



In The Supreme Court of Bermuda
APPELLATE JURISDICTION
2025: No. 17

BETWEEN:

DS & NK

Appellants

-v-

DIRECTOR OF CHILD AND FAMILY SERVICES

Respondent

JUDGMENT

Date of Hearing: 28th May 2025

Date of Judgment: 13th October 2025

Appearances: Mr Bruce Swan, Counsel for the Appellants
Mr Brian Moodie, Attorney-General's Chambers, Counsel for the Respondent

Reporting Restriction

Pursuant to section 85(1) of the Children Act 1998 (which prohibits any person from publishing or making public information that has the effect of identifying a child who is the subject of a proceeding pursuant to that Act, or a parent, a foster parent or a relative of the child) this ruling has been anonymized.

JUDGMENT of Richards J

Introduction

1. On 10th April 2025, a Family Court (Chaired by the Worshipful Magistrate, Ms. Maria Sofianos, sitting with two Panel Members) (“**the Family Court**”) made a care order (“**the Care Order**”) in respect of a child (“**the Child**”) in the exercise of its powers under section 25 of the Children Act 1998 (“**the 1998 Act**”). The Appellants are the parents of the Child. They opposed the making of the Care Order before the Family Court and, by Notice of Appeal also dated 10th April, sought to appeal against it.
2. On 8th May 2025, I heard an application for a stay of the Care Order. On 12th May 2025, I refused that application. My ruling on that application (which was not published at the time) is annexed to this judgment.
3. On 26th June 2025 (after hearing the substantive appeal), the Court received a letter, ostensibly from the Appellant DS, dated “JULY-25-2025” (sic). This letter made certain assertions as to the truthfulness of an Affidavit sworn by an officer of the Respondent. A note was affixed to it, asserting that “proof” in the form of some phone recordings would be sent via email. No such recordings have ever been received by me.
4. Since this letter appeared to have been filed by one of the Appellants personally and did not appear to have been copied to the Respondent’s Counsel, I caused it to be sent to both Counsel (on 30th June 2025). They were asked to advise how I should approach the letter. They were also told that, if they believed a further hearing was necessary, it might be possible to accommodate one the following week.
5. Mr Moodie responded first and submitted that I should ignore the correspondence. He pointed out that the hearing had concluded weeks ago and that neither party had sought cross-examination on the Affidavit evidence filed before the hearing. He also argued that the matters being raised in the correspondence would not assist the Court in determining whether

the Family Court erred in granting the Care Order because it did not address the material issues: lack of parental control and danger to self/others.

6. For the Appellants, Mr Swan asserted that the correspondence would assist the Court because the information contained therein spoke to the parties and their interaction with Dr. M and *“the concerns of the appropriateness and safety of the home and the prolonged nature of the efforts to address the matter”*. He concluded that *“it appears fair for us to be heard and move forward in all the circumstances.”* With respect, Mr Swan did not clearly state whether he was seeking a further hearing or merely inviting me to take the letter into account.
7. Having carefully considered the matter, however, I decided not to direct a further hearing and to exclude the letter from my consideration on this appeal. The manner in which it was filed was clearly irregular and by itself the letter added nothing to the evidence properly before me on the appeal. In my judgment, Mr Moodie was right to urge me to disregard it for the reasons he gave.

The Grounds of Appeal

8. The Grounds of Appeal, dated 10th April 2025, make the following assertions about the determination of the Family Court.
 - “a. The Learned Magistrate erred in law by failing to properly consider the evidence as to the Applicants ability to have the Minor Child be under their parental control.
 - i. Namely that the evidence was heard is that the Minor Child had a legitimate excuse to not attend Dellwood Middle School and as such should not be compelled to attend the same.
 - ii. Namely the Respondent provided no evidence of a Educational or health plan that has been considered and would be implemented on an emergency basis.

- iii. Namely, that the Department had no reasonable alternatives as to an educational pursuits that were readily available for the child.
 - iv. Namely the Respondents provided no evidence that the Minor Child would be save at the School or in their care generally bearing in mind the known risk to his health both physically or mentally.
 - b. That the Learned Magistrate erred in law by failing to correctly weight the evidence as to the efforts of the Appellants to have interventions for the Minor Child's benefit.
 - i. That DCFS in sworn evidence confirmed that they had not sought any Counselling interventions for the Minor Child despite him requesting the same in or about January 2025
 - ii. That the Appellants sought to have Counselling Services engaged but due to Government policy of the Department of Financial Assistance the same was not approved which is outside of the Appellant's control.”
- 9. In his written submissions filed in support of the appeal, Mr Swan also advanced a legal argument regarding the applicable standard of proof. He correctly submitted that the legislation does not expressly prescribe the standard of proof. Somewhat more controversially, he initially sought to argue that *“as the Appeals are subject to the Criminal Appeals Act it must be at the Criminal standard”*. For reasons which will become apparent, this argument was not maintained.

