

1 THE GRAND COURT OF THE CAYMAN ISLANDS
2 FAMILY DIVISION

3 CAUSE NO. FAM 0039 OF 2015
4

5 BETWEEN: AK PETITIONER

6
7 AND:

8 TK
9 RESPONDENT
10

11 Appearances: Mr. Alistair Walters for the Petitioner
12 Mr. David McGrath for the Respondent
13

14 Before: The Hon. Justice Cheryll Richards Q.C.
15

16 Hearing: 18th June 2019

17 Closing Submissions: 24th June 2019

18 Draft Judgment Circulated: 26th August 2019
19



20 HEADNOTE

21 *Family Law – Applicable Principles on Variation of Ancillary Order*
22

23 JUDGMENT
24
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1 INTRODUCTION

2 1. By Summons filed on the 23rd April 2018, the Petitioner AK seeks the variation of
3 orders made by Williams J., on the 9th May 2017. These require the payment of
4 spousal maintenance to the Respondent TK and child maintenance payments in respect
5 of the two children of the marriage. In this judgment for ease of reference, I shall refer
6 to AK as the husband and TK as the wife, notwithstanding that their divorce was made
7 final on the 16th May 2017.

8
9 2. The Final Ancillary Order of 9th May 2017 requires, *inter alia*, that commencing on
10 the 1st March 2017 the husband pays:

11 A. Spousal maintenance for a period of three years:

- 12 i. Year 1- US \$3,000.00 per month
13 ii. Year 2 to February 2019 - US \$2,500.00 per month
14 iii. Year 3 to February 2020- US \$2,000.00 per month
15

16 B. Child maintenance payments of US\$3,000 per month per child – to be paid until
17 a child is aged 16 or, if he is in full time education, until the age of 21.
18

19 3. By Schedule 1 to that Order the husband is also directly responsible for expenses for
20 the children. These include expenses for school and university fees, school uniforms,
21 school supplies, school lunches and ancillary educational expenses, after school care,
22 extracurricular costs, tutoring, sports and sports equipment costs, music lessons and
23 music costs, travel to sports and extracurricular activities, health insurance and



1 medical and optical expenses. These were assessed to be in the region of US \$5,443.62,
2 with the possibility of reduction, depending on the number of school sports trips.

3
4 4. The Learned Judge found that in the course of the thirteen-year marriage the wife had
5 carried out an important and supportive role to her family at the cost of her own career
6 and financial advancement. Further that her needs and those of the children justified
7 the making of the said spousal and maintenance orders. The position of the husband,
8 which was that he should pay no maintenance at all given his payment of other child
9 related expenses, was rejected.

10
11 5. The husband appealed the May 2017 Order of Williams J. His appeal was dismissed
12 by the Cayman Islands Court of Appeal (CICA) on the 14th November 2017 and he
13 was ordered to pay the Respondent's costs on the appeal to be taxed on the standard
14 basis if not agreed.¹

15
16 6. The 23rd April 2018 Summons of the husband followed on from the termination of his
17 employment by his employer with effect from the 28th March 2018. He made his last
18 full maintenance payment on the 1st April 2018. He remained unemployed for a period
19 of five months, through to the 15th August 2018, on which date he commenced
20 employment with a new employer.

21
22 7. By the agreed statement of issues for this hearing, the parties agree that the said
23 maintenance Orders should be varied, due to a change in circumstances, and that the
24 husband's child and spousal support payments should be reduced. There is sharp

¹ CICA 3/2017



1 disagreement as to the amount of the reduction and as to the payment of arrears since
2 the filing of the Summons. There is also an issue as to the residence of K and whether
3 maintenance payments should be made relative to him.

4
5 8. The background to the matter is extensive, involving protracted litigation over a period
6 of some four years. Much of this is detailed in the judgement of Williams J. dated 7th
7 February 2017 and in the judgement of the CICA dated 14th November 2017. It is
8 repeated herein only in brief to provide the context in which the issues arise.

9
10 9. The parties are both Canadian Nationals with permanent residency status in the
11 Cayman Islands. The husband is aged 47 years and is an experienced and senior
12 professional employed in the financial sector. The wife is aged 46 years and works in
13 marketing and public relations for a local property developer,

14
15 10. They were married on the 7th September 2002 and separated in March 2015, with the
16 husband filing for divorce on the 9th March 2015. Both remained in the family home
17 until the 31st March 2017 and the marriage was dissolved by Order of Williams J., on
18 the 16th May 2017.

19
20 11. There are two children of the marriage K., a boy, born 18th April 2004 now aged 15
21 years and M, a girl, born 29th March 2006, aged 13 years. Both attend a private school
22 on Island. Pursuant to a shared residence order made by McMillan J, on the 16th
23 December 2015, the children are to reside with each parent during alternate weeks,
24 and with each, for one-half of all school holidays.
25

1 12. At the time of the making of the maintenance orders, the annual salary of the husband
2 was assessed by Williams J., to be in the sum of US\$352,458.00 (CI\$296,064.72) or
3 US\$29,371.15 per month. This was based on a 3-year average increase of 7-9.8%. His
4 bonus figure was assessed to be US\$65,000.00 based on annual increases which he
5 had received between 2013 and 2015. Thus the total income assessed was
6 US\$417,458.00.

7
8 13. The Learned Judge concluded that a reasonable figure for his outgoings was in the
9 region of US\$23,065.00 per month with the possibility of further savings that could
10 be due to US\$9,996 per annum allocated for his vacations and due to the nature of an
11 unsecured loan. Adding reasonable child expenses his total outgoings were assessed
12 to be US\$28,508.62.

13
14 14. The maintenance Order was made on the factual basis that the residence order made
15 by McMillan J. remained in place. The Learned Judge said this:

16 *"If at the upcoming hearing to address child residence issues, McMillan J.*
17 *determines that there should be a variation due to conduct he ascribes to the wife, if*
18 *that variation involves a drastic reduction in the amount of time that the children*
19 *spend with the mother, that may have a bearing on the level of child maintenance*
20 *and may amount to a change of circumstances meriting consideration to vary any*
21 *child maintenance order that I may make in this judgment. It is unlikely to change*
22 *the court's goal to try to give each parent the opportunity to own a relatively*
23 *comparable standard of accommodation and lifestyle for themselves and for the*
24 *children to enjoy when staying with them."*²

25
26 15. The Learned Judge accepted that the correct approach was not to overly rely upon a
27 line by line analysis of each party's budget, but to review the figures to see if the

²Judgment in AK v. TK, 7th February 2018, paragraph 38

1 figures raised are reasonable, and to see what funds may be available, and what funds
2 are needed, to meet the needs of the children and of the parties.

3
4 16. With respect to the two aspects of income and the residence of the children, the Court
5 of Appeal in its judgement stated:

6 *"It is worth observing that, as Mr. McGrath submitted that Mr. K. leaves this*
7 *marriage in a far stronger financial position than Mrs. K. He has a generally rising*
8 *annual income, including bonus, of some US\$417,458. Her income is of a different*
9 *order (some US\$52,000) and somewhat uncertain. He will quickly be able to address*
10 *any short-term cash-flow pressure he may have...."*³
11

12
13 17. The Appellate Court noted that it had been advised that the wife does not see her son
14 and only saw M intermittently, and that counselling and mediation had been ordered.
15 The Court determined that it should work on the basis that the orders of McMillan J.
16 as to alternate weekly residence are complied with. The Court stated:

17 *"At the hearing, the judge approached the case on the basis that McMillan J's*
18 *residency orders would be honoured. The judge's orders reflect that. There is*
19 *currently an outstanding application by Mr. K before Mr. Justice McMillan for the*
20 *orders to be varied, so that he alone has residency. Mr. Justice McMillan has*
21 *ordered mediation and counselling. It is unclear when the matter will be resolved.*
22 *It seems to me that we, like the judge, must work on the basis that the existing orders*
23 *are complied with. We should do nothing which might imperil the possibility of that*
24 *happening as a result of counselling and mediation."*⁴
25

