

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 FAMILY DIVISION  
3

4 CAUSE NO. D0132 OF 2008  
5

6 BETWEEN:

BC

PETITIONER

7  
8 AND:

9 EC

10 RESPONDENT  
11



12 Appearances:

13 Mr. Lindsey Cacho of Cacho and Cacho, Attorneys at Law  
for the Petitioner

14 Ms. Kathleen Ryan of Brady, Attorneys at Law for the  
15 Respondent  
16

17 Before:

The Hon. Justice Cheryll Richards Q.C.  
18

19 Hearing:

3<sup>rd</sup> and 13<sup>th</sup> May 2019

20 1<sup>st</sup> November 2019

21 Draft Judgment Circulated:

27<sup>th</sup> December 2019  
22

23 **HEADNOTE**

24 *Family Law – Variation of a Final Ancillary Order, Applicable Principles,*  
25 *Child under a Disability.*  
26  
27

28 **JUDGMENT**  
29  
30



1 INTRODUCTION

2  
3 1. By Summons filed on the 6<sup>th</sup> September 2018, the Petitioner (the wife) applies for the variation  
4 of a final Ancillary Order made on the 1<sup>st</sup> July 2009 by Henderson J. By paragraph 3 of that  
5 Order the Respondent (the husband) was ordered to make maintenance payments in the fixed  
6 nominal annual sum of CI\$1.00 for each of two children of the marriage, sons, V. and J. I shall  
7 refer to the parties as the husband and the wife although they are no longer married.

8  
9 2. By paragraph 1 of the said Order, the wife retained sole custody, care and control of the two  
10 children of the marriage with reasonable access to the husband. By paragraph 2 thereof, the  
11 husband was released from all past and present liabilities arising from the previous interim  
12 order which had been made on the 31<sup>st</sup> July 2008 by Harrison J. (Acting). This interim order  
13 which was revoked, required the husband to pay the sum of CI\$400.00 per month (CI\$200.00)  
14 per child. By paragraph 4 of the said final Order, the husband's interest in the former  
15 matrimonial home at Registration Section West Bay North West, Block 1 D, Parcels 451 and  
16 452 was to be transferred to the wife subject to the consent of the chargee and the husband was  
17 released from all past and present liabilities in relation to it. Paragraph 5 is in the following  
18 terms:

19 *"That either party may apply for a variation of paragraphs 1 and 2 above should*  
20 *circumstances warrant variation and there shall also be liberty to apply as to the working*  
21 *of this Order generally."*  
22

23 3. The wife now seeks an order that the husband make maintenance payments in the sum of  
24 CI\$1,000.00 per child together with one half of the medical, educational and other expenses in  
25 relation to both children.  
26

1       4.       The parties were married for some twenty years between the 15<sup>th</sup> June 1985 and the date of  
2       separation in July 2005. Following the filing of a Petition by the wife on the 25<sup>th</sup> July 2008, the  
3       marriage was dissolved on the 21<sup>st</sup> July 2009. There are two children of the marriage, V. born  
4       6<sup>th</sup> August 1992 and J, born 9<sup>th</sup> July 2002. J is attending a local private school. The parties agree  
5       that in December 1995, V. was diagnosed as suffering from Autism and mental retardation and  
6       as requiring lifetime care and supervision. This is supported by reports in the hearing bundle  
7       dating back to the 27<sup>th</sup> November 1995 which diagnosed him as having an autism spectrum  
8       disorder<sup>1</sup> and as requiring intensive speech therapy, developmental training and neurological  
9       follow up. A report on tests conducted on him in April 2012<sup>2</sup> described him as a nineteen year  
10      old young man with severe delay cognitively, who had lost language since age 3 and who  
11      demonstrates a slow adaptive skill level across the communication, social skills and  
12      socialization domains. That report concluded that the results obtained from tests were  
13      consistent with reports previously issued in 1995, 2000 and 2009.

14  
15      5.       A more recent report is produced from the Health Services Authority dated 21<sup>st</sup> February 2019.  
16      Dr. G. Christian concludes that due to significant impairment in social functioning, as  
17      evidenced by the lowest possible score on the Lawton scale, which is as a result of his medical  
18      conditions of Autism Spectrum Disorder and Epilepsy, V. still and will always require  
19      significant assistance with his daily living functions.

