



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION**

CAUSE NO: FAM 53 of 2014

BETWEEN: AM Petitioner

AND: ALM Respondent

**Appearances: Mr. David McGrath of McGrath Tonner for the Petitioner
Mr. David Holland of Cayman Family Law for the Respondent**

Before: Hon. Mr. Justice Richard Williams

Heard: 18, 19 July 2022 & 4, 5 October 2022

**Written Closing
Submissions Received: 31 October 2022**

**Draft Ruling
Circulated: 15 February 2023**

Judgment Delivered: 24 February 2023

HEADNOTE

Ancillary Relief - Enforcement application in relation to housing allowance order – Variation application in relation to housing allowance order and child maintenance order - Application to review and vary contact arrangements.

JUDGMENT

The applications

1. The hearing before me concerns one female child, the youngest child of the family, who is 10 years old (“the child”). The present stage of these regrettably repetitive proceedings was commenced by a Variation Summons filed by the Petitioner husband on 10 March 2020 and by an Enforcement Summons filed by the Respondent wife on 3 September 2020.

2. Both 2020 Summonses were later amended by the parties. The Summonses and the Amended Summonses primarily relate to the order made by Hall J (Actg) on 9 February 2020 (“the 2020 Order”) which was drawn up to reflect the content of her Judgment dated 30 December 2019. The 2020 Order contains the following provisions:¹
 1. The Respondent mother’s application for leave to relocate the child to reside with her in Melbourne, Australia, is granted.
 2. The child shall have contact with the Petitioner father as follows:
 - a) For 2 weeks every Easter;
 - b) For 2 weeks during the last week June/first week July school holiday every week;
 - c) For 2 weeks during September school holiday every year;
 - d) Starting 2020, for 4 weeks during school Christmas holidays (incorporating Christmas Eve and Christmas Day on alternating years);
 - e) The above arrangements can be facilitated in Cayman, Australia, New Zealand or any other location that is convenient for the Petitioner; Facetime/telephone

¹ The highlighting in by underlining is to draw attention to the parts of the 2020 which are primarily relevant to the enforcement and variation applications contained in the parties’ Amended Summonses.

- f) Regular indirect Facetime/telephone contact 4:00 p.m. Cayman time or such other time as can be agreed and anytime between 5:00 p.m. and 11:00 p.m. on weekends; and
- g) The Petitioner is responsible for the travel costs of facilitating physical contact.
3. The Petitioner shall resume making child maintenance payments in respect of the child in accordance with paragraph 3 of the Final Ancillary Order dated 5th January 2016 so that the Petitioner shall pay to the Respondent the sum of CI\$1,500 per month.
4. The Petitioner shall pay the sum of CI\$1,500 per month in respect of child maintenance for J prorated based on the time that he spends in the Respondent's care each month.
5. The Petitioner shall forthwith pay to the Respondent the sum of CI\$14,000 in respect of housing allowance arrears (equivalent to 4 months at the rate of CI\$3,500 per month as provided for at paragraph 6 of the Final Ancillary Order dated 5th January 2016).
6. The Petitioner shall resume the payment of the housing allowance of CI\$3,500 per month in accordance with paragraph 6 of the Final Ancillary Order dated 6th January 2016 **once the Respondent secures a new home in Australia for her and the children.** As a consequence of this provision, the requirement to pay would remain in place until the youngest child reaches 18 or ceases full-time education up to age 21.
7. The Respondent's application for an extension of her spousal support is refused and dismissed.
8. Both parties have leave to apply to vary the above financial orders at paragraphs 3 to 6 as it relates to the change in currency.
9. The Petitioner shall repay the Legal Aid Fund in respect of the costs incurred under the Respondent's legal aid certificate.

3. In his Amended Summons for variation and specific issue application filed on 8 December 2021, the Petitioner husband seeks the following orders²:
1. Paragraph 2 of the 2020 Order be varied such that the Petitioner do have contact with the child as follows:
 - i. The child shall spend time with the Petitioner for a period of up to 5 weeks from 20 March 2022, as nominated by the Petitioner no less than 60 days before the time commencing, with the Petitioner to ensure school attendance.³
 - ii. At any other time that the Petitioner travels to Melbourne, for the entire duration of his trip, provided that the trip is 5 weeks or less and:
 - The Petitioner has provided the Respondent with written notice of the dates of his trip at least 60 days prior to his arrival in Australia; and
 - The Petitioner facilitates the child's attendance at school on all compulsory school days, unless otherwise agreed between the parties in writing.
 - iii. Up to 5 weeks' direct, overnight contact between 20 March and 29 April each year.
 - iv. Up to 5 weeks' direct contact, between 19 December and 26 January each year. Insofar as the Petitioner is able to arrange direct contact with the child at Christmas, she shall spend the Christmas period with the Petitioner.
 - v. The specific dates at (iii) and (iv) above shall be determined each year and shall be at the Petitioner's convenience.
 - vi. If the Petitioner travels to Melbourne to have contact with the child, the child will spend the whole of the period with him including during school time.
 - vii. Contact can be in Australia, New Zealand, the Cayman Islands or any location which is convenient to the Petitioner.
 - viii. For the purposes of such contact, the child may be collected or returned by the Petitioner, the Petitioner's wife, or the Petitioner's mother.

² The highlighting by underlining is to draw attention to the parts of the Amended Summons which H now wishes the Court to determine.

³ As the 2022 date had already passed prior to the hearing, the Petitioner was seeking the same order from 20 March 2023.

- ix. The Petitioner, the Petitioner's wife and the Petitioner's extended family shall be entitled to have generous physical contact with the child if they are in Australia and otherwise by electronic means.
2. A downwards variation of the quantum of child maintenance in respect of the child.
3. A downwards variation of the housing allowance payment at paragraph 6.
4. For the purposes of the child's time with the Petitioner:
 - (a) Such time can take place outside of Australia if it is during the Australian school holiday period, or otherwise agreed between the parties in writing.
 - (b) Handover shall place at Tullamarine Airport or the Respondent's home at the option of the Petitioner, or as otherwise agreed between the parties in writing;
 - (c) That any of the following people may facilitate changeover:
 - (i) The Petitioner; or
 - (ii) The Petitioner's wife; or
 - (iii) The Petitioner's mother.
5. That the child may speak with the Petitioner via Zoom, FaceTime, WhatsApp, Skype or other electronic means each day by agreement and failing agreement:
 - (i) Each school day at 8.00am; and
 - (ii) Each non-school day at 10:00am.
6. For the purposes of the child's communication with the Petitioner, the Respondent shall facilitate such communication by:
 - (i) Ensuring that the child has access to her own computer, phone, iPad or other device to facilitate the video call at the requisite time;
 - (ii) Ensuring that the device is charged, and it is connected to the internet;
 - (iii) Ensuring that Zoom, WhatsApp, FaceTime, Skype and any other communication software requested by the Petitioner are loaded on the child's iPad, phone and other devices;
 - (iv) Ensuring that the Respondent and her servants and or agents (including her family) are not in the room with the child when she is speaking to the Petitioner;
 - (v) Ensuring that the Respondent and her servants and/ or agents (including her

family) do not terminate or disrupt the conversations, except for when it is time for the child to leave for school; or, if the call has lasted for at least one hour.

7. The Respondent shall facilitate the child receiving and sending messages to and from the Petitioner, the Petitioner's wife, AJFM and the Petitioner's extended family, including but not limited to the Petitioner's mother and his sister by:
 - (i) Ensuring that the child's phone, iPad, or other device are connected to the internet whenever the child is at home; and
 - (ii) Ensuring that the child has her own email account and password.
8. That the Respondent and her servants and agents (including extended family) shall refrain from deleting or altering messages, photographs or videos sent by the Petitioner, the Petitioner's wife, or the Petitioner's extended family.
9. That the Respondent be restrained from taking the child to any psychologist, psychiatrist, or other mental health professional without the prior written consent of the Petitioner.
10. The parties shall refrain from:
 - (i) Denigrating, belittling, harassing, intimidating and/or rebuking the other parent, members of the other parent's family and/or household to and/or within the hearing of the child; and
 - (ii) Discussing any financial matters between the parties within the hearing of the child.
11. Unless otherwise agreed between the parties in writing, the Respondent shall facilitate the child continuing the following:
 - (i) Her weekly Spanish lessons with Senorita Tanya Nelson Hudson, or such other Spanish teacher as agreed between the parties in writing; and
 - (ii) Karate lessons.
12. The Respondent shall do all acts and things and sign all documents necessary to facilitate applications for the child to obtain British Overseas Territory, United Kingdom and New Zealand passports within 14 days of any request by the Petitioner.

13. The Petitioner's wife be granted parental responsibility as the child's step-mother, pursuant to s.4A Children Act (2012 Revision).
 14. Such further orders, directions or relief as this Honourable Court may deem just and appropriate.
4. In her Amended Summons filed on 9 December 2021, the Respondent seeks the following orders:
1. That the Petitioner shall forthwith pay the sum of CI\$67,701 in respect of housing allowance arrears owed pursuant to paragraph 6 of the 2020 Order.
 2. That the Petitioner shall resume paying private school fees and agreed extra-curricular activities for the child until she ceases full-time education or reaches the age of 21, whichever is the later, in accordance with paragraph 4 of the Order of Hall J (Actg) dated 5 January 2016 (the Ancillary Relief Order).

Initial observations

A) Section 10 child orders sought in the Petitioner's Amended Summons

4. Some orders sought, including a new freestanding application made by the Petitioner (i.e. not a variation of an existing Grand Court Order) for a parental responsibility order to be made in favour of a non-party to these proceedings (the Petitioner's wife) or for contact orders to be made in relation to non-parties (i.e. the Petitioner's wife and his wider family members), even if the applications had been properly brought, are matters to be determined in the jurisdiction where the child is habitually resident. Some of the orders sought descend into the minutiae of child arrangements which are not suitable for a Court to determine in a private law case. My above concerns about some of the s.10 orders were expressed to the parties at the outset of the hearing and, to their credit, the attorneys accepted the validity of those concerns, and they tailored the

parties' evidence and submissions accordingly. I have highlighted in paragraph 3 above which part of the Amended Summons H still invites the Court to determine.