26 18. The Appellate Court concluded at paragraphs 37 to 40 of its judgment that the Orders
27 made by the Learned Judge for child maintenance were consistent with the meaning
28 of s.21(f) of the *Matrimonial Causes Law* ("the Law") and were ones which were
29 within his discretion to make and stated:
30

³ CICA 3 of 2017, 14th November 2017, paragraph 63

⁴ CICA 3 of 2017, 14th November 2017, paragraph 3



1 *"In the result, I have concluded that the court should not interfere with the orders*
2 *for child maintenance which the judge made. Of course, should the position*
3 *regarding the present residence orders change, then no doubt they (and conceivably*
4 *the spousal maintenance order) will be re-visited."*⁵
5

6 **SUBSEQUENT EVENTS**

7 19. By Order of Carter J. (Actg.) made on the 8th March 2018, by consent, except for penal
8 notices, it was ordered that the shared residence order made by McMillan J. shall
9 remain in force allowing for flexibility as required. Further, the child M was to be
10 delivered by the husband to the residence of the mother, pursuant to the alternative-
11 weekly-residence roster. Both children were to commence weekly therapy sessions.
12 The child K was to undergo a psychiatric evaluation and joint-therapy sessions with
13 the wife.

14
15 20. By Consent Order dated 11th May 2018, made by Gunn J (Actg.) it was agreed that the
16 Summons filed by the husband of 23rd April 2018 was adjourned to the first open
17 available date after 10th September 2018.

18
19 21. The husband was ordered to disclose by way of an affidavit the details of his
20 termination payments from his former employer, and the details as to his expenditure
21 of those funds. Paragraph 3 of the Order is in the following terms:

22 *"The amounts payable pursuant to paragraphs 5 and 6 of the order of Williams J.*
23 *dated 9th May 2017 shall continue to accrue, save that the Petitioner is not obliged*
24 *to make any payments to meet the order until the hearing of his summons and a*
25 *determination is made of the amount of arrears, if any, for the period 1st May 2018*
26 *to the date of the hearing."*

⁵ CICA 3 of 2017, 14th November 2017, paragraph 41



1 22. In effect this was an agreed moratorium on payments pending the husband securing
2 alternative employment.

3
4 23. By Summons filed on the 5th October 2018, the wife sought the lifting of the
5 moratorium on payments, leave to commence enforcement of arrears and counselling
6 and treatment orders in respect of K, for both herself and the husband.

7
8 24. By further Order made on the 11th October 2018, paragraph 3 of the 11th May 2018
9 Order was discharged and the husband was to pay to the wife the sum of US\$8,500.00
10 commencing on the 22nd October 2018 and each month following thereafter.

11
12 25. The 11th October 2018 Order was made following a hearing before Gunn J. (Actg.) at
13 which both the husband's 23rd April 2018 Summons and the wife's 5th October 2018
14 Summons were set down for hearing.

15
16 26. The Learned Judge noted that the husband had secured new employment at a salary of
17 CI\$200,000.00 per annum in addition to discretionary bonus. This meant that there
18 was now a reduction in his salary of about one-third, and that his monthly income is
19 now US\$18,596.01.

20
21 27. The possible benefit from mediation was raised at that hearing by Counsel on behalf
22 of the husband. Counsel invited the Court to stay proceedings for six weeks in order
23 for the parties to participate in mediation. The wife indicated that she would consider
24 mediation provided that there was a resumption in the payments ordered by Williams

1 J, and that the husband makes full disclosure. The Court determined that it was
2 appropriate to allow time for the parties to pursue the option of mediation.

3
4 28. The Court reviewed the husband's expenses, his recent purchases of furniture for the
5 new home which he had purchased and his employment contract. The contract
6 provides that he is entitled to a discretionary payment from his employer towards
7 defraying the educational and living costs of his two children. The Court concluded
8 that the husband had access to funds - whether cash or credit - to be able to meet the
9 Order pending determination of his summons.⁶

10
11 29. At that time the sum in arrears was said to be US \$51,000.00⁷. The wife was given
12 leave to commence enforcement proceedings in respect of those arrears should she
13 wish to do so. The Court noted that the decision to lift the moratorium was not an
14 indication of what the Court may decide at this final hearing. Additionally the Court
15 noted that the parties should be mindful that if the husband's application is successful
16 there may be a recalculation of the payments from the date of his summons, filed in
17 April 2018, including the payments to be made from 22nd October 2018 onwards.

18
19 30. Both Summonses were adjourned for hearing on the first convenient date on or after
20 the 20th November 2018.

21
22 31. On the 19th October 2018 the husband sought leave to appeal the Order of Gunn J.
23 (Actg.) which lifted the moratorium on payments and a stay of that Order. Leave to
24 appeal was refused.
25

⁶ Judgement of 15th October 2018 of Gunn J. Actg., paragraph 40

⁷ Judgement of 15th October 2018 Gunn J. Actg., paragraph 34

1 32. Notwithstanding the lifting of the moratorium, the wife agreed not to enforce the
2 maintenance arrears until the hearing of the husband's Summons. The husband has
3 elected to pay only US\$500.00 per month rather than the \$8,500.00 ordered by the
4 Court.

5
6 33. On the 14th January 2019, the husband filed a Summons for the adjournment of the
7 hearing set for 11th and 12th February 2019 on the basis that further time was required
8 to allow the parties to undertake mediation. Mediation has been unsuccessful.

9 **ARREARS ACCRUED**

10 34. The arrears accrued to the date of this hearing, calculated as per the 2017 Order are as
11 follows:



May 2018 to Feb. 2019	10 months at \$8, 500.00	\$85,000.00
March 2019 to June 2019	4 months at \$8,000.00 per month	\$32,000.00
Less 9 months of payments from October 2018 to May 2019	9 months x \$500.00	(\$4, 500.00)
	US\$	\$112,500.00

12

13 **SHARING OF ASSETS**

14 35. The former matrimonial home has been sold and, in accordance with the asset sharing
15 order of Williams J., the wife retained the monies in her bank accounts and received
16 the sum of US\$600,153.40 which included a component for legal costs. She has used
17 this amount towards the purchase of her new home and to partially defray her legal
18 costs.

19

1 36. The husband received US\$220,670.00 and retained his pension of US\$366,853.00. He
2 has purchased a new home. Both parties now have substantial mortgages.

3 **THE POSITIONS OF THE PARTIES**

4 37. The husband's position is that there should be a full scale review of the May 2017
5 maintenance orders, in light of what he says are material changes in circumstances.
6 These include the changes in his own level of income, and the fact that, despite the
7 Shared Residence Orders, the son K. refuses to interact with his mother and thus
8 resides with him on a full time basis. This the husband says is a material change from
9 the Shared Residence Order originally made and on which the child maintenance
10 amount was initially determined.

11
12 38. Secondly he says that the February 2017 Order was made based on his old salary and
13 projected bonus and that the wife's income has greatly increased since the hearing in
14 2017. Counsel on behalf of the husband thus urges that there are three significant
15 changes that the Court must consider:

- 16 a. the increase in the wife's income;
17 b. the decrease in the husband's income; and,
18 c. the change to the residence of K.
19

20
21 39. The husband's position, in the light of these changes, is that he should be required to
22 pay no more than US\$500.00 per month for M, and should not be required to pay for
23 maintenance for K or to pay spousal support.
24



1 40. The husband disagrees with the reductions in maintenance payments put forward by
2 the wife. These are for a reduction to US\$6,500.00 for the period November 2018 to
3 February 2019, US\$6,000.00 for the period March 2019 to February 2020 and
4 US\$5,000.00 for the period March 2020 onwards. It is submitted on his behalf that he
5 cannot afford to make payments at such levels and further that payments at such levels
6 would be unfair to him in light of the facts of the case including that he bears almost
7 all of the expenses of the children.

