

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

4 **CAUSE NO. FAM 39/2015**

5  
6 **BETWEEN**

7  
8 **AK**

9 **Petitioner**

10 **AND**

11 **TK**

12 **Respondent**

13  
14  
15 **Before:** Hon. Gunn J (Actg)  
16 **Appearances:** Mr A. Walters of Campbell's for the Husband  
17 Mr D McGrath of McGrath Tonner for the Wife  
18 **Heard:** 11<sup>th</sup> October 2018  
19 **Ex-tempore**  
20 **judgment:** 11<sup>th</sup> October 2018  
21 **Perfected judgment**  
22 **released:** 15<sup>th</sup> October 2018  
23

24  
25 **Preamble**

26  
27 *This Judgment is distributed with the strict understanding that, in any*  
28 *report of it, no person, other than the attorneys (and any other person*  
29 *identified by name in the judgment itself) may be identified by name or*  
30 *location and in particular the anonymity of the children and adult*  
31 *members of the family must be strictly preserved.*  
32

33  
34 **JUDGMENT**

- 35  
36 1. The parties are formerly husband (AK) and wife (TK). Their marriage was  
37 dissolved by order of Williams J on 16<sup>th</sup> May 2017. They have two school age  
38 children, K and M.  
39



## Background

- 1
- 2
- 3 2. On 9<sup>th</sup> May 2017 Williams J made final ancillary orders with regards to the
- 4 financial affairs of the parties, which included an order for AK to make lump
- 5 sum payments as well as periodic payments (“the Order”) to TK. These
- 6 proceedings concern the child and spousal maintenance element of that
- 7 order. AK was ordered to pay US\$3,000 per child per month as child
- 8 maintenance and spousal maintenance for 3 years on a diminishing basis:
- 9 US\$3,000 per month for the 1<sup>st</sup> year, US\$2,500 per month for the second
- 10 year, and US\$2,000 per month for the final year.
- 11
- 12 3. On 14<sup>th</sup> November 2017 the Court of Appeal dismissed AK’s appeal of
- 13 William J’s order (CICA 3/2017). AK complied with the financial orders, until
- 14 his employment was terminated with effect from 28<sup>th</sup> March 2018. AK made
- 15 the last maintenance payment on 1<sup>st</sup> April 2018.
- 16
- 17 4. On 23<sup>rd</sup> April 2018 AK filed a summons seeking a downward variation of the
- 18 maintenance payments pursuant to section 23 of the Matrimonial Causes
- 19 Law (2005 Revision) (“the Law”) on the grounds that he is no longer able to
- 20 meet the terms of the Order. That summons came before me on 11<sup>th</sup> May
- 21 2018. After extensive discussions, both in and out of court, the parties
- 22 agreed a consent order adjourning AK’s summons pending the disclosure of
- 23 further financial information. Additionally the parties agreed that although
- 24 arrears would continue to accrue,
- 25 (i) AK was not required to make any payments<sup>1</sup>; and
- 26 (ii) TK could not seek enforcement of arrears without leave of the
- 27 court<sup>2</sup>

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<sup>1</sup> Paragraph 3 “The amounts payable pursuant to paragraph 5 and 6 of the order of Williams J dated 9<sup>th</sup> May 2017 shall continue to accrue, save that the Petitioner is not obliged to make any payments to meet the order until the hearing of his summons and a determination is made of arrears, if any, for the period of the 1<sup>st</sup> May 2018 to the date of the hearing.”

<sup>2</sup> Paragraph 4 “The Respondent shall not be permitted to enforce any arrears without leave of the court.”



1 until AK's summons was heard. These two clauses have been referred to as  
2 the "moratoriums". It was clear in May that the intention of the parties was  
3 that, given the uncertainty of how long AK would be unemployed, payments  
4 would stop until the summons was heard.