B) School fees order sought in the Respondent's Amended Summons

5. In relation to the school fees provision, I note that, at paragraph 38-41 in the Respondent's Affidavit sworn on 5 July 2022, she indicates that the child presently attends a Government school and will likely remain in the public education system for at least another 2-3 years. The Respondent states that she presently wishes the child to attend Caulfield Grammar, a private school, at the end of Year 7 (in January 2025), with the school fees being met by the Petitioner.
6. At paragraph 90 of the Petitioner's Affidavit sworn on 1 July 2022 he states that he will pay:
 - (i) all the child's government school fees as agreed by the parties in writing or ordered by the Court;
 - (ii) all the child's agreed extracurricular costs; and
 - (iii) all the child's private health insurance, medical, dental and optical expenses.

The private school fees provision in the Ancillary Relief Order related to only the two elder children who were then attending private schools. The youngest child was still at pre-school and an earlier order of Smellie CJ had drawn a distinction between the levels of education when it came to fees payment. The 2020 Order makes no mention of the payment of school fees for the child who, by then, had started attending a government school. I am satisfied that presently there is no school fees order to be enforced relating to the child who is still attending a Government school.

7. If I do not make an order for the private schools to be paid, the Respondent invites the Court⁴ to express a view about the appropriate forum to determine this education funding issue. If the Respondent seeks the child to attend a private school in around 2025, and if the Petitioner refuses to agree to the child attending at a private school and/or to pay all the private school fees, then an application should be made to a court to determine which school the child should attend and how that should be funded. An Australian Court will be far better placed to consider:
- (i) the comparisons between the available public and private schools in Melbourne; and
 - (ii) the benefits to a child from attending either.

For the above reasons and for the reasons indicated in the footnote at the end of this Judgment, I am of the view that the appropriate forum to determine the issue is the Family Court in Australia. As I have not made an order about private education, the Australian Court would not be enforcing an existing order but would be considering a new application, namely for the funding needed for a move from the public to private school system. Despite the rehearsal of the issue in the Written Closing Submissions, this issue was canvassed with the parties at the outset of the hearing, and I was at that time left with the impression that they had agreed with my observations concerning the appropriate forum for the determination of the potential private school funding issue.

8. It would be inappropriate for this Court to make an ill-informed decision about which school and any fees payment on the very limited information before it. Accordingly, I make no order in relation to paragraph 2 in the Respondent's Amended Summons. If a private school is being pursued, I accept that the child may need to register an application at some stage over the next twelve months and that there may be a reasonable registration fee to pay. If attendance at an identified private

⁴ The request is made a paragraph 94 in the Respondent's Written Closing Submissions.

school in Melbourne would be in the child's best interests, one would hope that the parents would strive for there to be parity in educational opportunities provided by them to their children⁵ and, at the very least, to be able to resolve that initial expenditure without again having to go to Court.

The hearing

9. At the hearing held in my Chambers on 18, 19 July 2022 and 4, 5 October 2022, I received oral evidence from the parties. The attorneys and the Petitioner physically attended my Chambers while the Respondent, who resides in Australia, attended and gave her oral evidence at this hearing by Zoom. Her remote attendance was agreed by the parties and approved by the Court. Although there were on occasion some connectivity issues and the Respondent had to endure attending in the early hours of the morning, I am satisfied that I have been able to receive and access the evidence properly and that neither party has been prejudiced. When I consider the wife's demeanour during the hearing, I have regard to the fact that she was attending in trying circumstances.

10. I also received oral and written submissions from Counsel for each party. At the end of the hearing, I adjourned for a reserved Judgment to be provided after the receipt of Written Closing Submissions. I received those submissions on 31 October 2022. This is my reserved Written Judgment. When determining the issues dealt with in this Judgment, I have considered the oral evidence, the written and oral submissions filed as well as the content in the five provided bundles. For convenience, and with no disrespect intended, I will hereafter herein refer to the Petitioner husband/father as "F" and the Respondent wife/mother as "M".

Background - The divorce proceedings and observations

⁵ The Petitioner has funded them through private school.

11. Due to the drawn-out nature of these proceedings, and to place the Amended Summonses into context, it is necessary to set out the background of the proceedings in far greater detail than one might ordinarily expect.

A. Relationship background

12. F and M met in 1992 and were married in London in 1997. F, a New Zealand national, was and remains working as a salaried partner in a law firm with an income of around US\$33,000 to US\$34,000/month⁶. M, an Australian national, had worked in a bar but became a Montessori school teacher. She is currently employed as a disability carer/therapy assistant in Australia with an average salary equivalent to CUS\$2,936 month. Three years after their eldest child was born, the family emigrated to the Cayman Islands in January 2003.
13. They had the child and two older children during the marriage. The child's siblings are a sister aged 23 ("R") and a brother aged 19 ("J"). The siblings are, due to their ages, no longer subject to any s.10 Children Act orders. R and M moved to Australia at the end of July 2018 because R wished to attend university there. Until that happened M had been the primary caregiver for all the children. J indicated that he wanted to stay in the Cayman Islands to complete his GCSE examinations but expressed an interest to possibly live in Australia in the future. R has been studying law since 2019⁷. R still lives in the same home as M and the child. Despite R's age, partly because R is still an undergraduate studying locally, M feels a moral responsibility to still provide for her. M states that R's presence in the home is in the child's best interests because she is close to her sister and is an important caregiving figure of the child. M says that the assistance provided by R enables M to

⁶ Paragraph 74 of F's Affidavit sworn on 1 July 2022 – "I can earn in theory US\$407,000, whereas before it was the least I could earn. I have a fixed salary of US\$357,000 and the discretionary bonus of up to US\$50,000."

⁷ Having completed her undergraduate studies, R is currently pursuing post graduate studies.

commit to her employment and saves childcare costs. J resides with F and his wife in the Cayman Islands and is still a relevant child for financial purposes, as he still attends at high school. F states that J plans to attend university in the United Kingdom. However, M states that J has already been accepted at RMIT University in Australia. It was unclear to the Court where J would eventually enrol as an undergraduate. As J is under 21 and still in full-time education studying for his A levels, both he and the child may be the subject for child related financial orders. If J were to attend university in Australia, and especially if he were to reside with M during the term time, then this could amount to a change of circumstances which might result in the need to review M's present housing arrangements and the housing provisions made in the order emanating from this Judgment. In relation to the children, I have regard to the fact that they should be able to all be together at certain times with each parent and that the accommodation would be suitable, albeit not necessarily with separate bedrooms.

14. From around 2009, there were issues with the marriage and F issued proceedings for Judicial Separation in 2009. Thereafter the parties attempted a reconciliation. They moved to the Cayman Islands in January 2003, and they finally separated around March/April 2013.
15. F still lives in the Cayman Islands with his wife who is an interior designer. There is minimal information before the Court about her income⁸ and although she is not responsible for maintaining the child, the Court may take into account that her income may release more of F's to be allocated for that purpose. The Court may also consider that the wife, to her credit, is also caring for and supporting J who lives with her and F.

⁸ Husband indicated in his oral evidence on 19 July 2022 that his wife is an interior designer and that they had set up a company in which she is employed by him. He said that his wife receives \$1000 per month.

A) Procedural background from the filing of the Petition to the ancillary relief hearing held on 11/12 August 2015

16. F filed the divorce Petition on 3 April 2014. The Petition was initially contested with an Answer and Cross-Petition being filed by M on 30 April 2014. However, in his Acknowledgment filed on 5 May 2014, F stated that he did not intend to defend the Cross-Petition. Despite that, the parties could not agree the basis upon which the Petition(s) should proceed, and it required the Court to rule on the same in an Ex-Tempore Judgment given on 25 September 2015. The Court proved the Cross-Petition based on the paragraphs that were admitted in F's Acknowledgment⁹ and leave was given to F to withdraw his Petition. On 27 May 2015 the Respondent filed an application by Summons to permanently remove the three children to Australia. That application was not pursued.
17. Proceedings relating to this family, which have engaged the Grand Court and the Family Court in Australia, have been characterised from the outset by:
- (i) the parties' inability to agree or concede matters that should have been resolved without the need to attend Court;
 - (ii) an apparent desire to raise and argue numerous issues; and
 - (iii) the parties' inability to conduct the proceedings in a cost effective and, for their family, financially beneficial manner.

Not including the Court of Appeal applications and the applications issued in Australia, there have been at least 16 Summonses and at least 30 Affidavits filed by the parties in the Grand Court and at least 15 appearances made before various Grand Court Judges. For the purpose of this Judgment, I need not set out the detail of each of those hearings. The materials in the case have occupied 4

⁹ After considering the Court of Appeal decision in *Grenfell v Grenfell* (1978) Fam 128.

full Grand Court Family Division files and 3 trial bundles (excluding the Authorities and Written Submissions bundles) containing 1,182 pages. The detail in the submitted bundles offers a vivid illustration of the unfortunate way in which the parties have chosen to litigate this matter. Throughout these proceedings the parties have both taken unrealistic positions in relation to the financial arrangements sought or offered, and their decision making has often been poorly impacted by their emotions. The financial issues before me are relatively straightforward, but both parties have regrettably litigated them in a manner which one would expect to encounter in far more complex matters.

18. In light of the Moses J's observation¹⁰ that the financial issues are a continuing source of dispute "*which underline the unfortunate continuing hostility to the detriment of (the child)*", this is a timely opportunity to reiterate the concerns expressed by me in *SD v AL* Fam 145 of 2006, a Judgment handed down on 12 September 2017 in the variation of child maintenance case, and which F has included in his Authorities bundle. As in that case, in the present matter before me, I have little doubt that the costs expended on these proceedings have been and remain massively disproportionate to the monetary value of the issue in the case and, save for the international relocation application, to what should be straightforward child arrangements issues. At Paragraph 31 in *SD v AL* I stated:

"31.I accept that this is not a big money case, but as a great deal of money and time has been squandered on these proceedings, I again share the sentiments of Munby J. KSO v MJO & Ors [2008] EWHC (Fam) 3031 when he stated:

"The picture is deeply dispiriting. And it is not as if it is only the adults who suffer from the consequences of such folly. The luckless children do as well. The present case is a sobering, and for me deeply saddening, example. If, instead of spending – squandering – over £430,000 in costs, the wife and the husband had been able to resolve their differences at a more modest and, dare I say it, more seemly level

¹⁰ Paragraph 12 in the Court of Appeal's Further Judgment on Costs delivered on 20 November 2020.

of costs, there might very well have been enough left in the matrimonial ‘pot’ to house the wife and children and to enable the children to remain at their school, whilst still leaving something more than a mere consolation prize over for the husband.the mother and the father, for that is what they are – are faced now with the wretched and thankless task of trying to explain to their daughters how it has all come to this.”

32. I also draw attention to the following remarks of Jackson J. in *TF v FF* [2013] EWHC

(Fam):

“In my view, the court has a responsibility to discourage currently profligate wasted costs, particularly in a case with a track record like this. It is a matter for each party to decide what they want to spend, but they cannot expect it to be recoverable if it exceeds that threshold.”