8
9 41. He was cross examined about an open offer which he made on the 22nd March 2019.
10 He agreed that in an attempt to settle the matter he has offered to pay spousal
11 maintenance of US\$1,000.00 per month, US\$500.00 per month for child maintenance
12 for M. and US\$1,000 per month in respect of arrears back dated to 20th September
13 2018, the date of his first new salary payment. This is a total of US\$2500.00 and thus
14 more than the US\$500.00 which he is currently paying. Ultimately through his
15 Counsel, in closing submissions, he appeared to resile from payment of this higher
16 figure – stating that consideration should be given to a figure which would not deprive
17 him of the whole of his surplus income.

18
19 42. With respect to the arrears, his position is that he is unable to afford to pay any arrears
20 based on his current income.

21
22 43. On his behalf his Counsel urges that there should be substantial reductions to reflect
23 the reality of the current situation and to be fair to both parties. Counsel urges further
24 that the wife's income should be assessed on the basis that it is likely to continue to

1 increase or at least remain constant. His position is that the Court should approach its
2 analysis of the current issues by determining:

- 3
4 a. As a matter of fact the income and day to day expenses of the parties.
5 b. As a matter of fact the disposable income of each before taking into account the
6 expenses of the children.
7 c. What is fair for each party to contribute towards the expenses of the children, bearing
8 in mind that one party should not be significantly better off at the expense of the
9 other and taking into account the amount of arrears that will follow.
10

11 44. The wife's position is that she accepts that the situation is such that there should be a
12 modest reduction in the current maintenance orders. However she urges that the
13 changes of circumstances are not as significant because the husband's disposable
14 income is at a similar level as in 2017, and the Shared Residence Order continues to
15 be in place. She submits further that she will need to continue to provide a home for
16 K in the hope that he will one day soon wish to rebuild his relationship with her.

17
18 45. She accepts that her income is greater than when the Orders were made, but says that
19 this was anticipated by Mr. Justice Williams, and that the Court deliberately made a
20 step down order. She has made financial plans based on the stability offered by that
21 Order.

22
23 46. On her behalf her Counsel urges, *inter alia* the following:
24



- 1 a. That both the arrangements for the children and W's increased future income were
2 envisaged at the time the Order was made and if any prospective reduction is to be
3 made to reflect the husband's claimed reduction income it ought to be modest one;
4
5 b. That it is unconscionable and inequitable for the husband to seek to financially
6 benefit from his reprehensible conduct in respect of K.
7
8 c. That W has acted in reliance and to her financial detriment on the Order;
9
10 d. The Court should be reluctant to interfere with an Order made as recently as 2017
11 and in respect of which the husband has only complied for 13 months when the
12 financial backdrop is not dissimilar to that which was in place when the Order was
13 made;
14
15 e. That divorcing parties should be afforded finality as far as possible. An Order of the
16 Court should withstand the inevitable fluctuations in income over time which, when
17 assessed as part of the factual matrix as a whole, cannot be described as a '*material*
18 *change.*'

19 **THE STATUTORY PROVISIONS**

- 20 47. The Court's power to vary the terms of an ancillary order is set out in s.23 of the Law
21 which provides as follows:

22 *"Either spouse or the personal representatives of either spouse may make*
23 *application for variation of any order made under section 21 and, the Court, after*
24 *hearing the parties, may make such variation."*
25

- 26 48. Section 19 of the said Law provides that:



1 *“In dealing with all ancillary matters arising under this Law, the Court shall have*
2 *regard first of all to the best interests of any children of a marriage and thereafter*
3 *to the responsibilities, needs, financial and other resources, actual and potential*
4 *earning power and the deserts of the parties.”*
5

6 **THE APPLICABLE PRINCIPLES**

7 49. In 2008, in the case of *VB v. JP*⁸, the wife in that case applied pursuant to s.31 (7) of
8 the (UK) *Matrimonial Causes Act 1973* for a an increase in the amount of periodical
9 payments payable under a consent order dated June 2001. This was about six years
10 after the order had first been made. She applied on the basis that the sums which were
11 being paid in respect of spousal and child maintenance were inadequate based upon
12 her needs and upon the principle of compensation as detailed by the House of Lords
13 in the case of *Miller v. Miller, McFarlane v. McFarlane*⁹. She claimed an entitlement
14 to a premium over budget, over and above need, for loss of her earning capacity
15 (relationship generated disadvantage).

16
17 50. In the course of the judgment in the case of *VB v. JP*, Sir Mark Potter, President of the
18 Family Division, reviewed the case of *Miller v. Miller, McFarlane v. McFarlane* and
19 a number of cases following. The Learned Judge concluded *inter alia* that where
20 periodical payments are necessary, any element of compensation is best dealt with by
21 a generous assessment of a wife’s continuing needs unrestricted by purely budgetary
22 considerations.¹⁰ The questions arising for the Court’s consideration on the matter
23 included, whether the strand of compensation also falls for consideration upon a

⁸ [2008] EWHC 112

⁹ [2006] UKHL 24

¹⁰ *Supra*, paragraph 59



1 variation application. The Court noted that in the case of *Lauder v Lauder*¹¹, the matter
2 had been rightly reconsidered in the light of the guidance provided in *Miller v. Miller*,
3 *McFarlane v. McFarlane*. The Learned judge approached the question of a variation
4 by considering, in some detail, the s.25 (2) factors.

5
6 51. In 2016 in the English Court of Appeal case of *Morris v. Morris*¹², Mr. Morris
7 appealed *inter alia* a variation order made in respect of certain periodical payments
8 which were to be made by him to his former wife. He contended that the learned judge
9 at first instance in reducing the amount to be paid only by a small amount had failed
10 to properly weigh the s.25 factors. Proper weighing would have included taking into
11 account his decreased income, housing needs, debts and the wife's improved
12 circumstances. This should have led to a substantial rather than small reduction in the
13 maintenance and or an adjustment of the term over which the payments were to be
14 made.

15
16 52. The issue for the Appellate Court included the extent of the Court's considerations on
17 a variation application. Counsel on behalf of the husband submitted that, in
18 determining such applications, the court must consider the matter *de novo* and that the
19 learned judge at first instance had approached the matter with an extremely "*light*
20 *touch*" which had led to focus on the single factor of the increased earnings of the wife.
21 The Appellate Court dismissed the husband's appeal, holding that the court, on a
22 variation application, is not required to consider the matter *de novo*. What is required
23 is that the court conducts an exercise which is proportionate to the requirements of a

¹¹ [2007] 2 F.L.R. 802

¹² [2016] EWCA Civ. 812

1 case. The Court has the flexibility to determine what is required in each case. This
2 may, in some circumstances, require a complete review, but, in others, a *light touch*
3 review may be justified.

4
5 53. The Court stated:

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

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

32
33 89. *In addition, in Lewis v Lewis [1977] 1 WLR 409, that great family judge,*
34 *Ormrod LJ, also does not say that the court must start de novo: “I am bound*
35 *to say that it has always seemed to me ... that the powers of variation, which*
36 *were given by statute to this court in a series of enactments going right back*
37 *to 1857, have been, if anything, progressively enlarged, and that the*
38 *intention of Parliament is that, in handling these family matters where*
39 *money is concerned, the court should have as unfettered a discretion as*
40 *possible to deal with the situation as it is when the matter comes before it”*
41 *(p. 412F).*
42





1 90. Further, although not referred to during the course of the hearing, the
2 overriding objective requires the court to deal with cases proportionately.
3 Thus, although section 31(7) requires the court to have "regard to all the
4 circumstances of the case", this is not the same as requiring the court to
5 undertake the section 25 exercise de novo. It is instructive to see what the
6 Supreme Court said recently in respect of case management in a financial
7 remedy claim. In *Wyatt v Vince (Nos 1 and 2)* [2015] 1 WLR 1228 Lord
8 Wilson JSC (with whom the rest of the court agreed) said (para 29): "... by
9 rule 1.4(1) of the family rules, the court must further the overriding objective
10 by actively managing cases, which, by rule 1.4(2)(b)(i)(c), includes
11 promptly identifying the issues, isolating those which need full investigation
12 and tailoring procedure accordingly. This exercise will dictate the nature,
13 and in particular, the length of the substantive hearing."

