18-09-12

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. FAM 180 of 2011

BETWEEN:

B **PETITIONER**

AND:

B **RESPONDENT**

Appearances:	**Mr. David McGrath of Samson & McGrath for the Petitioner**
	Mr. Shaun McCann of Campbells for the Respondent
Before:	**Hon. Justice Williams**
Heard:	**10th and 11th August 2012**
Delivered:	**18th September 2012**

HEADNOTE

Husband and Wife – Divorce, financial provision and ancillary children proceedings- Maintenance Pending Suit – Application by wife for costs allowance to fund her legal costs – Review of case law in relation to costs allowance orders – Application of ***Currey v. Currey*** *[2007] 1 FLR 946 - Obiter: Effect of Schedule 1 Children Law on applications for cost allowance orders.*

JUDGMENT

1. I have before me a Summons filed by the Petitioner Mrs. B ("the wife") dated 19th June 2012. In the Summons the wife sought an order that the Respondent Mr. B ("the husband") "*shall pay to the Petitioner's attorney within 14 days of this order a payment in respect of her outstanding legal fees in the total sum of CI$70,000 and a further payment in respect of the future legal costs up to the final hearing in the total sum of CI$50,000.*"

2. Upon the Court emphasising that any costs allowance order must be viewed as being an element of an order for maintenance pending suit made to fund a party's legal costs of matrimonial proceedings, the wife refined the terms of the application. The order now sought, over and above maintenance pending suit already ordered, is for there to be an additional amount to reflect a legal costs element at the rate of CI$40,000 to be paid bi-monthly, with the first payment being 60 days after the date of the order. The wife seeks three such payments which would total CI$120,000. The wife's unpaid fees as of 31st July 2012 were CI$98,960. The husband's unpaid fees as of 6th July 2012 were CI$71,585 but the Court was informed that the level reached at the time of the hearing was similar to that of the wife's. The Court has not received a proper breakdown of either parties' fees to date.

3. The wife's application is opposed by the husband who is represented by Mr. Shaun McCann.

BACKGROUND

4. On 16th December 2011 I delivered an ex tempore ruling dealing with, amongst a number of other issues, an application by the wife for a sum from the husband towards her legal costs. I ordered that a sum of CI$37,500 be paid by the husband. As this is intended to be a comprehensive Judgment, reference will be made to parts of the earlier Judgment.

5. The wife, an American national, married the husband, a Caymanian national, on 22nd December 2008. There are two children of the marriage, a son aged five years and a daughter aged three years. The children, who have dual nationality, currently reside in the former matrimonial home with the mother in the Cayman Islands and enjoy regular access with their father.

6. The wife filed her petition for divorce on 11th August 2011, less than three years after the date of the marriage. It is a short marriage. Regrettably, the proceedings thereafter have not progressed in a commendable manner. In my ex tempore rulings delivered in November and December 2011 I commented that both parties should be encouraged to minimise the need to continually seek the involvement of the Courts in determining any matrimonial issues that may arise. In these

proceedings there have been an unusually high number of court appearances, with the parties appearing to be unable to agree very little concerning the reasons for the breakdown of their marriage, as well as the way forward concerning finances and what is in the best interests of their children. It is turning out to be one of those dispiriting cases where, instead of spending substantial and disproportionate sums on litigation, had the parties been able to resolve their differences at a more modest and sensible level of costs, they would have potentially been able to put themselves in a position to ensure, if not for themselves then at the very least the financial security of their young children. Mr. David McGrath, who appears on behalf of the wife, when dealing with the manner in which the parties are litigating and the resultant high level of fees succinctly states at paragraph 16 of his written submissions that *"they make these choices at their own financial peril and at the peril of their children's financial future."*

7. The parties may, as these proceedings plough on, find it appropriate to have regard to the concerns expressed by Munby J (as he then was) in ***KSO v. MJO and JMO*** [2009] 1 FLR 1036 at paragraph 77 page 1053. He was clearly exasperated by the level of expenses being incurred in a number of ancillary relief proceedings and he referred to helpful earlier judicial observations as follows:

> *"In **A v. A (No 2) (Ancillary Relief: Costs)** [2007] EWHC 1810 (Fam), [2008] 1 FLR 1428, at para [269], I observed that in that case some 41.5% of*

matrimonial assets of £2,669,715 had gone in costs. I continued at para [270]:

> *'It may be that the "mega" rich can afford to squander grotesque sums in costs. The allusion is, of course, to* ***Moore v. Moore*** *[2007] EWCA Civ.361, [2007] 2 FLR 339, at para [6]. Lesser mortals cannot. Costs in too many so-called "big money" cases – in modern conditions many such cases do not in truth involve "big" money at all – are, as here, grossly disproportionate to either the amounts or the issues at stake. I have had occasion before to deplore the expenditure – one is tempted to say the waste – of money in such cases: see, for example,* ***Re G (Maintenance Pending Suit)*** *[2006] EWHC 1834 (Fam), [2007] 1 FLR 1674, at para [46]. Other Judges have also expressed their concerns. A very recent example is provided by* ***Wood v. Rost*** *[2007] EWHC 1511 (Fam), [2007] All ER (D) 198 (Jun), where, speaking of a case which had been conducted at "vast expense", the Deputy Judge lamented that the late Mr Charles Dickens was no longer alive to write a 21st century sequel to Bleak House. The simile, if I may say so, is all too apt. The accusatory finger which in the 19th century was appropriately pointed at the High Court Chancery is, in the modern world, more appropriately pointed at the Family Division."*

8. Having referred to the above, I note that it appears that the escalation in the level of costs in the matter before me is being driven by the parties and not by those who represent them.

9. Since the filing of the Petition in August 2011 the Court has already been inundated with approximately thirteen different Summonses. The Court has had to consider almost the full ambit of ancillary relief applications including two applications made under the Domestic Violence Law 2010 - applications for maintenance pending suit for the spouse and child - three applications for cost allowances - applications for the payment of school fees, medical costs and matrimonial home expenses - applications to vary maintenance pending suit - applications to define access - applications for custody, care and control resulting from the children's removal from the wife's care by the Department of Child and Family Services pursuant to place of safety orders - application for temporary removal of the children out of the jurisdiction - pending application to permanently remove the children from the jurisdiction and pending application for financial ancillary relief with issues as to disclosure. For the purpose of this Judgment I need not rehearse the nature of these various applications in any great detail.

10. The Court is still not in a position to list the final ancillary relief, as there are still some outstanding issues as to disclosure requiring attention, as well as a need to

first conclude the pending child related applications. Five days of court time has been allocated in December to hear the wife's application to permanently remove the children from the jurisdiction and, if necessary, any resultant children orders. The Court has been informed that leading counsel from London has been retained to represent the husband at the December hearing.

11. The current application for a costs allowance order is the third one to be considered during the course of these proceedings. On 18 August 2011 Quin J ordered that the husband do pay CI$10,000 "*by way of interim maintenance for legal fees*" and that the wife's attorneys were to provide the husband's attorneys with a preliminary estimate account and breakdown of legal fees. A similar application came before me on 16th December 2011. On that date, after considering the more limited case law then before me, I was satisfied that the Court had the jurisdiction to make such an order, that the wife had established that she had met the required criteria in making such an order, that there were liquid funds available to the husband to make a payment for a costs allowance and that, having regard to both the parties' circumstances, it was just to add a cost component to the existing maintenance pending suit order. I made an order for the payment of CI$37,500 which amounted to 75% of the total sum applied for by the wife, airing a concern about the limited breakdown of the level of the wife's costs provided to the Court. I indicated that both parties should feel able to pay that amount towards the liability to their respective attorneys. I understand that both

attorneys have since each been paid the sum of CI$37,500. The Court has been made aware that the husband has not paid his attorneys any amount over and above that amount to date, so this is not a situation where a husband has been discharging his fees liability from his assets whilst the wife has been unable to do so.

12. On 16th December 2011 the wife sought, pursuant to Section 20 (c) of the Matrimonial Causes Law, an order requiring the husband to pay $50,000 towards meeting her legal fees. In the skeleton argument filed by Ms. Dowse on behalf of the wife she stated that the payment was to *"enable her to have representation for her forthcoming applications to remove the children permanently from the Cayman Islands and for final ancillary relief."* The fact that the projected cost figures that were given in December have now been found to be significantly insufficient does not in itself present a bar to the wife seeking a later increased amount. These proceedings are a classic example of matrimonial proceedings mushrooming due to a number of unforeseen intervening applications and inaccurate time estimates for substantive hearings, resulting in a significant rise in the predicted legal fees. The wife mentioned at paragraph 22 of her affidavit sworn on 29th November 2011 that the order was sought because it was *"in the interest of justice that she be entitled to legal advice in order to be represented fully in these proceedings."*

13. At the December hearing the husband, during cross-examination, agreed that both parties required legal representation. He stated, when asked if it was appropriate for him to pay for both an attorney and a paralegal that:

> *"This is a serious matter, divorce .... I do not take lightly, involves two children, not in their best interest. I am a simple man, do the best I can, best possible attorney to represent my children and myself .... I do not disagree that she needs representation."*[1]

14. The husband accepted that both parties had legal bills and that these will need to be paid "*at some point.*"[2]

15. The Court considered[3] a letter from the wife's attorneys dated 6th December 2011 in which they stated to their client:

> *"In all the circumstances of this case our firm is not in a position to enter into an agreement whereby you grant us a charge over any settlement or award which you might receive. Obviously we can discuss funding options with you and applications which you can make and the court grant."*

[1] Paragraph 33 Judgment 16th December 2011
[2] Paragraph 34 Judgment 16th December 2011
[3] Paragraph 23 Judgment 16th December 2011

16. Having regard to the content of the letter and the wife's oral evidence that she was unable to enter into a Sears Tooth arrangement with her attorneys as well as the submissions made and evidence received in this latest application, I am similarly satisfied that such an arrangement with her current attorneys is still not available to her. Despite the husband's case being that the wife is not entitled to any part of the assets under his control as they are not matrimonial assets, he argues that she should have 'shopped around' to try and find and convince an alternative firm to represent her in these matrimonial proceedings retained under a Sears Tooth charge arrangement.

