

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS  
ON APPEAL FROM THE**

**CIVIL APPEAL NO. 3 OF 2017  
FAM 39 of 2015**

**BETWEEN:**

**K**

**Appellant**

**AND:**

**K**

**Respondent**

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**CERTIFICATE OF THE ORDER OF THE COURT**

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This appeal coming on for hearing on 14 November 2017 in the presence of leading counsel for the Appellant and counsel for the Respondent.

I HEREBY CERTIFY that an order was made as follows:

- 1) The Appellant's appeal is dismissed.
- 2) The Appellant shall pay the Respondent's costs of the appeal to be taxed on the standard basis if not agreed.

**Given under my hand and the seal of the Court this 21 day of December 2017.**

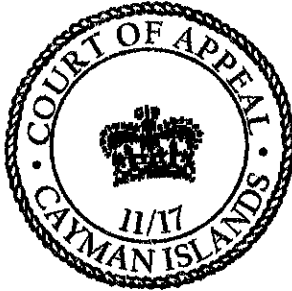
  
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**Registrar of the Court of Appeal**



**IN THE CAYMAN ISLANDS COURT OF APPEAL**

**CICA 3 OF 2017  
FAM 0039 OF 2015**

**BETWEEN:**



**K**

**APPELLANT**

**-and-**

**K**

**RESPONDENT**

**Before:**

**The Rt. Hon Sir John Goldring, President  
The Hon Sir Richard Field, Justice of Appeal  
The Rt. Hon Sir Alan Moses, Justice of Appeal**

**Appearances:**

**Ms Sally Harrison QC instructed by Mr Kerrie Cox of HSM for  
the Appellant  
Mr David McGrath of McGrath Tonner for the Respondent**

**Date of Hearing:**

**14 November 2017**

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**Judgment**

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Sir John Goldring, President

**Introduction**

1. This is an appeal by the husband, Mr K, from a judgment of Mr Justice Williams of 7<sup>th</sup> February 2017, and corresponding ancillary orders made on 9<sup>th</sup> May 2017.
2. Mr and Mrs K were married in Canada on 7<sup>th</sup> September 2002, from where both originally came. Mr K is 45 years old. He is a senior vice-president of an investment management Company in Grand Cayman. Mrs K is 43. She works for a local property developer. They have two children, a boy, K, born on 18<sup>th</sup> April 2004 and a girl, M, born on 29<sup>th</sup> March 2006. Mr K filed for divorce on 9<sup>th</sup> March 2015. In December 2015, following a contested hearing, Mr Justice McMillan made a shared residency order in respect of the children. Both parties continued to live in the family home until 31<sup>st</sup> December 2016. Between that date and 1 March 2017, Mrs K was undergoing rehabilitation. On that date, she moved out to rented accommodation. The children have remained living with Mr K at the family home. Mrs K, we

are told, does not see her son K, and only sees M intermittently, something which not surprisingly causes her distress. Although Mr K was adamant at the hearing before the judge that he wanted to retain the family home in the interests of stability for the children, he has now been reconciled to its sale. It has just gone on to the market at an asking price of US\$2.25 million.

3. At the hearing, the judge approached the case on the basis that McMillan J's residency orders would be honoured. The judge's orders reflect that. There is currently an outstanding application by Mr K before Mr Justice McMillan for the orders to be varied, so that he alone has residency. Mr Justice McMillan has ordered mediation and counselling. It is unclear when the matter will be resolved. It seems to me that we, like the judge, must work on the basis that the existing orders are complied with. We should do nothing which might imperil the possibility of that happening as a result of counselling and mediation.
4. The essential submission made by Mr K in this appeal can shortly be stated. The law requires that the court must ensure an outcome which is fair to both parties. Mr Justice Williams's decision did not do that. It favoured Mrs K and was unfair to Mr K, both in respect of income and capital. This court should intervene to put right that unfairness.

#### **The grounds of appeal**

5. The ambit of the issues between the parties has considerably narrowed in the light of Mr K's acceptance that the former family home is to be sold. No longer is the argument advanced that the judge's order was flawed, in that it required the family home to be sold, contrary to the interests of the children. In broad terms, the remaining grounds of appeal are, first, that the judge was wrong in the way he assessed child maintenance; the amount was excessive, it was to be paid for too long, and it should not have been backdated to 1<sup>st</sup> March 2017; second, the judge failed to consider the net effect of his award on the distribution of the capital assets between the parties, and in consequence awarded Mrs K more than 50% of those assets; in particular, he was wrong to adjust those assets by reference to legal costs; third, the judge failed to reflect the non-matrimonial assets generated by Mr K's post separation income, and, fourth, in the capital payment he ordered Mr K to make to Mrs K, he wrongly equated the worth of an immediate lump sum payment and the transfer of a pension valued in a similar nominal amount.

