won't come to Bermuda" created the impression in the child's mind that it is the Mother's fault. He said the child is trapped in Bermuda. Mrs Marshall referred to the incident at Bermuda immigration where in front of the child he said he was at risk of being denied entry. The reality was that he can come in for periods of time to see the child.

91. She submitted that the judge had all the evidence before her and reviewed it all. Having done so she made a protective order because she felt the child was so compromised and put at risk. It was typical of RRR cases that over time the child becomes resistant and will not have a relationship with one parent at all. Here there was persistent alienating behaviour by the Father to achieve his goal. Mrs Marshall stressed what was said by Peter Jackson LJ in *Re S (Parental Alienation: Cult)* [2020] EWCA Civ 58 at [13] quoted by the judge and set out at [26] above about the Court being alert to early signs of alienation and stopping it in its tracks before it got worse.
92. Mrs Marshall denied that the Mother's Scott Schedule was unfair to the Father. Although not legally represented, he has two law degrees and has written two books. She had not found the original Scott Schedule helpful, so had prepared the Mother's Scott Schedule. It was intended to set out in digestible form the findings she was asking the judge to make. It was not intended to ambush the Father and, in any event, he had the heads up on where Mrs Marshall was heading from her cross-examination of him. The Mother's Scott Schedule synthesised what was in the Mother's affidavits. It did not contain new evidence or change the factual scenario. She had gone through it paragraph by paragraph in cross-examination.
93. Mrs Marshall submitted that, by virtue of the Father making the concessions he did, the Mother was prejudiced. Mrs Marshall had had a whole list of allegations she was going to go through in cross-examination to establish the insidious behaviour, which she would have done if the concessions had not been made.
94. She submitted that this Court should not sweep aside days of evidence, 500 pages of the Mother's affidavits and a wealth of conceded material. She gave the example of the Father leveraging the healthcare of the child. The Mother had made an emergency appointment for the child at the dentist, but the Father said she should see the dentist in Atlanta who had fitted the brace. He had prevented the child having medical care, then put pressure on the Mother, saying it was her fault because she would not allow the child to go to Atlanta.
95. She also emphasised the incident where the Father had read out loud in front of the child the letter of 19 December 2024 withdrawing the Mother's consent to the child travelling abroad, but had not read out that this would be reconsidered if he agreed not to involve M in adult issues. He accepted in cross-examination that the child was upset. Mrs Marshall had put to him that he orchestrated situations which angered the child so she behaved badly towards the Mother. Up to that time M had never been petulant and rude.

Until he decided he was going back to Atlanta, the Mother had a warm, loving relationship with M but after that, it was eroded.

96. In relation to the committal application, Mrs Marshall submitted that the Father had clearly deliberately breached the Undertaking. Whilst the judge could be faulted for not adjourning that application, any irregularity ought not to infect the judge's findings. The judge had never intended her protective order to remain in place indefinitely. She had wanted assistance on the welfare of the child before making longer term arrangements, as reflected in the Concluding Remarks in her judgment.
97. Mrs Marshall submitted that this Court should remit the matter to another judge to consider directions for a litigation guardian and for welfare assessment. Until then the interim arrangements for the limited access of the Father should continue. They could not go back to "nesting". She submitted that, until there was a welfare assessment, this Court should not step on a minefield. The expert psychologist and social worker can be instructed in short order. The psychologist needed 2-3 months and the social worker four weeks to prepare reports. She submitted that the Court should not sweep away all the findings of fact.