14
15 91. In *Sharland v Sharland* [2015] 3 WLR 10170, Lady Hale (with whom the
16 other six Supreme Court Justices agreed) said, at para 43: "This court
17 recently emphasised in *Wyatt v Vince (Nos 1 and 2)* [2015] 1 WLR 1228 the
18 need for active case management of financial remedy proceedings, "which
19 ... includes promptly identifying the issues, isolating those which need full
20 investigation and tailoring future procedure accordingly": para 29. In other
21 words, there is enormous flexibility to enable the procedure to fit the case.
22 This applies just as much to cases of this sort as it does to any other".

23
24 92. The court has "enormous flexibility" to determine the "nature" of the
25 substantive hearing. This includes, as Mr Duckworth accepts, focusing on
26 the relevant factors and in my view also, where appropriate, conducting a
27 light touch review. Specifically, to require the court to undertake the
28 exercise de novo would be contrary to the overriding objective and the
29 obligation for a case to be dealt with proportionately."

30
31
32 54. Additionally the Appellate Court in considering the case before it noted the recency of
33 the final order which had been made only two years earlier in August 2014 and the
34 absence of sufficiently significant events in the case. With respect to the issue of
35 varying the term of periodical payments, the Court stated:

36 "Changes in employment and changes in income, as occurred in this case are not
37 unusual and they are not sufficient to support the need for a substantive review of
38 this element of the 2014 order."
39
40

1 55. The dicta in the case of *Morris v. Morris* has been approved in this jurisdiction in the
2 Grand Court case of *SD v. AL*¹³ Williams J. provided further guidance in the following
3 terms:

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

- 6 (i) *The practice has developed where the Court looks for a material change in*
7 *circumstances since the last order when considering varying periodical*
8 *payments order. However the wording of s. 23 and s. 19 MCL give the Court*
9 *wide powers to vary its ancillary relief orders and contemplates that there may*
10 *be other circumstances other than a change of means which would justify a*
11 *variation in the original order;*
12 (ii) *Whilst the Court has a broad discretion when determining variation*
13 *applications, such discretion should be exercised in a proportionate manner*
14 *:proportionate to the money involved, the cost and complexity;*
15 (iii) *In conducting its s. 23 MCL exercise the Court should have sufficient*
16 *information available to it for the relevant issues to be addressed in a way which*
17 *is fair and proportionate against eh backdrop of the Overriding Objective. The*
18 *provision of information for the exercise is a mutual and reciprocal obligation;*
19 *and*
20 (iv) *A full, exhaustive and expensive representation of a final ancillary relief hearing*
21 *should be avoided. That would be contrary to public policy, detrimental to the*
22 *parties interests and a drain on the limited resources of the Court.”*

23
24 **APPROACH**
25

26 56. I approach this matter with the above statutory and guiding principles in mind. I am
27 not necessarily required to proceed *de novo*. I am required to carry out a review which
28 is proportionate to the circumstances of this case. I must have in mind first of all the
29 best interests of the children of the marriage. Their requirements continue to include
30 adequate housing, education and on- going general maintenance. I will consider to the
31 extent that it is necessary to do so, the responsibilities, needs, financial and other

¹³ Judgment dated 5th September 2017





resources, actual and potential earning power and the deserts of the parties as well as the relevant factors raised in s.25 (2) of the *Matrimonial Causes Act 1973*.

57. This is not an appeal hearing as noted in the cited case above. Thus while I have due regard to all the relevant factors and all the circumstances of the case, I am considering in particular any changes in the matters considered by the Court upon the making of the original maintenance orders. In the cited case of *VB v. JP*, the Court noted that maintenance orders:

"... are by their very nature ongoing, concentrate upon continuing need and are themselves subject to later variation."

58. There is no suggestion in this case of an absence of continuing need. There is dispute on the husband's part as to the extent of the wife's need in light he says of her increased income and the actual residence arrangements for the children.

THE INCOME OF THE WIFE

59. I approach the matter by firstly considering any change to the wife's income. I do so fully recognizing that there may be cases where the changes in the income level of one party in whose favour a spousal or maintenance order was made may be such as to remove or significantly alter the substratum or needs basis on which a previous order was made. Such cases would no doubt require a full-scale review and a detailed look at all the relevant factors.

60. In this case the husband points to the increase in income of the wife and urges that this is a material change. It is urged on his behalf that her income has risen substantially

1 and consistently beyond what was envisaged by Williams J based on the conservative
2 evidence given at the hearing in 2017.

3
4 61. Counsel on behalf of the husband referenced the case of *B v S (Financial Remedy:
5 Marital Property Regime)*¹⁴ a decision of Moystyn J. in which the Learned Judge in
6 the context of that case stated:

7 *"I turn to the question of child maintenance, In circumstances where the children*
8 *exactly divide their time between the parents; where H is paying more of the child*
9 *care costs; and where he will pay all of the school fees I do not judge it fair or*
10 *reasonable for him to be required to pay a separate allowance for the children. W*
11 *is not a "primary carer" or a "residential parent" any more than H is. W will have*
12 *throughout a monthly spendable net sum from all sources of [GBP]13,000, and it is*
13 *reasonable for her to pay the expenses of the children in her time from that income."*
14

15
16 62. It is axiomatic that each case requires to be determined on its own facts and
17 circumstances.

18
19 63. The evidence on this hearing is that the annual base salary of the wife was increased
20 in March 2018 to CI\$48,000.00, with a monthly take home of CI\$3,747.34 after
21 deductions.¹⁵ In 2017 at the time of the making of the maintenance Orders, Williams
22 J. found her base salary to be CI\$42,000.00 plus commissions.¹⁶ There is an increase
23 of about thirteen percent or CI\$500.00 per month.

24
25 64. The evidence at the hearing in 2017 was that no increase in her base salary was likely
26 and that she could expect to receive commissions from one project of US\$160,000 in
27 total over 2018 and 2019, if no realtor was involved and around US\$70,000.00 if a

¹⁴ 2012] EHCW 265 (Fam) (paragraph 29 of the judgment)

¹⁵ Page 598 of trial bundle

¹⁶ Paragraph 100 of the judgment of Williams J. dated 7th February 2017



1 realtor was involved. Commissions for 2017 were expected to be insubstantial in the
2 amount of US\$4,283.00.¹⁷

3
4 65. On this variation application the evidence is that the wife was paid commissions in
5 2018 of CI\$59,593.40. Of this amount CI\$15,718.40 was paid to her directly and
6 \$43,875.00 of this was applied to a loan obtained from her employer to assist with the
7 purchase of her new home. The amount of \$8,931.70 which was pending release was
8 released to her on the day before this hearing and used by her to defray her legal costs.

9
10 66. During 2019 to date, she has received CI\$73,607.96 in commissions. Of this amount,
11 CI\$8,733.43 was paid to her directly and CI\$64,874.53 was applied to the remaining
12 balance owed on her home, leaving a balance of \$12,003.57 which is still owing to her
13 employer.¹⁸ The amount of CI\$18,706.24 which was pending release was released to
14 her on the day before this hearing and used by her to defray her legal costs.

15
16 67. Her total earnings in 2018 was therefore CI\$48,000, and commissions of
17 CI\$59,593.40, for a total of CI\$107,593.00.

18
19 68. Her projected annual income for 2019, (basic salary plus commissions received to
20 date) is CI\$121,607.96.