#### **The relevant legal principles**

6. By section 19 of the Matrimonial Causes Law (2005 Revision):

*“In dealing with all ancillary matters arising under this Law the court should have regard first of all to the best interests of any children of the marriage and thereafter to the responsibilities and financial and other resources, actual and potential earning power and deserts of the parties.”*

7. By section 21:

*“At the time of pronouncing a decree under this law, the court shall, as appropriate, make order for:*

*...(b) the disposition of matrimonial property, including the matrimonial home...*

*...(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*

*(f) providing for periodical payments to be made by either spouse for the benefit of the children...and other spouse; and*

*(g) costs.”*

8. As Chadwick P said in *McTaggart v McTaggart* [2011] (2) CILR 366 (paragraph 39), the general approach in this jurisdiction does not materially differ from that in England and Wales, in which the court is required by section 25(2) of the Matrimonial Causes Act 1973, as amended, to have regard to all the circumstances of the case, and in particular:

*“(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has, or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;*

*(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the immediate future;*

*(c) the standard of living enjoyed by the family before the breakdown of the marriage;*

*(d) the age of each party to the marriage and the duration of the marriage;*

*(e) any physical or mental disability of either party to the marriage;*

*(f) the contributions which each of the parties had made or likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;*

*(g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;*

*(h) in the case of proceedings for divorce...the value to each of the parties to the marriage of any benefit which, by reason of the dissolution...that party will lose the chance of acquiring."*

9. By section 25A of the Matrimonial Causes Act 1973, where, on or after a decree of divorce, the court decides to exercise its powers under sub-sections (a), (b) or (c), the court must consider whether it would be appropriate "*so to exercise those powers that the financial obligation of each party to towards the other will be terminated as soon after the decree of divorce as the court considers just and reasonable.*" Although there is no similar provision in the Cayman Islands, the desirability of a clean break (although not at the expense of a fair result) is something which equally applies in this jurisdiction, as Chadwick P stated at paragraphs 44-5 of *McTaggart v McTaggart* (supra).
10. The "*yardstick of equality of division,*" as it was described by Lord Nicholls of Birkenhead (at 605), was set out by the House of Lords in the well-known case of *White v White* [2001] 1 AC 596. In his speech in *Miller v Miller* and *McFarlane v McFarlane* [2006] AC, Lord Nicholls referred (in paragraph 1) to "*that most intractable of problems- how to achieve fairness in the division of property following a divorce.*" He said (at paragraph 9 and following):

*"...In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of 'taking away' from one party and 'giving' to the other property which 'belongs' to the former. The claimant is not a supplicant. Each party to a marriage is entitled to a fair share of the available property. The search is always for what are the requirements of fairness in the particular case.*

*10. What then, in principle, are these requirements? The statute provides that first consideration shall be given to the welfare of the children of the marriage...Beyond this several elements, or strands, are readily discernible. The first is financial needs. This is one of the matters listed in section 25(2), in paragraph (b): 'the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future'.*

*11 ...When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their*

*future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.*

*12. In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.*

*13. Another strand, recognised more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage...Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as home-maker and child-carer."*

11. As Baroness Hale of Richmond (at paragraph 144) put it:

*"...I have identified three principles which might guide the court in making an award: need (generously interpreted), compensation, and sharing. I agree that there cannot be a hard and fast rule about whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with equal sharing and departs if need or compensation supply a reason to do so, or whether one starts with need and compensation and shares the balance. Much will depend upon how far future income is to be shared, as well as current assets. In general, it can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal start on the road to independent living."*

12. In this case, the judge said, there was no dispute concerning which assets were to be considered as being matrimonial, which were not. Neither was there a dispute but that those assets (including pensions) should be divided equally between the parties (see paragraphs 21 and 39 of the judgment). However, because the appeal does raise an issue regarding matrimonial assets, I should briefly consider the applicable law. It was recently set out in the

Opinion of the Privy Council in *Scatliffe v Scatliffe* [2017] AC 94, an appeal from the British Virgin Islands. Lord Wilson JSC said (paragraph 25):