I hope the parties keep the above in mind if they seek to litigate this matter further in the future.

C) The ancillary relief hearing and the decision of Hall J (Actg)

19. After many interim hearings, the final ancillary relief hearing came on before by Hall J (Actg) on 11 and 12 August 2015. The Learned Judge provided the minute of her order on 21 September 2015, and she circulated the Reasons for her Decision on 17 November 2015. The filed Order states that it is dated 5 January 2016 and that it was sealed on 28 January 2016.
20. From the Judgment, as set out below herein, one can see that Hall J conducted the required review of the evidence and the parties’ submissions and that, based on that review, she reached her reasoned conclusion. In her Judgment, Hall J (Actg) highlighted the immigration issues relating to F and the family. She accepted that F was required to repurchase ownership of a property in the value of CI\$797,000 because, due to the sale of family real estate assets, he was no longer in compliance with this term of his grant of Permanent Residence.¹¹ There was a real risk that his, M’s and the children’s Permanent Residency could be revoked. The Learned Judge recognised that M had no assurance that she would be able to continue living in the Cayman Islands.

¹¹ Paragraph 84-85 in the Judgment.

21. When reaching her decision and resultant order, Hall J (Actg) agreed that F, for the above-mentioned immigration reasons, needed to urgently apply his share of the matrimonial assets and a proportion of his superior income towards obtaining and paying for real estate valued at CI\$797,0000. Such a property would meet F's needs as well as enable him to have, when required, all the children staying with him. Hall J (Actg), having ascertained that the housing needs of F were intertwined with his immigration issues, clearly tailored the wider maintenance and capital orders to enable F to be able to invest in a suitable property. She did that recognising that M would only be in a position to live in rental properties and that she must have financial security tailored from the order to enable that to be provided until the youngest child was aged 21.¹² This is a highly relevant factor, which favoured F and which placed his needs at the forefront, when considering the Learned Judge's order in a global manner.
22. Interestingly, within 6 months of the Ancillary Relief, at a time when the children were still primarily living with M, F was financially able to buy a luxury oceanside condominium for an amount considerably over the CI\$797,000 figure. This illustrates how, when comparing housing and financial security, the Ancillary Order was more advantageous to F. It would be a rather unattractive submission to now argue that there is now a change of his financial circumstances or that F no longer has sufficient disposable income in a situation where he has decided to arrange his financial affairs to acquire such property resulting in an increase in his housing costs/outgoings to the extent that he is now spending \$10,500/Month on his mortgage and strata fees. As mentioned above, this is not a case where F has been compelled or needs to to change his housing requirements due to the fact that J is now living with him rather than with M.

¹² See paragraphs 29-32 below.

23. Turning to the submissions made by the parties at the ancillary relief hearing, the Learned Judge noted that F submitted that:
- (a) There should be equal division of the matrimonial assets and that he calculated that this should amount to CI\$339,352 and that, although the Respondent had already received CI\$363,963 (53% of the matrimonial assets), he was not seeking a “reimbursement”¹³;
 - (b) M could find a suitable rental property for CI\$3,000/month¹⁴;
 - (c) He would need around CI\$9,000/month for mortgage payments for a home valued at CI\$797,000¹⁵;
 - (d) M had an earning capacity of between CI\$1,300 and \$2,000/month¹⁶;
 - (e) There was a possibility that his income could be reduced as he may be removed from Tier level-based earnings or demoted to a lower Tier¹⁷;
 - (f) He should pay child maintenance at a rate of CI\$2,000/child/month which figure includes the CI\$3,000 housing¹⁸;
 - (g) He should continue to pay the children’s school fees, agreed extracurricular activities, health insurance and medical/dental /optical expenses¹⁹; and
 - (h) F should pay spousal maintenance of CI\$1,500 /month until 1 September 2017²⁰.
24. The Learned Judge noted that M submitted that:
- i) She needed a 4-bedroom property and that F should make a lump sum payment of CI\$100,000 for the specific purpose of her purchasing a home valued at CI\$500,000 in

¹³ Paragraph 39 in the Judgment.

¹⁴ Paragraph 50 in the Judgment.

¹⁵ Mentioned at paragraph 70 in the Judgment – This figure seemed high albeit the term of the mortgage may not be a lengthy one.

¹⁶ Paragraph 51 in the Judgment.

¹⁷ Paragraph 62 in the Judgment.

¹⁸ Paragraph 52 in the Judgment

¹⁹ Paragraph 53 in the Judgment.

²⁰ Paragraph 53 in the Judgment.

- either the Cayman Islands or in Australia and then also pay her \$5,000/month towards their rent or for a ten year mortgage²¹;
- ii) Due to F's partnership agreement, it was unlikely that his income would be reduced and that he would continue to earn the equivalent of CI\$35,617 per month until he retired at aged 60²²;
 - iii) M had no income nor earning capacity at the time as she was the full-time carer for the children, but she could (i) seek part time work in 2017 when the child attended school; and (ii) fulltime work in 2024 when she started secondary school²³;
 - iv) M's expenses for herself and the children totalled CI\$7,660/month²⁴;
 - v) F should pay spousal maintenance of \$9,655/month until M was aged 65 and thereafter it be reduced to CI\$3,500/month²⁵;
 - vi) F should pay child maintenance of CI\$1,500/child/month²⁶;
 - vii) F should continue to pay school fees and extracurricular activities for each child²⁷;
 - viii) F should continue to pay the children's health insurance and additional medical/dental/optical expenses²⁸;
 - ix) F should continue to pay M's health insurance at the current level until she obtained employment related insurance²⁹.
25. The Learned Judge accepted the figures set out in the inventory of matrimonial assets totalling CI\$678,703 which had been presented by F³⁰ as well as his submission that assets accumulated by

²¹ Paragraph 70 in the Judgment.

²² Paragraph 62 in the Judgment.

²³ Paragraph 59 in the Judgment.

²⁴ Paragraph 66 in the Judgment.

²⁵ Paragraph 71 in the Judgment.

²⁶ Paragraph 72 in the Judgment.

²⁷ Paragraph 72 in the Judgment.

²⁸ Paragraph 72 in the Judgment.

²⁹ Paragraph 72 in the Judgment.

³⁰ Inventory replicated at page 11 of the Judgment.

him post-separation should be excluded from the Court's calculations. Hall J (Actg) agreed that the sum of \$20,000 had been advanced to M and the sum of CI\$10,000 for cosmetic treatments should be deducted from M's share of the matrimonial assets. She approved the parties' 50/50 division of the proceeds of the sale of the real estate.

26. The terms of the Judge's decision resulting from her Judgment were set out in the Ancillary Relief Order³¹, which provided:
- a) A residence order is made in favour of M in respect of the three children.³²
 - b) There shall be liberal contact between the children and F at such dates and times as may be agreed between the parties. In default of agreement either party shall have liberty to return the matter to the Grand Court for determination.
 - c) F shall pay child maintenance of CI\$1,500 per month per child, until each child ceases full-time education or reaches the age of 21, whichever is the later.
 - d) F shall pay the school fees and agreed extra-curricular activities of each child until the child ceases full-time education or reaches the age of 21, whichever is the later.
 - e) F shall pay the health Insurance and additional medical/dental/optical expenses for each child until the child ceases full-time education or reaches the age of 21, whichever is the later.
 - f) F shall contribute the additional sum of CI\$3,500 per month towards the housing needs of the children of the marriage. Such payments shall continue until the last child ceases to reside with M, ceases full-time education or reaches the age of 21, whichever is the earlier.³³

³¹ Which was finally dated and sealed after the Learned Judge had provided her Judgment on 15 December 2015 arising from a contested costs hearing related to the ancillary relief proceedings.

³² Pursuant to Section 11 (4) Children Act (2012 Revision), the residence order in relation to R had technically expired 3 January 2016 which was before the 2016 Order had been perfected and sealed.

³³ My emphasis by underlining.

The Judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgement itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.

- g) F shall pay spousal maintenance to the M of CI\$3,000 per month for a period of three years, commencing on 1st October 2015.
- h) The 50/50 division of the proceeds of sale of the real estate owned by the parties which had already occurred is noted and approved.
- i) M shall retain ownership of the Mazda motor vehicle and the F shall retain ownership of the Porsche and Toyota motor vehicles.
- j) No order as to costs.

27. In her Judgment, Hall J (Actg) found that, prior to the separation, the parties enjoyed an “*expensive lifestyle*” and that both parties had continued in that manner post-separation. That said, she did not accept that F had “*a responsibility to maintain (M) in the standard to which she has been accustomed; in perpetuity*”. With that in mind, despite:

- (i) the considerable disparity in the parties’ then income and future income capacity;
- (ii) the fact that M had been the home maker thereby enabling F to advance his career; and
- (iii) the Learned Judge, deciding not to exercise a discretion to take the approach often seen in the above circumstances when striving for the goal of a long-term clean break case, namely, to provide M (as the clearly less well-off party) with a greater percentage of the matrimonial assets,

Hall J (Actg) deemed it appropriate to only order that there be time limited spousal maintenance of CI\$3,000 for three years to “*assist her to get back on her feet*”.

28. Prior to the ancillary relief hearing F had presented an “*open position*” that he would provide funding on a property up to CI\$400,000 for M, on the basis that she contributed CI\$100,000 to the deposit/purchase price and stamp duty from the \$217,936 each party received from the sale of the

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property.³⁴ At the hearing M sought a lump sum of \$100,000 along with \$5,000 per month housing allowance from F to enable her to buy a property. Having regard to her concerns that M would still not have sufficient funds to buy a home with that lump sum and having regard to the Court of Appeal decision in *Ebanks v Zelaya-Ebanks* CICA 23/2012³⁵, and with the above coupled with F's immigration issues in mind, Hall J (Actg), ordered instead that F should pay \$3,500/month to M for housing and he should pay CI\$1,500/month child maintenance. The Learned Judge found that a housing allowance of CI\$3,500/month payable by F would put M in the position in 2016 to be able to provide an appropriate home of the standard that M and the children were used to. Unlike her approach in the 2020 Order, the Learned Judge did not order that the housing allowance would only be payable once the Respondent had secured a new home. This meant that the housing allowance order became payable immediately and could presumably be used straight away for locating and setting up a new home.