17. An important factor stressed by the Courts in England and Wales is that a party is entitled to representation by a lawyer possessing the commensurate ability and experience to conduct his client's case. Although it may be argued that the parties have not necessarily done all they can to simplify the financial matters, the varied applications pending before me are not straightforward in nature. Applications to remove children from the jurisdiction are recognised as being potentially complex and that is why in England and Wales such applications are reserved to the High Court Judge. This may also be one of the reasons why it appears that the husband is to be represented by leading counsel from England and Wales to meet that application. When proceedings like those before me have progressed over many months it would be unfair to expect a party to try to find a new attorney, who would have all the difficulties of coming up to speed with the case, because the

current attorney is reasonably unwilling to enter into a Sears Tooth arrangement. Having regard to the nature of the issue as to whether property currently under the husband's control can be regarded as matrimonial assets, it is unlikely that a firm experienced enough to recognise the complexity of the issue would be willing to take on the case on such a delayed potential payment arrangement. This is not the type of case referred to by Holman J in ***A v. A (Maintenance Pending Suit: Legal Fees)*** [2001] FLR 377 at paragraph C on page 608 concerning "*a normal divorce*" where "*..... it may be possible to predict that the wife will receive an approximate amount of capital.*" I am satisfied that the wife has demonstrated that she could not persuade her legal representative to enter into a Sears Tooth charge and it would not be reasonable or fair for her to, in the circumstances of this case, embark upon the likely unsuccessful task of finding an attorney of the requisite experience who might be willing to do so. Having reached this conclusion, I will at a later stage in this Judgment consider the position of the wife procuring legal advice by means of public funding.

18. In the December ex tempore Judgment[4] I referred to the following views expressed by Wilson J in ***Sears Tooth (a Firm) v. Payne Hicks Beach (a Firm)*** [1997] 2 FLR 116 at 118H-119A:

[4] At paragraph 25

"... ... a grave and widespread problem encountered increasingly in the Family Division: namely, how can a spouse, usually a wife, who is ineligible for legal aid but who has negligible capital, secure legal advice and representation in order to pursue her right against the husband, particularly one who is rich, litigious or obstructive or whose financial circumstances are complex or unclear."

19. In the December Judgment[5] I then went on to say that, at that time, it appeared as if the wife was unable to obtain legal aid. I commented that there was some complexity to the husband's financial affairs but did not go as far as to say that he was litigious or obstructive or particularly rich. I did not find that the husband was paying huge sums on litigation. I am now aware that the husband's mother intends to pay for leading counsel from London to represent him at the wife's upcoming application for permanent removal of her grandchildren. The Court has been informed that the quantum of the payment could be in the region of CI$100,000. This means that the husband will by that stage likely be paying far higher sums on litigation than the wife. Despite this, both parties accept that their respective legal fees to date are currently at a similar level and neither highlights a concern that the other's are excessive having regard to the work undertaken to date.

[5] At paragraphs 25 and 26

20. At the hearing in December both of the parties stated that their legal fees were in the region of CI$50,000. The parties had not presented me with a breakdown of their respective fees and therefore I was not in a position to undertake a review as to the reasonableness of the figures. However, in such circumstances it might be said that the best yardstick is gained from comparing the fees of the parties and, if they are similar, then that may be a good indication as to their reasonableness. Of course, if the level of one party's costs greatly exceeds the level of the other's, then that may be an indicator that their fees merit a fuller explanation. In December I expressed the concern that I was not willing to deplete any available asset in the amount of CI$50,000 without carrying out a proper review of a breakdown of fees sought and that is the reason why the payment ordered was at approximately 75% of the level claimed. I stated at paragraph 29 of the Judgment:

> *"I come to this conclusion as I feel it proper with such a substantial figure in a matrimonial matter which may not be regarded as being a big-money case that the Court should at least carry out such review, and I say so not because I see any merit in Mr. B's contention that Ms. Dowse and the firm of Sampson & McGrath are not acting in the best interest of their client and litigating in such a way to benefit from the receipt of increased legal fees."* [6]

[6] Paragraph 29 Judgment 16th December 2011

21. I am satisfied that the parties should have been aware that the Court views it to be required good practice for an application for maintenance pending suit with a costs element to be accompanied by a detailed cost estimate including a breakdown of past costs if also sought. At the very least I would have expected to have received a document similar to the "bill of costs" which the wife's attorneys sent to the husband's attorney[7] on 30th May 2012 pursuant to the costs order of Henderson J at the April 2012 hearing. I note that the attorneys for the wife, although no doubt seeking to find out what legal fees had already been paid by the husband, recognized the relevance of the level and a breakdown of a party's fees, because as recently as 8th June 2012 they wrote to the husband's attorney requesting *"a copy of all invoices raised in respect of your client whether paid or unpaid, to date."* I am fortified in the view that a proper breakdown should be given by the sentiments expressed by Mr. Nicholas Mostyn QC (as he then was) who, when sitting as a Deputy High Court Judge in ***TL v. ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)*** [2006] 1 FLR 1263, stated at paragraph 130 "*In every case I would expect that a fairly detailed estimate of the costs expected to be incurred should be produced.*" Ordinarily the application is primarily made as to future costs, but in the matter before me it is requested to cover work already done, so detailed breakdowns of both past and future costs should be provided.

[7] Exhibited at SCB1. Affidavit of husband sworn on 6th July 2012 - Page 639 trial bundle

22. Despite my disappointment that the wife did not 'take onboard' my indication, the failure to do so is not necessarily a bar to me making such an order, although the Court retains a discretion to do so in such circumstances, it is a factor to take into account when assessing whether the amounts claimed are reasonable and ought to be paid even if the wife has satisfied me of her inability to raise funds after I have conducted the "*overarching inquiry.*"

23. I stated at paragraph 30 of the December Judgment that "*the issue in this case, if satisfied that the sought fees are outstanding and to a degree reasonable, is whether there is a source from which any payment can be made by Mr. B. The Court at all times must have regard to the requirement of "equality of arms," affording each party a reasonable opportunity to present their case.*" I considered, based on the evidence then before me, where the parties might be able to raise funds to pay their legal fees. I was at that time unable to determine whether the husband had any other potential source save for the CI$134,000 disclosed in the Royal Bank of Canada account number ***.

24. I indicated in paragraph 32 of my Judgment that:

> *"the parties at the final hearing will need to look carefully at the corporate structure payments made by any companies/business entities that Mr. B has a possible connection with very carefully. What is clear today though is that Mr*

B's position is different to Mrs. B's. Mr. B has financial independence. He is the one who is controlling the bank account. He is not living in financial isolation in Cayman, and fortunately Mr. B is embraced by commendably supported family, as evidenced by the retaining of evidence from Philip Rabinowitz, a Floridian attorney, to assist his position in these proceedings."

25. At the December 2011 hearing the husband informed the Court that he would pay his legal bill "*from whatever is left in CI$134,000 account*" and that his "*intention is that I will pay out of that account.*" Having heard that, I commented at paragraph 34 in my Judgment that, "*Mr. B stated that the contents of the account was owned by him before the marriage, inferring that it should not be seen as a matrimonial asset. In light of that contention and his contention that this is a short marriage and his submission that Mrs. B's view of his financial worth is incorrect, as he has no other significant assets, it is not clear what source he feels that she will pay from when he suggested she pays (her legal fees), in his words, "out of the settlement" that will be available to her.*"

26. I then went on to say at paragraphs 35 and 36:

"35. In this case, having regard to Mr. B's contention about lack of significant assets save the bank account and on the financial disclosure currently before me, I am not able to predict, as one may be able to do in most cases, the

approximate amount of capital that the wife may receive at the hearing. It is submitted that Mrs. B is unable to obtain a loan to cover her fees and her attorneys have stated in the skeleton argument and letter of 6th December 2011 that they are not willing to rely upon any deed of assignment of rights to financial provision as in the Sears Tooth case.

"36. I am satisfied that Mrs. B does not have sufficient income or capital to enable her to pay for her lawyers and in Cayman is totally dependent upon her maintenance payments. There are funds in the Royal Bank of Canada account and I am satisfied that the payment by Mr. B to her legal fees should come from that account. The amount, for reasons already stated, at this stage, will be for CI$37,500."

27. It is agreed that the funds in the Royal Bank of Canada account are now depleted and this is no longer a source for payment of a costs allowance order. There is an issue as to how all of the funds in the account have been utilized, but that will be a matter for consideration at the final hearing. The issue as to whether the husband has the funds or the ability to raise funds to pay a costs allowance order is a primary issue in the application now before me. I will consider that issue at a later stage herein.

THE LAW

28. The Court of Appeal held in ***Wicks v. Wicks*** [1998] 1 FLR 470 that no statutory powers existed to make an interim lump sum order and that the Courts in England and Wales had no inherent jurisdiction to do so. The position is the same in the Cayman Islands under the Matrimonial Causes Law. Case law has developed in the absence of such jurisdiction and it has now become well-settled that a Court in England and Wales or in the Cayman Islands may award maintenance pending suit which includes an element to allow a party to pay legal fees. Hitherto, no thorough review of this developing case law appears to have been undertaken in the Courts in the Cayman Islands. Due to time constraints at the time I was unable to undertake such a review in my ex tempore Judgment on 16th December 2011. There is a need for such an exercise to now be conducted.

29. In ***A v. A (Maintenance Pending Suit: Provision for Legal Fees)*** [2001] 1 FLR 377, Holman J was tasked with considering whether such jurisdiction existed. The wife had been in receipt of legal aid but, following the making of a maintenance pending suit order, her legal aid certificate was discharged. By the time the issue of maintenance pending suit legal costs application came to court, her unpaid legal costs had reached £40,000. The wife had no income and had been dependent upon her husband during the marriage. The husband was paying large sums on his litigation.