21
22 69. The total commissions which she has received over 2018 and 2019 is therefore
23 CI\$124,467.93¹⁹ or US\$148,176.10, less than the upper limit assessed by the Learned
24 Judge in May 2017.

¹⁷ Paragraph 103 of the judgment of Williams J. dated 7th February 2017

¹⁸ Page 598 of trial bundle.

¹⁹ CI \$59,593.40. and CI \$64, 874.53,



1 70. It was urged on the husband's behalf that the construction industry and property
2 market in the Cayman Islands is at stage of high demand and that her employer is
3 involved in a larger number of projects than envisaged at the time of the hearing in
4 2017. Thus, that an assessment of the wife's income should be on the basis that the
5 commissions earned to date this year are likely to continue at least at the same level
6 for the foreseeable future – bearing in mind the increased level of construction activity
7 that is being undertaken by her employer.

8
9 71. In cross examination, the wife gave evidence that her employer would normally
10 undertake two development projects in tandem and is now undertaking three
11 development projects at a time. She agreed to the suggestion that the property market
12 is doing well, but said that it is an uncertain market which can change because of a
13 number of factors.

14
15 72. The evidence of the wife, which I accept, is that the commissions received in 2019
16 were received as a result of one of her employer's largest projects which had begun in
17 2016 coming to completion, as well as the completion of the first phase of another
18 project. She says that 2019 will therefore be an exceptional income year for her
19 because of the two completions and is not likely to be repeated. There are no further
20 commissions to be received from the major project.

21
22 73. With respect to ongoing projects, it was her evidence that for one of these projects
23 there are realtors involved so that she would only expect to receive commission of ½
24 percent of 2 ½ percent. For a second project she will receive commission on 11 of 22

1 units, because half of the units in the project will be sold by a realtor. She will not
2 receive commission on the units sold by a realtor. The third project will be completed
3 in August or September of 2020 and there are realtors involved so that she will receive
4 a split commission.

5
6 74. The uncertainty as to the receipt of commissions and thus the variability of her income
7 was extensively explored by the Learned Judge upon the making of the May 2017
8 Order. The Learned Judge noted that based on the evidence before the Court at that
9 time she would not be earning any significant commissions until at least 2018 and that
10 when she did so it would not be at the same percentage level as before because realtors
11 would be taking a greater role in the sales. The possibility of fresh development
12 potential from another project, then in the planning stage, for which planning
13 permission had been applied for in 2016 was noted. The Learned Judge stated:

14 *“However the husband is entitled to be able to arrange his long term affairs after*
15 *the wife’s income position has improved. With this in mind, I will place a time limit*
16 *on the spousal maintenance order of three years. This will enable the wife to better*
17 *meet her needs over the next three years, the early part of which will see her having*
18 *a reduced income. The three years will also give her time to explore other*
19 *employment options if there is not a significant increase in her salary in 2018.”²⁰*
20

21
22 75. It is evident from this passage and in other areas of the judgment that the Learned
23 Judge contemplated the possibility of a significant increase in the wife’s income in
24 2018 and structured the spousal payment in declining rate to take account of the
25 possibility of such increases. The decision made contemplated the uncertainties of the
26 real estate market but clearly also reflected possible change in the wife’s income for
27 the better. The approach of the Learned Judge was to recognise the possible variations

²⁰ Judgment of Williams J. dated 7th February 2018, paragraph 121

1 and to consider an appropriate figure in light of possible up or down movements which
2 were dependent on completion of the real estate projects.

3
4 76. There is, in my view, no change in the income level of the wife, of significance, which
5 would require a full-scale review of the Orders made in May 2017.

6
7 77. As to the wife's income going forward, while her income for 2019 would be as the
8 husband asserts, at the increased figure projected above, this figure cannot be said, on
9 the evidence, to be truly representative of her income in the future. A major project
10 has been completed and there is uncertainty as to when and how much she is likely to
11 receive from other projects given the involvement of realtors and whether or not the
12 real estate market will remain in the growth state that it is. The fluctuating nature of
13 her income levels is evident from her income for the period 2015 to date, over which
14 period there is no year during which she received income at 2019 levels.

15
16 78. Additionally I note that the commissions received by her have, for the most part, been
17 used to defray debts incurred over the period since the making of the Orders. Her
18 evidence is that she purchased her new home on the basis that she would be receiving
19 court-ordered maintenance. She was only eligible for a mortgage in the sum of
20 CI\$300,000.00. Thus in order to effect the purchase, she had to obtain an interest free
21 loan from her current employer in the sum of US\$144,000.00. This was granted to her
22 on the basis that it would be repaid from any commissions she received from the sale
23 of two developments. She will not have the benefit of commissions until her employer
24 is fully repaid. She also borrowed US\$175,000.00 from her mother, to assist her with
25 the purchase of the home, and agreed to repay her at the rate of US\$1,000.00 per



1 month. Her mother is retired and has limited income. The wife also has outstanding
2 legal fees of US\$61,000 not including the costs of this hearing. She also owes
3 US\$1,200.00 in mediation fees and US\$1,300.00 for her fence.

4
5 79. In my view it is clear from the evidence that her receipt of commissions at the level
6 received in 2018 and 2019 is effectively neutralized by the rise in her liabilities over
7 the period and the discharging of those liabilities, some of which remain outstanding.

8
9 **THE WIFE'S' EXPENSES**

10 80. In February 2017, the Learned Judge assessed the wife's outgoings to be in the region
11 of US\$14,718.00 if renting and US\$12,851.80 per month if she purchased her own
12 property, but concluded that there was still room for further savings on these figures.

13
14 81. The wife is now in a home ownership situation with a present budget which is slightly
15 more by US\$1,250.00 than was assessed by the Learned Judge. Her budget includes
16 provision for loan repayments to her mother. It is as follows:

Expenses	CI \$	US\$
Expenses for the children including clothes, shoes entertainment, snacks and vacation travel.	1,602.00	
Personal items, including clothing, lunches, gym membership, health and life insurance.	2,190.00	
Mortgage payments	2, 100.00	
Strata Fees	809.00	
Home and contents insurance	754.00	
Helper (including permit and insurance costs)	834.00	
Groceries and household supplies	1,500.00	
Other household expenses and transportation costs	975.41	
Loan Repayment to Mother	800.00	
Total CI	11,563.69	
Total US		14,102.03



1 82. Her stated outgoings do not include capital costs for repairs and replacement of
2 appliances which are estimated to cost US\$400.00 per month.²¹

3

4 83. The husband points to her asset position and calculates that she has bank accounts,
5 (current and investment accounts) with a total balance of US\$109,382.47, while he has
6 primarily an outstanding debt on his credit card account of US\$8,363.39. The asset
7 position of the wife which he presents does little to change the picture with respect to
8 her needs. When these assets are set against her outstanding liabilities, it is evident
9 that the wife is not in a financial state which can be described as healthy or free from
10 difficulty.

11

12 84. In summary, looking at her income and her expenses there continues to be a clear need
13 for spousal and child support in circumstances where she has remained in the same
14 employment since 2017, has had only a modest increase in base salary and almost all
15 her commission payments have been used to pay debts.

16

17 85. Importantly I note from the May 2017 judgment that the approach of the Learned
18 Judge was to accept that the household expenses of the wife had a bearing on the
19 quantum of child maintenance as there was an inevitable overlap within her budget for
20 expenditure to meet her needs and those of the children.

21

22 86. There is nothing in the evidence on this hearing, as to her financial state and thus her
23 ability to provide for herself and the children, which suggests that the foundations on
24 which the 2017 Order was made, require to be revisited. The changes such as they

²¹ Affidavit dated 4th June 2019 – paragraph 47 at page 634 of trial bundle.

1 are, appear for the most part to be no more than were anticipated in 2017, that she
2 would be working towards independent living and her economic position is likely to
3 improve during and after three years.