29. When deciding on the quantum and expiry date of the housing allowance order, Hall J (Actg) would have been conscious of what was needed to house the children (and the child when she became the only relevant child) as well as the cross-over benefit there would be for M.³⁶ She was also aware that as the order was designed in such a way that F would have the benefit of owning a property, M would be in much a less favourable position as she would have to rent for many years.³⁷ The Learned Judge's decision, in which she clearly 'had one eye' on the long-term financial position of the wife, about the housing allowance was given in the context where she had, despite the massive

³⁴ Paragraph 21 of H's affidavit sworn on 7 July 2015.

³⁵ The Learned Judge possibly also noting that any Order for a housing allowance under Schedule 1 can only last until the child ages out.

³⁶ Paragraph 90 in the Judgment.

³⁷ NB: the observations of the Learned Judge expressed in her Costs Ruling and set out herein at paragraph 26 below.

disparity in the parties' actual and foreseeable income capacity, decided that spousal maintenance would be time limited and that she would not make asset division orders providing the less well-off party with a significantly greater share of the assets. These are relevant factors when considering F's submissions, with him adopting a 'here and now' approach and disregarding the long-term approach adopted by and the global orders made by the Learned Judge, that the housing allowance should be reduced and backdated because only one relevant child is now living with M.

30. It is also important to note that, although the Learned Judge expected all three children to be living with M until their majority³⁸, she still envisaged that the full amount of \$3,500 housing allowance payment would continue to be paid even when there were potentially fewer children living in the house post them reaching their age of majority or, if in full-time education, up to the age of 21. This intention is not only illustrated by the clearly worded paragraph 4 in the Order, but also by the Learned Judge's analysis in her Ruling on Costs dated 24 December 2015 when she was considering what areas of the Order could be viewed as being more or less favourable to M when compared to F's proposed Consent Order. The Learned Judge stated:

"20. The Respondent has calculated that under the final order she would receive \$3500 per month for a period of at least 18 years. It was concluded from this that over the entire period she would receive \$756,000. A comparison of them made with negotiated capital offer of 500,000 less the proceeds of sale of the two matrimonial homes which totalled \$217,936 it was submitted that under the final order; she was awarded a 473,936 more in funds.

21. In reality, there is a big difference between receiving a lump sum "up front" such as the negotiations would have allowed receiving a much smaller sum on a monthly basis over a period of time. Additionally, submitted on behalf of the Petitioner, the terms of the

³⁸ She stated in her Judgment that she viewed it as being "the reality" that the children would continue to live with M until their majority.

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Consent Order would have led to her ownership of valuable real estate as opposed to having the ability to pay rent for comfortable accommodation.”

It is also evident that she felt that the wife was placed into a less fortunate position due to her not being able to purchase property. By making the order that the full payment was required until the youngest child completed full-time education up to age 21, the Learned Judge was enabling the child to stay in the same home and not have to rehouse to a smaller or alternative property when the other children aged out. This clearly would be in the child’s best interest, which is the Court’s first consideration in the proceedings.³⁹ Such an order would of course give some benefit to the wife, at least until the youngest child aged out. There is nothing wrong with that cross-over of benefit in the circumstances of this case when looking at how Hall J (Actg) in her Order sought to meet everybody’s housing needs and this is consistent with Goldring P’s observation at paragraph 37 in *K v K* [2017] (2) CILR that:

“The starting point of any analysis must be s.21(f) of the Matrimonial Causes Law (para. 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.”

31. Therefore, the fact that there is at this time only one child of the relevant age living with M is not in itself a change of circumstances relating to the housing allowance because it was a state of affairs

³⁹ Section 19 Matrimonial Proceedings Act provides: “In dealing with all ancillary matters arising under this Law, the Court shall have regard first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.”

provided for in the 2016 Order. That said, which is clearly not actually the case here, if F, post the Ancillary Relief Order, had felt and the Court were to find that he had to purchase/rent a larger property to accommodate J changing his living arrangements to live with him (because his accommodation budgeted for in the 2016 Order was inadequate), then that could arguably have been regarded as a potential change of circumstances concerning the housing allowance and of course the child maintenance payments.

32. Hall J's (Actg) Order could not be said to be one that contained provisions exceeding the needs of the children at that time or one which was favourable to M. Despite the considerable short-term and long-term disparity between the parties' income and prospects, the Ancillary Relief Order benefited F by providing him with a route to a clean break within only three years, albeit coupled with the required ongoing financial obligations for the children until the child reached the cut-off age. It was an order which required F to make payments which were clearly within his financial resources having regard to his income and which did not require the Court to undertake an in-depth analysis of his income and outgoings.

Appeal – Ancillary Relief Order of Hall J (Actg)

33. The Order was appealed by M. A Notice of Appeal was filed on 19 January 2016 and Memorandum of Appeal was filed on 23 February 2016. However, that appeal was later abandoned by her.

34. I note F did not seek to challenge the legal basis for Hall J (Actg) making the housing allowance order. That decision was not appealed by F⁴⁰ and it appears it was not argued before Hall J (Actg).

It is submitted by F that this is because:

“There would have been no point or merit in (F) appealing to the CICA in circumstances where he accepted that a maintenance figure of C\$2,666 per child was reasonable, but the sole basis of an appeal would have been that (F) disagreed with the nomenclature of a housing allowance payment. That, we suspect, would have been the sort of appeal which would have met with criticism of the CICA.”

35. Despite that, F has sought to challenge the legal basis of the Learned Judge’s Order at times during this variation hearing. At paragraph 16 of F’s Skeleton Argument dated 14 July 2022 it was submitted that the housing allowance order should “*terminate*” and that “*there is no legal provision for a specific order for housing allowance in any event under the MCA 2005, and that Hall J overreached when she made such an order.*” In F’s Written Closing Submissions, he revises that earlier submission stating:

“9. We do not want the Court to misunderstand (F’s) position. The Court can make an order that (F) contribute to the cost of (the child’s) housing and there are circumstances where such provision can be a discrete provision. But that, we respectfully submit, is not a procedurally normal way in which to express a payor parent’s obligations in respect of a child. The norm, we say, is that a child’s housing need is but one component of the child’s general maintenance need and it makes procedural common and jurisdictional sense for the periodic payment to be expressed as a single figure. The rationale, of course, is that when there is more than one child to whom a financial order relates, the obligation on the payor spouse terminates when either the child is beyond the jurisdictional age of the MCA (in the eldest child’s case) or is living full-time with the other spouse (in the middle child’s case) albeit the second scenario would require an order, unlike in (the eldest child’s) case.

⁴⁰ Whether by means of an appeal of the Ancillary Relief Order or during his appeal to the Court of Appeal filed on 31 January 2020 in relation to the 2020 Order emanating for Hall J’s Judgment dated 30 December 2019.

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10. But the manner in which Hall AJ has expressed (F's) obligation, by creating a discrete housing allowance, which does not recognise that (F's) obligation would diminish when one child ages out or where another child lives with him, we say, is to some extent at the root of the problem."

36. Although Hall J (Actg) did not feel it necessary to highlight the jurisdictional basis for her making the order, I am of the view that, like a school fees order, a housing allowance order may be regarded in the Matrimonial Causes Act as being a form of periodical payment for the benefit of the children, similar to a school fees order. Alternatively, s.13(1) of the Matrimonial Causes Act (2005 Revision) provides that, in divorce proceedings where there are children of the relevant age, the Court shall consider whether it should exercise any of its powers under the then Children Law (2003) with respect to any of them. Section 1(6) of the Children Act (2012 Revision) provides that:

"On making...a residence order the court may exercise any of its powers under this Schedule (Schedule 1) even though no application has been made to it under the Schedule."

Turning to Schedule 1, periodical payments orders can be made, and orders can be made for a parent to provide a property for child during its minority⁴¹ and this can include for example property transfer orders or a purchase through trust. In the text Applications Under Schedule 1 to the Children Act 1989 written by Garden Court Family Law Chambers and published by Family Law, the authors write at paragraph 11.29 on page 125 under the sub-heading "**Rental Accommodation**":

"There may be cases in which it would be appropriate to require a respondent to finance a rented property, rather than a trust purchased property. While an observation in this regard in RE C (Financial Provision)⁴² was said in the context of there being no rule that all wealthy cases should be by way of a settlement rather than rental, it may well be that rental property is the appropriate and perhaps only feasible option in a low asset case."

⁴¹ Schedule 1 paragraph 3(3) means that a Schedule 1 financial relief periodical payments order may continue beyond aged 18 if the child is receiving instruction at an educational establishment.

⁴² [2007] 2 FLR 13, FD, at paragraph 45.

37. In the circumstances of the case before me, I do not agree with the submission made by F that the order made by Hall J (Actg) complicates matters. In Schedule 1 cases where a parent is ordered to make housing provision for the children, it is unusual for that order to provide that the payment be extinguished or varied before the youngest child is ‘aged out.’ It is usual for the primary carer of the child and the youngest child to have the stability of accommodation, preferably remaining in the same home, until the order is extinguished due to the child reaching the requisite age. This is particularly so where the housing situation of the parent who has been ordered to pay for the housing provision is like or better than the level of housing that the child enjoyed when living together with the parents, and it is at a level that the primary carer cannot afford even with the housing allowance being paid. The level of F’s accommodation which he can provide for J and all of the other children when they are visiting him is clearly superior to that which M is able to afford. If, as F commends, the housing allowance was subsumed into a global child maintenance order, any reduction in that figure could well result in housing difficulties for the child and that would have occurred in this case when R aged out and J started living with the father.
38. It is not appropriate for this Court, when dealing with a Variation Summons, to take on an appellate role. However, even if I were sitting in such a capacity, I would not rule that the separate housing allowance was an order incorrectly made by a Judge overreaching. In fact, I can see the merits of such an order because of the accommodation security that it would give to the youngest child in a case where there exists such a disparity in her parents’ income capacity and housing provision. It was made in an unusual case having regard to the fact that the global order was made to the benefit of F as it was tailored to meet F’s need to acquire a property of a certain value for immigration reasons. I am fortified in holding a view that such orders can be made and may be appropriate due

to the fact that the Court of Appeal took a similar view, stated at paragraph 66 in its Judgment handed down on 24 June 2020 that:

“The orders made in respect of continuing housing allowance and for (the child’s) maintenance were not arguably wrong.”

The Court of Appeal did not find that the housing allowance order should have been reduced because J was living with F and the child was the only relevant child living with M.