30. Holman J concluded that the word "*maintenance*" in Section 22 of the Matrimonial Causes Act 1973 was not restricted to matters that are ones of "*daily living*" and was wide enough to include a need to pay legal costs. He found that there was no reason why a court could not include an element for costs when making an order for maintenance pending suit. Holman J stated at page 387:

> *"She is locked into a bitter struggle with him, whose outcome is of intense importance to her. She has acute need for good legal representation in which her lawyers do not have always to be desperately economising relative to the husband."*

31. Holman J continued at page 382 stating that the costs of the suit were:

> *"... After the provision of a roof over her head and food in her mouth, the wife's most urgent and pressing need and expense..... She simply cannot make any progress with the dominating issue in her life if she cannot pay her lawyers, and for this the state will not provide."*

32. In ***A v. A***, Holman J concluded that the husband could afford to make payments and that it was reasonable for him to do so. Accordingly, an order was made for maintenance pending suit at the rate of £7,750 per month comprising two elements: £3,750 towards the wife's general living expenses and £4,000 on her

undertaking that she would pay it promptly to her solicitors on account of her costs of the proceedings to be credited against the ultimate liability of the husband to pay or contribute to her costs.

33. In **G v. G** ***(Maintenance Pending Suit: Costs)*** [2003] 2 FLR 71, Charles J followed the approach taken in ***A v. A*** and endorsed Holman J's interpretation of the word maintenance. Charles J did not accept or proceed on the basis of the husband's assertions that he was not able to pay. However, the Learned Judge emphasised that the power was discretionary and therefore he was required to consider fairness between both parties by having regard to the advantages and disadvantages to the parties that would flow from making or not making such an order.

34. Thorpe LJ sitting in the Court of Appeal in the case of ***Moses – Taiga v. Taiga*** [2006] 1 FLR 1263 endorsed the developing practice of making an order for maintenance pending suit for costs and stated that such an approach was both "*pragmatic*" and "*sensible*". The Petitioner wife, pleading a customary marriage in Nigeria, petitioned for divorce and sought ancillary relief and orders under the Children Act 1989. The husband denied the existence of the marriage and challenged the court's jurisdiction. An interim order was made for maintenance pending suit which included a component for the wife's legal costs. On appeal the husband sought to challenge on the basis that the court lacked jurisdiction because

there was no marriage and that England was not the appropriate forum and therefore payments for maintenance pending suit would not be recoverable if he won his case. The appeal was dismissed and it was held that the Court had jurisdiction to make discretionary orders for maintenance pending suit where there was a preliminary issue as to jurisdiction. The jurisdiction existed even where the existence of the marriage was an issue. It was held that even in these circumstances the Court could include a component for legal costs in the maintenance pending suit order. Thorpe LJ stated at paragraph 18 that:

> *"There is manifestly a risk of unjustified and irrecoverable payments, but that has to be balanced against the risk of denial of access to justice for the petitioner, if she has not the means to sustain herself and the litigation pending its determination."*

35. Thorpe LJ at paragraph 25 of his Judgment set out the following principles:

> *"In the 1970s a petitioner who had no assets whose only prospect of affluence lay in the outcome of her application for ancillary relief could easily find specialist solicitors who would pursue her claim on legal aid. That world has long since gone. In those days a number of the leading specialist ancillary relief firms could, as a matter of public duty, take on an admittedly small number of legally-aided cases. Leading firms that would not take legally-aided clients invariably had an*

arrangement to pass such cases to highly competent firms that would do legal aid. All those support systems have disappeared. The modern reality is that the highly specialist solicitors and counsel necessary for the conduct of big-money cases will no longer do publicly-funded work. So if the applicant has no assets, can give no security for borrowing, cannot guarantee an outcome that would enable her to enter into an arrangement such as that which was upheld in ***Sears Tooth v. Payne Hicks Beach****, then there is no source of funding of the litigation other than the approach to the court for a maintenance pending suit that will include a substantial element to fund the cost of the litigation. Obviously in all these cases the dominant safeguard against injustice is the discretion of the trial Judge, and it will only be in cases that are demonstrated to be exceptional that the court will consider exercising the jurisdiction. But I am in no doubt that in such exceptional cases section 22 can in modern times be construed to extend that far."*

36. Thorpe LJ appeared to be stating that the making of costs allowance orders should be confined to "*exceptional*" cases. This part of Thorpe LJ's Judgment has been the subject of judicial comment as case law has developed. Thorpe LJ held that such an order was appropriate if the applicant: (i) had no assets; (ii) could not obtain a legal fees alone; (iii) could not enter into a Sears Tooth deed with his/her attorney due to the uncertainty of the outcome of the proceedings and (iv) was unable to obtain legal aid at a level suitable to provide adequate legal representation.

37. Singer J in ***L-K v. K (Brussels II Revised: Maintenance Pending Suit)*** [2006] 2 FLR 1113 similarly recognised the need to consider potential injustice to a husband if he were to prove that the English Court did not have jurisdiction. Singer J, following the Court of Appeal's decision in ***Moses-Taiga v. Taiga,*** made an order for maintenance pending suit, including an element for the wife's legal costs having determined, at paragraph 40, that the balance of unfairness would fall more heavily on the wife than on the husband if the Court declined to make such an order, as she should not be expected to continue the litigation in person. Singer J, in carrying out this exercise, accepted that there was a risk of injustice to the husband if he was ordered to fund the wife's litigation against him and then he succeeded on the jurisdiction issue, but he balanced this against this finding that the wife had no other means of paying her legal costs.

38. In ***TL v. ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)*** [2006] 1 FLR 1263 Mr. Mostyn QC confirmed that the Court had jurisdiction to award costs allowance orders. The husband in that case came from a wealthy Greek shipping family. The husband and wife lived in London in a property registered in the husband's brother's name. The husband worked in the family business and was paid through various offshore company bank accounts. The third respondent was the husband's father and the second respondent was the husband's brother. The husband challenged the wife's contention that he beneficially owned the property and the bank accounts. The wife in the alternative

argued that the husband's parents' assets amounted to resources within the extended meaning of that word as established in ***Thomas v. Thomas*** [1995] 2 FLR 668 and that the Court should "*encourage*" them to be made available to meet her claims. Mr. Mostyn QC considered, amongst other issues, the husband's appeal of the decision to award maintenance pending suit in the annual amount of £205,000 with monthly payments being set at £17,083 per month. The annual amount included an element for a costs allowance order of £60,000 per annum. Mr. Mostyn QC noted that there was no detailed estimate of the costs that the wife expected to incur, nor was it stated for how long it was being asked that the payments should continue. He noted that the wife had not produced any evidence that she could not obtain funding from other sources and that when the husband did not pay her father paid the costs. Mr. Mostyn QC concluded that the cost allowance element of the maintenance pending suit award was not sufficiently evidentially based or sufficiently reasoned by the district Judge and allowed the appeal in respect of that element.

39. At paragraphs 123 and 124 in his Judgment Mr. Mostyn QC, upon highlighting the leading cases as to the principles to be applied in an application for maintenance pending suit to be ***F v. F (Ancillary Relief: Substantial Assets)*** [1995] 2 FLR 45, ***G v. G (Maintenance Pending Suit: Legal Costs)*** [2002] 3 FCR 339, and ***M v. M (Maintenance Pending Suit)*** [2002] 2 FLR 123, most

helpfully set out the principles to be applied in maintenance pending suit cases, as follows:

(a) The sole criterion in determining an application for maintenance pending suit is 'reasonableness', which is synonymous with 'fairness'.

(b) A very important factor is the marital standard of living, but the exercise is not merely to replicate this.

(c) There should be a specific maintenance pending suit budget that excludes capital or long-term expenditure more aptly to be considered on a final hearing. The budget should be examined critically in every case to exclude forensic exaggeration.

(d) Where the affidavit or Form E disclosure by the payer is obviously deficient the Court should not hesitate to make robust assumptions about his ability to pay. The Court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the Court should err in favour of the payee.

(e) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty has been

curtailed but where the position of the outsider is ambiguous or unclear, then the Court is justified in assuming that the third party will continue to supply the bounty, at least until final trial.

40. Mr. Mostyn QC indicated that if an applicant for a costs allowance order demonstrated that he had no assets, could not raise a litigation loan and could not persuade his attorneys to enter into a Sears Tooth arrangement, then that would amount to the exceptional circumstances mentioned by Thorpe LJ in ***Moses-Taiga v. Taiga***.

41. Mr. Mostyn QC suggested that a statement from an applicant's attorney would be sufficient to meet the Sears Tooth criteria and that the production of correspondence between an applicant's attorney and two banks indicating that a loan was not feasible would be sufficient evidence that a litigation loan could not be raised. I note that, in that case, the wife came from a wealthy family who, although voluntarily becoming involved in the proceedings, was unwilling to provide helpful details as to their financial affairs. Although the provision of letters from banks concerning refusal to lend monies might be required in certain cases, and may in fact better assist the party to persuade the Court that this avenue of possible funding has been exhausted, it is questionable whether it should be regarded as a strict requirement for every case. In some cases, such as the matter before me, a statement in an affidavit setting out the current situation as to an

applicant's liquid assets or readily available funds will suffice as in certain cases the facts speak for themselves. For example, for the reasons set out in paragraphs 14 and 15 above, it is difficult to predict the amount of capital that the wife might receive, making it unrealistic to expect a bank to lend money to a person on a low wage based on an uncertain expectation of any future lump sum. Of course the husband's case is that the wife will not be entitled to any of the assets under his control.