Discussion

98. In my judgment, there were such flaws and irregularities in the proceedings before the judge that the judge's findings must be set aside. I have reached that conclusion for a number of inter-related reasons. First and foremost, the judge should not have allowed the committal application to proceed at the same time as the fact-finding hearing. What Moses LJ said in *Hammerton v Hammerton* quoted at [78] above is entirely apposite. That error by the judge was itself compounded by the fact that the Father had such limited time to consider the committal application. The judge did not advise him of his right to seek legal advice and be represented on the hearing of the committal application. She did not warn him of his right of reply and his right to remain silent, nor did she advise him of the privilege against self-incrimination. Instead without any such warning or opportunity to take advice he was effectively plunged into being cross-examined.
99. It is clear from a number of the comments he made during his evidence that he was troubled by the prospect of being imprisoned for contempt. Ms Bailey-Munroe submitted correctly that he could not fairly address both the fact-finding hearing and the committal application at the same time. There was such unfairness in what the judge allowed to happen that it infects both his evidence and the findings the judge made. Mrs Marshall's suggestion that the findings were not infected by the procedural irregularity whilst accepting, as she did, that the contempt order and suspended sentence had to be set aside because of procedural irregularity, was unmeritorious.
100. It is also striking that, in finding the Father in contempt, the judge did not engage with any specific examples of what constituted breaches of the Undertaking. Had she done so, she would have realised that some of the alleged breaches pre-dated the giving of the Undertaking and so could not amount to contempt, for example the searches for dogs and houses in May 2025 referred to at [73] above. Other matters were arguably not a breach of the Undertaking (as in the case of the matters referred to at [74] above).

101. On this ground alone, that the findings were infected because of the unfairness of hearing the fact-finding hearing and the committal application together, I consider that the judge's findings must be set aside.
102. Second, the Father was a litigant in person. Notwithstanding that he has two law degrees, he is not a qualified barrister or solicitor and yet the judge made no concession for the fact that he was a litigant in person. She appears to have had no regard to any of the issues which arise for a judge when dealing with a litigant in person as set out by Lord Wilson JSC in *Serafin* quoted at [81] above. The judge allowed interruption of the Father by counsel, and I agree with Ms Bailey-Munroe that there was undue pressure put on the Father. The judge should have ensured that there were no such interruptions and pressure placed on the Father and that she acted as a facilitator of justice, assisting the Father as a litigant in person.
103. Third, I consider that there was a serious flaw in the judge's approach to the whole issue of parental alienation. The first element which has to be established in the sequential determination of whether there has been alienating behaviour is that the child is reluctant, resisting or refusing to engage in, a relationship with a parent or carer ("RRR"): see the FJC Guidance referred to at [27] above, most recently confirmed by Sir Andrew McFarlane P in *Re Y*. If this element is not established, then the Court does not go on to consider the second or third elements and parental alienation is not established. Establishing RRR is in effect a condition precedent to any finding of parental alienation.
104. In the present case, the evidence did not establish RRR on the part of the child towards the Mother. I have borne in mind the point made by Peter Jackson LJ in *Re S* about the need for the Court to be alert to early signs of parental alienation, so as to prevent it before it deteriorates, but I do not consider there were any such early signs here. The judge reached her conclusion that there had been alienating behaviour by the Father on the basis of the Mother's evidence, without any independent professional evidence as to whether M exhibits RRR towards her Mother from a Litigation Guardian or an expert psychologist or a social worker. Furthermore, whilst on the basis of the Mother's evidence, there were instances where the child became angry and distressed with her Mother, it seems to me that they were no more than the reaction to be expected from a ten-year old child when her parents' marriage has broken up and they are in conflict with one another. If the evidence in this case amounted to the establishing of this first element it is difficult to see why that would not effectively be the case in every instance of a child caught between two warring parents.
105. Fourth, I consider that the judge gave undue weight to the Father's concessions. They were clearly made in circumstances where the Father was not intending by them to admit that he had engaged in coercive or alienating behaviour, hence his statement, quoted at [14] above, that he would concede "Team Dad", relentless badgering and "Poor me" but that [the cross-examination] should focus on alienating, berating and coercive control. The Father was obviously not intending to accept alienating and coercive behaviour and yet the judge relied upon the concessions in support of her conclusion that there was parental alienation. The significance she attached to the concessions and the extent to which she considered that the fact that he made concessions which she thought should have been made earlier impacted adversely on his case is apparent from [109] of the judgment, quoted at [55] above.