*“...when a court finds that an asset is not one in which either party has an interest...no account should be taken of it. (iii) It is, however, confusing for such an asset to be described as “non-matrimonial property.” (iv) It was when introducing the “yardstick of equality of division” in...White... that Lord Nicholls proceeded, at p 610, to refer to “matrimonial property” and to distinguish it from “property owned by one spouse before marriage, and inherited property, whenever acquired.” In the McFarlane case [2006] 2 AC 618 at paras 22 and 23, he described the latter as non-matrimonial property” as meaning “property acquired during the marriage otherwise than by inheritance or gift.” (v) So the phrase “non-matrimonial property” refers to property owned by one or the other of the parties, just as the phrase “matrimonial property” refers to property owned by one or other or both of the parties...(vii)...it was decided in [those]... cases that not only matrimonial property, but also non-matrimonial property was subject to the sharing principle...(x)...in the ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then ask whether...the principles of need and/or compensation, best explained by Baroness Hale in the McFarlane case...require additional adjustment in the form of transfer to one party of further property, even non-matrimonial property, held by the other.”*

13. In paragraph 31 of his judgment, the judge set out his intended approach:

*“The position is that the court should determine, whilst reminding itself that it must have regard to the best interests of the children first at the outset, as well as when then considering the other factors in s.19 of the Law, what the matrimonial assets are and their value and then deciding how they should be fairly divided. If those assets do not appropriately meet the needs of the children and each party, then the court may consider making a spousal periodical payment orders [sic] under s.21(f). On the other hand, Sir John Chadwick P, stating the importance of the clean break principle and confirming its applicability to ancillary relief cases in the Cayman Islands, made clear that if the division of assets would make appropriate provision when considering need, compensation and sharing, then the court should not make a spousal periodical payment “without good reason. An observation which is no doubt supported by the husband who seeks a clean break.”*

14. Finally, under this head, I should mention that our attention has been drawn to a number of authorities as to the appropriate approach of this court when dealing with appeals on the facts.

It is not necessary to refer to them, for it is agreed that the court should only interfere in a finding of fact by the judge, if he exceeded the generous ambit of his discretion.

### **Income related issues**

#### *The maintenance orders made by the judge*

15. Paragraph 5 of the judge's order states that:

*"5. The Petitioner shall pay to the Respondent the sum of US\$3,000 per child per month as child maintenance. These payments shall continue until the child is 16, or if he is in full time education until the age of 21."*

16. Paragraph 6 provides for spousal maintenance for 3 years at a reducing rate: for year 1, at US\$3,000, for year 2 at US\$2,500 and for year 3 at US\$2,000. Thereafter, it ceases.

#### *How the judge arrived at the amounts of child maintenance ordered*

17. At first sight, it was not easy on reading the judgment to understand how the judge arrived at the sums he did. After some discussion with counsel, it has become reasonably clear.

18. Mrs K prepared three schedules setting out her monthly expenses. The first set out expenses directly in respect of the children, the second personal items and the third home expenses. Mr McGrath, on behalf of Mrs K, submitted to the judge that:

*"Many of...the [home expenses] straddle both children and spousal needs, but it is submitted that in order to give [Mrs K]...the ability to provide a home for the children, many of these...[home expenses] will have to be categorised as being part of the children's needs and therefore falling under a computation of a child maintenance figure."*

19. At paragraph 107 of his judgment, the judge set out that schedule of home expenses, which included such items as washing and running her car, food, groceries and household supplies, as well as the costs of buying or renting. Having analysed them, the judge reduced the expenses to around US\$9,024 per month if Mrs K rented a home, US\$7,157.80 if she bought a home (see paragraph 108). He then said, having seemingly having accepted Mr McGrath's submission as to their treatment, that:

*"The housing outgoings have a bearing on the level of not only spousal maintenance, but also on child maintenance due to the inevitable overlap in the listed items being required to meet the wife and the children's needs."*

20. He set out (in paragraph 111) the “*child related expenses*” which Mrs K had listed. Taking into account areas of possible savings, he put (in paragraph 113) Mrs K’s “*purely child related expenses ...[at] around US\$1,555.*”
21. The judge assessed (in paragraphs 114 and 115) Mrs K’s outgoings at US\$14,718 per month when renting, US\$12,851 if she purchased a property. On her basic salary of \$4,268.33 per month she would have a shortfall of some US\$10,112 if renting, US\$8,583 if purchasing.
22. The judge went on to say (paragraphs 116 and 117), that due to Mr K’s wish to remain in the family home, there was insufficient capital to enable him to award a sufficient amount to Mrs K for there to be a clean break, however desirable that would have been. However, as will become apparent, the judge did not adjust the capital payment in the event of sale of the family home (the issue of the pension calculation apart). He certainly, and would seem to me rightly on the available figures, did not suggest that sale of the matrimonial home would permit a clean break.
23. The judge went on to say (paragraph 121 and following):

*“...the husband is entitled to be able to arrange his long-term affairs after the wife’s income position has improved. With this in mind, I will place a time limit on the spousal maintenance order of three years...The first year...should be set at US\$3,000 per month...the second year...US\$2,500 per month and for the last year...US\$2,000 per month...”*