42. Mr. Mostyn QC expressed the view that a cost allowance made within a maintenance order is not an order for costs. He went on to say that an applicant should be required to give an undertaking: (i) only to apply the costs allowance to the payment of costs; and (ii) to repay such part of the cost allowance at trial if, and to the extent that, the Court is of the opinion, when considering costs, that she ought to do so. This is a practice that I endorse.

43. In light of the intention to reform the Matrimonial Causes Law in the Cayman Islands, I adopt Mr. Mostyn QC's recommendation made to English legislators that thought be given to including in the new legislation provisions enabling the Court to award an interim lump sum. This would mean that a lump sum payment could be made on the basis that it is only used for funding the costs and credit could be given against the ultimate lump sum in respect of the payment.

44. Before I leave the case of ***TL v. ML and others***, those who come before the Court should pay regard to the procedural guidance given by Mr. Mostyn QC at paragraph 36 concerning cases where a dispute arises about the ownership of property in ancillary relief proceedings between a spouse and a third party when he stated:

> *"The following things should ordinarily happen:*
>
> *(i) the third party should be joined to proceedings at the earliest opportunity;*
>
> *(ii) directions should be given to the issue to be fully pleaded by points of claim and points of defence;*
>
> *(iii) separate witness statements should be directed in relation to the dispute; and the dispute should be directed to be heard separately as a preliminary issue, before the FDR."*

45. It is accepted that we do not have the same rules as those that apply in England and Wales, but the general approach recommended above, with modifications to take into account local practice, is commendable.

46. In *C v. C (Maintenance Pending Suit: Legal Costs)* [2006] 2 FLR 1207, Hedley J considered an application by the wife to vary an order for maintenance pending suit which had been made by consent only three months earlier. As a part of the variation the wife now sought for the first time in the proceedings a costs allowance order. The case involved a 15 year marriage of a 50 year-old wife who was found to have no earning capacity as she had been a homemaker and mother to the children of the marriage. The husband, aged 45, was a businessman with a 72.6% shareholding in a company valued at £13 million. The husband raised liquidity issues, contending that further income could not readily be drawn from the business. The Court found that the business had a very large and growing turnover and showed a healthy profit. The Court found that the husband had a lifestyle that *"befits his station"*, including hobbies and recently being able to redeem $500,000 off his mortgage taken out on a new house purchased for himself. The Court recognised that the husband may have to borrow and increase his indebtedness. Hedley J did not find the husband's argument that the wife should raise the money on the security of her half share in the family home (the share which was thought to be more than £500,000) as it could risk her and the children of the marriage's occupation of the same. The Court acknowledged that it could not conduct a full investigation of the husband's financial affairs and should not reach conclusions about his liquidity on the information then before it, but should look at the broader picture including how the husband was using his money. Hedley J found that the husband had the capacity, by re-structuring his

business and personal affairs, to pay the wife's legal expenses component of £100,000 at a rate of £10,000 per month for 10 months or by any other means the husband deemed to be appropriate. This order was made on the wife giving a required undertaking to pay that sum to her lawyers, to be credited against any costs order she might eventually obtain against the husband.

47. Hedley J developed the consideration given by Mostyn J in ***TL v. ML*** to Thorpe LJ's observations concerning the exceptional test set out in ***Moses-Taiga v. Taiga***. When considering what was exceptional Hedley J stated that Thorpe LJ's words were illustrative rather than definitive, as they described a particular exceptional set of circumstances existing in ***Moses-Taiga v. Taiga***. Hedley J incorporating this approach found that the length of the marriage, the needs of the children, the fact that the matrimonial assets were under the control of the husband and that there was a need for the court to properly assess the assets amounted to exceptional circumstances.

48. In ***B v. B*** [2006] EWHC 1834 (Fam), Munby J considered a cross-appeal of an order for maintenance pending suit which included a cost allowance of £6,000 per month made by the Deputy District Judge. Munby J followed the approach taken by Hedley J in ***C v. C*** finding that the case was exceptional and that the categories referred to by Thorpe LJ in ***Moses-Taiga v. Taiga*** should be regarded as illustrative and not definitive of what might amount to an exceptional case. The

husband was found, when adding in his bonuses, to have a net monthly income in the region of £25,000-£29,000. The husband was ordered to pay £10,000 each month maintenance pending suit with an additional £6,000 monthly element for a cost allowance. The wife had exhausted a loan of £120,000 which she had raised on the security of the former matrimonial home in which she and the children resided, as well as exhausting £42,500 which the Court had released from a 'blocked account.' The submission of the husband that the wife should continue to remortgage the property until no lender was prepared to advance any more did not find favour with the Court. Munby J found that there should be equality of arms and that required the husband to make at least some contribution to the wife's ongoing costs.

49. The current approach to applications made for a cost allowance has been set out by the Court of Appeal in ***Currey v. Currey (No.2)*** [2007] 1 FLR 946. In Currey the Court of Appeal heard an appeal from the Judge's decision to increase a periodical payments order which was worth approximately £50,000 per annum by £10,000 per month over four months, so as to provide the husband with £40,000 to enable him to procure continued legal advice and representation until the end of a financial dispute resolution appointment. The Learned Judge had accepted the husband's undertaking to pay the four extra instalments to his lawyers on account of costs he incurred until then and as well as his undertaking "*to repay the wife or*

such part of the periodical payments relating to legal fees as he may hereafter be ordered to repay."

50. The proceedings related to an application brought by a rich wife seeking a clean break order by means of the Court making an order against herself for capitalisation of the periodical payments. The husband resisted this application fearing that it would have an impact on his position with his creditors. The husband already owed the wife at least £46,000 in costs. The wife contended that it was not open for a Judge to include a cost allowance component to an order for periodical payments where the husband still had a liability to the wife for costs.

51. Wilson LJ (as he then was) considered the exceptional requirement raised by Thorpe LJ in ***Moses-Taiga v. Taiga***. The Court of Appeal established a reasonableness test, placing greater emphasis on the position that was established in "*the seminal decision*"[8] of Holman J in ***A v. A***. Wilson LJ expressed the view that the word exceptional had become controversial and was obstructing the proper exercise of the Court's discretion to include a costs allowance. Wilson LJ felt that the three stage test referred to by Thorpe LJ should not be taken literally, stating at paragraph 19:

[8] Wilson J at Paragraph 14 - Currey v. Currey

"For it is clear that the reference by Thorpe LJ to an applicant needing to demonstrate that she "has no assets [and] can give no security for borrowings" should not be taken literally. Mrs. C did have assets and could give security for borrowings; the point was, however, that it was unreasonable to expect her to do so."

52. Wilson LJ at paragraph 20 went on to say that the *"initial over arching enquiry"* should be whether an applicant for a costs allowance order can demonstrate that she could not reasonably procure legal advice and representation by any other means. So in a case where an applicant has assets she needs to demonstrate that they could not reasonably be deployed either directly or by raising a loan to fund legal services. It was held that an applicant should also have to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon the ultimate capital recovery. Wilson LJ added an additional criterion, namely the need to satisfy the Court that no legal aid was available to the applicant to enable her to obtain legal advice and representation at a level of expertise commensurate with the complexity and nature of the proceedings. In other words, if an applicant did not wish to take an offer of legal aid because of the operation of the statutory charge she should not be able to seek to persuade the Court to make a cost allowance order.

53. Wilson LJ outlined a different approach to that commended by Mr. Mostyn QC in ***Moses-Taiga v. Taiga*** when at paragraph 21 he stated that even if an applicant satisfied the Court concerning the criteria, which she would have to do to establish that there was a lack of alternative funding, that may not be a sufficient condition for a costs allowance order to be made. Wilson LJ felt that other factors may need to be considered, such as the subject matter of the proceedings, and the reasonableness of the applicant's stance in the proceedings. A variety of other features may be relevant, including an ongoing liability as to costs owed by the applicant to the other party. The list is not limited to those specifically mentioned by Wilson LJ. He added that the Court should proceed with a "*judicious mixture of realism and caution as to both the amount and duration of any order.*"

54. The approach outlined by Wilson LJ and the Court of Appeal in ***Currey v. Currey*** is the one which I endorse and adopt. I must determine whether the wife can reasonably procure legal advice and representation at a level of expertise apt to these proceedings otherwise than by a costs allowance order. If I find that she cannot, I must then go on to consider the other factors raised by Mr. McCann when exercising my discretion as to whether, on the facts, an order should be made.

55. When reviewing the English case law I am conscious of the fact that there are differences between our two jurisdictions. Until recently the perception has been

that public funding has been more readily available for ancillary relief proceedings in England and Wales than in the Cayman Islands. Although I accept that there has been some concern that even though legal aid has been available that, in particular in big-money cases, lawyers in England and Wales have been reluctant to take matters which are not privately paid. The commencement of restrictions on legal aid may have been one of the factors that led Wilson LJ to acknowledge at paragraph 1 of his Judgment that applications will relate only to "*big-money*" cases but then goes on to state that recent jurisprudence on ancillary relief betrayed "*an unbalanced concentration upon forensic conflict within only a few rich people.*" The reason why it may have been perceived as only applying in big money cases is because ordinarily the average party in ancillary relief proceedings has neither the resources to support the other in funding drawn out litigation nor the wherewithal to fund any resulting costs order.

56. The approach to the granting of legal aid for ancillary relief matters in the Cayman Islands has historically been different to the approach in England and Wales. As a consequence, there is arguably a need for non-publicly funded litigants, particularly in what may be termed middle-money cases, to have representation and they may need to apply for a costs allowance order to enable that to happen. Interestingly, this may also soon be the position in England and Wales where public funding is shortly to disappear from nearly all private family

law cases dependent on the date of entry into force of the Legal Aid Sentencing and Punishment of Offenders Act.