106. Given that the Father was a litigant in person and did not have the benefit of legal advice, the very least the judge should have done was to warn the Father of what she regarded as being the implications of the concessions he was making. It seems highly likely that, if he had thought that by making those concessions, he was accepting that he had engaged in alienating or coercive behaviour, he would not have made the concessions. Furthermore, I consider that the concessions cannot be said to have been made in a free and fair manner. In the exchange with the President referred to at [79] above, Ms Bailey-Munroe agreed that the concessions had been made by the Father with one eye to the possibility that he might be imprisoned for contempt. This is another example of why the judge's hearing of the fact-finding exercise and the contempt application at the same time was unfair to the Father and why the judge's reliance on the concessions is tainted.
107. Fifth, the unfairness to the Father was compounded by the way in which the Scott Schedules were dealt with. The Father had responded to the original Scott Schedule produced by the Mother's attorneys and had sent this document with his responses to the Mother's attorneys before the fact-finding hearing, assuming that this would be agreed and would be the document used at the hearing. However, the Mother and her attorneys had not responded in relation to that document, but instead only the day before the hearing produced a different Scott Schedule, the Mother's Scott Schedule. This was not simply a question of rearranging the allegations in the original Scott Schedule, but, as Ms Bailey-Munroe pointed out, it contained new allegations, the one in Item 11 about the Father being "physically menacing and intimidating" referred to at [76] above being an example. Furthermore, the version of the Mother's Scott Schedule produced by the Mother's attorneys the day before the hearing only had page number references. However, during her closing submissions Mrs Marshall produced another version containing detailed references to the evidence.
108. Mrs Marshall said that it was not intended to ambush the Father with this document, but that was the effect of this late production and use of the Mother's Scott Schedule. The Father was given no time to consider and, if so advised, take legal advice on its contents. In my judgment, if the judge was going to rely upon the Mother's Scott Schedule, she should at the very least have afforded the Father the opportunity to formulate a proper response to the document, if necessary by granting an adjournment of the hearing so that he could provide a response. The judge's approach of simply allowing the cross-examination of the Father to proceed without giving him time to respond to the new document was unfair. Ms Bailey-Munroe was correct that this unfairness in relation to the Mother's Scott Schedule bled into or infected the judge's findings. It is this document which is Appendix II to the judgment as "Final Scott Schedule".
109. Sixth, in any event, the order the judge made suspending contact between the Father and the child other than audio-visual supervised contact for twenty minutes every other day was exceptional and disproportionate. The judge evidently thought that she was ensuring that the welfare of the child was prioritised, but she does not seem to have given any consideration to the damage which might be done to the child if her contact with the Father was severely limited in this peremptory fashion. As such, the judge failed to have regard to M's overall welfare needs. The importance of that consideration, even in a case of parental alienation, was emphasised by Peter Jackson LJ in *Re S (Parental Alienation: Cult)* [2020] EWCA Civ 58 at [10]:

“Where a process of alienation is found to exist, there is a spectrum of severity and the remedy will depend upon an assessment of all aspects of the child's welfare, and not merely those that concern the relationship that may be under threat. The court's first inclination will be to reason with parents and seek to persuade them to take the right course for their child's sake, and it will only make orders when it is better than not to do so.”