*122. I have had to think carefully in relation to child periodical payments to be made to the wife. I am satisfied, having regard to the figures in relation to her schedule...in paragraph 109 [which sets out “personal expenses” of US\$3,755 per month] and the overlap in the household expenses [between US\$10,000 and US\$12,000 per month] that a substantial order is necessary. When I do so, I have regard to the fact that the husband will voluntarily be making considerable payments [see paragraphs 89-91 of the judgment] and that McMillan J has ordered that the children will be spending equal time in each party’s home. It is important that the level or quality of lifestyle in one party’s home is not disproportionate to that which can be offered in the other.*

*123. I order that, having regard to the wife’s and the husband’s current income, and upon the basis that the husband will meet the child expenses set out...in paragraph 91, there should be a periodical payment of US\$3,000 per month per child. This is the figure sought by the wife, although this will not enable all the child related expenditure set out in the wife’s home and children schedules to be met...What is clear is that the consequences of [Mr K’s then wish to remain in the family home]...*

*should not prevent the Court from making the necessary maintenance orders to enable the wife to meet the children's needs at a level that is not too disproportionately lower than the one they enjoy when they are residing with the father."*

24. In short, it seems the judge accepted Mr McGrath's reasoning in its entirety. In assessing child maintenance, he took into account Mrs K's expenditure on household expenses schedule.
25. Ms Harrison QC, on behalf of Mr K, submits that the judge's approach was flawed, his calculation unexplained. Mrs K's child related expenses (for both children) were US\$1,555 a month. That figure should have formed the basis of any child maintenance order. The award of US\$3,000 was way out of line. It was US\$4,445 per month more than the judge's own calculation of the children's needs. It appears to have been arrived at to fill her income/expenditure shortfall after taking account of spousal maintenance. What should have happened, is that the spousal maintenance order should have been increased to meet any shortfall. What is more, the payments were to run until the children were 21, unlike the spousal maintenance order. That too was wrong and unfair. No-where does the judge explain how a child maintenance order to the age of 21 was going to meet the children's needs as opposed to the Mrs K's. This was using child maintenance as a buffer for spousal support.
26. Ms Harrison also raises what she submits would be a problem for Mrs K should Mr K succeed in his application that the children reside with him. As the child maintenance orders include household expenditure for her, Mrs K would be left in financial difficulty. She would need an increased spousal maintenance order. In subsequent written submissions, Ms Harrison submits that it would be open to Mrs K to seek to extend the term of such an order under section 23 of the Matrimonial Causes Law.
27. Ms Harrison accepts that there will never be a clear line between child and spousal maintenance. However, she submits, there must be some demarcation between what is maintenance for the children and what is maintenance for the spouse. Litigants need to have some idea as to how child maintenance is to be assessed.
28. In response to a request from the court during closing submissions, Ms Harrison has valiantly sought to identify English authorities which might provide guidance on the quantification of child maintenance. Because the Child Support Act 1991 has removed the court's jurisdiction

in respect of the determination of child maintenance, little help on issues of principle can be derived from the English authorities, as the short summary below illustrates.

29. *Northrop v Northrop* [1966] 3 All E R 979, said no more than the court should not “haphazardly” divide the sum necessary to support mother and child between them, a proposition with which no-one could sensibly disagree. *In re TW v TW (minors)* [2016] 2 FLR 1386, Mostyn J held that the appropriate starting point for a child maintenance order should be arrived at by application of the Child Support Rules made under the Child Support Act. In *B v S (Financial Remedy: Marital Property Regime)* [2012] EHC 265 (Fam), the time each child spent in the home of each party was held to be relevant. *H v H* [2007] EWHC 459, does no more than set out Charles J’s calculation of maintenance in the case which he was considering.
30. Mr McGrath drew our attention to the guidance offered by Thorpe LJ (at paragraph 47) in *Re P* [2003] EWCA Civ 837. That was a claim under paragraph 1(1) of Schedule 1 of the Children Act 1989, which, as section 15 states, “*makes provision in relation to financial relief for the children.*” Although concerning a claim between unmarried parents, he submits it is equally valid in a claim for ancillary relief in respect of children. As Thorpe LJ put it,
- “[The] issues [of the home having been settled], the judge can proceed to determine what budget the mother reasonably requires to fund her expenditure in maintaining the home, its contents and in meeting her other expenditure external to the home, such as school fees, holidays, routine travel expenses, entertainments, presents etc. In approaching this last decision, the judge is likely to be assailed by rival budgets that specialist family lawyers are adept at producing. Invariably, the applicant’s budget hovers somewhere between the generous and the extravagant. Invariably, the respondent’s budget expresses parsimony. These arts have been developed in Matrimonial Causes Act claims, particularly where the budget is advanced to found the calculation of the price of the clean break. But it is worth emphasising the trite point that, by contrast, an order for periodical payments is always variable and will generally have to be re-visited to reflect changes of circumstances and also the factor of inflation. Therefore, in my judgment, the court should discourage undue bickering over budgets. What is required is a broad, common sense assessment. What the court first ordains may have a comparatively brief life before a review is claimed by one or other party.”*