20  
21      6.       In relation to the Court's powers to order continued maintenance provision for V, who is now  
22      27 years old, the *Matrimonial Causes Law* (2005 Revision) provides in s.22 as follows:  
23

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<sup>1</sup> Report of Dr. Oscar Papazian

<sup>2</sup> Dr. Ellen Strot dated 17<sup>th</sup> May 2012





1           *“Where an order is made under section 21 for periodic payments, such order, unless varied*  
2           *by the Court, shall remain in force in respect of payments to a spouse, until the remarriage*  
3           *or death of such spouse and in respect of payments for the benefit of a child of the marriage*  
4           *until the death of such child or until such child attains the age of sixteen years:*

5           *Provided that in the case of payments for the benefit of a child of the marriage, the Court*  
6           *may extend the period of such payments so long as the child is receiving education and is*  
7           *under the age of twenty-one years:*

8           *Provided further that, where a child of the marriage is, at the time of pronouncing a decree,*  
9           *under a disability of such a nature as to preclude it from maintaining itself independently,*  
10          *the Court may order that the payments shall be continued throughout the period of*  
11          *disability, notwithstanding the age of the child.”*



12  
13          7.       The Parties agree that at the time of the pronouncement of the decree of dissolution of the  
14                   marriage, V was under such a disability. The medical evidence produced establishes that he  
15                   was then and is now suffering from such a disability. Based on the medical evidence, it is  
16                   determined that the Court has jurisdiction to order the continuation of maintenance payments  
17                   in respect of V.

18  
19          8.       This is accepted by the husband whose position is stated in written submissions by his Counsel:

20                   *“The Respondent’s position is that he accepts that despite his son V. no longer being in*  
21                   *school, being past the age of 21 years, but due to him suffering from a permanent disability,*  
22                   *autism, mental retardation disorder and seizures, this honourable court, by the powers laid*  
23                   *down in MCL 21-22, has discretion to permit a variation of an ancillary order. Such a*  
24                   *variation would make the Respondent duty bound to continue to assist with the financial*  
25                   *cost of care for V.”*

26  
27          9.       In response to the wife’s application the husband has offered to pay US\$200.00 per month for  
28                   the maintenance of V. In his oral evidence before the Court, he stated that he still feels  
29                   responsible for V. He said that V. was diagnosed with autism “way back” and he does require  
30                   help. He determined the figure of US\$200.00 because it is what he can afford.

1        10.        On the 13<sup>th</sup> May 2019, an interim Order was made by consent that the husband pay US\$200.00  
2                   per month for maintenance for V. pending the completion of the hearing. The matter was  
3                   adjourned to await reports as to the husband's level of income.



4  
5        **THE POSITIONS OF THE PARTIES**

6        **The Husband's Position**  
7

8        11.        The husband's position is that it is impossible for him to make payments at the level being  
9                   requested by the wife. He states that he is a tour bus operator and that during the high season  
10                  April to November, the highest level of his earnings is approximately US\$2,500.00 per month.  
11                  He further contends that his monthly expenses and payments towards debts usually exceed his  
12                  earnings, and that as a result of this, he is often in arrears with his rent and utilities. He cannot  
13                  afford medical insurance or pension for himself.

14  
15        12.        With respect to continued maintenance of J. he declines to make any contribution, urging that  
16                   it would not be fair to require this of him. He states that he does not feel that he is legally  
17                   responsible for maintaining J. This is because at the time of the finalization of the divorce,  
18                   everything that he owned financially was given to the wife for the care of the children. The  
19                   wife received the former matrimonial home which was worth some CI\$500,000.00. He  
20                   expresses himself aggrieved because through no fault of his, the wife lost the home which was  
21                   given to her for the benefit of the children. Further he contends that he has never consented to  
22                   the attendance of J at a private school rather than a Government School where the costs are  
23                   significantly lower. He urges that he should not be responsible for tuition costs for attendance  
24                   at a private school. The husband is firmly of the view that the wife's application in respect of  
25                   both children is unreasonable and excessive.



1   **The Wife's Position**

2

3       13.    The wife's position is that circumstances have changed since the final Ancillary Order was  
4            made in 2009. By her Affidavit of 30<sup>th</sup> November 2018, she states that she is struggling to  
5            properly afford to care for V. and J. In the past she had been assisted by her parents but they  
6            have become prone to illness as the years have passed. Additionally V.'s health has  
7            deteriorated. He has developed a seizure disorder since 2008 and over the years he has become  
8            more and more susceptible to seizures. In the course of attempting to care for him, she found it  
9            difficult to make the mortgage payments on the former matrimonial home and eventually the  
10           mortgagor bank foreclosed on the property.

11

12       14.    V. requires 24-hour supervision and a structured therapy program. He is in need of a  
13            professional care giver. She has taken on this responsibility as her aging parents are not able to  
14            provide this. This means that she is no longer able to work and has not been gainfully employed  
15            for more than a year. She receives assistance of CI\$750.00 for V. from the Government and is  
16            otherwise dependent on support from her parents, by way of the *ex gratia* payments which they  
17            receive, and support from other family members.

18

19       15.    She has been working for 20 years in the same field as the husband does and she does not  
20            accept the earnings level put forward by the husband. She estimates that he earns between  
21            US\$500.00 to US\$1,000.00 daily. By her calculations he would be taking average tours of 26  
22            persons at a rate of US\$20.00 per person. The Government set fee rate is US\$520.00 per tour.  
23            For beach trips the rate is US\$5.00 per person, earnings would be on average US \$130.00 one  
24            way or US\$260.00 round trip.