4 THE HUSBAND'S INCOME

5
6 87. The husband is employed as a senior finance professional. His contract provides for
7 him to receive a salary at the annual rate of CI\$200,000, (US\$243,902.43). It is
8 accepted by both parties that there has been a reduction in the income of the husband
9 which in 2017 was assessed at US\$417,458.00. By his calculation this would amount
10 to a reduction of some 42%.

11
12 88. The wife submits that the reduction is not so great because the figure which he puts
13 forward and on which he calculates his expenses does not factor in the child expense
14 payments which are mandated by Clause 10 of his contract. This states as follows:

15
16 *"During the continuance of the employment of the Employee under this agreement,*
17 *the Company shall by way of a discretionary payment as a gesture of good will to*
18 *the employees, pay an aggregate quarterly amount of CI \$12,500.00 to a separate*
19 *account set up for this purpose, which monies shall be used for the sole purpose of*
20 *defraying the educational and living costs of the employees' two children."*²²

21
22 89. The husband urged that this payment is discretionary and seemed to suggest that he
23 cannot rely on its continuing - given its discretionary nature - so that it ought not to be
24 included as part of his income.
25

²² Page 725 of the trial bundle



1 90. The wife countered with the fact that the wording of clause has the word “shall”
2 clearly indicating the mandatory nature of the payment.

3
4 91. The oral evidence of the husband was that initially he had walked away from the offer
5 of employment made by his new employer. He said that he did so because of concerns
6 that he was only being offered basic insurance for the children and no additional
7 benefits similar to his previous employment. He said that thereafter his new employer
8 contacted him and while not agreeing to match the benefits provided by his previous
9 employer, offered him an enhanced insurance package and payments towards
10 defraying educational costs for the children.

11
12 92. The nature of the negotiations which he described suggested to me his clear reliance
13 on the insurance and child benefits offered as a pre-condition to his entering into the
14 contract and the knowledge and acceptance of his employer that this was his position.

15
16 93. More importantly he provided payment records to the Court which evidence the fact
17 of payment of this allowance to him in the sum of US\$15,243.00 per quarter for the
18 periods September to November 2018 and December to February 2019.²³ He gave oral
19 evidence that he has since received payment of this allowance for a third quarter but
20 that he will have to use this amount to pay tuition costs for the children.

21
22 94. In my view, from the wording of the contract, this is a mandatory payment which his
23 employer is required to pay. Moreover it is a payment which he has received for three

²³ Page 435 of the trial bundle



1 quarters and there is therefore some continuity as to its receipt. In these circumstances,
2 I am satisfied that it can be included as a part of his income.

3
4 95. With the addition of US\$60,972.00, (four payments of US\$15,243.00), this would take
5 his new income from US\$243,902.43 to US\$304,874.00. I therefore assess the
6 reduction in his income to be 27% rather than the 42% initially put forward by him.

7
8 96. He gives his net income after deductions as US\$18,596.01. To this should be added
9 US\$5,081.00, being one twelfth of the child payments under clause 10 of his contract.
10 This additional amount would make his net income US\$23,677.00 per month not
11 including discretionary bonuses.

12
13 97. It is the wife's case that despite repeated requests for the particulars as to how his
14 discretionary bonus will be calculated, the husband contends that he is unable to
15 provide this at this time and that he has no expectation of receiving any bonus for
16 2019. He says that despite the senior nature of his employment he has had no
17 discussions with his employer about it. He submits that he did not receive any bonus
18 for the partial year 2018 that he was employed. His Counsel has urged that in these
19 circumstances, the Court should assess the bonus factor as zero.

20
21 98. Counsel for the wife urged that the Court should attribute a bonus to the husband in
22 light of:

- 23 a. The paucity of evidence before the Court on this issue;
- 24 b. His seniority;
- 25 c. His previous bonus levels;
- 26
- 27



- 1 d. The similarity between his previous and current job roles;
2
3 e. The fact that this information is uniquely with the province of himself and his
4 employer.

5
6 99. I note that clause 7 of the husband's contract is specific as to the discretionary nature
7 of any bonus and Clause 7.5.2 states that if the company decides to pay a bonus in any
8 one year or other bonus period, this shall not give rise to a contractual entitlement of
9 expectation to a bonus or similar level of bonus in future years.

10
11 100. I accept that the bonus component of his remuneration package cannot be taken into
12 account at this stage. There is simply not enough information to allow for this to be
13 done in a fair way. I leave it open as an entitlement which he has which may or may
14 not improve his economic position in the future.
15



16 **THE HUSBAND'S EXPENSES**

17
18 101. The husband has an outstanding mortgage of US\$804,634.32 on his new home which
19 is held by his former employer until August 2019. Thereafter he will have to seek
20 alternative financing. His evidence is that based on his age and the amount of the
21 mortgage, the payments will be the same monthly amount of US\$7,000.00 as he is
22 now paying or higher. He anticipates that he will have to pay a commercial lender a
23 higher rate of interest than he is paying now but feels that the higher rate will be offset
24 by an extension of the terms of payment up to age 60 or 65. In his Affidavit evidence²⁴

²⁴ Affidavit of 5th June 2019

1 he attests that the wife has more than twice the amount of equity in her home than he
2 has in his. He states that he has home equity of US \$387,843.27.

3
4 102. He bears responsibility not only for providing a home for the children in keeping with
5 the Shared Residence Order but also for expenses for their education.

6
7 103. At the time of the Order in 2017, his monthly expenses were assessed at US\$28,065.00
8 with the possibility of further savings that could be due to US\$9,996.00 per annum
9 and the unsecured nature of his loan. This expense amount was on the basis that he
10 was to remain in the matrimonial home and would have had to make a payment of
11 US\$8,189.01 per month to the wife in satisfaction of the lump sum order.

12
13 104. The evidence on this hearing is that his monthly expenses²⁵ have decreased. They are
14 stated by him to be as follows:

Net Monthly Salary	18 596.01	
Mortgage and Home insurance	7,791.49	
Electricity	540.17	
Water	437.88	
Pool Maintenance	213.41	
Natural Gas	58.57	
Internet	181.17	
Housekeeper (including insurance)	572.36	
Landscaping	225.00	
Pestkill	40.65	
Total home costs	10,061.24	
Transportation and fuel costs	397.32	
Personal costs- health and life insurance, cell phone , professional dues, clothes,	826.53	



²⁵ Page 261 of trial bundle



haircuts, groceries, vacations annualized		
School, travel and Personal Expenses for K	3, 999.25	Tuition costs are 2,299.44 Includes three school trips annualized est total costs of \$4,625.00 for the year
School, travel and Personal Expenses for M	2,914.03	Tuition costs are 1, 944.74. Includes two school and soccer trips annualized est. total costs of \$1300.00 for the year
Total Expenses	18,198.38	
Child Maintenance for M.	500.00	
Balance	(102.36)	

1

2 105. His evidence is that he would have only \$398.00 in hand after payment of expenses.
3 As indicated above, to US\$18,596.01 should be added the amount of US\$5,081 per
4 month to a total of US\$23,677.00 which would leave a balance after expenses of
5 US\$5,479.00. At the time of the May 2017 orders he was assessed to have a notional
6 surplus after expenses of US\$ 6279.50.²⁶

7 **RESIDENCE OF K**

8

9 106. The husband's evidence is that M resides with both parents as per the Shared
10 Residence Order made by the Court. He says that despite the Order, K resides with
11 him on a fulltime basis. It is his case that the Court should on this application take into
12 account the *de facto* position and order that no child maintenance payments should be
13 made to the wife for K.

14

15 107. It is apparent from her evidence that this is an issue which is causing deep distress to
16 the wife.