31. Although, rightly, Mr McGrath accepted, *in re P* was not direct authority as far as the present case is concerned, he submits it was persuasive authority in favour of the judge's approach. Moreover, it reflects the approach taken in the Cayman Islands to child maintenance.

*The duration of the child maintenance orders*

32. There was a further flaw in the judge's order, submits Ms Harrison. The order should have stated that child maintenance would cease when the children entered tertiary education.

33. By section 22(1) of the Matrimonial Causes Law:

*"Duration of periodic payments*

*Where an order is made under section 21 for periodic payments such order, unless varied by the Court, shall remain in force...in respect of payments for the benefit of a child of the marriage...until such child attains the age of sixteen years:*

*Provided that...the Court may extend the period of such payments so long as the child is receiving education and is under twenty-one years ...*

*23. Either spouse...may make application for variation of any order made under section 21, and the Court, after hearing the parties, may make such variation."*

34. At a further hearing on 3<sup>rd</sup> May 2017, by which time Mr K was representing himself, the judge said (at paragraph 25):

*"The husband questions the need for the duration provision contained in the second sentence [of paragraph 5] of my Order...and feels it would not reflect the position that would exist when any of the children is attending university and therefore not residing full time at home. I have explained...that this is a standard duration provision which appears in almost every ancillary relief order made in the Cayman Islands, as it reflects the governing statutory position at section 22(1) of the Matrimonial Causes Law...I am satisfied that paragraph 5 of the draft order should be replicated in paragraph 5 of the final order."*

35. I can take Ms Harrison's submissions on this aspect shortly. Section 21 requires to the judge to exercise a discretion as to the duration of the order having regard to the facts of the case before him. It is not good enough to say these are the standard words. Had the judge properly exercised a discretion, he would not have made the order he did. The children were likely to be educated outside the Cayman Islands. Paying for their maintenance to Mrs K to meet their needs in such circumstances was not right. Ms Harrison submits that in England and Wales, at the age of 17, payments through a wife would end. A particular aspect which the judge failed to take into account was that a large element of the children's maintenance orders comprised

payment for Mrs K's household expenditure. Moreover, as revealed by a schedule before the judge, there was a specific fund for the children's education.

36. Mr McGrath's short response is that the judge was entitled to make the length of order he did. In any event, if the position becomes as is envisaged by Ms Harrison, the duration of the order can be varied.

*My conclusion in respect of the child maintenance payments*

37. The starting point of any analysis must be section 21(f) of the Matrimonial Causes Law (paragraph 7 above). By it, the court was obliged to make an "appropriate" order "for the benefit of the children." Those latter words seem to me to provide the judge with a wide discretion. They do not mean that the order has to be solely for the children's benefit. It is sufficient, if it can reasonably be said of the order that it fulfils needs of the children which would otherwise not be met. While I accept that *in re P* is not direct authority, it does seem to me that the guidance offered by Thorpe LJ is not inconsistent with the wording of section 21(f).

38. Here, the judge identified two areas of need for the children which fell to be met. The first area he identified were those expenses incurred by Mrs K which were directly attributable to them. The sum of US\$1,555 per month for both children met that need. The second area of unmet need was broader. It reflected the need to provide Mrs K with sufficient resources to enable her to provide for the children at a level which, in my view rightly, the judge thought appropriate. It seems to me two routes were open to the judge to do that. He could have met the children's needs by making an order for payment to Mrs K of such maintenance as would have met the children's needs for so long as they remained. The second route, and the one chosen by the judge, was to provide what would be a similar sum by way of child maintenance. I can see nothing objectionable in the route the judge chose. As to the sum he decided upon (which under this aspect of their need amounted to US\$4,268 per month for both children), while possibly a little generous, this was in my judgment within in his discretion.

39. In short, in my view, the judge's orders were consistent with the meaning of section 21(f) of the Matrimonial Causes Law and ones he was entitled to make.

40. I agree that Ms Harrison has a point regarding the duration of the child maintenance orders. The judge was required to exercise a discretion as she submitted. If the children's education continues outside the Cayman Islands after they are 17, orders in the present form until 21 are

not appropriate. However, that having been said, the orders can always be amended to reflect any changes in circumstance, whether by agreement or by application. I can see nothing presently to be gained by this court now interfering.