The Law

- 10. Care orders are made under Part IV of the 1998 Act. Section 25 confers the power to make such orders (and supervision orders) and section 24 prescribes the *“relevant factors”* to which the court shall have particular regard to when doing so:

“Court orders, relevant factors

24. In making, varying or discharging an order under this Part, the court shall have regard in particular to—
- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
 - (b) his physical, emotional and educational needs;
 - (c) the likely effect on him of any change in circumstances;
 - (d) his age, sex, background and any characteristics of his which the court considers relevant;
 - (e) any harm which he has suffered or is at risk of suffering;
 - (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
 - (g) the importance of the child's development of a positive relationship with the parent and a secure place as a member of a family;
 - (h) the child's relationships with relatives;
 - (i) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
 - (j) the bonding that exists between the child and the child's parent;¹
 - (k) the range of powers available to the court under this Act in the proceedings in question;

Care and supervision orders

25. (1) On the application of the Director, the court may make an order—
- (a) placing the child with respect to whom the application is made in the care of the Director; or
 - (b) putting him under the supervision of the Director or a probation officer.
- (2) The court may only make a care order or supervision order if it is satisfied—
- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
 - (b) that the harm, or likelihood of harm, is attributable to—
 - (i) the care given to the child or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or
 - (ii) the child's being beyond parental control.
- (3) No care order or supervision order may be made with respect to a person who has reached the age of 18 years (or 16 years, in the case of a child who is married).
- (4) An application under this section may be made on its own or in any other family proceedings.
- (5) The court may—
- (a) on an application for a care order, make a supervision order;
 - (b) on an application for a supervision order, make a care order.”

11. In the course of his written and oral submissions, Mr Swan frequently spoke in terms of the risk of “imminent” or “immediate” harm. Neither is required to be found before an order may be made. What is required is “significant” harm or a likelihood of the same. The Act defines the concept of “significant harm” in section 3:

“Meaning of significant harm

3. For the purpose of this Act “significant harm”, in relation to a child, means illtreatment or impairment of health or development of a child and includes circumstances where—
- (a) the child has suffered physical harm inflicted by a parent of the child or caused by the failure of a parent to supervise and protect the child adequately;

¹ One would typically expect to see an “and” here and a full stop at the end of paragraph (k) (instead of a semicolon), but neither are present in the version of the Act published on www.bermudalaws.bm. This suggests that the list may have been intended to continue, but it is longer than the equivalent list in section 1(3) of the UK Children Act 1989 (upon which Bermuda's legislation is based).

- (b) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in paragraph (a);
- (c) the child has been sexually abused by a parent of the child or by another person where the parent of the child knows or should know of the possibility of sexual abuse and fails to protect the child;
- (d) there is a substantial risk that the child will be sexually abused as described in paragraph (c);
- (e) the child requires medical treatment to cure, prevent or alleviate physical harm or suffering, and the child's parent does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
- (f) the child has suffered emotional harm demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
- (g) there is a substantial risk that the child will suffer emotional harm of the kind described in paragraph (f) and the parent does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
- (h) the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the condition;
- (i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent of the child, and the child's parent fails or refuses to obtain services or treatment to remedy or alleviate the violence;
- (j) the child has suffered physical or emotional harm caused by chronic and serious neglect by a parent of the child, and the parent does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;
- (k) there is a substantial risk of physical, mental or emotional harm to the child by reason of neglect or the failure of the parent or person having parental responsibility to provide adequate food, clothing, medical treatment or accommodation for the child, and a person who leaves a child of tender years unattended for an unreasonable length of time without making reasonable provision for the child's safety and supervision shall be deemed to have neglected the child;
- (l) there is substantial risk of physical, mental or emotional harm to the child by reason of substance abuse or other injurious behaviour by the parent or person having parental responsibility;
- (m) the child has displayed violent behaviour and threatens to become a danger to himself or others or is otherwise beyond parental control;
- (n) the child has been abandoned, the child's only parent has died or is unavailable to exercise custodial rights over the child and has not made adequate provision for the child's care and custody, or the child is in the care of another person and the parent of the child refuses or is unable or unwilling to resume the child's care and custody;
- (o) the child has been the victim of an offence under section 19 or an offence referred to in subparagraphs (ii) to (vii) of section 55(1)(a);
- (p) the child is by reason of his environment or associations exposed to moral danger; or
- (q) the child is pregnant and refuses or is unable to provide properly and adequately for the health and welfare needs of her child in the womb." (emphasis added)

12. Mr Moodie countered Mr Swan's argument regarding the standard of proof by reference to *Re B (Care Proceedings: Standard of Proof)*², in which the Appellate Committee of the House of Lords held (per Baroness Hale of Richmond) that:

² [2008] UKHL 35

“...the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”

13. The 1989 Act referenced here is the UK’s Children Act. Section 31(2) thereof is replicated in section 25(2) of Bermuda’s 1998 Act. The welfare considerations in section 1 of the UK Act are the same as those listed in paragraphs (a) - (f) and (k) of section 24 of Bermuda’s 1998 Act.
14. As rehearsed in my earlier ruling in this matter, section 18 of the 1998 Act provides that a person aggrieved by a care order may appeal *“to the Supreme Court in the manner and subject to the conditions provided by the Criminal Appeal Act 1952 as though the order appealed against were an order made on a conviction by a court of summary jurisdiction.”*
15. Since his submission regarding the standard of proof rested on the fact that, in Bermuda, appeals against care orders follow the regime for criminal appeals (which is not the case in the UK), Mr Swan might have sought to argue that *Re B* should not be applied in Bermuda. However, having been afforded a little time to consider that authority, he accepted that the applicable standard of proof is the civil standard. I would have rejected Mr Swan’s initial submission even without the clear and relevant guidance to be derived from *Re B*. Discerning the precise effect of section 18 of the 1998 Act is not entirely straightforward (see my earlier ruling), but it cannot have been intended to alter the standard of proof applying at first instance in what are clearly civil proceedings. Given the purposes of this legislation (set out in section 5 of the Act), the Legislature would surely only have sought to make such a modification by means of the clearest language. A family court bound to apply the criminal standard of proof to the threshold in section 25(2) would be unable to make an order if they thought it highly likely that the threshold was met, but were unsure about it. Given the risk of harm to which that might expose a child, such a reading of the legislation is inherently

improbable. It is true that the consequences of making an order can also be serious, but as Baroness Hale pointed out in *Re B*:

“As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.”