1     **THE ISSUES**

2           16.     The husband identifies the issues as being whether:

- 3                   i)       The wife's application for the payment of maintenance in the sum of C\$1,000.00
- 4                             per child is reasonable.
- 5                   ii)       The offer to pay US\$200.00 for the maintenance of V. is a reasonable one.
- 6                   iii)       It is a fair and reasonable expectation that he should contribute to maintenance
- 7                             for J.
- 8                   iv)       J. should cease attending private school and attend Government school to assist
- 9                             in the reduction of expenses.
- 10                  v)       It is reasonable that he should contribute one half of the medical, dental and
- 11                             educational expenses for both children.

12

13          17.     The wife identifies the issues to be:

- 14                   i)       To determine the Court's jurisdiction on the application.
- 15                   ii)       The extent to which the Court may exercise its discretion to vary the existing
- 16                             ancillary order.
- 17                   iii)       The financial means of one or both parents to satisfy any order to be made.

18

19          18.     Counsel on behalf of the wife draws the Court's attention to the statutory framework in the

20                   Matrimonial Causes Law and to the case of *C. v. F (Disabled Child, Maintenance Orders)*.<sup>3</sup>

21                   In that case, the Court held that there was jurisdiction to extend an order for the child T,

22                   beyond his nineteenth birthday given his disability which amounted to a special circumstance

23                   under the *Children Act 1989*.

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<sup>3</sup> 1998 2 FLR 1 (CA)





1     **THE STATUTORY PROVISIONS**

2           19.     The Court's power to vary the terms of an ancillary order is set out in s.23 of the *Matrimonial*  
3                 *Causes Law* which provides as follows:

4                     (1) "*Either spouse or the personal representatives of either spouse may make*  
5                         *application for variation of any order made under section 21 and, the Court,*  
6                         *after hearing the parties, may make such variation.*"  
7

8           20.     Section 19 of the said Law provides that:

9                     (1) "*In dealing with all ancillary matters arising under this Law, the Court shall*  
10                        *have regard first of all to the best interests of any children of a marriage and*  
11                        *thereafter to the responsibilities, needs, financial and other resources, actual*  
12                        *and potential earning power and the deserts of the parties.*"  
13

14     **THE APPLICABLE PRINCIPLES**

15           21.     In 2008, in the case of *VB v. JP*<sup>4</sup>, the wife in that case applied pursuant to s.31(7) of the (UK)  
16                 *Matrimonial Causes Act 1973* for a an increase in the amount of periodical payments payable  
17                 under a consent order dated June 2001. This was about six years after the order had first been  
18                 made. She applied on the basis that the sums which were being paid in respect of spousal and  
19                 child maintenance were inadequate based upon her needs and upon the principle of  
20                 compensation as detailed by the House of Lords in the case of *Miller v. Miller, McFarlane v.*  
21                 *McFarlane*<sup>5</sup>. She claimed an entitlement to a premium over budget, over and above need, for  
22                 loss of her earning capacity (relationship generated disadvantage).

23  
24           22.     In the course of the judgment in the case of *VB v. JP*, Sir Mark Potter, President of the Family  
25                 Division, reviewed the case of *Miller v. Miller, McFarlane v. McFarlane* and a number of  
26                 cases following. The Learned Judge concluded *inter alia* that where periodical payments are

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<sup>4</sup> [2008] EWHC 112

<sup>5</sup> [2006] UKHL 24





necessary, any element of compensation is best dealt with by a generous assessment of a wife's continuing needs unrestricted by purely budgetary considerations.<sup>6</sup> The questions arising for the Court's consideration on the matter included, whether the strand of compensation also falls for consideration upon a variation application. The Court noted that in the case of *Lauder v Lauder*<sup>7</sup>, the matter had been rightly reconsidered in the light of the guidance provided in *Miller v. Miller, McFarlane v. McFarlane*. The learned Judge approached the question of a variation by considering, in some detail, the s.25(2) factors.

23. In 2016 in the English Court of Appeal case of *Morris v. Morris*<sup>8</sup>, Mr. Morris appealed *inter alia* a variation order made in respect of certain periodical payments which were to be made by him to his former wife. He contended that the learned judge at first instance in reducing the amount to be paid only by a small amount had failed to properly weigh the s.25 factors. Proper weighing would have included taking into account his decreased income, housing needs, debts and the wife's improved circumstances. This should have led to a substantial rather than small reduction in the maintenance and or an adjustment of the term over which the payments were to be made.

24. The issue for the Appellate Court included the extent of the Court's considerations on a variation application. Counsel on behalf of the husband submitted that, in determining such applications, the court must consider the matter *de novo* and that the learned judge at first instance had approached the matter with an extremely "*light touch*" which had led to focus on the single factor of the increased earnings of the wife. The Appellate Court dismissed the husband's appeal, holding that the court, on a variation application, is not required to consider

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<sup>6</sup> Supra, paragraph 59

<sup>7</sup> [2007] 2 F.L.R. 802

<sup>8</sup> [2016] EWCA Civ. 812

1 the matter *de novo*. What is required is that the court conducts an exercise which is  
2 proportionate to the requirements of a case. The Court has the flexibility to determine what is  
3 required in each case. This may, in some circumstances, require a complete review, but, in  
4 others, a *light touch* review may be justified.