110. If the judge had considered properly all aspects of M's welfare, she should have concluded that this case was at the lower end of the spectrum of severity to which Peter Jackson LJ referred and that the order which she went on to make was not only disproportionate but potentially harmful to the child's welfare. The order was certainly one which the judge should not have made without the benefit of a report from a Litigation Guardian and reports from an expert psychologist and social worker dealing with the likely effects on the child of such an order. Furthermore, although the order the judge made was originally an interim one which she intended would be reviewed within less than three weeks, it has now been in force for the best part of six months.
111. Overall, the unfairness to the Father in how the proceedings were conducted is such that, in my judgment, all the judge's findings must be set aside. The obvious question then arises as to whether a further fact-finding hearing should take place. I have considerable doubts as to whether there should be such a hearing, particularly given the delays which have already occurred, but it seems to me that the Court should have the benefit of reports setting out a full welfare assessment from not just the Litigation Guardian but an expert psychologist and a social worker before considering whether a further fact-finding hearing is appropriate or necessary. If it is not, the Court clearly has discretion to dispense with a further fact-finding hearing as is clear from the decision of the Court of Appeal of England and Wales in *H-N*. When the reports are all available, this Court will consider (i) whether it needs to hear evidence from the Litigation Guardian, the expert psychologist and the social worker or whether any such hearing should be remitted to be heard by a different judge in the Supreme Court; and (ii) whether another fact-finding hearing is necessary or appropriate.
112. In my judgment, the judge also erred in making a costs order against the Father. In children cases, such orders are exceptional and only made for example where there has been reprehensible or unreasonable behaviour by the losing party not in relation to the welfare of the child but in relation to the conduct of the litigation. The general practice in England and Wales, followed in Bermuda, was described by Peter Jackson LJ in *Re E (children: costs)* [2025] EWCA Civ 183 at [23]:

“There is a general practice of not awarding costs against a party in family proceedings concerning children, but the court retains a discretion to do so in exceptional circumstances. These include cases in which a party has been guilty of reprehensible or unreasonable behaviour in relation to the proceedings. This practice applies equally in public law and private law proceedings, and irrespective of whether a party is legally aided. Nor is there any difference in principle between fact-finding hearings and other hearings.”
113. That was a case where there had clearly been unreasonable behaviour by the Mother in the conduct of the litigation. She had made untrue allegations that the Father had not only sexually abused the children of the family, but had made them the victims of a sex ring.

Nothing in the Father's conduct of the present litigation could be described as so unreasonable or reprehensible that he should be held liable for the costs. The judge considered that his conduct in resisting the Mother's allegations in relation to the three Items he subsequently conceded was unreasonable, but that justification for the costs order cannot stand given my conclusion that the concessions were not freely and fairly made.

Conclusion

114. For all the reasons set out in the Discussion section, I consider that the appeal should be allowed on all the Grounds and the judge's findings and order dated 2 February 2026 and the further findings dated 20 April 2026 should be set aside.

Gloster JA

115. I agree.

Kawaley P

116. I also agree. Managing contentious civil litigation in which one party is represented by experienced counsel and the other party is a litigant in person is almost invariably one of the most challenging scenarios for a trial judge. The present case was no exception. The regrettable result was that the Court below lost sight of basic principles. The judge embarked upon a trial of domestic abuse allegations, which were first raised by the Mother after the Father applied to remove M from the jurisdiction, (1) against a previous status quo of joint custody and shared care and control, (2) in the absence of a reasoned decision explaining the need for a fact-finding hearing and (3) at the same time as adjudicating a contempt motion against the litigant in person. Contact between the Father and M was then severely limited without any independent reports supporting this course. A further difficulty faced by the Supreme Court was the absence of any relevant local Practice Direction and a paucity of local authority in this difficult area of family law. The Joint Authorities Bundle contained 31 authorities; all but the last two were from England and Wales. The two local cases were seemingly relied upon as regards the test for granting leave to appeal.
117. *H-N*, despite being decided by the English Court of Appeal against the background of practice directions and reports which have no counterparts here, provides valuable guidance as to how to judicially approach similar legal and factual issues before the Bermudian courts. The President of the Family Division, after emphasising that the proof of allegations of domestic abuse is essentially governed by general rules of civil procedure, most significantly opined as follows:

“7. In addition to deciding what facts are, or are not, proved, Family judges and magistrates also have the responsibility at an earlier stage of proceedings in deciding whether or not it is necessary to conduct a fact-finding hearing and, if so, which of a range of allegations that may be before the court should be the focus of that exercise. Such ‘case management’ decisions may not be straight forward, yet they too may have a long-lasting impact on the outcome of the court case and the final orders that are, or are not, made.