16. Mr Swan was accordingly right to abandon any argument that the Family Court should have applied the criminal standard of proof.
17. In his oral submissions, Mr Moodie contended that there were only four bases on which an appeal of this sort might succeed:
 - (i) Error of law (not raised);
 - (ii) Procedural irregularity (not raised);
 - (iii) Lack of adequate reasons (not raised); and
 - (iv) Findings of fact unsupported by the evidence.
18. Mr Moodie said he derived these from common law principles and resisted (initially at least) my effort to take him to the Criminal Appeal Act 1952 (“**the 1952 Act**”). He contended that the 1952 Act governed only the procedure on appeals because “*there are no conditions in [the 1952 Act] which relate to the grounds of appeal arising out of a family court matter.*” I disagree and indeed it has already been held by both Kawaley J³ and Bell J⁴ (as they then were) – in decisions not cited by either Counsel on this appeal – that section 18 of the 1952 Act does apply to appeals of this type:

“54. This is of course an appeal under the terms of the [1952] Act, and in the case of *D v Attorney General*, Kawaley J. dealt with the appeal mechanism in respect of appeals from orders of the Family Court, and particularly the effect of the proviso to section 18(1) of the [1952] Act.

³ In *D v Attorney General* [2004] Bda LR 45

⁴ In *AW v DCFS* [2008] SC (Bda) 39 App

55. That sub-section is in the following terms:

‘18 (1) Subject as hereinafter provided, the Supreme Court in determining an appeal under section 3 by an appellant against his conviction, shall allow the appeal if it appears to the Court—

(a) that the conviction should be set aside on the ground that, upon a weighing up of all the evidence, it ought not to be supported; or

(b) that the conviction should be set aside on the ground of a wrong decision in law; or

(c) that on any ground there was a miscarriage of justice;

and in any other case shall dismiss the appeal:

Provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction.’

56. It is no doubt helpful to set out how Kawaley J. viewed the application of section 18(1), since I respectfully agree with his approach. He said:

‘In my view section 18(1) clearly applies to appeals such as this. Section 18 of the Children Act confers, on a person dissatisfied with orders made under the 1998 Act, the same rights of appeal as a person convicted of an offence by the Magistrates’ Court enjoys under the 1952 Act. References to ‘conviction’ must read as ‘order’ and references to ‘criminal proceedings’ read as ‘civil proceeding’, with references to ‘sentence’ presumably ignored. So a decision of the Family Court can be reversed on the grounds of (a) it being against the weight of the evidence, (b) an error of law, or (c) any other miscarriage of justice. But the proviso entitles this Court to dismiss an appeal if satisfied that ‘no substantial miscarriage of justice occurred’.

57. Kawaley J. carried on to consider the potential applicability of section 18(2) of the [1952] Act. In this case, as in the case before Kawaley J., the power to substitute a different order for that made by the Family Court does not arise.

58. Kawaley J. then carried on to consider how the court's discretion should be exercised in a child welfare case, given the wording of the proviso, and in particular the reference to 'no substantial miscarriage of justice'. Kawaley J. took the view that regard must be had to the provisions of section 6 of the Act, and the requirement that in the administration and interpretation of the Act, the welfare of the child should be the paramount consideration. He carried on to say:

'In the appellate context, therefore, it seems to me the circumstances will be rare where a decision which is not clearly inconsistent with the interests of the child and/or not fundamentally flawed will be interfered with by this Court.'

and:

'Thus for this additional policy reason, in my view this Court should be slow to second-guess the Family Court on the merits of a child welfare decision, unless something is obviously materially wrong.'" (emphases added)

19. It might, somewhat pedantically, be observed that section 18 of the 1998 Act does not say that orders made under that Act are appealable as though they were convictions, but as though they were "*order[s] made on a conviction*". However, a reading that somehow equates orders like this with sentences does not seem to me likely to aid in the application of the 1952 Act. I, therefore, agree with the approaches of Kawaley J and Bell J and shall endeavour to follow them.
20. Although I disagree with how he got there (or preferred not to get there), I ultimately agree with Mr Moodie's contention that the appeal must be approached as one in which it is being

suggested that the Family Court's conclusions were unsupported by the evidence. An appellate court will always be slow to interfere with a trial court's assessment of evidence that it heard firsthand (and the appellate court did not). As Kawaley J recognized in *D* this must be particularly true in this context. I should be slow to second-guess the approach of a specialist family court to a child welfare decision.

The Family Court Judgment

21. The Family Court began its judgment with a detailed chronology of the matter, beginning in August 2020. It summarised some 21 appearances between then and November 2024. It was noted that, since 3rd July 2023, the same Magistrate and Panel Members had heard the matter on each occasion. I further note that a care order was first made in 2020. In 2021 a supervision order was made, initially for six months and subsequently for twelve. Thereafter supervision orders were either extended or further similar orders were made. The last such order was made on 15th November 2024.