5  
6 25. The Court stated:

7 “87. On a variation application is the court required to consider the matter *de*  
8 *novo*? In my view, the simple answer is that it is not. The court must  
9 conduct an exercise which is proportionate to the requirements of the case.  
10 They might warrant a complete review but they can also justify, what Mr  
11 Duckworth refers to as, a *light touch* review. In this respect, Mr  
12 Duckworth was right to acknowledge that the court can confine its  
13 consideration to factors relevant to the variation application.

14 88. I do not consider that the authorities on which Mr Duckworth relies  
15 support his submission that the court must undertake the exercise *de novo*.  
16 He can point to the passage in Ward LJ’s judgment in *Flavell v Flavell*  
17 when he says (at p. 357): “the court is not required to proceed from the  
18 starting-point of the original order but looks at the matter *de novo*.” But,  
19 this has to be seen in context, namely that it was in response to a  
20 submission that the court does not have jurisdiction to vary an order  
21 unless the applicant can show exceptional circumstances or, at least, a  
22 material change. Further, Ward LJ’s observation is not the same as saying  
23 that the court is required to consider the matter *de novo*. That Ward LJ is  
24 not saying this is clear because he agrees “entirely” with what Cazalet J  
25 had said in *Garner v Garner* [1992] 1 FLR 573: “Almost invariably, an  
26 application to vary an earlier periodical payments order will be brought  
27 on the basis that there has been some change in the circumstances since  
28 the original order was made; otherwise, except in exceptional  
29 circumstances, the application will, in effect, be an appeal. If an order is  
30 not appealed against, or is made by consent, then the presumption must  
31 be that the order was correct when made. If it was correct when made,  
32 then there will usually be no justification for varying it unless there has  
33 been a change in the circumstances.”

34 89. In addition, in *Lewis v Lewis* [1977] 1 WLR 409, that great family judge,  
35 Ormrod LJ, also does not say that the court must start *de novo*: “I am  
36 bound to say that it has always seemed to me ... that the powers of  
37 variation, which were given by statute to this court in a series of  
38 enactments going right back to 1857, have been, if anything, progressively  
39 enlarged, and that the intention of Parliament is that, in handling these  
40 family matters where money is concerned, the court should have as  
41 unfettered a discretion as possible to deal with the situation as it is when  
42 the matter comes before it” (p. 412F).  
43







90. Further, although not referred to during the course of the hearing, the overriding objective requires the court to deal with cases proportionately. Thus, although section 31(7) requires the court to have “regard to all the circumstances of the case”, this is not the same as requiring the court to undertake the section 25 exercise de novo. It is instructive to see what the Supreme Court said recently in respect of case management in a financial remedy claim. In *Wyatt v Vince* (Nos 1 and 2) [2015] 1 WLR 1228 Lord Wilson JSC (with whom the rest of the court agreed) said (para 29): “... by rule 1.4(1) of the family rules, the court must further the overriding objective by actively managing cases, which, by rule 1.4(2)(b)(i)(c), includes promptly identifying the issues, isolating those which need full investigation and tailoring procedure accordingly. This exercise will dictate the nature, and in particular, the length of the substantive hearing.”
91. In *Sharland v Sharland* [2015] 3 WLR 10170, Lady Hale (with whom the other six Supreme Court Justices agreed) said, at para 43: “This court recently emphasised in *Wyatt v Vince* (Nos 1 and 2) [2015] 1 WLR 1228 the need for active case management of financial remedy proceedings, “which ... includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly”: para 29. In other words, there is enormous flexibility to enable the procedure to fit the case. This applies just as much to cases of this sort as it does to any other”.
92. The court has “enormous flexibility” to determine the “nature” of the substantive hearing. This includes, as Mr Duckworth accepts, focusing on the relevant factors and in my view also, where appropriate, conducting a light touch review. Specifically, to require the court to undertake the exercise de novo would be contrary to the overriding objective and the obligation for a case to be dealt with proportionately.”

26. Additionally the Appellate Court in considering the case before it noted the recency of the final order which had been made only two years earlier in August 2014 and the absence of sufficiently significant events in the case. With respect to the issue of varying the term of periodical payments, the Court stated:

- (1) “Changes in employment and changes in income, as occurred in this case are not unusual and they are not sufficient to support the need for a substantive review of this element of the 2014 order.”