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

*Backdating the child maintenance payments to begin on 1<sup>st</sup> March 2017*

42. This topic first arose in the implementation hearing of 4<sup>th</sup> May 2017. By this time, Mr K was representing himself. The judge (at paragraph 36) said:

*“...the husband objects to a commencement date being placed in the order as he feels that this would be a retrospective order and that it was too technical a provision for him to address without legal representation. In my Judgment I did not enter a date for commencement, as I had no information when the wife would be vacating the matrimonial home. I had expected the parties to agree...that the commencement order would coincide with her leaving the property. The decision in the Judgement in respect of the level of child maintenance was made on the basis of the [shared residence] arrangements...of MacMillan J...remains in force...It is conceded by the husband that the wife vacated the property on or around 1<sup>st</sup> March 2017...[T]he commencement date should be 1<sup>st</sup> March 2017...[I]t is arguable that the commencement date could be the date of the Judgment in February 2017. Mr McGrath has sensibly not sought to try to persuade the Court that an earlier date should be...placed in the order.*

*37. The wife makes an oral application...for a forthwith order for the payment of unpaid child maintenance from 1<sup>st</sup> March 2017 to date as the husband has failed to make any child maintenance payments. I understand that the husband wishes to raise submissions which would basically amount to an application to remit some or all the arrears on the basis of extra expenditure he says has had to make for the children as the shared residence arrangements...have regrettably not been implemented...[T]oday's hearing with unrepresented husband is not the time to deal with enforcement...”*

43. Ms Harrison submits that as Mr K was wholly supporting the children from 1<sup>st</sup> March 2017, with very little contact with Mrs K after that, the order should not have been backdated, resulting in Mr K being immediately in arrears. It gave rise to a capital liability which only

served to increase the financial pressure on Mr K. Mr K was never asking for the order to be remitted, as the judge suggested. He was asking for it to start later. The judge should have had regard to the reality of the situation, as should this court.

44. As Mr McGrath submits, the judge found Mrs K needed to provide a home of particular size and quality in order to enable the existing residence order properly to be complied with. The child maintenance order currently enables her to do that. The fact that the court's order has not been complied with, that Mrs K's contact with the children has been limited (and with respect to her son, currently non-existent), is not a basis for changing the starting date for the order. The judge was entitled to back-date the order as he did.

### **Capital Related issues**

#### *Costs*

45. Both parties' legal advisers had submitted that the judge should consider costs at the end of the case. He chose not to do so, but decided the costs issue without argument in the following way.

46. He said at paragraph 73 of his judgment:

*"Since their separation the wife has had to withdraw considerable sums from the RBC [Royal Bank of Canada] investment accounts held in her name. The husband has paid considerably more towards clearing his legal fees liability to date, but it is not clear which sources have been used by him to do so. The wife contends that expenditure on fees should be seen as necessary liabilities and that the Court should therefore use the balances in her accounts which were available for disposition in or around March/April 2016 and then also have regard to any later legal fees deductions to get an accurate picture of what assets are available to meet the parties' needs. At the January 2017 hearing the Court indicated to the parties that it could take into account what each party had already expended to meet their fees when calculating the fair division of assets."*

47. He did so in paragraphs 79-82 of his judgment. In summary, he concluded that by 1<sup>st</sup> October 2016, Mrs K had paid legal fees of US\$67,893. She had depleted the matrimonial assets in that sum. She still owed a similar amount (CI\$55,373). Mr K had paid US\$97,119.77; in other words, US\$41,746.77 more than Mrs K. The judge said he had been able to pay US\$41,746.77 more than his wife either by depleting the matrimonial assets by that amount or by using his higher income. We have been told the second was the case.

48. In an affidavit sworn on 23<sup>rd</sup> March 2015, in response to Mrs K's application for a legal costs allowance, Mr K stated he did not have C1\$20,000 available to pay Mrs K's attorney, as the bulk of cash and investable assets were in her name. He accepted those accounts were matrimonial assets and suggested Mrs K. use them to pay her attorney. As the judge put it (paragraph 80):

*"In other words, the husband was authorising the wife to deplete the marital assets to meet his [sic] legal fees, whilst at the same time he depleted marital assets and/or used income to make a greater payment towards his fees."*

49. The judge went on to say (paragraph 81):

*"Payment of her legal fees is something that will 'eat into' the capital available to meet her and the children's needs...As mentioned...at the January 2017 hearing, having regard to the circumstances above, it is appropriate that the wife be placed in the same position as the husband as it relates to their legal fees as of 1 October 2016. With this in mind, I direct that the husband, in addition, pay to the wife the sum of US\$41,746. Subject to any later submission by counsel, my preliminary view is that each party should then be responsible for their own remaining fees."*