22. The judgment then proceeded to set out the positions of the parties and the evidence called by them in detail. Having quoted section 25 of the Act, the judgment then explained its findings and decision (some anonymisation not employed below has been adopted in this version of the text):

“35. We accept the unchallenged evidence of Ms. R that the Child shared his feelings with her on the telephone on 16th January 2025. He was crying while he spoke to her. He expressed fear about returning to School D. We also accept that he expressed he is open to mental health services. The Respondents have indicated themselves that the Child is in need of those services. He has not received any therapeutic intervention since the incident at School D in October 2024 and six months have passed. The Child has not yet met with Dr. M to commence the neuropsychological assessment, although there is an appointment next week. The first appointment was cancelled as NK said the Child was sick. It is not lost on the Court that often there is the excuse of the Child being sick. It is a recurring theme. We also take note of the comments shared by Dr. M when she met with the Respondents, she was unable to gather sufficient information from them as they had

argued for most of the interview⁵. This is a feature that has been ongoing throughout the history of this matter. In our view, the Child has suffered significant harm pursuant to section 3(f) of the Act by way of emotional harm, whether it is caused by past or present issues, demonstrated by withdrawal and aggressive behaviour and the Respondents have not provided services of treatment to remedy or alleviate the harm.

36. We also take note of the history of the Child's documented absences from school from School E to School W to School D. There were often reasons put forth by the Respondents. Since the incident in October 2024, the Child has not been in a formal education setting. We accept the evidence of the Respondents that he is now enrolled online with School K however, we have not received any confirmation from the MOE that it is an acceptable curriculum nor how it will be monitored by the MOE. The Respondents were ordered to file the Child's end of year academic reports at the end of the school year in 2024. Nothing was received. To date the Court has no evidence before it speaking to where the Child stands academically, although the parties agree that he is a bright young man. The Court has also heard that the Respondents have engaged with Dr. T with the intention of having the Child placed in his programme. Again, the Court has no evidence before it confirming the credentials of Dr. T or the curriculum offered at School X. In our view, while the Respondents may have good intentions, the Child's learning has languished for at least the past two years. He is in need of better structure and support.

37. We accept Ms. R's evidence about the challenges she has had with the Supervision Order. The dynamics have been prevalent for some time. The DCFS has a role to supervise and to provide support to the family but it is our view, that the Respondents have not taken up the opportunity to receive the support offered. We accept Ms. R has not seen the Child in person since December 2024 despite unannounced visits to the property. We also accept the unchallenged evidence of Ms. R that when she recently attended the property, she heard the Child inside of the main house with DS, although no one answered the door. We note this is in breach of the Order of the Court that the Child is not to attend the main house, which still has not been vetted for suitability despite the requests of the DCFS.

⁵ This is the issue which the letter of 25th June 2025 sought to reopen (see above).

38. We have also considered the unchallenged evidence from School D that after the incident in October 2024, the Child had commented that he would have killed the other boy and that he had brought a knife to school that day. Again, he has received no therapeutic services since then. We move on to consider the recent report involving the axe. NK has since explained that the reason she telephoned the police was to find the missing panel from the front door which the Child had removed. She said she was not intimidated and the Child never dug the axe in the ground. In our view, NK's explanation is not plausible because one does not seek the aid of the police to locate a door panel. We reject her explanation. It follows we do not find NK truthful when she said the Child had not displayed aggression or acted up in many, many months. Rather, we accept the version that she first shared with Ms. R and that is why she really telephoned the police. It flows from all of this that we find the Child is out of parental control and may, if certain services are not provided in due course, harm himself or harm others. In our view, the Child has suffered significant harm pursuant to section 3(m) of the Act by displaying violent behaviour and threatens to become a danger to himself or others or is otherwise beyond parental control.

39. We noted that in reaching its decision, the Court has also considered relevant factors as provided in section 24 of the Act with particular regard to the Child's wishes and feeling, his physical, emotional and educational needs, the likely effect on him, his age, sex and background, any harm he has suffered or is at risk of suffering, the capabilities of the Respondents in meeting his needs, the importance of the Child's development, continuity of care and any disruption to the Child, the bonding that exists between the Child and the Respondents and the range of powers available to the Court under the Act.

40. The Court notes that Counsel Mr. Swan had opposed the application for a Care Order but was silent as to whether the Supervision Order already in place should continue. In any case, in all of the circumstances, having carefully considered the entirety of the evidence, and applying the law to the facts, the Court is satisfied to discharge the

Supervision Order and to grant the application for a Care Order in respect of the Child.
The Court orders that there shall be a Care Order in place until further Order of the Court.”

Analysis & Decision

23. Thus the Family Court made two clear findings that the Child had suffered significant harm and a clear finding that he was beyond parental control. Those findings may not have been consistent with the Appellants’ evidence or be accepted by them now, but I am unable to see how they can properly be said not to have been supported by the evidence. Where there is disputed evidence, the Family Court is not merely entitled to, but *must* make such factual findings as are necessary properly to discharge its functions under the legislation.
24. An example of the Family Court doing just that can be found in paragraph 38. Mr Swan is critical of the Family Court’s analysis of NK’s evidence re the incident with the axe. It appears to me, however, that they make it quite clear why it was that they did not accept her account of the incident.
25. I note that the Appellant’s Counsel was silent before the Family Court as to whether the supervision order, in place at the time the Care Order was made, should remain in effect. Before me Mr Swan contended that a supervision order should be substituted for the Care Order. On the face of section 25, the requirements for a care order and supervision order are the same. It is, therefore, a matter for the court’s discretion which it makes once the threshold conditions are satisfied. However, the statute offers a little more guidance. Section 24(k) requires the court to have regard to “*the range of powers available to it*”. Section 25(2)(b)(i) and (ii) are also instructive. If the court is satisfied that the harm or likelihood of harm is attributable to the care given or likely to be given to the child if the order is not made (not being what it would be reasonable to expect a parent to give), it may make the order. Thus the court has to consider and compare what is likely to happen if it makes no order, a supervision order and a care order. If, however, the harm or likelihood of harm is attributable to the child being beyond parental control (as the Family Court found), no such comparison is necessary as a threshold matter. Still, it seems to me, that the essence of the discretion to choose between interventions must involve the court asking itself (i) whether an order is