1 27. The dicta in the case of *Morris v. Morris* has been approved in this jurisdiction in the Grand  
2 Court case of *SD v. AL*<sup>9</sup> Williams J. provided further guidance in the following terms:

3 “Having regard to *Morris*, the following principles are appropriate as a guide to the Court  
4 in the exercise of its discretion:

5 (i) The practice has developed where the Court looks for a material change in  
6 circumstances since the last order when considering varying periodical payments  
7 order. However the wording of s. 23 and s. 19 MCL give the Court wide powers to  
8 vary its ancillary relief orders and contemplates that there may be other  
9 circumstances other than a change of means which would justify a variation in the  
10 original order;

11 (ii) Whilst the Court has a broad discretion when determining variation applications,  
12 such discretion should be exercised in a proportionate manner: proportionate to  
13 the money involved, the cost and complexity;

14 (iii) In conducting its s. 23 MCL exercise the Court should have sufficient information  
15 available to it for the relevant issues to be addressed in a way which is fair and  
16 proportionate against the backdrop of the Overriding Objective. The provision of  
17 information for the exercise is a mutual and reciprocal obligation; and

18 (iv) A full, exhaustive and expensive representation of a final ancillary relief hearing  
19 should be avoided. That would be contrary to public policy, detrimental to the  
20 parties interests and a drain on the limited resources of the Court.”

## 21 APPROACH

22  
23 28. I approach this matter with the above statutory and guiding principles in mind. The final Order  
24 has been in place for a significant period of time. I am required to carry out a review which is  
25 proportionate to the circumstances of this case. I must have in mind first of all the best interests  
26 of the children of the marriage. They continue to require adequate housing, education and on-  
27 going general maintenance. I will consider to the extent that it is necessary to do so, the  
28 responsibilities, needs, financial and other actual and potential earning power and the deserts  
29 of the parties as well as the relevant factors raised in s.25(2) of the *Matrimonial Causes Act*  
30 *1973*.

<sup>9</sup> Judgment dated 5<sup>th</sup> September 2017



1        29.     While I have due regard to all the relevant factors and all the circumstances of the case, I am  
2                considering in particular any changes in the matters considered by the Court upon the making  
3                of the original maintenance orders. In the cited case of *VB v. JP*, the Court noted that  
4                maintenance orders:

5                                “... are by their very nature ongoing, concentrate upon continuing need and are  
6                                themselves subject to later variation.”  
7  
8  
9

10        **THE EVIDENCE IN THE CASE**

11        30.     The material change in circumstances is that the wife is no longer gainfully employed. The  
12                wife and the children now reside in the home of the wife’s parents. The additional needs of the  
13                children are not in dispute. The disputed issue on the evidence is the level of the earnings of  
14                the husband - with the wife maintaining in Affidavit and oral evidence that he earns  
15                significantly more than the US\$2,500.00 per month which he claims.  
16

17        **EVIDENCE OF THE WIFE**

18        31.     The wife gave oral evidence as to the changes in her circumstances which have led to the  
19                making of this application. In large measure this is due to V.’s needs. He has had seizures for  
20                the last couple of months, and there was difficulty identifying a programme into which he could  
21                be enrolled. She also wanted to try to work on his critical life skills. He requires supervision at  
22                all times. For this reason, she had to stop working in order to look after him. In order for her  
23                to return to work she would need to employ a specialist care giver for him. One had been  
24                previously employed at \$300.00 per week. For most of that time V. had been in school. V.  
25                requires a neurological examination every six months.  
26

32. The wife has no income at present, other than the money from Government. J is attending a private school at a cost of \$1,100.00 per month. She is in arrears with his school fees by an outstanding debt to the private school of \$4,300.39. From the records produced, her bank accounts have less than \$1000.00 in total. She has no other savings and receives assistance from her parents and other relatives. The critical need is for a caregiver for V. then she would be able to return to work.

33. By her more recent Affidavit of 21<sup>st</sup> March 2019, the wife states that the monthly expenses for V. exceed the amount received from Government. She provided details of her expenses as follows:

**Monthly Expenses for V.**



|                                                                         | CIS\$           |
|-------------------------------------------------------------------------|-----------------|
| Daily Snacks                                                            | 200.00          |
| Personal care (haircuts, deodorant, shaving items, vitamin supplements) | 100.00          |
| Food                                                                    | 250.00          |
| Specialist caregiver                                                    | 1,200.00        |
| Health insurance for care giver                                         | 160.00          |
| clothing                                                                | 85.00           |
| <b>Total</b>                                                            | <b>1,995.00</b> |

**Monthly Expenses for J.**

|                                | CIS\$           |
|--------------------------------|-----------------|
| School Fees for private school | 1,100.00        |
| School break and lunch         | 200.00          |
| Food                           | 250.00          |
| School uniforms and PE Kit     | 85.00           |
| Personal care                  | 100.00          |
| Clothing                       | 50.00           |
| Math tutoring                  | 240.00          |
| Medical insurance              | 67.00           |
| <b>Total</b>                   | <b>2,092.00</b> |

**Monthly Expenses of Wife:**





|                      | CI \$           |
|----------------------|-----------------|
| Food                 | 850.00          |
| Electricity          | 322.08          |
| Water                | 220.54          |
| Cable                | 94.00           |
| Propane              | 44.00           |
| Telephone            | 100.00          |
| Personal Care        | 250.00          |
| Medical insurance    | 236.00          |
| Disability insurance | 75.99           |
| Gas                  | 200.00          |
| Life Insurance       | 84.53           |
| <b>Total</b>         | <b>2,477.14</b> |

1  
2 34. Additionally, the wife states that she has knowledge of the transportation industry and the  
3 earning capacity of tour operators. She states that she has seen the husband's bus full of  
4 passengers on a regular basis and produces photographs showing this. A 26 seater bus at  
5 US\$25.00 per person will yield US\$650.00 per trip and it is possible to make a minimum of  
6 two tours per day.