Proceedings post the Ancillary Relief Order Hall J (Actg)

39. On 19 July 2016, M filed an Enforcement Summons alleging non-compliance by F with the Ancillary Relief Order. She sought:

- (i) An application to enforce the order for F to pay the pre-school fees for the child (CI\$995/month);
- (ii) An application that F set aside CI\$200/month into a separate bank account for extra-curricular activities until the child attains 18 or 21 if continuing education;
- (iii) An order for F to pay to M the sum of CI\$64,100 as retroactive payment of the usual funds from December 2013 to July 2014;
- (iv) An order for F to reimburse to M the costs incurred in relation to educational expenses since the separation of the marriage, that being CI\$9,096 as at 5 July 2016; and
- (v) An attachment of earnings order.

40. That Summons was dismissed on 19 October 2016 by Hall J (Actg) with costs awarded against M.

M’s 2018 Relocation Summons 2018 and F’s 2018 Summons seeking a variation of child and financial provisions in the ancillary relief order

41. On 15 June 2018 M filed a Summons in which she sought:
- (a) Leave to permanently remove the child and J from the Cayman Islands to relocate to Australia;
 - (b) A variation of the 2016 Order to provide for F to have “*such contact as the court may deem appropriate both in Cayman and in Australia*”.
 - (c) A variation of the 2016 Order to extend the payment of spousal maintenance for an additional 3 years; and
 - (d) A legal costs allowance...for the benefit of the subject children pursuant to Schedule 1 Children Law (2012 Revision).
42. On 15 August 2018, F filed an application seeking a variation of the Ancillary Relief Order⁴³. F sought the following orders:
- (a) a sole residence order in his favour in relation to the child and J;
 - (b) an order for M to have generous contact with the child and J;
 - (c) a variation of the child maintenance order;
 - (d) a variation of the housing allowance order; and
 - (e) an order that the applications for Cayman Islands passports for the two children be signed by M or, alternatively, by the Court.
43. In a Ruling dated 3 October 2018, following a hearing held on 28 September 2018, Hall J (Actg) declined to make the legal costs allowance sought by M in the Summons.

⁴³I have not seen a copy of the Summons, but the application is mentioned by Hall J (Actg) at paragraph 16 of her Judgment dated 30 December 2020.

The hearing of M's 2018 Relocation/Financial Order Summons 2018 and F's 2018 Summons seeking a variation of child/financial provisions in the Ancillary Relief Order

44. The F's Summons and the remaining part of M's Summons came on before Hall J (Actg) on 9-11 December 2019. Both Summonses were contested. At the outset of the hearing, the relocation application in relation to J was withdrawn as he had already reached the age of 16 and, in any event, he had expressed a wish to remain living in the Cayman Islands.
45. The change of circumstances that had occurred between the Ancillary Relief Order and the 2019 hearing and the likely changes that would result if a relocation order were made were known and should have been shared with Hall J (Actg) at the time of the hearing. In family cases, as occurred in this case, frequently parties have to argue their cases and the Court has to make its decision about the level of maintenance to be paid based on estimated/projected income and outgoings presented to it by the parties. For example, divorcing parties are often still cohabiting at the time of the proceedings, but after the divorce one of them will have to leave the former matrimonial home and they will provide the Court with their estimated new outgoings and provide property details of the type of property they say is reasonable for them to move into. In some cases, one of the parties (usually a party that has been the primary carer of the children) may not be employed but accepts that post-divorce they will need to seek employment, as the Court will take into account their income capacity. Although they may not yet have employment, they will provide the Court with details of the type of work they are seeking and the possible levels of remuneration. The Court is not required to wait until the party has established themselves in a new home with the new related outgoings or until they find employment before it reaches a decision about the level of maintenance. If the new property or new outgoings or employment is within the possible margins disclosed by

the parties before the decision was made by the Court, then those changes do not amount to a change of circumstances for the purposes of a variation application.

46. Both parties had ample opportunity to provide and request information for that hearing. If either party felt that the other had failed to provide sufficient information to enable the party to address the financial issues raised in his/her own Variation Summons at that variation hearing, then he/she had a responsibility to seek that disclosure prior to that hearing. This was a hearing that took place after the parties had put their mind to and sought the disclosure that they felt was necessary for them to argue their financial case.
47. On 28 June 2018 Hall J (Actg), directions that affidavits be filed by the parties in relation to the financial and children applications. From a review of the bundle, I note that M's attorneys sought financial disclosure from F in a letter dated 12 September 2018, as they felt that he had failed to do so in his affidavit of 10 August 2018. F's attorney replied providing certain disclosure. However, in that letter no disclosure was sought from M. M's attorneys, in light of that letter, on 21 September 2018, highlighting that there was an obligation pursuant to Hall J's direction to provide financial disclosure sought further clarification in relation to financial matters. The bundle contains no further letters in that exchange.
48. On 27 August 2019, F's attorneys stated in a letter:
- “Turning to the proposed directions for updating disclosure, we suggest that the directions in relation to disclosure be sufficiently prescribed so that the parties’ disclosure obligations are clear.”*

The letter then set out the disclosure which was sought, and this included:

- (i) the provision of bank and credit card statements; and

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(ii) a schedule of M's outgoings with evidence in support; and (iii) evidence of M's employment status or about her attempts to find employment.

49. In a letter dated 2 September 2019, F's attorneys suggested that the parties' financial disclosure be filed and served by 11 October 2019 and reiterated the request in relation to both and credit card statements and, in addition, asked the details of any state benefits M had received since arriving in Australia, as well as details of any financial support she had received from third parties since January 2018. A further letter was sent by F's attorneys on 22 September 2019 which contained proposals for a settlement but made no mention about any further disclosure.
50. On 4 November 2019, F's attorneys in a letter sought a schedule with supporting evidence detailing where child maintenance payments are being held or had been used. M's attorneys replied and referred F to the financial disclosure already given and indicated that oral commentary could be given on the issue, if required, at the final hearing. On 5 November 2019, M's attorneys, in a letter referred to the request for disclosure previously made in relation to twenty matters. There is no letter in reply in the bundle. However, on 26 November 2019 F's attorney highlighted that the matter was listed for a pre-trial review on the following day and sought disclosure of documentary evidence in relation to the eldest child's university course commencement dates.
51. At the Pre-Trial Review, Hall J (Actg) directed that both parties were to provide responses to the additional disclosure queries in preparation for the final hearing fixed for 9 December 2019. On 4 December 2019, M's attorneys sent a letter responding to the requests made in F's letters of 4 and 26 November 2019 and attached several bank statements.

52. On 5 December 2019, only 4 days prior to the hearing, F's attorneys sent a letter responding to the twenty further and better particular requests made in the letter from M dated 5 November 2019 and attached several bank statements, a loan statement and some salary slips.
53. It is evident that, from at least 27 August 2019, the parties had actively put their minds to the issue of financial disclosure in preparation for the hearing and that they had sought and obtained disclosure, which either party could have raised and addressed with the Court at the hearing. Although noting that F made his submissions on finances based on the possible outcomes of the relocation application and that he stated that it would be far easier to address the financial matters once a relocation decision is made, the Judge did not give the impression in her Judgment that either party had contended to her that they had insufficient financial disclosure from the other party to enable the Court to deal with the financial issues in the case. As both parties' financial applications proceeded, they were obligated to fully argue their respective cases and the Court was obligated to deliver a decision on the application is made.
54. It was evident from M's affidavit evidence that her status in the Cayman Islands had become more certain when, in August 2017, she was removed as a dependent under F's RERC. She could only remain if she obtained a work permit. M highlighted that there had been difficulty finding employment due to the uncertainty over her immigration status, but that eventually she found work as a schoolteacher in September 2017, earning between CI\$1,700 to \$1,900/month. However, this employment came to an end at some stage in 2018. She indicated that at that time she had no other income from any other source, no real property, and no assets of value, save for a motor vehicle which she had received in the divorce settlement. She informed in her Affidavit that any capital she had received from the division of the property on divorce had been spent prior to the final ancillary

relief hearing on legal fees and on initial accommodation costs. She indicated that since being employed, she had been able to amass savings in her bank account of approximately CI\$20,000. She commented that those savings would be quickly consumed by her legal fees, return flight/accommodation expenses to Australia for her and the eldest child, and for flights to come to the Cayman Islands to attend court proceedings and see the other children.

55. M went on in the affidavit evidence to highlight that she did intend to find work in Australia. In her Affidavit, M conceded that there were a lot more job opportunities for her in Melbourne compared to in those in the Cayman Islands. It was, therefore, clear that everyone knew that her income capacity was better in Australia and that the salary range could be between AUSD\$49,000-130,000 per year. M made it clear that she would still require (which is consistent with the Ancillary Relief Order) CI\$3,500/month housing allowance, even if only one child was living with her in Australia and the other children only visiting her. She attached several examples of rental properties in Melbourne, which have similar monthly rental amounts to the Cayman market. Although not at parity with the superior accommodation that F has been able to provide the children with when they are with him, the properties seemed suitable. This information would have enabled F (and the Court) to know about the type of accommodation that M was seeking and the opportunity to challenge the reasonableness of her expectations and to explore and provide to the Court detail about alternative accommodation.

56. In addition, M set out what she estimated the average basic monthly outgoings to be in Australia. She did not include the children's expenses for education and in, any event, F did not dispute that he would be responsible for meeting those. M stated that she did not envisage the expenses to be drastically different to those in the Cayman Islands, although the education costs which F was

obliged to meet would be less. Again, this information would have enabled F and Hall J (Actg) to know what M was projecting her outgoings to be in Australia. If F disagreed with these figures, he could have sought further disclosure from M or obtained more detailed evidence himself in support of his submission that the cost of living in Melbourne was substantially less than in the Cayman Islands.

57. In addition to M's Affidavit evidence, there were Affidavits sworn by F on 10 August 2018 and 4 November 2018 and an Affidavit sworn by his wife on 10 August 2019. In the 2018 Affidavit F expressed his concerns about how M had depleted the capital sum that she had received in the divorce. He spoke about the costs of living comparison between Melbourne and Grand Cayman and about the cost of housing there. F expressed his view that the housing allowance payments should be reduced. He did not set out any details about his own financial position in that Affidavit. In his 2019 Affidavit, F reiterated his concerns about how M had depleted the capital sum, including to meet her legal fees. He noted that M was saying that she was earning AUD900-AUD1300/week from babysitting/family support roles and was concerned that the view expressed by M that she had greater employment prospects in Australia had not turned out to be accurate. He stated that M had failed to put forward any real plan of action in relation to future career opportunities and did not provide any associated cost information. He said that he found the "suggestion" that he should be expected to house M at this stage to be "quite incredible, never mind in a four-bedroom property as she seemingly proposes". Again, he chose not to provide any detail about his own financial situation, save to wrongly criticise M's comment that "It simply cannot be right that" he has "a significant amount of income at (his) disposal when she cannot offer anything approaching the same standard of living". This comment is consistent with my views concerning the assessment of

child maintenance in *AK v TK* FAM 39 of 2015 (7 February 2017) where I stated at paragraph 122 that:

“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’ and at paragraph 123 that the Court should try “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.”