appropriate and, if so; (ii) whether a supervision order is adequate to counter such harm or risk of harm as it finds to exist. Only if an order is appropriate, but a supervision order is not adequate, will a care order be appropriate.

26. Mr Swan argued that *“it was clear the Panel who had previously indicated they thought the child should have been in care at previous hearings had predetermined the application notwithstanding the lack of discharging the burden of proof”*. Further that *“the Panel would have considered evidence prior to the hearing date and thus was older evidence which should not have been considered was considered and thus causing the Appellants to be prejudiced and thus not a reasonable conclusion the Panel should have found based on the evidence presented.”*
27. If I understand this submission correctly, the contention is that the slate should effectively be wiped clean each time the matter is reconsidered; in this case, the evidence which previously persuaded the Family Court to make/extend supervision orders should have been disregarded when it came to deciding whether or not to make the Care Order. With respect, I find this to be an extraordinary and unrealistic submission. On the contrary, it seems to me that, in this context, the effect (or lack of effect) of previous interventions must necessarily be considered when determining how to proceed in the future. Had the position been that the supervision order that was in place prior to 10th April 2025 was working well, the Appellant’s would surely not have wished the Family Court to ignore that fact when determining the Respondent’s application. In *S v M⁶ Kawaley J* (as he then was) observed:
- “The case for the same tribunal dealing with contested access cases in the family court is far more compelling than for other cases generally because the court's jurisdiction in child-related matters has a unique character... Accumulated knowledge about the family is indispensable to both (a) the court's ability to make rational decisions in often volatile situations and (b) the confidence of often vulnerable litigants that the judicial system is according their cases appropriate levels of care consideration and respect.”
- These observations seem to me to apply with equal force in the present public law context.

⁶ BM 2007 SC 31

28. As to the contention that the Panel prejudged the application, it will be recalled that the same Magistrate and Members had heard the matter since 3rd July 2023. Thus they did not make the Care Order until the eighth appearance of the matter before them (almost two years after they first began hearing the matter together). I do not find it surprising that observations were made during the course of those hearings to the effect that a care order might prove necessary. They were doubtless trying to underscore the importance of the Appellants doing their best to make the supervision order(s) work. In any event, they cannot fairly be said to have been overly eager to make the order which they ultimately did.
29. During the course of the appeal hearing, I was advised by Mr Swan that an incident had taken place since the Child was surrendered to care, during which the Child had been attacked and a bottle had been thrown. It became apparent from reports that I was supplied with by Mr Moodie that this incident occurred on 15th May 2025. Another child then being housed in the same facility had apparently been antagonising the Child since lunchtime. Based on the observations of staff involved the Child had subsequently, waited behind the entrance door to an area of the premises and slammed it shut once the other had entered. The Child then lunged at the other and a fight ensued. A staff member present expressed the view that the Child's form had seemed like that of a trained athletic fighter. He also shared the intensity of the altercation from the Child, noting the calmness and self-control he displayed in a combative situation. The bottle was thrown subsequently by the other child and undoubtedly the incident as it was described in the reports was not one-sided. The first physical aggression seems to have come from the Child, but that would seem to have been a response to antagonistic language.
30. Set in the context of the evidence heard by the Family Court as to the Child's past behaviour, this evidence is concerning. It was deployed in an attempt to suggest that the risk of harm to the Child was, if anything, greater in care than it had been before. I do not accept that. Undoubtedly the incident will require DCFS to employ careful management of both children going forward. However, even supposing that it would be right for me to take these circumstances into account, I do not see how they can properly be said to undermine the correctness of the Family Court's findings. Ultimately, I have concluded that, in deciding

this appeal, I should focus on the Family Court's analysis of the evidence that was before them.

31. Mr Swan criticises the Family Court for observing, in relation to School K, that *“we have not received any confirmation from the MOE that it is an acceptable curriculum nor how it will be monitored by the MOE.”* By the time the appeal was filed, a letter had been obtained from the Ministry of Education by the Appellants (dated 2nd May 2025), stating inter alia that: *“The Department of Education recognizes School K as an accredited K-12 online educational alternative.”* Mr Swan submitted *“That the panel misdirected itself in not being appraised of the mediate of the Ministry of Education to determine how online learning is monitored and as such not correctly weight the need to have supervision of the course that was not required in any way.”* I confess to some difficulty in deciphering this submission, but note that the MOE’s letter (which is addressed to Mr Swan and NK) continues: *“It is imperative that as the managers of the Child’s educational path, that you create and maintain his academic portfolio, detailing his comprehensive learning path.”* As the Panel observed, *“The Respondents [now Appellants] were ordered to file the Child’s end of year academic reports at the end of the school year in 2024. Nothing was received. To date the Court has no evidence before it speaking to where the Child stands academically, although the parties agree that he is a bright young man.”* This was clearly a concerning situation, which the Family Court was entitled to conclude should not be permitted to continue and which, with the greatest of respect, the Appellant’s were simply not equipped, on the evidence, to remediate.
32. Mr Moodie observed that *“The Appellants aver that they have made efforts to engage counselling for the child, but then stipulate as a ground of appeal, that they haven’t been able to secure same because their application for Government financial Assistance was refused.”* There is some suggestion before me that this may be because DS has not submitted all the documentation needed by Financial Assistance to process the application, but the point remains that the Appellants have not secured the services. If they do not have the means to do so, that is not a factor that weighs against the making of the Care Order. It is the best interests of the child that must remain paramount.