7  
8 35. In oral evidence, the wife stated that she had always worked in the taxi business since the  
9 1990's. Her family was also in the business. She last worked as a taxi driver in 2017. She was  
10 aware of the husband's earnings as a tour bus operator because she saw his journals. He earned  
11 \$4,370.25 for the month of July 1999. She produced the journal record for this period as an  
12 exhibit in the case. In cross-examination she agreed that there are more tour operators now than  
13 in 1999 and that the competition is there. She said that J. is doing quite well in school and will  
14 finish in 2 years' time. She said that it would be unfair to put him in a new environment. She  
15 does not think that he would fit into the public school now.

**Evidence of the Husband**

36. By his Affidavit of 11<sup>th</sup> January 2019, it is the husband's evidence that his license as a Tour Bus operator allows him to pick up passengers from the Port only. He does not work for the cruise ship or tour companies. He does not have a taxi license so he cannot pick up and drop off passengers from other locations such as the airport or hotels. He describes his tour bus as a 26 year old, 1993 Toyota Coaster which is in poor condition. It failed a road fitness test in 2017 and had been off the road for some time until he was able to afford to repair it. It was repaired and licensed in 2018 but is now off the road again so that he has no income. The repair work needed is estimated to cost some \$3,800.00 and there will be license and other fees amounting to some \$1,836. With stated earnings of US\$2,000 to US\$2,500, he gives his monthly expenses as follows:

|                                                         | CI \$          |
|---------------------------------------------------------|----------------|
| Rent                                                    | 400.00         |
| Electricity                                             | 70.00          |
| Water                                                   | 45.00          |
| Telephone                                               | 70.00          |
| Food                                                    | 600.00         |
| WI-FI                                                   | 53.00          |
| Education costs for AA (daughter by other relationship) | 400.00         |
| Maintenance for A (adopted child)                       | 50.00          |
| <b>Total</b>                                            | <b>1688.00</b> |

37. The bank account statement which he produced had a balance of US\$15.67 as at 15<sup>th</sup> October 2018.

38. By his Second Affidavit of 25<sup>th</sup> April 2019, the husband states that his license does not allow him to seek passengers in the areas adjacent to the Port. He is required to register at the dispatch point for his category of bus before 6:15a.m. at the beginning of each day and passengers are

allocated to drivers on a first-come basis. There are some 60 to 80 drivers in all categories. He says that unlike taxi drivers, tour bus operators are subject to Port Authority rules and must wait in line. He produces the rules of the Port Authority in support of his assertion. He states that the wife as a taxi driver is able to transport passengers to and from more locations than he is. He has to compete among 60 to 80 drivers in line on a daily basis. Thus his earning capacity for each day depends on the number drawn by each individual driver and where the tourists want to go. He gave his monthly expenses as follows:

|                                                                                        | CI \$           |
|----------------------------------------------------------------------------------------|-----------------|
| Rent                                                                                   | 300.00          |
| Electricity                                                                            | 75.00           |
| Water                                                                                  | 45.00           |
| Telephone                                                                              | 60.00           |
| WI-FI                                                                                  | 59.00           |
| Grocery                                                                                | 600.00          |
| Barber /Hair                                                                           | 40.00           |
| Vehicle costs                                                                          | 917.60          |
| Medical and medication                                                                 | 62.50           |
| Entertainment/Alcohol                                                                  | 50.00           |
| Education costs for AA (daughter by other relationship –Court Order from Summary Court | 400.00          |
| Maintenance for A (adopted child)                                                      | 50.00           |
| <b>Total</b>                                                                           | <b>2,659.93</b> |

39. His assets are his bus valued at CI\$12,000.00 and a pension of CI\$795.49. His liabilities include two loans totaling CI\$14,752.00. He said that in 2004 he had depression issues, was diagnosed as suffering from bipolar disorder and had been suicidal. His mother is terminally ill with cancer and he cannot afford to assist her because of the level of his earnings.

40. In his oral evidence the husband stated that prior to the divorce his monthly earnings were significantly higher. He had licenses as a tour operator and taxi driver. He worked day and night and was making about CI\$5,000.00 per month. He said that he “*actually lived on the street, because he had a very big mortgage*” (having to work continuously to make this



1 amount). He explained that things changed when he lost both licences – due to the divorce,  
2 and, because he was charged with Assault and Insulting the Modesty of a Woman filed by the  
3 wife. In oral evidence he explained that the Assault charge “*cost him everything that he worked*  
4 *for in life.*” He said that during the time that he was without both licences, he was “doing odd  
5 jobs” to earn a living. Now, he has regained one licence – that of the tour operator. With this  
6 licence he cannot work from the hotels.