8. Not every case requires a fact-finding hearing even where domestic abuse is alleged. As we emphasise later, it is of critical importance to identify at an early stage the real issue in the case in particular with regard to the welfare of the child before a court is able to assess if, a fact-finding hearing is necessary and if so, what form it should take...

37. The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'."

118. The current English law position on the approach to deciding whether a separate fact-finding hearing is necessary before dealing with the substantive application before the court is centrally based on principles of proportionality which are found in Order 1A of our own Rules of the Supreme Court. That judicial evaluation necessarily involves assessing precisely what allegations should form part of the fact-finding inquiry, if any is to take place at all. As Flaux JA has noted above (at [8]-[9]), Richards J heard a contested application by the Mother for a fact-finding inquiry in advance of the Father's permanent removal application on 7 July 2025 and reserved judgment. On 13 November 2025, without any judgment being delivered by Richards J, at a hearing before the judge on 13 November 2025 the parties were informed by her that Richards J had informed the judge that he had ordered a fact-finding inquiry. By the time of the hearing of the appeal before us in June 2026, almost a year after the 7 July 2025 hearing, not even a formal order, let alone a reasoned judgment, could be placed before us. This was a serious procedural irregularity, because:

- (a) the judge embarked upon a wide-ranging fact-finding inquiry without any or any sufficient basis for being satisfied that (1) a fact-finding hearing was necessary and (2) if it was, what factual issues ought to have been explored;
- (b) judicial decisions are not properly signified by informal communications between judges of coordinate jurisdiction, but through judgments and orders communicated by the adjudicating judge to the parties who appeared before him.

119. The fact-finding hearing ought not to have been embarked upon based on such an unstable foundation. Flaux JA has also rightly noted (at [110]) that the drastic reduction of the Father's contact with M ought not to have been ordered without the benefit of independent reports. Whether or not one or more reports is appropriate as part of the determination as to whether a fact-finding inquiry is needed is in my judgment something which needs to be taken into account as part of the proportionality analysis. The Supreme Court of Bermuda is not bound by the English Practice Direction (12J – Child Arrangements & Contact Orders: Domestic Abuse and Harm), which seemingly assumes that fact-finding is an exercise for the court. However in *H-N*, Sir Andrew McFarlane suggested (at [40]) that submissions to the Court by the English Children and Family Court Advisory and Support Service (“Cafcass”) justified “*close consideration by those who are charged with reviewing PD12J*”. The following submissions were recorded (at [38]):

“...In some cases, the allegations may be such as to make it obvious that a fact-finding hearing is required before any further assessment can take place. In others, early social work assessment could lead to a conclusion that a fact-finding hearing is not necessary, but that some other intervention would be more helpful. At present, it is rare for there to be any substantive Cafcass involvement prior to fact-finding...”

120. As a matter of Bermuda law, any contested application for a fact-finding hearing in relation to alleged domestic abuse before the substantive determination of an access and/or custody application may validly include answering the following question. Would an independent report assist the Court to determine that a fact-finding hearing is not needed? Order 1A of the RSC (as applied by rule 3 (1) of the Matrimonial Causes Rules 2023) pertinently provides:

“1A/1 The Overriding Objective

(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

1A/2 Application by the Court of the Overriding Objective

The court must seek to give effect to the overriding objective when it—

(a) exercises any power given to it by the Rules; or

(b) interprets any rule.”

121. The Overriding Objective was important in the present case as it will be in many family law cases. This is primarily because of (a) the need to ensure a level playing field between parties with unequal financial resources and legal representation and (b) the enhanced risk that in emotionally charged litigation, the parties will find it difficult to advance their cases in a proportional, expeditious and fair manner. There will of course be cases where the need for a fact-finding hearing will be obvious because of the seriousness of the allegations on their face so no need for a careful examination of the impact of a fact-finding hearing on the fairness of the proceedings will not arise. The present case was not such a case.