5  
6 5. AK's summons was subsequently set down for hearing on 11<sup>th</sup> October 2018.  
7 Fortunately, AK secured new employment in August. AK's new employment  
8 contract provides that AK's salary is CI\$200,000 per annum ("the basic  
9 salary") in addition to other discretionary payments. AK's new basic salary  
10 represents an approximate US\$100,000 decrease in basic salary.

11  
12 6. AK received his first salary on 20<sup>th</sup> September, totalling US\$18,596.01  
13 following all deductions. Despite securing new employment, AK did not  
14 voluntarily resume making maintenance payments, even partial payments. It  
15 is important to note that although a shared residence order made by  
16 McMillan J on 15<sup>th</sup> December 2015 requires the parties' two children to  
17 reside with each parent on a weekly alternating rotation, K is residing with  
18 AK full-time and has no contact with TK. This was the position when the  
19 matter was before the Court of Appeal. Their Lordships concluded that  
20 despite the existing circumstances, given the terms and intention of the  
21 shared residence order, it was proper for AK to pay child maintenance for K  
22 to TK (at paragraph 44). There is no application before the court to vary the  
23 residence order.

24  
25 7. Prior to AK's summons coming on for hearing, counsel for both parties were  
26 in communication. AK offered to pay TK US\$1,500 per month for M, but that  
27 maintenance for K and spousal maintenance would cease. AK also suggested  
28 that the parties participate in mediation to come to an agreement for reduced  
29 maintenance payments going forward. TK refused the offer of mediation,  
30 asserting that it had no prospect of success. AK subsequently withdrew his  
31 offer of payment, I am told, on the basis that it became apparent to him that  
32 he could not even afford US\$1,500 per month. Ultimately, the parties agreed



1 through counsel that the hearing of AK's summons should be adjourned  
2 again and the hearing date be used for a directions hearing. Additionally, AK  
3 was requesting an adjournment of 6 weeks so that the parties can pursue  
4 mediation.

5  
6 8. On 5<sup>th</sup> October, six days before the hearing, TK filed her own summons  
7 seeking orders -

8 (i) lifting the moratorium on payments;

9 (ii) giving TK leave to commence enforcement of arrears; and

10 (iii) arranging K's counselling;

11 (iv) mandating AK to participate in counselling;

12 (v) mandating that TK continue counselling;

13 (vi) the preparation of an addendum report by DCFS; and

14 (vii) that the matter be re-listed for mention in February 2019 for a review  
15 of K's treatment pursuant to (iii) above.

16  
17 9. Despite TK's summons being filed so close to the hearing, I was satisfied that  
18 the summons did not raise any new, unexpected or complicated issues that  
19 would prevent the parties from properly arguing the point on the evidence  
20 before me.

### 21 22 **The Applications**

23  
24 10. On 11<sup>th</sup> October I heard lengthy submissions from counsel on all aspects of  
25 their summonses and I gave a brief oral judgment with limited reasons. I  
26 undertook to provide more detailed reasons in short order as AK wishes to  
27 seek leave to appeal my order. My perfected judgment is hereby provided.

28  
29 11. These proceedings are concerned with the child and spousal maintenance  
30 aspect of William J's order. Currently, AK is required to pay a total of  
31 US\$8,500 per month in maintenance. Since the moratoriums were imposed



1 arrears of US\$51,000 have accrued. Upon AK's summons being heard, that  
2 figure may be less.

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4  
5 Mediation

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7 12. Mr Walters, on behalf of AK, invited me to stay the proceedings for 6 weeks  
8 in order for the parties to participate in mediation.

9  
10 13. Paragraph 3(1) of the Mediation Information and Assessment Rules ("the  
11 Rules") provide that at any stage of the proceedings the court shall consider  
12 whether the matter is suitable for family mediation. If the court considers  
13 that it is and the parties agree to mediation, then the proceedings should be  
14 adjourned to allow mediation to commence (paragraph 4(1)).

15  
16 14. It is widely accepted that mediation is a valuable tool in family proceedings  
17 as, if successful, it is often quicker and considerably less expensive than  
18 litigation. The Rules presume that a matter should be referred to MIAM and  
19 mediation unless an exemption applies.