57. I am also conscious that the availability and development of costs allowance orders in England and Wales has happened at the same time as the change in the approach towards costs in ancillary relief cases in that jurisdiction. This modern approach towards costs in family proceedings has not been adopted in the Cayman Islands. In 2006, the presumption of no cost order in the absence of litigation misconduct was introduced for ancillary relief cases in England and Wales. This means that Judges in England tend to take costs to be one of the respective debts of the parties in calculating what order to make. This means that legal costs are treated as a liability like any other, subject to the requirement that, to be fully taken into account, the liability must have been reasonably incurred. This led Wilson LJ at paragraph 32 in ***Currey v. Currey*** to note that objections historically raised concerning costs allowance orders based upon the argument that it pre-empts the consideration of costs issues at the conclusion of the proceedings falls away by virtue of the new approach. The approach to costs in England and Wales is one to be encouraged in promoting the proper approach to family law cases in the Cayman Islands. It is hoped that this is another issue that those who are currently advising on the reforms to the Matrimonial Causes Law will bear in mind. In addition, I note that the Grand Court Rules do not contain a rule similar to RSC Order 62 r.3 (5) which provides that the principle, in which

ordinarily costs will follow the event, does not apply to proceedings in the Family Division.

58. There is little case law in the Cayman Islands concerning applications for costs allowance orders. The only reported case appears to be ***Huig Zuiderent v. Patricia Layne Zuiderent*** D 122 of 2000. In Zuiderent, Graham J, after considering ***A v. A*** and Section 20 of the Matrimonial Causes Law[9], concluded that he had the jurisdiction to make a series of interim orders for maintenance pending suit, including an order that the sum of CI$10,000 be paid directly to the respondent wife's attorneys for the purpose of her legal expenses. Graham J stated that such an order was very much in the public interest where a spouse of a rich man did not have legal aid. This case is important because it rightly establishes that the Grand Court in the Cayman Islands is able to make cost allowance orders. However, as it is a case decided in 2000, it pre-dates the developing and constructive approach taken by Family Courts when exercising their discretion. I reiterate that the helpful and informed approach commended by the Court of Appeal in ***Currey v. Currey***, should now be followed in the Cayman Islands.

59. Before I move on, I note that the long overdue Children Law, 2003 is now, subject to the transitional provisions, applicable. Schedule 1 of the Children Law provides for financial provision for children. The content of Schedule 1 is very

[9] Although at paragraph 2 of Graham J's written reasons for order reference is made to Section 21 and section 19

similar to the wording of Schedule 1 Children Act 1989, England and Wales. Although there is no statutory jurisdiction to make orders for interim lump sums in ancillary relief claims, it is clear that under Schedule 1 in England and Wales, and I suggest under Schedule 1 in the Cayman Islands, lump sums can now be awarded at any time in proceedings for the benefit of the child. In addition, periodical payments can be made. Paragraph 9 of Schedule 1 provides that *"the court may, at any time before it disposes of the application, make an interim order... requiring either or both parents to make such periodical payments at such times and for such term as the court thinks fit.*

60. Bennett J in ***W v. J (Child: Variation of Financial Provision)*** [2004] 2 FLR 300 found that there was no jurisdiction under Schedule 1 to make an interim order to meet legal costs in relation to litigation over a child, since such costs would not have the benefit of a child. Bennett J was not satisfied that the words *"for the benefit of the child"* in paragraph 1 (2) (a) Schedule 1 was wide enough to grant the Court jurisdiction to make such an order under Schedule 1.

61. However, Courts have distinguished ***W v. J***, as that case involved a wholly unmeritorious application and as the decision was based upon the particular facts of that case. The Courts have taken a less restrictive approach to that taken by Bennett J. It has been held that a meritorious application brought by a parent under Schedule 1 could be said to be for the principal benefit of the child or

children. The Courts, including the Court of Appeal, have accepted the argument that the Court should adopt a construction of the words *'for the benefit of the child'* in paragraph 1 (2) (a) of Schedule 1 as wide enough to enable funds to be made available for ordering one parent to make a payment to the other parent to cover the latter's legal fees. The relevant cases are Re S (Child: Financial Provision) [2005] 2 FLR 94, ***M-T v. T*** [2007] 2 FLR 925, ***G v .G (Child Maintenance: Interim Costs Provision)*** [2010] 1264 and ***CF v. KM (Financial Provision for Child: Cost of Legal Proceedings)*** [2011] 1 FLR 208. As the relevant applications before me are brought within pending proceedings, and as a consequence the Children Law does not apply, I need not carry out a review of that case law.

62. A significant part of the costs in the matter before me are related to the wife's temporary and permanent applications to remove the children from the jurisdiction and private law custody access applications. If these were not pending proceedings, the wife might arguably have been in a position to contend that cost allowance orders could be made under Schedule 1 of the Children Law. I have little doubt that in future cases before this Court parties will recognise the important extension to the Court's jurisdiction exercisable pursuant to Section 17 and Schedule 1 of the Law when dealing with applications relating to children.

POSITION OF THE PARTIES AND CONCLUSIONS

63. Although the hearing for which the parties had provided a time estimate of two hours in fact extended into two days, almost the totality of the wife's arguments were contained in Mr. McGrath's succinct written submissions. Counsel contended that the Court was required to determine whether a further costs allowance order should be made. He contended that if the Court concluded that such an order should not be made, then it should grant legal aid to the wife. Mr. McGrath submitted that there existed no source from which the wife could raise funds to pay for her own legal representation. It appeared to be agreed by both Counsel at the opening of the trial that, the Court having determined in December that the wife had shown that she had no other source of funding which could reasonably be deployed to pay her legal costs, the real issue for determination was whether the husband was in a position to make any additional maintenance pending suit payments towards costs. However, as the hearing progressed it became clear that Mr. McCann was submitting that the wife had failed to satisfy the necessary requirements concerning her alleged inability to raise the funds to pay for her legal fees.

64. I indicated at the outset of the hearing that I did not feel it was appropriate for me to consider whether or not to order the grant of legal aid. There exists an established procedure relating to referrals of legal aid applications to the Chief

Justice and/or possibly to a designated Judge. Hitherto, consideration of legal aid applications has not been designated to me. The Chief Justice had been consulted about and ruled upon the legal aid application in this matter on more than one occasion. I feel it would be highly inappropriate for me to review or appear to overrule the Chief Justice's decisions concerning the conditions to be attached to any legal aid certificate in this matter. The Chief Justice is far better placed than I to determine the policy in relation to the grant of legal aid and he is far better informed than I concerning the availability and allocation of the limited legal aid funds for cases. If I do not grant a costs allowance order, I am not minded to consider reviewing the Chief Justice's decision and substitute my own decision concerning legal aid, even if I had felt that a variation to the conditions contained in the certificate was appropriate. If a costs allowance order is not made the wife may submit a fresh application for legal aid and attach thereto a copy of this ruling. The ruling would, in those circumstances, support a contention that the wife had unsuccessfully attempted to seek an order that the husband allow access to assets funds to pay her attorney.

65. However, I must still go on to consider the history and current status of the wife's application for legal aid. Following ***Currey v. Currey*** an applicant for a costs allowance order is required to satisfy the Court that her legal costs cannot be met from public funding. Mr. McGrath has indicated that his Firm has been and continues to be willing to undertake legal aid work in these cases, but not if a cap

is placed on the amount that may be made available through legal aid. I have read the affidavit sworn on 2nd August 2012 by Ms. Dowse, who has the primary conduct of these proceedings on behalf of the wife and I have reviewed the Legal Aid Department file.

66. The wife submitted her *"Form No. 1, Application for Legal Aid Form"* on 6 March 2012. Following the Chief Justice's consideration of the application, a civil legal aid certificate for the *"divorce/child support/removal from the jurisdiction applications"* was granted on 9th March 2012. The grant was conditional upon their being a cap of CI$3,500 *"without further grant."* The attorneys were requested, at the conclusion of the case, to consider making a claw-back order under section 12 (6) of the Legal Aid Rules 1997.

67. On 9th April 2012 a request for a decision by a Judge in relation to the application for legal aid was filed. It was supported by a letter dated 4th April 2012 by the wife's attorneys. In that letter the attorneys indicated that they were not able to accept the certificate with a cap and with the limit being set at CI$3,500. The letter indicated that there were pending applications to enforce spousal and child maintenance, that there was an upcoming two-day hearing on the removal jurisdiction application (that application has since been listed for five days with the husband likely being represented by leading counsel), and that there would then follow a two-day hearing in relation to financial ancillary relief matters. A

request was made to remove the condition on the legal aid certificate which set a cap, leaving the 'claw-back' as the only condition. The application was again considered by the Chief Justice and on 30th April 2012 a "*Form No. 5 - 5 Refusal of Legal Aid Certificate Form*" was sent to the attorneys. The condition box in the form stated "*legal aid refused. It is simply not accepted that parties having available to them the assets these do should have their private litigation funded with a blank cheque at public expense. The cap remains in place. The applicant's attorney should seek an order from the Court that Mr. B allows the applicant access to funds to pay her attorney.*" The bottom of the form contained the standard wording "*I hereby certify that the above-mentioned person is refused legal aid for the purpose of taking or defending legal proceedings as specified above.*"

68. Having regard to the level of costs already incurred (albeit at non-legal aid rates) in what is now a divorce and private law family case, the Chief Justice's sentiments set out in the *'Refusal of Legal Aid Form'* are understandable. It would be helpful that when an attorney sends a letter in support of an application for legal aid, in a well advanced case such as this, an estimate of what likely costs will be incurred at the legal aid rate be set out therein. In addition, especially in a case such as this where the attorney has been involved for some time, it would be helpful if the attorney also very briefly highlighted the issues in the case and the merits of the case generally and specifically of any applications made by the

person seeking legal aid. This may be particularly so when it is being suggested by an applicant that the legal costs may be refunded pursuant to 12(6) of the Legal Aid Rules. All of this information would assist the Chief Justice to make an informed decision, when considering an application, as to whether legal aid should be granted and, if it is, what condition should be attached.