The lack of financial disclosure in relation to his finances in the affidavit evidence presented by F was brought to his attention in the above-mentioned letter of September 2018 from M’s attorney.

58. Although the affidavit evidence submitted by F did not set out his then financial position or highlight any change in his financial circumstances since the 2016 Order, he had the opportunity to do that in the inter-parties disclosure correspondence as well as in oral evidence presented to Hall J at the hearing. The parties understood the applications before the Court in 2019 required Hall J to put her mind to and make orders concerning the parties’ finances. That was the opportunity for the parties to present any evidence that they wished, prior to and during that hearing to set out what their respective positions were and what circumstances have changed. That is why the parties requested disclosure in their inter-partes correspondence. If a party chose not to present sufficient information about their current or any change in their financial circumstances, then that is a matter for them, and they cannot seek to rely upon the fact that the Judge did not have such information which they could and should have presented to her. That said, it is evident that the Learned Judge did not make her decision in a vacuum of evidence about the parties’ financial circumstances. The evidence that was presented to her, although not analysed in her Judgment, resulted in the Learned Judge varying certain orders and extending other financial orders contained in the 2016 Order. Similarly, F had the opportunity to challenge Hall J’s financial orders and the manner in which she

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reached that decision before the Court of Appeal, and that Court decided not to interfere with the financial orders that she had made.

59. In addition to the financial details contained in the parties' affidavit and inter-partes disclosure which the parties and the Court could have had, the parties had significant financial details from other evidential sources, including the detail in the Welfare Reports. Available to the parties and placed before Hall J (Actg) at the November 2019 was the Welfare Report of Kernita Rose Bailey dated 28 September 2018 and the Welfare Report from Ms. Amelia McDermott and Ms. Aga Duc of International Social Services in Australia filed on 1 October 2018.

60. In her Court Welfare Report⁴⁴, Kernita-Rose Bailey stated, when considering the 'welfare checklist' and the likely effect on the child of any change in the circumstances, that she believed that if the child relocated to Australia that:

"It is likely that the financial provisions that were previously made for her care would be maintained." She added that "it is uncertain whether her mother would be able to afford to maintain a similar standard of living as they enjoyed while they resided in the Cayman Islands, as the spousal support expired in September 2018."

61. The authors of the Australian Welfare Report considered the financial implications if the child were to relocate to join M in Australia. They noted that M wanted to find a 4-bedroom rental property close to the maternal grandparents' home as this type of property was *"the standard that the children are used to"*. The reporters stated that *"the chosen area will serve well for the family and their needs"*. The reporters provided details, presumably derived from their local knowledge, that the cost of renting such properties range from between AUD 750 (about CI\$419.70)⁴⁵ to AUD

⁴⁴ In paragraph 176 of the Welfare Report.

⁴⁵ XE Currency converter.

1500/week (about CI\$830.40). The authors noted that M was intending to register as a Montessori school teacher which would enable her to work as a pre-school teacher. They indicated that M said that she wanted to set up a business project where she could visit schools and deliver a wellness program. The authors stated that the wage scale is anywhere between AUD49,000 to AUD 130,000 per annum which is higher than the average Montessori wage. They noted that M was receiving the housing allowance of CI\$3,500 and child maintenance of CI\$1,500 per child per month. It is clear that they, and the Court, had regard to the required financial stability that this ongoing income would give to the child if there was a relocation.

62. All the above information would have been available to F prior to the hearing, and it would have provided him with information about what M was saying about:
- (i) her domestic budget;
 - (ii) the financial needs of the children;
 - (iii) the proposed employment details on the bands of possible income; and
 - (iv) the housing needs and the possible cost of her housing needs. Hall J (Actg) would also have had the information before her at the 2019 variation hearing when she made the Order.

Hall J's (Actg) Judgment relating to M's 2018 Relocation/Financial Summons 2018 and F's 2018 Summons seeking a variation of child/financial provisions in the Ancillary Relief Order

63. The case benefitted from the parties' applications being heard by the same Judge who had determined the ancillary relief proceedings, thereby giving continuity with someone who had familiarity with the financial background of the family. Hall J (Actg) handed down her Judgment on 30 December 2019. The resultant 2020 Order set out in detail at paragraph 2 above, reflects the decisions made by the Learned Judge in her Written Judgment.

64. In her Judgment, Hall J (Actg) noted when reaching her decision that R, then aged 19, had from 2019 been attending University in Australia and that she had been living in Australia with M at the maternal grandparents' home since July 2018. She highlighted the matters that were not in dispute which included:

- (a) that M had started work on a work permit at a Montessori School in Grand Cayman in September 2017. F highlighted that M had resigned from that job and that she remained unemployed for 9 months until she took up an ad hoc 2 day a week baby-sitting job. The Learned Judge found that a few months after that M found another ad hoc job babysitting and caring for /sponsoring a recovering alcoholic;
- (b) that during the marriage and prior to M's departure to Australia in 2018, M had been the primary caregiver for the children. F did state that there had been occasions when he had taken on that role;
- (c) that the child and J had remained living with F and his wife after M's 2018 departure to Australia; and
- (d) (i) that F had not made any of the housing allowance payments ordered in the 2016 Order to M after she left to Australia, although he continued to pay the CI\$1,500/month maintenance for R and CI\$350/month child maintenance for the child and J; (ii) that M contended that the arrears amounted to C\$56,000 and she sought payment of some or all of that sum which was for the benefit of the children; and (iii) that M said that the housing allowance order should not be varied as she still required appropriate accommodation to house them all and the arrears and future payments would assist her in establishing a home for them in Australia.

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65. Hall J (Actg) noted when reaching her decision that F had been on “gardening leave” from work for six months when R and the child came to live with him and that he was now employed at a different law firm. She recorded that, although M accepted that the child maintenance orders would be impacted by the outcome of the relocation application, she would still need some child maintenance wherever they were located as she would have to care for the children for an extended period during the school holidays.
66. In her Judgment Hall J (Actg) highlighted that F made his submissions on finances based in the possible outcome of the relocation application. She recorded that F stated that if the child remained in the Cayman Islands:
- (a) He would be responsible for the cost of the child’s flights to and from Australia each Summer and alternate Christmases.
 - (b) When the child is visiting M in Australia, he would pay child maintenance at the rate of CI\$250/week. He would pay the same for J when he was visiting Australia.
 - (c) The monthly child maintenance payments would cease as he was meeting the children’s expenses as they were living with him.
 - (d) If R is living in presumably rented accommodation with M, he will make a monthly housing allowance of payment at the rate of CI\$1,200 until she reached the age of 21.
 - (e) He would then, in effect, be paying a total of CI\$2,770 in child payments for the eldest child and this would be in addition to paying all her university fees.

If, on the other hand, the child was to relocate to Australia, the Judge noted that F said that:

- (aa) Child maintenance should be reduced to 2/3rds of the current rate, namely a reduction to CI\$1,000/month, as the cost of living is about 65% less there and because he would be

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funding the significant additional cost of travel. He said that the same would apply if J were to relocate to Australia; and

(bb)The amount of the housing allowance would depend on how many children were living with M. F accepted that M might require a three-bedroom property and he proposed a housing allowance of CI\$2,200/ month until R's 21st birthday when it would be reduced.

67. Having decided that the child should relocate to Australia the Learned Judge went on to consider the financial matters in her Judgment. Hall J (Actg) determined that maintenance for the child should remain at \$1,500/month, but that F would only need to pay pro-rata maintenance for J for any time that he spent living with M. This, therefore, was an appropriate variation of the child maintenance order to reflect the change of circumstances in relation to J. The Court did not make any order requiring M to pay child maintenance for J to M. This was understandable having regard to F's far superior financial position and his ability to meet the child's physical needs.

68. Hall J (Actg) rightly criticised F for unilaterally ceasing housing allowance payments and rightly commented that such an action first required a variation application to the Court to be brought and determined. As stated by Sir James Munby in his 7th View From the President's Chambers, January 2014⁴⁶:

"Orders including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications, they are orders. This principle applies as much to orders by way of interlocutory directions as to any other species of order. The court is entitled to expect – and from now on family courts will demand- strict compliance with all such orders."

⁴⁶ Recorded in Grand Court Practice Circular No. 1/2014 Requirement for Strict Compliance with Court Orders Made in the Family Division of the Grand Court.

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69. Hall J (Actg) correctly found that the M was entitled to arrears but, with the actual living arrangements being at the maternal grandparents' home in mind, she decided to remit a substantial amount of the arrears and ordered F to pay only CI\$14,000 in arrears. A decision which the Court of Appeal felt could be regarded as being "*arguably charitable*".⁴⁷ F has since paid the ordered \$14,000 arrears in housing allowance to M.
70. Hall J (Actg) also noted that if such an application to vary had been made, and if the Court had been advised that M and R were living rent free with the maternal grandparents, she would have adjusted the amount to be paid. This is an indication that the Judge was of the view that if M's actual housing costs were reduced, then the figure for housing allowance to be paid could also be reduced. This is a sensible approach, and it could apply in circumstances where a suitable property was acquired by M with a rental figure for less than CI\$3,500, an outcome which would be more likely in Australia than Grand Cayman. Therefore, I am satisfied that if I were to review the housing allowance figure to reflect the actual housing rental costs of M then this would be consistent with Hall J's (Actg) intention and would amount to a change of circumstances that she envisaged may result in a variation of her Order. Also, unlike in the Ancillary Relief Order, the Learned Judge no longer intended the housing allowance to be payable forthwith but was now stating in the Judgment that the payment should "*resume*" "*once a home is found for the children*". This was further refined by Hall J (Actg) in the 2020 Order, to provide that the payments should be resumed "*once the Respondent has secured a new home...*". This is relevant when considering M's claim concerning arrears of the housing allowance payments.

⁴⁷ Paragraph 66, Moses J *CICA (Civil) Appeal No 2 of 2020*.