20  
21 15. Paragraph 3(2) provides that in deciding whether a matter is suitable for  
22 mediation the court should consider -

23 (a) whether a MIAM took place;

24 (b) whether a MIAM exception applies; and

25 (c) whether the parties have previously attempted mediation or  
26 another form of non-court dispute resolution and the outcome  
27 of that process.

28  
29 16. The final factor was the focus of both pre-hearing correspondence and  
30 submissions. AK is optimistic that mediation will result in a satisfactory  
31 agreement on lower maintenance payments, or certain payments ceasing  
32 altogether. AK referred to a previous mediation session as evidence that the



1 parties were capable of successfully mediating their issues. After further  
2 probing, Mr Walters conceded that mediation terminated after one session  
3 without the parties reaching agreement on any of the issues and that the case  
4 proceeded to a contested hearing. Mr Walters asserted that a consent order  
5 bringing the contested hearing to an early conclusion was as a result of  
6 matters arising from the mediation. TK and her counsel Mr McGrath  
7 disagreed with Mr Walters' analysis, asserting that mediation was entirely  
8 unsuccessful and that any further attempt would be futile. TK maintained  
9 that a request for mediation was AK's attempt to avoid/delay making  
10 maintenance payments rather than a genuine desire to resolve the current  
11 issues.

12  
13 17. Mr Walters submitted that TK's refusal to participate in mediation is  
14 unreasonable given that calculating a smaller maintenance amount is  
15 amenable to mediation at a considerably lower cost than litigation. He  
16 argued that the court should consider leaving open the option of TK paying  
17 all or part of AK's costs which will accrue from continued litigation. Mr  
18 Walters drew my attention to the judgment of Mr Recorder Furst QC in **PGF**  
19 **II SA v OMFS Company 1 Limited** [2013] EWCA Civ 1288 in which the  
20 learned Recorder opined –

21  
22 *"51. ...a finding of unreasonable conduct constituted by a*  
23 *refusal to accept an invitation to participate in ADR or, which is*  
24 *more serious in my view, a refusal to engage in discussion about*  
25 *ADR, produces no automatic results in terms of a costs penalty. It is*  
26 *simply an aspect of the parties' conduct which needs to be addressed*  
27 *in a wider balancing exercise...the proper response in any particular*  
28 *case may range between the disallowing of the whole, or only a*  
29 *modest part of, the otherwise successful party's costs.*

30  
31 *52. ...the court might go further, and order the otherwise*  
32 *successful party to pay all or part of the unsuccessful party's costs.*



1            *While in principle the court must have that power, it seems to me*  
2            *that a sanction that draconian should be reserved for only the most*  
3            *serious and flagrant failures to engage with ADR, for example where*  
4            *the court had taken it upon itself to encourage the parties to do so,*  
5            *and its encouragement had been ignored.”*  
6

7            18. I was also provided with the decision in **SM v DAM** [2014] EWHC 537 (Fam)  
8            which confirms that, while the court cannot force the parties into mediation  
9            in family proceedings, an unreasonable refusal may well attract a costs order.  
10

11           19. A failed attempt at mediation in the past is probably not enough on its own to  
12           constitute a reasonable ground for refusing to return to mediation? But much  
13           will depend on the circumstances of the particular case. These proceedings  
14           have a long and costly history and undoubtedly have been very acrimonious.  
15           These are relevant considerations.  
16

17           20. Knowing the likely costs of counsel preparing for and conducting a half- to a  
18           full-day hearing, I am sure that neither party wishes to incur further legal  
19           fees at this stage. During the course of the hearing TK indicated that she  
20           would consider mediation if AK –

- 21                (i)      resumes payments ordered by Williams J; and  
22                (ii)     makes full financial disclosure.  
23

24           21. Given the change of circumstances, the parties will need to make full financial  
25           disclosure before commencing mediation in order for the process to have any  
26           hope of success.  
27

28           22. As the Rules provide and case law confirms, I can only adjourn the  
29           proceedings for mediation if the matter is suitable *and* the parties agree to  
30           participate in mediation. Given the order I make in relation to TK’s summons,  
31           I am of the view that these proceedings are amenable to mediation, and I



1           urge the parties to seriously consider attempting mediation. I will return to  
2           their options later.