69. Due to the confusing nature of the content of the form, on 1st May 2012 the wife's attorneys submitted a further request for a decision by Judge which was supported by an e-mail highlighting the inconsistent contents therein. They requested an urgent meeting with the Chief Justice to discuss the application. That correspondence was placed before the Chief Justice. On 11th May 2012 a further "*Form No. 5 - Refusal of Legal Aid Certificate Form*" which stated in the condition box "*legal aid refused. Ms. Dowse at liberty to reapply if cap is exceeded*" was sent to the wife's attorneys. The claw-back condition was reiterated in the form. The form again contained the standard provision saying that legal aid had been refused.

70. On 25th May 2012 a further request for a decision by a Judge form was submitted and it was supported by a letter from the wife's attorneys dated 23rd May 2012. The attorneys recounted the contents of the various certificates stating that they were "*contradictory and unclear*" as on the one hand the certificates were suggesting that legal aid had been refused but on the other hand were saying that

it was granted subject to a cap and claw-back conditions. The attorneys made it clear that their position was that they were unable to accept capped legal aid certificates. That was confirmed in Court as being the Firm's standard policy by Mr. McGrath, a principal partner within the firm, during the hearing. The attorneys indicated that they could not accept the conditional certificate and invited the Court to discharge it. They indicated that they would be applying to the Court for a costs allowance order. The application was considered by the Chief Justice and on 28th May 2012 a discharge certificate was sent with the reasons being that it was "*in keeping with the request of the applicant's attorneys, the certificate is discharged.*"

71. Having regard to the conditions attached to the grant of legal aid I am satisfied that it was reasonable for the attorneys to refuse to be retained pursuant to the certificate on the ground that the Cap of CI$3,500 would not cover the amount of work that they would need to undertake to ensure that their client was properly represented, especially having regard to the complex nature of the heavily contested proceedings. Although technically a legal aid certificate had been granted, I am satisfied, due to the limitations contained therein and having regard to the nature of these proceedings, that the wife has been unable to secure sufficient public funding to enable her to obtain advice and representation at the level of expertise appropriate to the proceedings.

72. In paragraphs 23 and 24 herein, I refer to paragraph 31, 35 and 36 in the December Judgment where I considered whether the wife had any readily available funds or whether she was able to raise or deploy funds from any other source to pay for her legal representation. I am of the view that the wife's position remains as it was back in December, namely that she cannot reasonably procure legal representation by her own means. When I reach this conclusion I have regard to Mr. McCann's submission concerning the hitherto unvalued jewellery owned by the wife. The husband places valuation on that jewellery of CI$70,000, with one ring being valued at CI$30,000. The wife says that the jewellery cost only CI$26,900 new and its second hand value is only in the region of CI$10,000. On the evidence before me, it does appear that the wife has not been co-operative in having her jewellery valued pursuant to the order of Henderson J made in April 2012. It is contended by the husband that the wife could sell the jewellery and it is accepted that she tried to sell one piece for around CI$2,000 on an online market.

73. I considered the resources available to the wife and stated at paragraph 31 of my December Judgment:

> *"Despite the questioning concerning the alleged value of Mrs. B's jewellery and the contents of the Lexis Nexis report, it appears that Mrs. B is in financial isolation, is totally reliant upon the ordered interim maintenance payments. In relation to the jewellery, even if valued at the level contended by*

Mr. B, there is no evidence before me as to whether it would be realistic to expect that to be sold in Grand Cayman for its market value at this time. The value of the jewellery may of course become more relevant if deemed to be a relevant asset at the final ancillary relief hearing."

74. That is still the view I hold when dealing with the present application before me. I also take a similar approach concerning the items of jewellery under the husband's control. I do not feel the husband should or would be in a position to sell his watches and jewellery to fund a costs allowance order. The wife should now get on and comply with the order made by Henderson J in April 2012 and obtain a valuation for the jewellery and she should take up the husband's offer to arrange for and fund the inspection of the jewellery by a reputable valuer. It is important that the wife recognises that the jewellery obtained during the course of the marriage may be found to be a matrimonial asset and that she should not unilaterally dispose of the same pending determination of the ancillary relief proceedings. If the wife is unsuccessful in her application for a costs allowance order and if subsequently legal aid was granted to her, it may be arguable that certain orders may be made in relation to the jewellery that mean that it could be considered an asset under Section 12(6) of the Legal Aid Rules.

75. The husband contends that the Land Rover vehicle used by the wife to transport herself and the children, but registered in his name, be sold. He contends that

vehicle is valued at CI$28,000-CI$30,000 and that from the proceeds the wife could buy a smaller vehicle for around CI$10,000 and then the balance could be used towards legal fees. If the vehicle was sold, and in fact the wife does not object to such a course in principle, the proceeds would not be sufficient to meet her legal costs obligations. When I consider this contention from the husband I do so on the background that he is already CI$32,348 in arrears of maintenance pending suit payments. I'm aware that in April 2012 the husband unsuccessfully made an application to vary the amount of those payments before Henderson J. It is arguable that, if there were enforcement proceedings in relation to the arrears before this Court, the Court could make an order for a payment to reduce the arrears by a certain date taking into account the feasibility of the husband selling the vehicle. If the vehicle were sold the husband's share of the proceeds of sale of this matrimonial asset could then be used to satisfy the payment of arrears order. It is submitted by Mr. McGrath that, although his client is apparently willing for the car to be sold, this is not a source from which the wife can be reasonably expected to raise sufficient funds to pay her legal fees. The wife has indicated that the vehicle has a brake light and suspension problem. If this is right, it is not clear how that would affect the husband's valuation. It appears that CI$28,000 might be the best price for the vehicle but for a quick sale it would realise less. I will return to the issue of the motor vehicle at a later stage in this Judgment.

76. The husband has again raised an issue concerning a property in Jacksonville Florida. This property was brought to the Court's attention during the December hearing when reference was made to a Lexis Nexis report. At Paragraph 31 of the December Judgment I noted :

> *"The Lexis Nexus report produced by Mr. B in support of a contention that Mrs. B has assets and is registered as being resident in Florida cannot be relied upon. The first paragraph of the document under the bold heading "important: states: "the public record and can commercially available data sources used on reports have errors. Data is sometimes entered poorly, processed incorrectly and is generally not free from defect. This system should not be relied upon as definitively accurate. Before relying on any data this system supplies, should be independently verified."*

77. At paragraph 1 of her affidavit sworn on 2nd August 2012 the wife deals with a property situated and known as 14425 66th Street, North, Loxahatchee, FL 33470. She reiterated that this is a property where her mother resides with her stepfather and upon which they have a mortgage. She said that she had been informed that her and her sister's names had been placed on the Registry in 2011 by their mother. As their mother had not told them what she had done, the wife says that this first came to her knowledge as a consequence of the husband hiring a private investigator. The wife's evidence is that her mother had done this to avoid probate

issues at a later date. The wife stated that there was no intention that she would have part ownership in the property and it was intended that her interest in the property would arise only after her, currently healthy, mother had passed away. This is a plausible explanation for the purpose of this hearing. However, it is regrettable that the wife at paragraph 5 of her affidavit, in response to the formal request of the husband dated 19th July 2012 for her to "*provide documentary evidence in support, including a copy of the land register or title deed, showing details of all registered owners over the past four years,*" simply responded that she was unable to get a copy of the title. Although it may well be that the documentation could have obtained by either party from the relevant authorities in Florida, the wife would have been well advised to have obtained the details to fortify her evidence on this issue. The wife or the husband may feel it wise to obtain this documentation for the final hearing, to at least narrow the potential issues between the parties.

78. The wife is employed on a low salary. Pending the determination of the removal jurisdiction application in only three months it would not be reasonable to expect her to find a more highly paid permanent post. However, if she is not permitted to remove the children from the jurisdiction then at that stage the court would expect her to use her best endeavours to find better paid employment.

79. The husband is consistently failing to comply with a maintenance pending suit order, with the consequence that the wife and children have income coming into their household well below the level determined by the Court as necessary to meet their reasonable needs. The wife has insignificant amounts of money in her bank accounts and has no liquid assets. I accept Mr. McGrath's submission that the wife is unable to raise a litigation loan for a charge or security against any future award which she may obtain in the proceedings.

80. Having regard to the test set out in ***Currey v. Currey,*** having regard to my review of the wife's financial position based on the evidence and submissions before me, I am satisfied that: (i) the wife is unable to deploy her assets either directly, or to raise a loan to fund the legal services: (ii) the wife cannot obtain legal services by the offer of a charge upon the ultimate capital recovery with a Sears Tooth arrangement with her attorneys and (iii) she, despite making an application, has been unable to obtain a legal aid certificate containing conditions which would enable her to be represented at the level of expertise appropriate to the proceedings. The wife has satisfied me that she has met the requirements of the "*initial overarching enquiry.*"

81. Having regard to the nature of the pending proceedings, I do not accept Mr. McCann's submission that the wife's stance in the proceedings can be viewed as wholly unreasonable. The principal application occupying both parties' minds is

the removal jurisdiction application due to be heard in December 2012. I have noted, at Mr. McCann's insistence, the contents, including the apparently favourable recommendations therein in favour of the husband, of the welfare officer's report. I am not in a position to come to an informed view about her recommendations until the welfare officer and the parties have given her oral evidence. The nature of removal jurisdiction applications means that they are usually contested. Each application should be considered separately and is fact specific. Having regard to all of the circumstances of the case the Court could not say that either party was being unreasonable in asking the Court to assist by making a determination of the issues raised by the application. I am not in a position to determine whether either party is taking an unreasonable stance in relation to the financial proceedings at this stage.

82. Therefore, the substantive issue in the case, as rightly highlighted by Mr. McGrath at the outset, is whether it is reasonable and fair for the husband, having regard to all of the circumstances of the case and in particular his financial circumstances, to make payments towards the wife's legal fees. When the Court does this it must try, if possible, to ensure that there is equality of arms for the parties in the ongoing litigation.