71. The Learned Judge's approach set out in paragraph 71 above should not be read as her concluding that if fewer children were living with M that the housing allowance should be reduced. Despite the submission made by F (which is set out at paragraph 67 (aa) and (bb) above and paragraph 149 in the Judgment) that as a matter of law there must be a reduction in the housing allowance figure when R ages out and with the changed circumstance with J living with F, the Learned Judge was not persuaded. The Learned Judge did not say that she would remit arrears or vary the housing allowance provision in the 2016 Order on the basis that fewer children were now living with M. If she had said or done that, it would have been arguably inconsistent with her decision set out in in the 2016 Order, namely that the full \$3,500 housing allowance would remain payable even if there was only one relevant child living with M. In fact, she firmly reaffirmed at paragraph 159 in her Judgment that the \$3,500/month housing order should resume "*according to the terms of the original order*".
72. Hall J's decision about financial orders was clearly based on the potential changed circumstances arising from M and the child living in Australia and J living with F and his wife in Cayman. Therefore, the figures that she reached were based on the post-relocation circumstances and on the fact that the family's circumstances had changed since the Ancillary Relief Order. At paragraph 162 in her Judgment, Hall J (Actg) stated that:

"In recognition that the change of jurisdiction means that that there is a change in currency and details on living costs, both sides have leave to return and make applications for variations to the financial orders as it relates to the change in currency."

Clarity is given to what she meant when one looks at paragraph 8 of the Order dated 7 February 2020 arising from the Judgment which says that:

“Both parties have leave to apply to vary the above financial orders at paragraph 3 to 6 as it relates to the change in currency.”⁴⁸

I do not read this as being an open invitation to the parties to return to Court shortly after the Judgment to make a further substantive variation application of the financial orders. It is clearly a ‘tweaking provision’ dealing with the effects of the currency conversion rates. It is evident that the Learned Judge was not persuaded to take up F’s invitation recorded at paragraph 139 in her Judgment to deal with the child maintenance and housing allowance part of the application after her substantive decision. I am not persuaded by the submissions raised by F that I should elevate that invitation made to Hall J (Actg) to excuse a party from taking that opportunity to fully argue the variation application at that hearing.

73. Of course, if there has been a meaningful change of circumstances after the date of the 2020 Order, then that may properly ground a variation application, one not restricted to currency fluctuations.
74. Hall J, having made a relocation order, stated that the child contact terms of the 2020 Order, which are set out at paragraph 2 above, were made, she having adopted the submissions made on behalf of M. Regrettably, M surreptitiously left the jurisdiction with the child on 1 January 2020, failing to return the child to F after a contact visit and failing to provide the child with a proper opportunity to say her ‘good byes’ with her father, step-mother and J. This was a most unattractive and non-child centric approach taken by M and it does her little credit. The Court of Appeal⁴⁹ rightly highlighted that F had *“shown himself to be a responsible and caring father in the lengthy period while (M) was away while he looked after (the child) on the Islands”* and F was a *“loving father”*.

⁴⁸ My emphasis by highlighting.

⁴⁹ Paragraph 13 of the Court of Appeal’s Further Judgment on Costs handed down on 20 November 2020.

Because of M's actions, F was understandably distraught, and from his demeanor during this the hearing, he remains so. It is evident that M's actions greatly heightened the tension and dysfunctional communication that already existed between these parents and have been very counter-productive resulting in the troublesome way that both parties have thereafter litigated this case. However, having made the above observations, I recognise that M's actions should have no bearing on my decision to be made on the applications now before me.

Proceedings after the Relocation/Financial Variation Hearing - F's appeal to the Court of Appeal

75. As mentioned above, in relation to the variation of the financial orders application, both parties had the opportunity at the hearing before Hall J (Actg) to submit evidence and make representations about any change of circumstances that had occurred post the Ancillary Relief Order or that would occur if the child was to relocate to Australia. If that was not fully canvassed by the parties at the hearing or if a party remains frustrated because it feels that that Court wrongly concluded on the evidence and submissions made to it that the circumstances at the time did not merit a variation, that does not ground an application to have this Court at this hearing re-conduct the exercise that the parties had the opportunity to carry out in the 2019 hearing. This is especially so if this is being sought after that decision had been reviewed by the Court of Appeal at the request of F.
76. If a party disagreed with financial orders made and wished to challenge them or even have the Court of Appeal vary parts of the order, they could appeal the same. This is precisely what F did, presumably correctly recognising at that time that an appeal, and not a further variation application, was the appropriate way to proceed. On 20 January 2020, Hall J (Actg) granted F leave to appeal but refused a stay and/or return order as the child had already left the jurisdiction.

77. This judgment in this matter is being distributed on a strict understanding that in any report no person other than the applicant (and any other person identified by name in the judgement itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.

77. The Grounds of Appeal were filed on 31 January 2020. In relation to the financial orders which are relevant to the present application before me, F pleaded:

- (a) In ordering F to pay unpaid housing allowance of CI\$14,000, the Learned Judge ordered the payment of a sum which F had never paid because M had been living for free at her parents' home since her relocation to Australis in July 2018. The order is therefore, inappropriate and unsustainable.
- (b) In ordering to pay housing allowance at the rate of CI\$3,500/month:
 - (i) The Learned Judge again failed to provide any reasons for her decision;
 - (ii) The Learned Judge failed to conduct any analysis between the cost of living in Melbourne and the Cayman Islands;
 - (iii) The Learned Judge failed to account for the fact that the middle child is now living with the father; and
 - (iv) The Learned judge failed to provide any limit of time on the order given that the eldest child, will be 21 in January 2021.
- (c) In ordering child maintenance at the rate of CI\$1,500/month in respect of the child;
 - (i) The Learned Judge again failed to provide any reasons for her decision; and
 - (ii) The Learned Judge failed to conduct any analysis between the cost of living in Melbourne and the Cayman Islands.

The Grounds of Appeal raise the same issues that have been reargued before me.

78. The Grounds of Appeal were elaborated on by Mr. Alex Verdan KC on behalf of F in his Written Submissions filed for the Appeal and one would expect also in his oral submissions. He indicated that the appeal focuses on the relocation as the financial orders that were made were essentially

linked to it. He also indicated that F did not accept any obligation to pay arrears of housing allowance at all.

79. Moses JA dealt with the financial orders in two paragraphs (65 and 66) in the Court of Appeal Judgment delivered on 24 June 2020. He noted that F accepted that his appeal in relation to the financial orders made was linked to his appeal as to relocation and that, since the Court dismissed his appeal, a substantial portion of this aspect of the appeal had gone. The link to the relocation application was that the financial orders made by Hall J, after evidence had been placed before her about the parties' financial positions and the financial needs for the child post relocation, were made on the premise that the child would be relocating to Australia and that the middle child would be remaining with F in the Cayman Islands. The appeal was brought on the basis that the financial orders were wrongly made and not properly reasoned by the Learned Judge. However, the Court of Appeal did not interfere in any way with the financial orders made by the Judge. They did not criticise the Learned Judge's decision nor the manner in which she reasoned her decision in her Judgment. The Court of Appeal specifically upheld the Judge's decision about the arrears of housing allowance, although they felt that it was a generous one for F as 12 months of arrears were remitted. The Court of Appeal also found that:

"The orders made in respect of continuing housing allowance and for (the child's) maintenance were not arguably wrong."

When reaching its decision, the Court of Appeal were cognisant of the parties' employment and the disparity in their financial and housing positions. F was referred to as being a:

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“talented busy lawyer”⁵⁰ and it was “obvious that (he) could provide a stronger financial and more prosperous background to (M).”⁵¹

80. For completeness sake, I note that the Court of Appeal in its further Judgment on Costs handed down on 20 November 2020 upheld F’s appeal against the order for costs made against him and it stood by that decision following a request from M, made after its earlier Written Decision had been handed down, for a further review of the costs order. In its Decision, the Court of Appeal commented that *“(M) is undoubtedly in a far less happy financial position than (F)”⁵²* and they noted M’s complaint that F’s conduct in relation to financial issues is a continuing source of dispute. The Court of Appeal commented that:

“These disputes underline the unfortunate continuing hostility to the detriment of (the child) and that the court should be concerned in (the child’s) interests to bring these disputes to an end.”⁵³

The Court of Appeal added that:

“It was with that hope that the court was disposed to make no order as to costs.”

It is clear from Costs Judgment and its substantive Judgment, that the Court of Appeal did not envisage there to be a need for the financial matters returning to Court for review or further consideration. I fully endorse the sentiments expressed by the Court of Appeal which are consistent with my observations set out at paragraphs 18 and 19 herein.

Events – Post Court of Appeal Judgment

⁵⁰ Paragraph 47 in the Court of Appeal Ruling.

⁵¹ Paragraph 49 in the Court of Appeal Ruling.

⁵² Paragraph 11 in the Court of Appeal’s Further Judgment on Costs handed down on 20 November 2020.

⁵³ Paragraph 12 in the Court of Appeal’s Further Judgment on Costs handed down on 20 November 2020.

81. If F disagreed with the decision of the Court of Appeal and wished to challenge he could have sought to appeal to the Privy Council. It is not the role of this Court to, in effect, step into the shoes of the Court of Appeal and hear a challenge to the Ancillary Relief Order and/or the 2020 Order. Similarly, it is not the role of this Court to be asked to, in effect, step into the shoes of the Privy Council to review the approach taken by the Court of Appeal as it did not interfere with the financial orders.
82. However, on 10 March 2020, only 7 days after the Court of Appeal hearing and before its Written Judgment had been delivered, F filed a Summons seeking:
- (i) to vary the contact arrangements with set out suggested replacement defined contact provisions;
 - (ii) a passport order;
 - (iii) a downward variation of child maintenance in respect of all three children; and
 - (iv) a downward variation of the housing allowance.

The request for the new passport application and for some greater definition in relation to contact to be reviewed was understandable, but it was questionable for there to be an application to vary financial orders so shortly after the Court of Appeal had decided not to interfere with the Judge's decision concerning the almost identical variation application.

H's current applications

83. On 26 March 2020, F's attorneys wrote to M's attorneys. In that letter they raised certain suggestions concerning ongoing contact arrangements. Although Hall J made an order for contact, when a child relocates overseas, there is often a need for there to be fluidity in and adaptation of

contact orders. Therefore, the suggestions relating to contact made by F merited further discussion between the parties.

84. The letter also raised issues concerning the financial provision, most of which had already been raised and considered by the Courts in the proceedings. In the letter the attorneys again commented that the family's circumstances were different to those that existed at the time of the making of the Ancillary Relief Order and again argued that this merited a downward variation of the quantum of child maintenance to US\$1,000/month and of the housing allowance to US\$1,333. They again highlighted that:

- (i) in 2016 all three children resided with M and now only two do;
- (ii) in 2016 both parties were living in the Cayman Islands;
- (iii) as M has left the Cayman Island to live in Australia the cost of living in Australia is significantly less than it is in the Cayman Islands;
- (iv) F has changed employers and his current income was now between 20-25% less than it was in 2016;
- (v) M was unemployed in 2016 and she is now in employment; and
- (vi) in about 8 months' time R would no longer be a relevant child for the purpose of the financial orders as she would be 'aged out'.