3

4       23. I leave it to the court that hears the substantive applications to determine  
5           what the consequences of a refusal should be.

6

7

8       Lifting the moratoriums

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10       24. This is not the hearing of AK's summons, and, therefore, it is not the time for  
11           me to decide whether the current order should be varied. Rather, it is a  
12           consideration of whether the moratorium on payments should be lifted and  
13           TK be permitted to pursue the arrears. Both counsel agreed that this was an  
14           all or nothing decision, there was no option to order partial payments  
15           without a proper examination of the evidence.

16

17       25. AK's position is that he still cannot afford the level of maintenance set by the  
18           Order. He provided a detailed budget of his monthly expenditure and  
19           asserted that after meeting all of his responsibilities he is left with a surplus  
20           of only US\$330.77 (see AK's affidavit dated 8<sup>th</sup> October 2018).

21

22       26. During the course of the most recent hearing AK offered to pay US\$500.00  
23           per month, approximately 6% of the amount TK is due under the Order.

24

25       27. TK asserted that, even with his reduced salary, AK is able to meet his  
26           obligations under the Order. Mr McGrath argues that TK has had to "cut her  
27           cloth" for the past 6 months in order to meet her obligations without the  
28           maintenance payments, and she should not continue to be deprived of the  
29           sums any longer. He argues that even if there is a recalculation, the sums are  
30           unlikely to all be reduced to zero.

31



1 28. The Listings Officer has advised that the next available date for the hearing of  
2 the two summonses is 20<sup>th</sup> November 2018. A hearing fixed on or close to  
3 that date would limit any payments, or lack of payments, to an 8-week  
4 period, i.e. 1 or possibly 2 payments.

5

6 29. I was therefore considering TK's application in the context of a short period.  
7 I had section 19 of the Matrimonial Causes law in mind which provides that -

8

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

14

15 30. Williams J has previously determined these issues in the circumstances as  
16 they were in 2017. The change in AK's income may warrant a reduction in  
17 the level of maintenance payable by him. As yet, AK and TK's evidence is  
18 untested. TK's financial circumstances will also be a factor when AK's  
19 application is determined. Further financial disclosure by both parties is  
20 therefore necessary.

21

22 31. As I have already stated, this is an "all or nothing" decision: I have to decide  
23 on the untested evidence whether it is more likely than not that AK can meet  
24 the Order now until the hearing of his summons.

25

26 32. My considerations are not dissimilar to the court considering an application  
27 for maintenance pending suit. In **T v T (Financial Provisions)** [1990] FCR  
28 169 [1989] Fam Law 438 the court concluded that -

29

30 *"The primary aim of the court will be to make an order, if possible,*  
31 *which will give a spouse certainly sufficient money to discharge the*  
32 *day-to-day outgoings and to feed, clothe and keep a roof over the*  
*head of that spouse until the final adjustments and orders are made*  
*in relation to the matrimonial assets and the finances after decree*



1           *nisi...where there are sufficient assets revealed by the parties the*  
2           *usual exercise for the court is to balance needs against resources*  
3           *and thus come to a temporary figure until the whole question for the*  
4           *division of the matrimonial property can be decided."*  
5

6       33. It is helpful to also consider the frequently referred to guidelines of Mostyn J  
7       in **TL v ML** [2005] EWHC 2860 (Fam)

8  
9           (i) the sole criterion to be applied is 'reasonableness' which is  
10          synonymous with fairness

11          (ii) the marital standards of living is an important factor,  
12          although the exercise is not to replicate that standard

13          (iii) there should be a specific budget for that application which  
14          excludes capital or long-term expenditure. The budget  
15          should be examined critically in every case so as to exclude  
16          frenzied exaggeration.