83. This is an unusual case because it can by no means be termed a big-money case. Lamentably, the parties have allowed the legal costs to escalate to the level one

might expect to see in a big-money case. The majority, if not all, of the case law to date has dealt with a position where there are significant assets and where the proposed payer has ample means. In Zuderent, Graham J sitting in the Grand Court stated that the making of costs allowance orders was in the public interest in cases where a spouse of a rich man had no resources. As already mentioned herein, Wilson J commented in ***Currey v. Currey*** that applications will relate only to "big-money" cases.

84. However, in the Cayman Islands, where legal aid may not be so readily available for family cases, consideration should be given to making reasonable costs allowance orders in certain middle-money cases if equality of arms requires the husband to make some contribution to the wife's ongoing costs. When I say this I am mindful of Thorpe LJ stating in ***Moses-Taiga v. Taiga*** *"that that the progressive construction that Judges have adopted in the Family Division is both pragmatic and sensible."* However when considering applying it to middle-money cases the Courts should look very carefully at the husband's means to ensure fairness to him and think long and hard before doing it. The requirement for caution is increased in this case where the payment sought is substantial, disproportionate to the amounts at issue and having regard to the parties' respective means. As Mr. Mostyn QC stated in ***TL v. ML*** and others if the Court decides to make a costs allowance order it ought to proceed with a *"judicious mixture of realism and caution as to both its amount and its duration."*

85. The wife accepts that the husband has no liquid cash from which to make any payments. This is not a case in which it is submitted that the husband's approach to his disclosure of his resources is such that a Court can infer that they are greater than disclosed. It is submitted that the Court should consider making an order against any illiquid assets that he may have. It is accepted by Mr. McGrath that there is little case law to support this submission. He submits that this may be because such applications have historically been made in big-money cases or because litigants in the wife's position in England and Wales would have legal aid assistance. I am satisfied that the Court may look at illiquid assets when considering whether a party, in this case the husband, has the ability to raise funds.

86. It is suggested by Mr. McGrath at paragraph 15 of his written submissions that *"if parties decide to contest legal proceedings in the way that these parties have, legal representatives are entitled to be remunerated."* This statement seems to have encouraged Mr. McCann to say that the application *"in reality is an application by the lawyers for their fees. They want to have the husband liquidate assets pending suit rather than accept a Sears Tooth or apply for costs at the full hearing."* Having regard to the statement expressed by Mr. McGrath in his written submissions it is hoped that attorneys recognise why I have stated on previous occasions, and reiterate now, that there is a need to give a detailed budget for presentation to the Judge when making such applications. This is

important as a Court may form a view that inflated claims may encourage litigation and should be avoided. If a final outright capital payment is a real issue, then the client and his or her attorney seeking the payment should be cautious about spending above the budget presented to the Court. This is because an attorney runs a financial risk where a case is run in a manner that incurs very significant costs well in excess of a monthly costs allowance award made by the Court. The case before me is also unusual because I am being asked to consider making an order primarily for costs already accrued (despite there being only a one page document with minimum detail setting out how that amount has been reached) as well as a significant amount for the ongoing litigation.

87. Mr. McGrath conceded, for the purposes of this application, that the husband could not pay the costs allowance order from his income. The husband has minimum amounts in his bank accounts. Mr. McGrath submits that the liquidation of assets or the need for the husband to borrow is "*inevitable*" in this case. He urges upon the Court that this exercise could commence now rather than at the conclusion of the proceedings. It is submitted that the husband can raise the funds by sale, commercial borrowing or personal borrowing. The Court is urged to endeavour to reach a robust and pragmatic solution to this issue. It is submitted that the burden falls on the husband to show that he is unable to pay in any of these ways. It is further submitted, and I accept, that the Court may look at

personal/non matrimonial assets as a source. This is fortified by the cases[10] in which it has been held that the costs allowance order can be made even though there may be a risk of injustice to a payer if successful in proving that there was no jurisdiction to make any final financial orders. Mr. McGrath encourages the Court to tread that path to ensure that there is equality of arms for the wife in the pending litigation.

88. Mr. McGrath produced a one-page un-agreed schedule of the husband's assets and liabilities which he had placed in his core material bundle. In the schedule Mr. McGrath valued the net total assets to be CI$1,112,346. Mr. McCann opposed the introduction of the schedule on the basis that it was not exhibited to an affidavit. I permitted Mr. McGrath to introduce the schedule which in itself was not evidence but was drafted from details found primarily in the husband's sworn affidavits. In any event, it is good practice for attorneys when filing the trial bundle to ensure that it contains, as a preliminary document, preferably an agreed schedule of the parties' issues, but failing that an un-agreed schedule filed by each party. I use this opportunity to reiterate this Court's strong indication to parties that for hearings over an hour in length they should provide a paginated court bundle that complies with the commendable Practice Direction dated 26th July 2000 issued by the President of the Family Division in England and Wales.

[10] L-K v. K . A v. A (above)

89. The husband's potential unencumbered assets appear to be: (i) the former matrimonial home at a Omega Bay in his sole name and which has an equity of CI$295,000; and (ii) land at Grand Harbour valued at CI$251,000. It is submitted by Mr. McGrath that, as these are unencumbered real property, commercial borrowing could be taken out charged against them.

90. I accept Mr. McCann's submissions that it is unrealistic having regard to the husband's current circumstances, including his income, to expect that any lending institution would be willing to lend him monies against both or either of these properties. The husband would, in his application for borrowing, have to disclose all of his outgoings including the order of the maintenance pending suit and his current arrears in relation to that order. If giving full disclosure to the a prospective lender he would also be expected to inform them about his liability to his attorneys for legal fees. It is hard to see how any lender would be satisfied that the husband would be able to make even interest only payments. Regrettably, the commercial lending is not a feasible option having regard to the husband's circumstances.

91. The husband set out details concerning the rest of his assets, which for the purposes of this hearing, have not been disputed. There is BD Company Limited which is a development company for TA Phase 2 and HP Development. He holds a 15% shareholding in the company with the majority shares of 85% being held

independently by a family member. The HP property was purchased in 2001 with a loan from First Caribbean International Bank. The husband's mother acted as a guarantor for that loan. Six apartments have been sold and all of the funds received have been used towards repaying the loan. The loan still has a balance of CI$1million and only the interest on the loan is being serviced. There are five unsold apartments which are rented, two for CI$1,700 each, one for CI$1,800, one for CI$1,900 and one for CI$2,000. The husband says that the rent is used to service the interest on the loan. The Company is still responsible for the insurance on the unsold units along with monthly maintenance and garbage fees for the common property.

92. TA Phase 2 consists of eight apartments. Due to slow sales and only two out of the eight units selling, only one block of the four units are being constructed. The credit facility for the building is being provided by BIRC Ltd who have to date paid CI$1,800,000. A further CI$2million would be required to complete the entire project. As a consequence, there appears on the evidence before me to be no income from BD Company Limited.

93. The husband is a 50% shareholder with an independent third party in BD Limited. The Company owns land in Prospect. There is a registered first charge over the property to Cayman National Bank Ltd with an outstanding balance of CI$700,000. The husband states that the interest only loan is currently in arrears

with payments due of CI$4,000 per month. The property is collateralised by a charge on a townhouse at the Town and Country Development. The Company is currently in the process of trying to sell the land which has a value of CI$650,000. The aforementioned Town & Country property is valued at between CI$175,000 to CI$200,000. It is currently rented for CI$$1,600 per month and that in turn is used to pay the strata fees of CI$550 per month. It is evident that BD Limited or the Town & Country property are not sources from which funds could be derived for the making of a costs allowance order.

94. I also note that the husband is the majority shareholder in SF Ltd. Regrettably, due to a decline in trade, it was closed in 2010. It is contended that the Company, which is in liquidation, has no value as a trading concern. On or around 31st May 2012 the husband has received a draft writ from the liquidator and faces possible litigation in a claim for US$266,558.55.

95. It is submitted by Mr. McGrath that the husband could take out a non-commercial personal loan. It is submitted that the Court should not rule out the possibility of a loan being provided from his family members. His mother is a successful businesswoman, with a significant interest in a large and successful employment agency in the Cayman Islands. It is submitted that the Court should have regard to the fact that his mother is willing to assist him by funding leading counsel to represent him at the December removal from the jurisdiction application. I am

also conscious of the fact that funding from the husband's family also paid to obtain affidavit evidence from Mr Rabinowitz, an attorney in Florida, in relation to the earlier successful application for temporary removal of the children from the jurisdiction. Mr. McCann has submitted that the paternal grandmother has made the offer to pay for the representation due to her concerns for the welfare of her grandchildren, with whom she has a relationship, if the wife is permitted to remove them from the jurisdiction.

96. Mr. McGrath mentioned the Court of Appeal case of ***Thomas v. Thomas*** [1995] 2 FLR 668. In Thomas the husband appealed a financial award made in ancillary relief proceedings. He was a joint managing director of a successful family business. He had a shareholding in the company valued at £600,000. The husband's brother and mother could be considered third parties as they owned directly or indirectly (together with Mr Thomas) the remaining shares of the company. The husband had a monthly salary of £2,791 per month as the company had a policy to pay low salaries and plough profits back into the business. He also had an additional income of £172 per month. The family home was valued at £250,000 with a mortgage of £78,000. The husband was a name at Lloyd's. He had a bank guarantee covering contingent liabilities to Lloyd's of up to £100,000 and a Lloyd's losses loan of £43,000. His pension fund was valued at £394,000. The wife had no capital and no independent source of income.

97. The Judge found that the home could be sold, as alternative security could be found for the guarantee and Lloyd's losses loan. The Judge ordered that the wife receive a payment of £158,000 which would come from the ordered sale of the home. In addition, a periodical payments order in the sum of £1500 per month was made for the benefit of the children to the wife, as well as an order that the husband to pay £12,000 per annum for the two children's private school fees. The Judge was of the view that the husband had a greater income capacity which could come about by a change of the company policy in relation to salaries of management and payment of dividends. The capital award to the wife was only a small fraction of the husband's overall capital wealth. The income award used up the majority of the husband's monthly income.