7  
8 41. He maintains that his actual earnings are between US\$2000.00 and US\$2500.00. Additionally  
9 his earning ability has now been affected by his health. He can’t sleep and he “gets lots of  
10 headaches.” He does not have the money to afford treatment following the earlier diagnosis of  
11 being bi-polar so he takes sleeping pills. He tries to work, but is not able to do so on some days.

12  
13 42. There are also days when after going to the Port dispatch point, he returns to his home because  
14 it “*does not make sense.*” He has just had four days off because of the slow season. Usually  
15 he would expect to work four days per week, but this may be affected by bad weather, and  
16 cancellations. Additionally, problems with the bus may affect his ability to work as the bus is  
17 in poor condition right now. The estimate for repairs is \$10,155.50. The fuel pump needs  
18 repairs and he will not be able to work until it is repaired.

19  
20 43. He said that he is not up to date on all his bills and is living day by day. He just pays as he goes.  
21 He owes rent for his own dwelling and is trying to catch up. He also is in arrears with  
22 maintenance for his other children.





1 44. He stated that he already gave J. calculated equity in the former matrimonial home. He does  
2 not think that it is fair to come back to him ten years after the final Order. He was adamant  
3 that he is not responsible for J. because he paid his debt to him already and he refuses to pay  
4 maintenance for him.

5  
6 45. He said that he cannot afford to look after himself and is "*living like a dog*". He said that he is  
7 not in a position to contribute towards J's school fees and that, in his view, J. should go to the  
8 Government school. He thinks all schools are bad. It is up to the individual child to do well.  
9 Primary school did not make a difference in his own life. What made the difference was how  
10 focused he could be.

11  
12 46. In cross-examination, he explained that the Port Authority records which he produced show a  
13 lack of continuity of his earnings in certain months. This was because of days when he had  
14 problems with the bus and days when the numbers that he obtained on the first-come basis were  
15 not good. On occasion where he has been unable to secure an early number in the morning at  
16 the dispatch point, he would go to the other end, i.e. to the beach, to try to secure trips to take  
17 persons back to the ships. The total shown on the Port Authority forms do not include return  
18 beach trips. Sometimes he does not secure any such trips because it is a race among bus  
19 operators to get them. However, he agreed that there were sometimes up to seven ships in Port  
20 during the high season.

21  
22 47. He said that he follows the rules when he can but "*desperation will make you do anything.*" He  
23 has been suspended on many occasions for working in unauthorised places. He denied ever  
24 picking up a tour from the beach.  
25

1 48. He explained that the loan from DC shown in his budget was for the bus. He still owes a balance  
2 on it. He pays what he can monthly to him. This outstanding loan for the bus is more than the  
3 value of the bus. It has been over 15 years and he still owes him \$14,152.00.

4  
5 49. In the past, in order to make ends meet, he has taken part-time construction work, if his bus is  
6 not in working condition. This was during the period when his health was good. He no longer  
7 does part-time construction work.

8  
9 **ASSESSMENT**

10  
11 50. From the evidence given, it is clear that the children of the marriage, V and J are in need of  
12 financial support. The wife's circumstances have changed significantly because of V's need  
13 for continuing care which has led the wife to cease gainful employment in order to look after  
14 him.

15  
16 51. While the wife challenges the husband's level of earnings, the definitive information of the  
17 journal record which she produces is some 20 years old. She also agreed that the number of  
18 operators has increased and that there is more competition. It does not appear to be in dispute  
19 that the husband now has only one license rather than two.

20  
21 52. It also appears that the husband's income is subject not only to the limitations of his license but  
22 also to the variability of his health and his ability to get to the Port dispatch point at an early  
23 time.

24  
25 53. The financial assessments undertaken by the Department of Children and Family Services do  
26 not show him as having a higher level of income but are of limited assistance as they rely only  
27 on the budgets which he himself presented. No separate analysis appears to have been done.





1 54. Counsel for the wife has drawn the Court's attention to the case of *Graceleyn Cato nee Peters*  
2 *v. Lorraine Cato*.<sup>10</sup> The Court therein referred to the case of *Watchell v. Watchell*<sup>11</sup> at page  
3 840, and stated:

4 "I do not get the sense that the Wife is pursuing the applications for periodical and lump  
5 sum payments as prayed for pursuant to sections 31 (1) a and..... of the Act, but if it  
6 is, I do not think that the income and means of the Husband would allow me to make such  
7 orders. I take account of the need to avoid making orders for periodical payments which  
8 are beyond the means of the party ordered to pay."  
9

10  
11 55. In this case I am not satisfied on balance that the husband's earnings are at the higher level  
12 suggested by the wife. There is thus insufficient evidence that he is able to afford maintenance  
13 payments at the level of \$2000 per month for the two children. To order payments to be made  
14 at this level, in the face of the evidence as to his inability to pay would be an exercise in futility.  
15