17          (iv) Where the disclosure by the paying party is deficient, the  
18          court should not hesitate to make any robust assumptions  
19          about the ability to pay. The court is not confined to the mere  
20          say-so of the payer as to the extent of any income or  
21          resources. In such circumstances, the court should err in  
22          favour of the payee.

23  
24       34. Williams J considered the evidence and made findings applying the section  
25       19 factors before making his Order. The Court of Appeal affirmed the Order.  
26       To date TK has not received US\$51,000, a significant sum that she  
27       legitimately expected and budgeted for. I have no doubt that she has had to  
28       make adjustments to account for this shortfall.

29  
30       35. In January 2018 AK committed to purchasing a property for CI\$938,000.00.  
31       AK's termination payment totalled US\$194,882.57, which was almost  
32       entirely used as a deposit on the new property. When the matter came



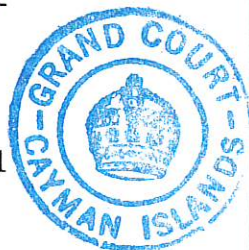
1 before me in May, the fact that these funds were already committed to the  
2 purchase was a key reason AK asserted he did not have the necessary funds  
3 to meet the Order until he secured new employment.  
4

5 36. It is apparent from AK's budget that a number of expenditures were included  
6 in his monthly budget when, in fact, they are annual payments. He has  
7 spread the annual cost over the year, similar to what one may do to save up  
8 for the event. By way of example, AK budgeted US\$100 per child per month  
9 and a further US\$110 per month for himself for vacations. AK and the  
10 children will obviously not be going on holiday every month at a cost of  
11 US\$310, rather this is a paper accounting of the anticipated costs of a future,  
12 unspecified holiday. Similarly, AK has budgeted US\$101.63 per month for  
13 the permanent residency fee for each child, although this fee is in fact  
14 payable in one lump sum on an annual basis. I identified numerous annual  
15 and/or infrequent expenses which have been budgeted in this manner:

- 16 • School uniforms
- 17 • School supplies
- 18 • Sports and musician camps
- 19 • Permanent residency fee
- 20 • Birthday presents
- 21 • Vacations
- 22 • Car registration
- 23 • Car insurance
- 24 • Car maintenance

25

26 37. In total I identified over US\$1,100 in expenses that are not truly monthly  
27 expenses. Much of that budget should be available to AK in the short term to  
28 meet his current legal obligation under the Order. Those funds should be  
29 available from September's salary and the upcoming October salary. I find  
30 that it is more likely than not that AK can adjust his expenditure in the short-  
31 term to free up those funds and that it is reasonable to require him to do so.



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38. Furthermore, AK's contract provides at paragraph 10.1 that his employer -

*"... shall, by way of a discretionary payment as a gesture of goodwill  
..., pay an aggregate quarterly amount of CI\$12,500 to a separate  
account set up for this purpose, which monies shall be used for the  
sole purpose of defraying the educational and living costs of the  
employee's two children..."*. (emphasis added)

39. AK asserted that he has not yet received this payment. Despite being referred to as a discretionary payment, the contract mandates this payment, totalling approximately US\$5,081.30 per month. The onus is upon AK to ensure he receives those funds, and I consider those funds to be available to him to help meet his obligations. Additionally, TK's evidence was that AK has recently spent US\$30,000 purchasing furniture for his new property (paragraph 15 of TK's affidavit dated 5<sup>th</sup> October 2018). AK omitted this purchase from his disclosure to the court. This purchase strongly suggests that AK has access to significant cash or credit, which he has not disclosed, to the court.

40. All the forgoing lead me to conclude that AK has access to funds, whether cash and/or credit, which he can use in the short-term to meet the Order until his application is finally determined, without adversely affecting his ability to meet his other financial responsibilities and needs. Consequently, I find that it is just to discharge paragraph 3 of the 11<sup>th</sup> May 2018 consent order. AK is ordered to resume maintenance payments as per the order made by Williams J beginning Monday 22<sup>nd</sup> October 2018.