98. On appeal, the husband contended that there was no evidence that he could transfer the security of his liabilities. The husband further contended that the Judge when leaving the husband with a deficiency of income had failed to act with the necessary self restraint as this was a case affecting third parties.

99. Waite LJ stated at page 670:

> *"... The court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's*

expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of its assets. Another is that where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third-party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a Judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proved to be a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed."

100. The Court of Appeal dismissed the appeal, finding that the husband had substantial means although he faced liquidity problems. It was held that it was for the husband to satisfy the Court that he had explored all means of access to liquid

funds to support suitable provision for the wife and that upon doing so it was found to be impossible. As he had failed to demonstrate that, inferences could be drawn to the effect that he could find ways, with the assistance of his mother and brother, of funding the award made by the Court. The Court found that the Judge's order based on the evidence before him was justified. The Court had regard to the fact that it was both parents' choice that the children attend private schools and if this reduced the father's income then that was his choice. As Mr. Mostyn QC commented when reviewing Thomas at paragraph 82 in ***TL v. ML and others*** "*it is important to recognize... that no part of the ancillary relief award ranged over assets of income that were not Mr Thomas' as of right.*"

101. In ***M v. M (Maintenance Pending Suit)*** [2002] 2 FLR 123 Charles J considered ***Thomas v. Thomas***. The parties separated after eight years of marriage. The child of the marriage, who was aged five, resided with the wife. The parties had benefited from a very high standard of living during the marriage which included a rented home in London at £130,000 per annum, a rented flat in Paris at £24,000 per annum and an equally owned property in Miami with outgoings of £98,000 per year. The husband anticipated an inheritance of around $100 million from his extremely wealthy father. Throughout the marriage the husband's father had supplemented his income, but the husband indicated that this was no longer the case. The wife was applying for maintenance pending suit in the sum of £510,000 per annum which would cover the rent and outgoings on both the London and

Paris properties, the outgoings on the Miami property and would cover spousal and child maintenance needs of around £240,000. The husband did not contest that the figures accurately represented the expenditure, but claimed that he was not in a position to make the payment as his father was no longer willing to supplement his income and because one of the husband's companies had failed. Charles J, felt it was appropriate to have regard to the standards of the very rich and made an award of £330,000 per annum. Charles J accepted that he should have regard to both parties' contentions when deciding what figure was reasonable and in particular the husband's contention that there had been a change in circumstances brought about by the alleged change of the role played by his father in the family's finances. It was clear that Charles J, based on the facts before him and the lack of full and frank disclosure by the husband, was unable to be clear as to the father's alleged change of stance and his reasons for that. Charles J was of the view that there was a responsibility on the husband to put the Court in an informed position as to what the father's current attitude was. The Court was not willing to accept that the father of the husband was no longer willing to support him or to enable him to comply with Court orders. Charles J felt that the principles and guidance set out in Thomas had an "*inbuilt flexibility*" as they look at the realities of a given situation when it was alleged that a third-party was likely to fund a party to ancillary relief proceedings.

102. In the matter before me it cannot be said that the parties had an extremely high standard of living during the marriage. It is not submitted by the wife that any of the husband's family have supported him to any significant degree during the marriage. I am satisfied that the husband has explained why his mother is willing to fund only the removal jurisdiction element of the ancillary proceedings. So when I consider the principles to be applied on application for maintenance pending suit as set out by Mr. Mostyn QC at paragraph 124 in ***TL v. ML*** and others, I do not find that the husband has been historically supported by his mother, nor am I satisfied that the position of his mother as it relates to potential financial support to the husband is ambiguous or unclear. This is not one of those cases, when considering an application for maintenance pending suit, in which I am justified in assuming that the husband's mother would be making any other contributions save for leading counsel's expenses for the removal jurisdiction hearing. If I were to make a maintenance pending suit order with a costs allowance element it should not be made against assets or income of any third-party and which are not the husband's as of right. I am not satisfied on the balance of probabilities that the mother or any other member of the husband's family will provide money to meet a costs allowance order which the husband cannot meet from his absolute property. This is not a case in which I am assisted by the principles set out in ***Thomas v. Thomas*** when determining whether I should make the requested costs allowance order in favour of the wife.

103. Having regard to my finding that the wife lacks funds or the ability to raise funds, as I am required to do following ***Currey v. Currey***, I have carefully considered the husband's evidence in relation to his financial position. Regrettably, it is evident that he is unable to provide a substantial contribution to the wife's fees either from the liquid or illiquid assets. He is already struggling to pay the current level of maintenance pending suit, and substantial arrears have accrued.

104. Although the husband has legal fees liabilities to his attorneys at roughly the same level as the wife's, due to his mother's willingness to pay for leading counsel for the removal jurisdiction application in relation to her grandchildren, he will have representation at that hearing by an attorney with commensurate ability and experience. If the wife is unable to now successfully re-apply for legal aid after there has been a finding that the husband is not in a position to put her in funds to pay her attorney, her attorneys may feel unable to continue to represent her. This possible situation troubles the Court greatly.

105. With this in mind, I return my attention to the Land Rover motor-vehicle mentioned in paragraph 65 herein. If the vehicle was sold for around CI$28,000 the wife would be able to purchase a replacement vehicle (of a similar value to that owned by the husband) for around CI$10,000. The balance of the proceeds of sale could then be used to towards her legal fees. I understand Mr. McGrath's submission when he says that such an approach may only be akin to applying a

'*band aid*" to the real problems. However, using a band aid in certain circumstances when it is the only treatment available is better than administering nothing at all.

106. I do not have the power under Section 20 Matrimonial Causes Law to order a non-consensual sale of the vehicle or to order that the husband pay a lump sum. However, I have regard to the oral submissions made by Mr. McCann based upon paragraph 10 of the husband's affidavit sworn on 6th July 2012 and paragraph 3 (ii) of the husband's affidavit sworn on 10th August 2012. The submissions were that the vehicle could be sold, the wife purchase a vehicle for CI$10,000 and that would free up money to go towards legal expenses. I also have regard to the husband's sensible recognition at the December 2011 hearing that both parties required legal representation and monies to pay their respective fees.[11] It would be disappointing if the husband were to renege from the position he took at the December hearing and in his recent affidavit evidence concerning the sale of the Land Rover.

107. The husband having taken this position, and due to the jurisdictional issues faced by the Court, an appropriate way forward would be for the motor vehicle to be sold by agreement. It would seem sensible that the wife, who has day-to-day use

[11] see paragraph 11 and 12 above

of the vehicle, have conduct of the sale. No sale could take place without the husband's consent as he would be required to sign the transfer documentation. The husband should undertake to sign all the necessary transfer papers if a proper and willing purchaser is found willing to pay CI$28,000 or any lesser amount agreed by the parties. I mention lesser amount as the parties may, after conducting a review of the local second hand market for a this vehicle in its current state, conclude that a realistic amount for a quick sale would be have to be less than CI$28,000.

108. However, if such agreement is not reached, it may be open to the wife to make an application to enforce payment of all or part of all or part of the current arrears of maintenance pending suit. If the Court felt that the husband had access to a sum of money in the region of CI$28,000 which could be raised in a reasonable period of time from the sale of the motor-vehicle, it could order that he pay that sum towards the arrears by a certain date. In making such an order the Court would have to consider first of all the best interests of the children and thereafter the responsibilities, and financial needs and other resources[12] and actual and potential earning power and deserts of the parties. At the final ancillary relief hearing the Court would have to pay regard to the fact that, if the vehicle were found to be a matrimonial asset, it had been utilised to pay off arrears of maintenance and give

[12] my emphasis

the wife credit at that time when considering the division of other matrimonial assets.

109. If there is no agreement reached between the parties then I direct that, by or on seven days after the handing down of the perfected version of this Judgment, the parties to provide me with brief written submissions setting out their views as to whether I should now make a maintenance pending suit order with a costs allowance element in the sum of CI$18,000 and an increase totalling CI$10,000 in the current maintenance pending suit order to cover the cost of replacement vehicle. The concern about making the latter order, without hearing further from the parties, is that I have not heard from the husband as to what he might believe to be a reasonable period of time to be given for the sale to take place. I would need to consider both parties' views, as I would need to specify a date on which the payment should be made.

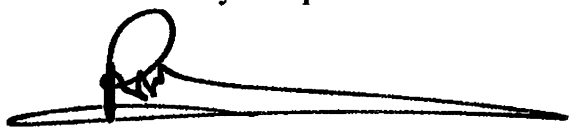
110. It is clear that the husband has accepted that the wife requires representation during these proceedings. On the husband's case, due to his mother's wish to pay resulting from her concerns for her grandchildren, he will be well represented at the removal jurisdiction application. The Court must strive to ensure that there is, as best it can, equality of arms during the proceedings. It is clear that the parties have in their evidence before this Court both agreed that the motor-vehicle could

be sold and the proceeds used in the way suggested. Therefore, it would be a great shame if further costs now had to be incurred if agreement could not be reached.

111. It is clear that the mother requires representation at the removal from the jurisdiction application. If the vehicle is sold, a figure in the region of CI$18,000 may enable the wife to have representation. I accept that this would be dependent upon the position taken by her attorneys who are already owed fees greatly in excess of CI$18,000. This may be the only way for the wife to maintain her legal representation for that hearing and the other outstanding ancillary matters requiring determination unless a successful application for legal aid can be made as a consequence of the findings in this Judgment.

112. In relation to costs, I am minded to reserve the same. I do so as I wish to leave the option open, after having afforded the parties the opportunity to make submissions, of making some other order in relation to this hearing after all the facts have emerged at the final hearing of ancillaries.

Dated this 18th day of September 2012.



Richard Williams J
Judge of the Grand Court