Conclusion

33. This Court will be slow to second-guess the Family Court on the merits of a child welfare decision, unless something is obviously materially wrong. I am satisfied that the Care Order was not clearly inconsistent with the interests of the Child. Nor was the process whereby the Family Court concluded that it was appropriate fundamentally flawed. On the contrary, the Family Court came to what appear to me to be conclusions to which they were properly entitled to come on the evidence before them.
34. The appeal is therefore dismissed.
35. Given the subject matter, there shall be no order as to costs, unless the Respondent notifies the Court within 14 days of an intention to seek them, in which case the Appellant should file a written response 14 days thereafter.

Dated this 13th day of **October 2025**

A red circular seal of the Supreme Court of Bermuda is positioned behind the signature. The seal features a central coat of arms with a lion and a unicorn, surrounded by the text "SEAL OF THE SUPREME COURT OF BERMUDA".
A blue ink signature is written across the seal and the text below it.

THE HONOURABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE

ANNEX

RULING ON STAY APPLICATION



In The Supreme Court of Bermuda
APPELLATE JURISDICTION
2025: No. 17

BETWEEN:

DS & NK

Applicants

-v-

DIRECTOR OF CHILD AND FAMILY SERVICES

Respondent

RULING

Date of Hearing: 8th May 2025
Date of Ruling: 12th May 2025

Appearances: Mr Bruce Swan, Counsel for the Applicants
Mr Brian Moodie, Attorney-General's Chambers, Counsel for the Respondent

Reporting Restriction

Pursuant to section 85(1) of the Children Act 1998 (which prohibits any person from publishing or making public information that has the effect of identifying a child who is the subject of a proceeding pursuant to that Act, or a parent, a foster parent or a relative of the child) this ruling has been anonymized.

RULING of Richards J

Introduction

1. On 10th April 2025, a Family Court (Chaired by the Worshipful Magistrate, Ms. Maria Sofianos, sitting with two Panel Members) (“**the Family Court**”) made a care order (“**the Care Order**”) in respect of a child (“**the Child**”) in the exercise of its powers under section 25 of the Children Act 1998. The Applicants are the parents of the Child. They opposed the making of the Care Order and, by Notice of Appeal also dated 10th April, seek to appeal against it.
2. On the same date, the Applicants filed a Summons seeking a stay of the Care Order. The matter came on for its first hearing before this Court on 1st May 2025. At that hearing, the Chief Justice¹ refused an application for a temporary stay (sought on an emergency basis prior to the filing of any evidence) and gave directions for the filing of Affidavits by either side. He further listed the matter for hearing before me on 8th May 2025, with a view to me hearing a full (supported) application for a stay and giving directions for the future conduct of the appeal. Lastly, upon learning that the Child had not been surrendered to the Director², the Chief Justice directed the Child’s surrender by 12:30 pm on the day the matter came before him. I do not know exactly when it occurred, but it was apparent from the submissions made before me that the Child had since been surrendered.
3. For the reasons set out herein, I refuse the application for the stay.

Discussion

4. Section 18 of the Children Act 1998 provides as follows:

“Any child or other person aggrieved by any order made under this Act may appeal from the order to the Supreme Court in the manner and subject to the conditions provided by the Criminal Appeal Act 1952 as though the

¹ The Honourable Mr Justice Larry Mussenden

² of Child and Family Services

order appealed against were an order made on a conviction by a court of summary jurisdiction.”

5. It is interesting to note that section 5(3) of the Minors Act 1950 (which also confers various powers relating to children on Special Courts constituted under Part II of the Magistrates Act 1948) provides as follows:

“Where an application is made under this Act to a Special Court and the Special Court makes or refuses to make an order, an appeal shall lie to the Supreme Court in the manner and subject to the conditions provided for an appeal in a civil cause or matter by the Civil Appeals Act 1971.”

6. It is not clear to me why it is that appeals under these closely related regimes should proceed differently. Neither of the parties’ Counsel were aware of or could immediately suggest any reason why appeals under the Children Act 1998 should proceed via the Criminal Appeal Act 1952 (“**the CrAA**”). It may be that the Legislature thought that it would accelerate the appeal process. More time is permitted for filing a notice of appeal under the civil regime and there are a greater number of preliminary steps, both of which have the potential to conflict with the Courts’ obligations to minimise delay (see section 7 of the Children Act 1998). However, one would think that the same considerations would apply under the Minors Act 1950 (albeit in the absence of an express provision akin to section 7).
7. Be that as it may, section 18 of the Children Act 1998 is not especially clear in its effect. A few of the provisions of the CrAA may easily be translated, but given the difference in subject matter, it is unsurprising that several of them clearly cannot apply outside the criminal context. The problem is that at least some fall into a third category, where the extent of their application and its effect is not obvious.
8. In KW v CD [2019] SC (Bda) 51 App, Subair Williams J considered the application of section 11(1) of the CrAA in the context of an appeal against an interim order concerning parental care and control:

“49.The Respondent did not challenge the Appellant's proposition that the 4 July Order was stayed by section 11(1). Equally, I did not address my mind to the true and full effect of section 11(1) when the matter was before me on 31 July for directions or at the 12 August appeal hearing. However, in reviewing section 11(1), I find that any such attempt to invoke this section as a means of automatically staying the 4 July Order is, as a matter of literal construction, flawed.