17

²⁶ Judgment of Williams J. 4th May 2018, paragraph 98

1 108. In her Affidavit evidence she raises the issue of parental alienation and asserts that the
2 husband has done all he can to frustrate contact with the children. Further that he has
3 made it clear that he did not want to pay any maintenance to her and wanted the
4 children to reside with him full time. It is her evidence that as part of his strategy he
5 has willfully and deliberately tried to manipulate the children and discouraged them
6 from spending time with her in the hope that that this will affect the level of
7 maintenance payments. She states:



8
9 *"Although I appreciate that this application is in connection with the*
10 *finances and not the arrangements for the children, it is paramount that the*
11 *Court recognizes that for [H] these two issues have always been*
12 *inextricably linked. I say it is important for the Court to recognize this*
13 *because [H] advances as one of the relevant change of circumstances the*
14 *fact that our older child, K, does not have contact with me. [H] has done all*
15 *that he can to frustrate contact between the children and me and it is, in my*
16 *view, the plainest case of parental alienation. [H] made it clear from the*
17 *outset that he did not want to pay any maintenance to me and wanted the*
18 *children to reside with him fulltime. As part of his strategy he has willfully*
19 *and deliberately tried to manipulate the children and discourage them from*
20 *spending time with me in the hope that if the children do not spend time with*
21 *me then the maintenance will cease. I believe [H's] behaviour is borne (sic)*
22 *out of resentment and anger towards me. Unfortunately, his anger has*
23 *spilled over into arrangements for the children and he uses them as a*
24 *weapon to punish me. [H] appears to not be able to separate my*
25 *relationship with him from our relationship with the children. I believe the*
26 *damage to the children has been profound and, in K's case, in particular,*
27 *potentially irreparable.*²⁷
28
29

30 109. It is the wife's belief that the husband causes the children to feel conflicted and plans
31 activities when they are to be spending time with her. She says that he is manipulative
32 and has essentially brainwashed the children. He has discussed details of the divorce
33 with the children and re-enforced a negative image of her.
34

²⁷ Affidavit of 4th June 2019, paragraph 17

1 110. She also states that she was forced to seek a hearing on the 8th March 2018 to seek to
2 ensure that the husband would comply with orders to deliver the children to her and
3 points to the fact that the part of the Order of Carter J (Actg.) dealing with delivery of
4 the children had penal notices attached. M now spends time with her but K continues
5 to refuse to see her or even communicate with her. She has had no contact with him
6 for almost 2 ½ years. In order to see him, she continues to attend his sporting activities
7 and to bake and take cookies and other items to the husband's home to be delivered to
8 him.

9
10 111. Despite previous good relationships with other members of her family, K now refuses
11 to interact with them unless his father is present. There are reports that he has been
12 using indecent language and exhibiting aggressive behavior at school. He has been
13 suspended from school for aggression and physical assaults and his psychologist has
14 recommended that he undergo a psychiatric assessment. He has been enrolled in
15 various counselling sessions but has refused to participate. She says that she is at a
16 complete loss as to what to do next as in her view her son is clearly suffering emotional
17 harm. She says that the husband's responsive position to all this is that he will not
18 force the children to see her and that K should not be forced to meet with a counsellor.

19
20 112. The husband gave evidence that he disagrees with the findings in a psychiatric report
21 obtained in relation to K upon which the wife sought to rely. The psychiatrist was not
22 called and there was no opportunity for cross-examination. I pay no regard to that
23 report.
24



1 113. It is the wife's position that if maintenance is discontinued the husband would be
2 financially rewarded for keeping K from her and that this will provide a strong
3 incentive for him to continue to do so. Additionally, that there has been no formal
4 variation of the Residence Order. She asserts that the husband, in seeking to reduce
5 the maintenance payments for K to zero, is seeking to benefit from the alienation
6 between her and K. which he himself has fostered.

7
8 114. Parental alienation is a grave allegation and not one which falls to be determined for
9 this application. I limit my observations to saying that I was inclined to accept the
10 evidence of the wife as to the fact that there is cause for concern with respect to
11 K. This is evident from the lack of contact with his mother and the lengthy period over
12 which this has continued. The reports as to his behavior in school raise questions as to
13 possible emotional issues for inquiry by the appropriate counselling professionals.
14 Whether the husband is at fault in some way is not a matter for this hearing and I make
15 it plain that I do not decide the issues upon this hearing on any such basis.

16
17 115. However I consider that I must and do have regard to the fact that the Shared Residence
18 Order of McMillan J. remains in force. Indeed that Order was confirmed by Carter J
19 (Actg.) on 8th March 2018. K is therefore to reside with the wife for an equal period of
20 time for each month. In doing so, I am mindful of the positions taken by the Grand
21 Court on the making of the maintenance orders in 2017 and by the Court of Appeal as
22 referenced above.

23 116. In the absence of a variation of that Order, I do not consider that it would be
24 appropriate to do anything at this time that would "tip the scales" or change the
25 position one way or another. Further in my view, it would not be in the best interests



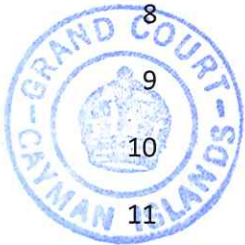
1 of the child or be fair to the parties to make adjustments of the Residence Order
2 through a side door which in effect is what I am being asked to do. There is no
3 application to vary the Residence Order before this Court which would allow for the
4 opportunity for a full hearing on all the issues including the allegation of parental
5 alienation and K's participation in counselling.

6
7 117. Counsel for the husband drew attention to the fact that in cross-examination of the
8 wife, she accepted that because K refuses to engage with her and reside in the home
9 that she has provided, she presently has minimal overheads associated with him. She
10 indicated in qualification of that answer that she has purchased a three-bedroom home,
11 so that K has a room of his own in her house in the hope that he will spend time with
12 her in the future.

13
14 118. I accept that she has incurred the costs of the purchase of a home of this size, three
15 bedrooms and has ongoing mortgage, strata and maintenance costs which are
16 proportionately attributable to K. I note also that costs for the helper who works for
17 additional hours when M is resident at her home, would not be reduced because there
18 is one child rather than two.

19
20 **ASSESSMENT**

21 119. I conclude that the single area in which there is change of significance is the reduction
22 in income of the husband. Given the recent making of the 2017 Order and the limited
23 changes in circumstances, I apply "the light touch" referenced in the cited case of
24 *Morris v. Morris*. I have given consideration to all the statutory principles but in



1 particular I have considered the income, responsibilities, needs and financial and other
2 resources of the parties as detailed above.

3
4 120. Having regard to the husband's responsibilities, needs and financial resources, it is
5 appropriate and fair that there should be a reduction in the level of periodical payments
6 which he is required to make. His budget indicates that close to one half of his funds
7 is used for home costs. There may be little room for savings within this subgroup
8 unless he is able to secure a mortgage at a lower rate. Other sub-groups may offer
9 opportunities for savings. For example, while acknowledging that he would want to
10 provide for the children's school trips and to share in the experience of holiday travel
11 with them as he is entitled to do, some savings may be achieved by reducing the
12 number of such trips. These must rank of lesser priority in the face of maintenance
13 needs.

14
15 121. On the budgets presented, I have in mind the guidance from the case of *SS v. NS*
16 (*Spousal maintenance*)²⁸ in which the Court stated:



17 *"But the essential task of the judge is not to go through these budgets item*
18 *by item but stand back and ask, what is the appropriate proportion of the*
19 *husband's available income that should go to support of the wife? This*
20 *decision should not be taken to mean that the individual items of a budget*
21 *are irrelevant. Rather it emphasizes that in the exercise it is important that*
22 *the court should clearly survey the wood as well as the trees."*
23

24 122. Approaching the matter broadly and bearing in mind the level of reduction in the
25 husband's income of 27% and considering the level of his expenses, the following
26 reduction appears to be fair in all the circumstances, for 2019 to 2020:-

²⁸ [2014] EWHC 4183 (Fam)



	Existing Order – US \$	% Reduction	Payment varied to US\$
Spousal Maintenance March 2019 to Feb. 2020	2000	40%	1200.00
Maintenance for K.	3000	30%	2100.00
Maintenance for M.	3000	30%	2100.00
Total			5,400.00

123. From the \$5,479.00, this will leave him a balance of \$79.00 which can be augmented by budgetary savings.

124. Payments would decrease, within a few months, in March 2020 to \$4,200 with the ending of the spousal maintenance payment.