41. Given AK's failure to even make a "goodwill payment" of a reasonable amount (even US\$1,500 is inadequate in these circumstances) when he has the funds to do so, I find that it is appropriate to give TK leave to commence enforcement proceedings should she wish to do so. The determination of



1 what, if any, arrears there are will be determined as part of AK's application  
2 in any event. On a very cursory review of the evidence, it seems unlikely that  
3 the court would find that no payments at all should be due between May  
4 2018 and the date of final hearing, i.e. zero arrears. Discharging paragraph 4  
5 of the 11<sup>th</sup> May 2018 consent order simply clears the way for TK to seek  
6 enforcement for any arrears after any recalculations are done (if so ordered).  
7

8 42. My decision to lift the moratorium and to give TK leave to enforce arrears is  
9 in no way an indication of what the court may decide at the final hearing.  
10 The parties should be mindful that if AK's application is successful there may  
11 be a recalculation of the payments from the date of his summons, including  
12 the payments made going forward from today.  
13

14 43. I order that the substantive hearing of both AK and TK's summonses shall be  
15 fixed to be heard on the first convenient date on or after 20<sup>th</sup> November  
16 2018.  
17  
18

19 Opportunity for Mediation  
20

21 44. I return to the issue of mediation. I am advised that the court can offer AK  
22 and TK mediation appointments every Friday, commencing 2<sup>nd</sup> November. I  
23 urge both parties to carefully consider their positions in light of the orders I  
24 have made. The resumption of payments, the anticipated exchange of  
25 disclosure in the next 14 days and the availability of mediation appointments  
26 provides a good opportunity for both parties to at least commence  
27 mediation. If mediation is pursued then the hearing of the summonses can be  
28 adjourned for mediation to conclude. On the other hand, if either party were  
29 to unreasonably refuse to engage in mediation in these favourable  
30 circumstances, then the court might find that material when considering the  
31 issue of costs.  
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Counselling

45. TK sought a number of orders addressing K and each other to attend counselling. By order of Carter J (Actg) on 8<sup>th</sup> March 2018 K is to receive such treatment as recommended by Dr Lockhart (paragraph 2(b)). During the course of the hearing it became apparent that TK had not been informed that K had in fact commenced counselling. Such a lack of communication is a sign of poor co-parenting, and, ultimately, contrary to the best interests of the child. AK is not in breach of Carter J's order and I find there is no need to make any further orders as to counselling at this time. I am pleased that I need not make an order mandating communication, as I am advised that the parties have undertaken to keep each other informed as to K's appointments and his attendance at counselling.

46. I also find that there is no benefit to setting the matter down for review in February and will only increase legal costs. As a consequence I do not order an addendum welfare report either. The parties should keep K's counselling under review themselves. If necessary the parties should return to this issue when the matter is next before the court and carefully consider whether court supervision is absolutely necessary.

Directions

47. I turn to the direction to take the matter to hearing –

- (i) AK summons for variation and TK's summons to enforce arrears are to be heard together on the first convenient date on or after 20<sup>th</sup> November 2018. 1-day time estimate. Any judge (except Williams J) can deal.



- 1 (ii) The parties are to exchange disclosure in accordance with  
2 schedule 1 and 2 of TK's summons by 26<sup>th</sup> October 2018.  
3 (iii) Final affidavits are to be filed and served not less than 14  
4 days before the date of final hearing. No further evidence  
5 after that date without leave of the court.  
6 (iv) The parties are to comply with Practice Direction 11/2014  
7  
8

9 Costs

10  
11 48. The issue of costs of preparation and for attendance at today's hearing is  
12 reserved until the final determination of both summonses.  
13  
14  
15

16 Dated this 15<sup>th</sup> day of October 2018

17  
18   
19

20 Hon Kirsty-Ann Gunn

21 Acting Judge of the Grand Court