50. Section 11(1) bars the lower Court from making any orders or holding any *further* proceedings once the notice of appeal has been filed. Section 11(1) does not unravel or freeze any orders made by the court prior to the filing of a notice of appeal. Thus the 4 July 2019 Order was not capable of being stayed under section 11(1) by a notice of appeal dated and filed on 5 July 2019.

51. For these reasons, I find that the 4 July Order was unaffected by section 11(1) of the Criminal Appeal Act 1952 and continues to be live and operational.”

9. I certainly agree with Her Ladyship as to the meaning and effect of section 11(1) in the context of an appeal like that which she was hearing (against an interim order). In this case, where the appeal is against a final order, the effect may be less clear, but I think Mr Moodie likely correct that, section 11(1) would effectively bar the Family Court from entertaining an application to discharge or vary the order (pursuant to section 33 of the Children Act 1998) while the appeal is pending.
10. Section 11(2)(v) does not appear to have been considered in *KW v CD*. It provides:
“(v) except as otherwise expressly provided in any Act, and subject to subsection (3), where any order or recommendation has been made then

that order or recommendation shall be suspended and shall be deemed to be of no effect pending the determination or abandonment of the appeal.”

Subsection (3) then goes on to make special provision for certain types of ancillary orders (e.g. disqualification from driving), none of which are relevant here.

11. In preparing for the hearing on 8th May 2025, I came to the preliminary view that this provision may have the effect of preventing the implementation of the Care Order in this case once the Notice of Appeal had been filed. However, that is not initially how Mr Swan sought to present his arguments. He instead directed my attention to section 12(1) of the CrAA, which provides for an appellant who has been sentenced to a term of imprisonment to seek release from such a sentence pending appeal. The application is (at least initially) to be made to a court of summary jurisdiction. Mr Swan sought to argue that a sentence of imprisonment could, for these purposes, be regarded as equivalent to a care order. Mr Moodie did not directly respond to this argument, but it was unnecessary; I unhesitatingly reject it. They are quite different things. A sentence of imprisonment is a punishment inflicted on a person for an offence. A care order is made to protect a child who has been found to be suffering or to be likely to suffer significant harm. I do not see that section 12 of the CrAA has any application here.
12. Wisely, perhaps, Mr Swan modified his argument once I had drawn his attention to section 11(2)(v) and then contended that it had the effect I first thought. However, Mr Moodie disagreed. He says that the only part of section 11 that can apply here is subsection (1). As to (2)(v), he argues that it can only be properly understood in the context of subsection (2) as a whole, which is only engaged “*Where a court of summary jurisdiction, before notice of appeal has been given (a) has imposed a sentence...*” (or one of three other disposals, none of which were available to the Family Court on this application). I accept this submission. The legislation could be clearer, but Mr Moodie’s interpretation is a reasonable one and I do not think it likely that the Legislature intended to create a situation whereby, despite the Family Court having concluded that a care order should be made to protect a child from significant harm, that conclusion could be defeated simply by filing a Notice of

Appeal. In my judgment that would run counter to the whole purpose of the Children Act 1998 (and in particular provisions such as sections 5, 6 and 14).

13. For the avoidance of doubt and contrary to my preliminary view, I conclude that section 11(2)(v) of the CrAA does not apply to an appeal against a care order made under the Children Act 1998. There is, therefore, no automatic stay of the order in this case pending appeal.
14. However, Mr Moodie does accept that I have jurisdiction to consider an application to stay the Care Order, as an exercise of discretion, pending appeal. When I asked from where that power derived, he initially suggested RSC Order 55, but as I pointed out Rule 1(2) provides that that Order “*shall not apply to... an appeal under the Criminal Appeal Act 1952*”. It could, I think, be argued that, despite section 18 of the Children Act 1998, this appeal is not to be regarded as one brought “*under*” the CrAA. Certainly nothing in the CrAA makes an order like this appealable; that is only achieved by section 18 providing that it is appealable “*in the manner and subject to the conditions provided by*” the CrAA “*as though the order appealed against were an order made on conviction*”. However, if one considers provisions such as Rule 3(1) or 4(2) of Order 55, which are clearly inconsistent with easily translated provisions of the CrAA, it seems clear that the Order cannot sensibly apply to an appeal to which section 18 applies. In the alternative, Mr Moodie resorted to the Court’s inherent jurisdiction and I agree that it would seem to be the only basis upon which I may have jurisdiction to do as Mr Swan asks.
15. However, I am not satisfied with that conclusion because (i) it leaves me in some doubt as to whether the Legislature really intended that I should have the power to stay a care order pending appeal; and (ii) I am seemingly left to decide for myself what the test for such an application should be. Given the findings a Family Court must reach before making a care order, the Legislature could rationally have concluded that such an order should properly continue in effect unless and until an appeal against it succeeds on the merits. I can think of at least three justifications for such a conclusion. First, allowing for a stay could risk temporarily returning a child to a situation in which a Family Court has rightly concluded

that he or she was suffering or was likely to suffer significant harm. Secondly, the consequence of a stay might be that a child has to go in and out of care while a stay is sought and granted, only to be returned to it if the appeal fails. Thirdly, no provision would appear to have been made to enable this court, on being satisfied to grant a stay of a care order, to consider whether a supervision order should be put in place while the appeal is determined. That would presumably be the effect of a stay being entered in this case because a supervision order was in place before the Care Order was granted. In another case, however, a supervision order may never have been made. At minimum these concerns suggest to me that the threshold for staying a care order pending appeal must be a high one, as Mr Moodie has contended.