50. Having dealt with costs in the way he did, the judge (in paragraph 7 of his final order) made no order for costs.

51. In *McTaggart v McTaggart* (supra), the President said:

*"Having regard to the needs and financial resources of a party...the court takes account of the need of each party to discharge his or her liabilities to their respective legal representatives in respects of the costs of the ancillary relief proceedings. So, in a "big money" case, the court should ask itself- when determining what order to make under section 21(b) of the Law for the disposition of matrimonial property- whether the order which it is proposing to make will adequately meet the need of each party in relation to his or her liabilities in respect of costs. If the court is not satisfied that the order which it is proposing to make will adequately meet the need of, say, the wife in respect of her liability to her legal representatives then, as it seems to me, there are three courses open to it: (a) it can vary the proposed order [for the disposition of property] under section 21(b)- that is to say, it can make an order under that section which awards the wife a greater proportionate share of the matrimonial property; (b) it can leave the order under section 21(b) in the form proposed and make an order under section 21(e) ["costs"] for payment by the husband to the wife which includes a sufficient sum to meet that need [to pay her*

*legal representatives]; or (c) it can leave the matter to be dealt with by an order for costs in the wife's favour."*

52. The President's observations apply equally to a case such as the present. The judge, in paragraph 81 of the judgment, appears to have had in mind the first of the President's three choices, namely awarding Mrs K a greater proportion of the matrimonial property to meet her need to pay her outstanding legal fees (US\$41,746).
53. Ms Harrison submits the judge was wrong. Had he heard argument, he would not have reached the costs decision he did. The consequence was to provide Mrs K with more than half the matrimonial assets (by an amount of some 8%: US\$491,441 for Mr K, as opposed to US\$574,935 for Mrs K). Mr K, submits Ms Harrison, had paid his legal fees from post-separation, non-matrimonial earnings, in respect of which Mrs K was not entitled to a share. Unlike Mrs K, he did not deplete matrimonial assets to pay his costs. As *McTaggart*, to which the judge did not refer, makes plain, costs should only be awarded if needed. That was not so in the present case. Mrs K had sufficient resources to pay her legal fees. She was able to borrow US\$350,000 from which she could pay them. Ms Harrison also submits, that if the judge was intending to equalise the amounts of legal fees paid by each party, he failed to do so. The appellant's fees were US\$97,119, the respondent's US\$67,893, a total of US\$165,012. Half that was US\$67,893. On the basis of equality, the appellant should only have been ordered to pay the respondent US\$14,613.
54. Mr McGrath accepts, as he must, that the judge should not have made any order regarding costs without having heard proper argument. He submits however, as it seems to me with force, that having heard argument, the judge would have been bound to make a substantial costs order in Mrs K's favour. Mr K's case that he was not liable to pay any child or spousal maintenance failed. Such a costs order would have been paid from Mr K's non-matrimonial income. In the final analysis, it makes no difference whether the judge assessed costs at the end of the case in the normal way or by way of capital adjustment. The outcome would have been the same. Moreover, it cannot be said that an award of \$41,746 in respect of Mrs K's costs was disproportionate or outside the judge's discretion to make, particularly having regard to the parties' disparity of income.
55. I have concluded that had the matter been dealt with in the more conventional way, the outcome would not have been materially different. I would not therefore interfere in respect of the costs order.

*The mortgage payments made by Mr K*

56. After the separation in March 2015, Mr K reduced the mortgage on the family home by US\$57,056. Mrs K did not match those payments. In doing so, Mr K increased the equity of the family home by that amount. That was a non-matrimonial asset which should have been taken into account in Mr K's favour, submits Ms Harrison.
57. The weakness of Mr K's argument is highlighted by paragraph 54 of Ms Harrison's skeleton argument, in which it is said, "*H drew this post-separation payment to the Judge's attention during closing submissions. Whilst he did not urge departure from equality in his favour to reflect this non-marital asset, it was wrong for the Judge to simply ignore it.*" In other words, it was never suggested to the judge that an adjustment of US\$57,056 in Mr K's favour should be made under this head. The reason may well have been, as Mr McGrath has submitted, that during the time Mr K was paying the mortgage, the parties were sharing the family home (albeit that for the last two months Mrs K was undergoing rehabilitation away from the home). As he puts it, "*the economic aspect of the partnership subsisted even though there were proceedings extant.*" That is different from the situation contemplated in *McTaggart v McTaggart* (supra). The judge, in my view, was entitled not to take account of Mr K's mortgage repayments in all the circumstances.