16 56. I make it clear that the husband does have parental responsibility to contribute financially to  
17 the maintenance of both children. He is aggrieved that there is a need for him to maintain J.  
18 despite the transfer of the former matrimonial home to the wife some ten years ago. This  
19 transfer does not absolve him of the parental responsibility to maintain the child where the  
20 circumstances have changed such that there is a demonstrable and present-day need. The wife  
21 is currently unemployed and both children are in need of financial support.  
22

23 57. While there is limited evidence as to the higher level of income urged by the wife, the cross  
24 examination of the husband, did highlight the fact that he does have the opportunity to increase  
25 his income by working from the beach end and that records as to the number of trips from that  
26 end are not retained. The overall impression with which the Court was left, is that particularly

<sup>10</sup> [2015] ECSJ No. 100

<sup>11</sup> [1977] 1 ALL ER at 840

1 in high season when there are sometimes up to seven ships in port, the husband has the  
2 opportunity to increase his level of income by arriving early at the dispatch point and making  
3 multiple trips, including from what he describes as the back end. Additionally his evidence  
4 was that in the past he has been able to secure odd jobs, sometimes in the construction sector  
5 in order to supplement his income. He gave evidence that his work days are usually short and  
6 he would finish work by 3pm. He clearly has the ability and opportunity to supplement his  
7 income should he wish to do so.

8  
9 58. As to the actual level of his earnings, while it is accepted that he does have some difficulties  
10 with his sleep and health, as well as given the age of his bus, in my assessment of him as he  
11 gave evidence, I formed the view that he was doing his best to minimize his earnings below  
12 what they actually are. In part, this was because the figures which he gives do not appear to be  
13 in line with the number of possible trips and the cost of such trips.

14  
15 59. Using the figures which he gave in evidence of usually working 4 days per week, even if he  
16 took only 19 persons on a single tour per day at a rate of US\$25.00 per person<sup>12</sup>, this would  
17 amount to US\$475.00 per day which would amount to US\$1900.00 per week for a four-day  
18 week or US\$7,600.00 per month. I have used the figure of 19 persons rather than 26, in light  
19 of his evidence that some of the smaller folding seats in the bus are broken and need to be  
20 repaired. Discounting the possible monthly total by a cautionary one half for the exigencies of  
21 his personal circumstances health wise, the age of the bus, his possible late arrival at the  
22 dispatch point and competition among the large number of drivers, his earnings would be at  
23 least US\$3,800.00 per month. This figure does not include earnings for trips back from the



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<sup>12</sup> Rate from paragraph 11 of Affidavit of wife dated 21<sup>st</sup> March 2019

1 beach and excludes days when he is able to make two trips per day. I assess his income at this  
2 minimum level.

3  
4 60. The level of his expenditure is noted including the fact that he has court ordered maintenance  
5 for another child. On the budgets presented, I have in mind the guidance from the case of *SS v.*  
6 *NS (Spousal maintenance)*<sup>13</sup> in which the Court stated:

7 *"But the essential task of the judge is not to go through these budgets item*  
8 *by item but stand back and ask, what is the appropriate proportion of the*  
9 *husband's available income that should go to support of the wife? This*  
10 *decision should not be taken to mean that the individual items of a budget*  
11 *are irrelevant. Rather it emphasizes that in the exercise it is important that*  
12 *the court should clearly survey the wood as well as the trees."*  
13

14 61. I have taken into account all the submissions made by both Counsel and the facts and  
15 circumstances of this case, including the level of the husband's expenses. In my view the  
16 appropriate percentage of the husband's income which should go to support the children is at  
17 minimum 20%. I would therefore order that the husband make monthly payments of  
18 US\$250.00 per month for each child. The US\$250.00 for J. is to assist with his general care,  
19 school lunches and food. In addition the husband is to pay one half of the medical and dental  
20 expenses for each child as and when they occur. No order is made with respect to the tuition  
21 fees for J. While the wife's wish to keep J. in the private school to which he is accustomed is  
22 entirely understandable, the tuition costs are high and there is insufficient evidence that the  
23 husband would be able to make one half of the payment of \$1,100.00 per month towards this  
24 in addition to the other payments required. The wife must at some stage consider the practical  
25 reality that to meet this tuition expense over a further 24 months will be difficult unless she is  
26 able to return to full time employment. She may wish to give careful consideration to the

<sup>13</sup> [2014] EWHC 4183 (Fam)



1 alternative option of the Government school where the cost will be significantly reduced such  
2 as to be minimal.

3  
4 62. The interim order made on the on 13<sup>th</sup> May 2019 which required payments of US\$200.00 per  
5 month for V. is superseded by this Order. Payments are to commence on the 28<sup>th</sup> day of January  
6 2020.

7  
8 **Dated this the 23<sup>rd</sup> day of January 2020**

9  
10 



11 **Honourable Justice Cheryll Richards Q.C.**  
12 **Judge of the Grand Court**  
13