125. The effect of this reduction is that the wife will receive significantly less than she has planned for and less than her needs and that of the children while they are in her care require. The reduction is being made based on the husband's ability to pay and not on any changes in the financial position of the wife. She will have to do the best that she can to work on savings from her own budget. The reality is that at this time there is no evidence that the husband has the means to pay other than at the level contemplated above.

THE ARREARS

126. The husband's employment was terminated on the 28th March 2018. Between May and September 2018, he paid no maintenance amounts. Since October 2018 to date he has been paying US\$500.00 per month towards the maintenance. The wife submits that she has made financial plans on the basis of the stability offered by the court

1 maintenance orders. On her behalf it is submitted that the husband received a sum
2 equivalent to 6 months' salary from his previous employer and for that time period he
3 should pay the maintenance arrears in full at the original rate. Thereafter, the arrears
4 should be assessed at the same rate as the maintenance moving forward. It is further
5 submitted that to take any other approach would mean that the wife has effectively
6 contributed to the husband's home purchase, its contents, its landscaping and his legal
7 fees.

8
9 127. The wife points to evidence of his unwillingness to pay over the years, in statements
10 he has made and in his positions in Court. She also raises issues as to his level of
11 disclosure of the terms of his termination settlement and as to his spending during
12 2018 on non-priority items.

13
14 128. The evidence is that following the termination of his employment, on the 1st May 2018
15 the husband received the sum of US\$21,573.00 as an accrued bonus payment on
16 termination. There is an issue as to whether or not he disclosed this to the Court in
17 2018 in the course of making his application for a stay of the payments. It appears that
18 he did not. His explanation is that he was only required by the Court Order to disclose
19 termination payments and this was not a termination payment. His evidence was that
20 \$15,000.00 of the amount received was immediately transferred to pay his credit card
21 bill as he had been living on credit through the month of April.

22
23 129. He did initially disclose that on the 2nd May 2018, he received US\$194,882.57 from
24 his employer. The wife's case is that this was the equivalent of six months' salary
25 being one half of his total salary as assessed by Williams J. to be US\$352,458.00.



1 130. The husband's bank statement shows that following the deposit of this money there
2 was a withdrawal of \$3,000.00 on the 5th May 2018 leaving a balance in his account
3 of \$201,125.25. His oral evidence was that on the morning of the 11th May 2018 and
4 prior to his appearance in Court for his stay application he made the following
5 payments from his account:

Payment to employer in relation to mortgage on home	109,242.00
Payment to shipment company toward shipment of furniture	20,050.00
Legal fees	12,069.19
Rent Payment to Employer	12, 500.00
Transfer to his CI Account	12, 500.00

6
7 131. His oral evidence was that the balance of \$39,258.00 which remained thereafter was
8 the amount that he needed to live on for the next two months while he searched for
9 other employment. In his Affidavit evidence of 23rd April 2018, he stated that his
10 monthly outgoings at that time amounted to around \$17,059.00 not including the
11 maintenance amount of \$8,500.00. Of the \$17,059.00, mortgage, condominium fees
12 and home insurance amounted to \$7,937.00. The evidence is that he was then living
13 in temporary rent free accommodation provided by his employer. Further, the closing
14 on the new house which he had purchased did not take place until the end of August
15 2018.

16 132. There was detailed cross examination of him as to his spending over the period. In
17 addition to the amounts received above, his evidence was that from June 2018 to
18 February 2019, his parents paid his credit card bill and told him to do whatever he
19 needed to do. He spent some \$46,000.00 on the card, which his parents paid. During
20 the period from April onwards, he went on eight overseas trips, some of which were
21 with the children, while a ninth trip was for a job interview for which cost he was



1 reimbursed. Examples of his spending included that he spent US\$7,500.00 on
2 landscaping, US\$763.14 on a total of three occasions for flowers for his girlfriend,
3 US\$2,299.50 at a jewelry store on jewelry for her anniversary, and \$2,172.36, to install
4 fitness equipment in his new garage. He also bought three televisions at a cost of
5 \$850.00 each and spent money on various hotel stays while overseas. In response to
6 Counsel's suggestion that some of his spending was non-essential and frivolous, he
7 said that it was all necessary and essential. He said further that his parents paid for it
8 and he did not ask them to help him with maintenance payments.

9
10 133. He gave evidence before this Court that he was struggling to make ends meet during
11 this period and sought to explain that he needed to furnish the house for himself and
12 the children and that by the time of the spending about which he was cross examined,
13 the Court had suspended his payments so he was not required to pay anything.

14
15 134. In so far as his highlighted spending bears upon this application, it was apparent from
16 his bank and credit card records and the detailed cross examination of him that there
17 was little or no attempt on his part to practice economy much less frugality over the
18 period that he was unemployed. He received and spent large sums on items which
19 though he might describe them as necessary to him, were clearly not urgent or
20 immediate needs. The nature of some of them meant that they could have been deferred
21 to a later time.

22
23 135. While it is understandable that he would wish to furnish his new home for the comfort
24 of himself and the children and to enjoy holidays with them and with his friends and
25 family, there were notably, in the midst of this, no voluntary payments or purchases,

1 even of groceries towards his maintenance obligations. The undoubted impression
2 which was left is that it was not as difficult for him as he sought to suggest and that he
3 could have made some payments had he chosen to give priority to his court-ordered
4 obligations.

5
6 136. I can see no basis for remitting all of the arrears in circumstances where he received
7 payments from his previous employer in the amounts as set out above, had balances
8 left over after major payments, had no mortgage payments until August 2018 and had
9 access to another source of funding. As to his ability to pay going forward, he has a
10 small surplus, a budget which would allow for some savings and in a few months the
11 amount of the ongoing payments will be reduced.

12
13 137. He should pay the first portion of the arrears at the rate previously ordered by the
14 Court, of US\$8,500.00, but this is limited to four months for the months of May to
15 August 2018. For the months of September 2018 onwards when he commenced new
16 employment, he is to pay the arrears at the rates detailed above. From October 2018,
17 the husband has been paying US \$500.00 per month which amounts will be deducted
18 from the outstanding arrears.

19
20 138. The arrears are therefore assessed as follows:-

May 2018 to August 2018	4 months at \$8,500.00	34,000.00
September 2018 to February 2019 (at percentage reduction levels shown above.)	6 months at \$5,700.00	34,200.00
March 2019 to August 2019 (at percentage reduction levels shown above.)	6 months at \$5,400.00	32,400.00
Less credit for payments made	(11 months at \$500.00)	(5,500.00)
Total		US\$95,100.00



1 **CONCLUSION**

2 139. Having considered all the evidence on this hearing and the submissions made, orders
3 are made for variation of maintenance payments in the amounts stated above and for
4 payments of the assessed arrears. The husband must make arrangements to pay the
5 arrears, whether by loan or other funding so that they are paid within six months.

6
7 140. The wife has asked that I make an order that within seven days of his being informed
8 as to the level of his discretionary bonus that he should disclose this to the wife. I
9 make this order accepting that it is an appropriate order to be made in the
10 circumstances of this case.

11
12 141. Should the parties wish to make submissions on costs, they may so indicate within five
13 days of receipt of the perfected judgment.

14
15

16 **Dated this the 3rd day of September 2019**

17 



17

18 **Honourable Justice Cheryll Richards Q.C.**
19 **Judge of the Grand Court**
20