16. I note with interest that section 34 of the Children Act 1998 is entitled “**Orders pending appeal in cases about care or supervision orders**”. It allows a Family Court that refuses to make a care order or a supervision order to continue the effect of any interim order that may have been in place until time to appeal has expired or (if an appeal is filed) the determination of any appeal. By virtue of subsection (5) the Supreme Court may extend the period for which such an order is to have effect, but not beyond the determination of the appeal. It is not stated whether the Supreme Court may stay any such order before it has expired. Given the existence of section 34, I find it surprising that no express provision has been made to address the situation that confronts me. It may be because the Legislature thought this Court’s inherent jurisdiction would be sufficient to the task, but it may alternatively be because they did not think that a care order, once made, should cease to have effect unless or until an appeal against it has succeeded on the merits.
17. I incline to the latter view. It must be remembered that a care order and a criminal sentence are very different things. Provision exists under the CrAA for suspending the effect of certain types of sentence in criminal proceedings because it is recognised that an appellant may otherwise serve his punishment before this Court has determined that he ought never to have received it. A care order is not a punishment, however much it may feel like one to a child or those with parental responsibility for that child. It is made to protect a child from significant harm. It is right that someone aggrieved by such an order should be able to

appeal against it and such an appeal should be heard and determined swiftly, in accordance with section 7. However, in the interim, the Family Court's determination should, in my judgment, be respected. In other words, I conclude that the Legislature has not provided a means by which to stay a care order pending appeal because it did not intend to allow for such an application to be made or granted.

18. If I am wrong about that, it seems to me that the only basis upon which a stay of a care order could ever be appropriate is where it was clear, on even a preliminary view, that there was a strong basis upon which to question the correctness of the Family Court's determination. For example, if it were clear that the Family Court had applied the wrong test before making the order. That is not the situation here. Indeed, the parties' arguments before me demonstrated that there are substantial differences between them. Those will have to be ventilated fully during the appeal. I have not yet reached any concluded view about them, but I find myself very far from being able to say, at this preliminary stage, that there is clearly a strong basis upon which to question the correctness of the Family Court's determination.
19. Lastly, I note that the appeal is now to be heard on 29th May 2025. The Child ought to have been surrendered to the Director on 10th April 2025. However, the Applicants did not surrender the Child until after they were ordered to do so by the Chief Justice on 1st May 2025. Their failure to respect the order of the Family Court may itself be a basis for concluding that it would not be appropriate to order a stay in this case, but putting that conduct to one side and even if I have set the bar too high in paragraph 18 above, I would be very slow to grant a stay in circumstances where it could result in the Child being released from care now (having been there for less than two weeks), only potentially to have to return to care (in just over two weeks). That would not be fair to any child and would, in my judgment, conflict with the welfare principle.

Conclusion

20. For the reasons stated above I conclude that:
 - (i) There is no automatic stay of the Care Order pending appeal;

- (ii) I lack jurisdiction to stay the Care Order in the exercise of my discretion; and
- (iii) Alternatively, if I have the jurisdiction, it is not appropriate in this case, to exercise such a discretion in favour of granting a stay.

21. I therefore refuse to stay the Care Order.

22. I further confirm the directions issued on 8th May 2025:

- (i) The Appellants shall file written submissions in support of the appeal by 15th May 2025;
- (ii) The Respondent shall file written submissions in reply by 22nd May 2025; and
- (iii) The appeal shall be heard on 29th May at 9:30 a.m.

23. I am grateful to the parties and their Counsel for indicating their willingness to get this appeal on quickly. The Court will do its best to render a decision on or as soon after 29th May as possible.

Postscript

24. I cannot conclude this ruling without noting that I have had to confront herein certain ambiguities of the relevant legislative framework, which it seems to me would benefit from a review by the proper authorities. During oral argument, I expressed the view that it might be better if section 18 of the Children Act 1998 had adopted the Civil Appeals Act 1972 instead. However, I am no longer of that view. I think the CrAA is to be preferred because it will likely result in appeals being determined more quickly, but a bespoke appellate regime would be better still. A large number of the CrAA's provisions clearly cannot apply, but had Mr Moodie not persuaded me that section 11(2) should be entirely disregarded for these purposes, I might have concluded that I had no choice but to stay the Care Order. As will be apparent, I do not think that such a conclusion would be consistent with the true intent of the Children Act 1998, but that intention could be made much clearer if dedicated provision were made for appeals under that Act, and perhaps also the Minors Act 1950. Then it could be stated clearly what effect, if any, the filing of a notice of appeal should have on an order made by the Family Court; whether it should be stayed automatically or

only on application and if so by whom and by reference to what standard. As it is, I just have to hope that I have correctly discerned the Legislature's intentions.

Dated this 12th day of May 2025


~~THE HONOURABLE MR JUSTICE ALAN RICHARDS~~
~~PUISNE JUDGE~~