*The pension issue*

58. Paragraphs 1 and 3 of the judge's order of 9<sup>th</sup> May 2017 state that:

*"The Petitioner [husband] shall transfer to the Respondent [wife] the sum of US\$600,154.17. This figure shall either be a cash payment, or, if the Petitioner so elects, a cash payment of US\$474,629.57 plus a pension sharing order in the sum of US\$125,524.60 to the Respondent's pension account...*

*3. If the Petitioner [husband] is not able to make the payments at paragraph 1, the former matrimonial home...shall be marketed for sale and out of the net proceeds of sale, the Petitioner shall pay the Respondent the sum of US\$600,154.17 if the net proceeds are US\$1,950,000."*

59. Ms Harrison's point is that in paragraph 1 of the Order, Mr K was given the choice of using his pension as part of the payment of US\$600,154.17, whereas in paragraph 5 he was not. That is said to be inconsistent, unfair and unexplained. The judge, it is submitted, apparently overlooked the fact that the pension was not available to be used by Mr K as an immediate cash sum. This was to confuse a sum immediately available for use, with a right to financial benefits on retirement: see *Maskell v Maskell* [2001] EWCA 856 and *Martin-Dye v Martin-*

*Dye* [2006] All E R 369. The net effect of the order in paragraph 3 was more onerous for Mr K and affected his ability to meet his and the children's housing needs. Mrs K did not need such a large cash payment.

60. It is self-evidently the case that a pension is not the equivalent of an immediate, available cash sum. However, it does not seem to me that the judge believed it was. At paragraph 66 of his judgment he said:

*“The wife contends that, if the former matrimonial home has to be sold, the husband requires sufficient funding to enable him to buy a property of a similar nature and size to the one which she seeks to buy, namely one similar to the former[first] family home at Snug Harbour. Prior to the hearing on 17 January 2017 the parties were informed in writing that the Court would like clarification at the hearing from the husband about the type of property he feels he would require if the sale of the matrimonial home was ordered. Despite this, at the hearing the husband's counsel indicated that no instructions had been taken on this point, and that in any event he did not wish to take up the opportunity to provide clarification and would not seek to do so before any order for sale was made and before reviewing the basis upon which any such order was made. In the absence of submissions on behalf of the husband and having regard to the current orders in relation to the children and the importance of each parent to them, I am satisfied that, if I were to order a sale of the matrimonial home, any division of assets should endeavour to place both parties in a position to buy a family property of similar value and nature.”*

61. At paragraph 78, the judge said that a property valued between US\$750,000 and US\$800,000 would meet Mrs K's needs. It follows that sum would equally meet Mr K's needs. Assuming a sale of the family home, Mr K would have liquid assets of some US\$359,409 on the basis of the figures set out in the judgment, and summarised by Mr McGrath at paragraph 21 of his skeleton argument. The judge assessed Mr K's income for 2016 at some US\$352,458 plus a bonus: some US\$417,458 and assessed it would probably rise for the foreseeable future (see paragraphs 86-89 of the judgment). As at June 2016, Mr K had a mortgage from his employer of more than \$1million. It is plain that he could afford to buy a property valued at between US\$750,000 and US\$800,000 to meet his and the children's needs should the family home be sold. On the other hand, Mrs K leaves the marriage with a somewhat speculative annual income of some US\$51,219 and a borrowing facility of some US\$350,000. In paragraph 1 of the Order, the judge was doing his best to try and enable Mr K to retain the family home. In paragraph 3, on the basis of its sale, the judge was better able to reflect the starkly different financial circumstances of the parties. That, as it seems to me, led to the different approach in

paragraph 3 from paragraph 1. Moreover, as Mr McGrath points out, given Mr K's income, the liquidity imbalance between the two is likely speedily to be redressed.

62. I have concluded that what the judge ordered is clearly explicable and within his discretion.

**Conclusion**

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

64. In my view, the judge sought to resolve the many issues between them in as fair a way as possible. I cannot accept the outcome was unfair to Mr K as has been submitted. For the reasons I have given, I have concluded this court should not interfere with the decisions the judge reached. I would dismiss this appeal.

65. I have two final observations.

66. First, as the court emphasised more than once during the hearing, the primary responsibility for resolving outstanding issues is that of Mr and Mrs K. Each must put personal feelings to one side. What matters above all are the interests of their children.

67. Second, I am most concerned by what seems to me an inordinate delay in the court listing and resolving the residency issues of these children. It is now time to inject some real urgency into these proceedings.

**Justice of Appeal Moses:** I agree.

**Justice of Appeal Field:** I too agree.