This information is no different to that which should have been placed before Hall J (Actg) and the Court of Appeal. The Attorney requested disclosure of:

- (i) M's domestic budget;
- (ii) a schedule of the children's needs;
- (iii) M's employment and evidence of salary; and
- (iv) general updating disclosure.

In the letter they advised M not to enter into a medium or long term lease. This is a rather unattractive and unfair demand, especially as M had indicated that she had lost the opportunity to rent a number of suitable properties due to F's historical failure to comply with the housing allowance provision in the ancillary relief and beyond⁵⁴, because F now argues that the CI\$3,500 ordered by Hall J (Actg) would not become payable by him until M had "secured" a new home for her and the children in Australia.

85. F seeks to argue that the change of circumstances should be considered by comparing the circumstances now to what they were at the time of the Ancillary Relief Order. It is submitted that "even a most cursory review of the judgments of Hall J (Actg) and the Court of Appeal" show that those Courts did not consider, address and finally determine the instant financial issues. It is argued that the issues have not been dealt with by Courts since the consideration given to them by Hall J (Actg) resulting the Ancillary Relief Order.
86. For the reasons already stated in this Judgment, I do not accept that submission, and find that it is a wrong one to adopt in this case. To take that approach would disregard the decision of Hall J (Actg) which resulted in the 2020 Order. Her orders were reached on the updated documentary financial disclosure provided to the Court after the parties had taken up the opportunity in the above inter-partes correspondence and by Court directions to seek updated and projected financial disclosure from the other party. To take the approach advocated by F would also be wrong as it would require the Court to disregard the Court of Appeal's decision that the financial orders made by Hall J (Actg) were not arguably wrong and should not be interfered with.

⁵⁴ Examples of such properties are exhibited to W's Affidavit sworn on 20 November 2020.

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Financial matters for consideration

87. Section 23 of the Matrimonial Causes Act is the wide provision grounding applications to vary. It provides:

“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.”

88. The consideration of any variation of the financial orders should be based on any significant change of circumstances that have occurred since the date of the 2020 Order which (i) could not have been envisaged in the disclosure exchange between the parties and which they could have presented to the Court at the 2019 hearing or (ii) were not covered by the terms in the 2020 Order. Of course, by the date that F’s Variation Summons was issued in March 2020, so shortly after the Court of Appeal hearing, there had been no such change of circumstances. However, I am satisfied that this Court may, well over two years later, now consider the change of circumstances from March 2020 to the current date and determine whether there should be any variations made to the 2020 Order.

89. With the above in mind, I make the following observations concerning the approach to be taken concerning the applications now made in relation to the financial orders. I have in mind the guidance summary given by me in *SD v AL* [2017] FAM 145 of 2006 where I noted that:

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

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

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

(ii) A full, exhaustive and expensive representation of a final ancillary relief hearing should be avoided. That would be contrary to public policy, detrimental to the parties' interests and a drain on the limited resources of the court."

90. This Court has a wide discretion as to how to conduct this hearing. If F is correct in his assertion that the Court should start at the Ancillary Relief Order and take an in depth look at the change of circumstances since that time, then the almost de novo approach that he advocated may be appropriate. However, I have rejected that submission and have found that the parties had the opportunity to argue the changes at the 2019 hearing and the Court then reviewed and gave a judgment, albeit not in the detail F would have desired, concerning the effect of those changes since 2016 and of the possible post-relocation changes. I am satisfied that a light touch review is more proportionate to the circumstances in this case and that I should not be reviewing previous orders in an appellate manner.

91. As touched on earlier in this Judgment I am acutely aware that the child's needs must be my first consideration. This was made clear by me at paragraph 31 in *AL v NL* FAM 194 of 212 (21 February 2020) where I stated:

"At a variation hearing the Court is entitled to look de novo at all the matters under the general provision set out at s.19 of the Law.10 However, the nature of the review actually conducted is a matter for the Court having regard to proportionality and may not require a full de novo approach. What is clear is that the Court, when considering an application to make or vary a child maintenance order in relation to X, must have regard first of all to his interests. Although the Court may then also consider the parents' circumstances, including any change in their circumstances since the Order, and specifically their

responsibilities, needs, financial and other resources, actual and potential earning power and deserts of the parties, it must do so in the context of X's needs being put first.”

The Housing Allowance

92. For reasons already stated herein, I have determined that, pursuant to the Ancillary Relief Order and the 2020 Order, Hall J (Actg) intended that the housing allowance payments remain payable to at the very least meet the rent payments, even if there is only one relevant child living with M. Accordingly, I reject F's submissions and will not vary the housing allowance payments on that basis. It would be wrong for me to consider the housing allowance as a totally discrete provision when considering F's contention for a variation on this ground, as it was clearly the intention of the Learned Judge that the housing needs and level of accommodation of even one remaining child should be consistent and have regard to the fact that the global order was tailored to meet F's housing needs.
93. Having regard to the nature of the property found by M and the level of rent actually being paid, I am satisfied that I may review the level of the housing allowance payments. I do not accept M's submission, based on her presumption set out at paragraph 74 of her Written Closing Submissions, that the housing allowance was always intended to be a wide provision to cover the general housing needs of the children (i.e., utility bills, minor rent increases and other housing incidentals) and not just the monthly rent. As rightly conceded by Mr. Holland, this was not spelt out in the Judgment. I make this finding whilst noting that Hall J (Actg) stated in the Judgment that it was possible to find appropriate rental accommodation for CI\$3,000 per month but then went on to say that F should pay \$3,500 per month as funds for "*housing the children*". Another presumption that could be drawn from the Learned Judge's wording might be that she wanted to give some flexibility to acquire a property with rent being up to CI\$3,500. Although I did not accept, in the circumstances

of this case, F's submission that the Court should not make a separate housing order but should instead include the housing element as a part of a global child maintenance figure, I see a distinction between a rent payment and incidental housing payments such as utilities. I share F's view that additional housing expenses should form part of the child maintenance calculation. Accordingly, even if I am wrong concerning what Hall J (Actg) intended the housing payment figure to cover, I am satisfied that housing incidentals such as utility bills are factors to be taken into account when reaching a figure for the global child maintenance figure. Accordingly, I will be calculating the housing allowance payment figure based on the rent due and on the basis that the incidental housing costs should form a part in any separate child maintenance considerations.

94. In April 2021, M found reasonable accommodation in the area where she informed the Court that she would like to live, namely Caulfield, Melbourne. It is located close to M's parents, her work and the child's school, I have seen the particulars and photographs of the property. It appears to be a reasonably modern and comfortable town home with three bedrooms and close to her parents' house. I am satisfied that at least a three-bedroom property is required. I noted that M contends the property "*is far from ideal*" and that she does not feel:

"that our children should have to settle for accommodation that doesn't meet their needs when their father can afford better and when he himself enjoys an extremely nice lifestyle."

She indicates that R and the child should have their own rooms and that she also needs a separate room to house J (and his girlfriend) when they come to stay. Therefore, M suggests that the full housing allowance order should remain in place as this would enable her to be able to rent more suitable properties for which she has exhibited some particulars. She submits that her current property is extremely cheap in terms of the Melbourne rental market but is all that she felt able to afford as F had failed to make any housing payments. She comments that:

“We are ultimately six years on from the making of the original housing order and the cost of housing globally has increased significantly. We are also in the midst of a lot of economic uncertainty and high inflation which will only result in even higher housing expenses. Even our existing lease will be subject to a significant increase in the coming months.”

95. There is some force in the submissions made by M. It is very clear that the housing that F enjoys and can give the children when they are with him is far superior to what M can offer. It also seems, when looking at the particulars of the property and from what M says about the reputation of the area in which it is located, that, to use colloquial language, she ‘got a good deal’. In such circumstances, she is right to express a concern that, having regard to the increasing costs of living, the rent on that property will likely increase. I will have regard to that when phrasing the order that I make. I am also sympathetic to the fact that M may have felt compelled to rent a cheaper property because of the difficulties encountered by her when trying to get F to commit to making housing payments. I accept that M communicated with F to inform him that she wished to move out of her parents’ home and about properties that may be suitable. For example, on 14 January 2020 F’s attorney was informed that M had found a suitable property and sought confirmation that F would commence the housing allowance payments. No reply was received, although the lack of engagement may have been partly caused due to F being so distraught and his emotions raw due to the way M had left the Cayman Islands with the child. On 4 February 2020 a further letter was sent reiterating the property had been found but that it could not be secured until payment had been received. From the correspondence thereafter in 2020, F would have been aware that M was informing him that the opportunity to rent properties which she had found had come and gone due to her not being put into a financial position to enable her to sign the leases and make payments. There were further communications in 2020 clearly stating valid reasons why M and the children

should vacate the grandparents' home and move into their own rental property. This was occurring at a time when F, through his attorneys, had advised M not to enter any medium or long-term lease. The costs, of course, of renting a short-term property are ordinarily prohibitively greater than for a more extended lease. When I review the evidence, I am satisfied that the position taken by F was deliberately obstructive and it prevented M from securing a property in a timely manner. With this in mind, in such circumstances, including a lack of any contribution from F to the running costs of the maternal grandparents' home when his children were being so generously housed by them, even if I find that no arrears of housing benefit have accrued, I do not view it as fair and just to order any repayment to F for housing allowance payments he has made that exceed the rent actually paid.

96. Despite my concerns about F's conduct delaying M's ability to secure rental property, I am not satisfied that arrears have accrued for housing payments not made when M was not renting a property. It is not an expenditure that M requires repayment for. I note that the payments made by F have exceeded the amount required to cover the rent payments made. I do not find that there are any arrears. Accordingly, I also make no order in relation to paragraph 1 of M's Amended Summons dated 8 December 2021.
97. When I consider paragraph 3 of F's Amended Summons dated 7 December 2021, I feel it necessary to refine the housing allowance order contained in the 2020 Order. For reasons set out above herein, I am satisfied that the amount to be paid should be to cover the rental payments that M is required to be made. For reasons set out above herein, I am of the view that F is still obligated to pay the full amount of that rent, even though there is only one relevant child. In her current circumstances I deem M's property to be a suitable property for her and the child to reside in under the current rental agreement. Therefore, I order that F is to pay a housing allowance of AUD3,041. If M is able

to remain in her present property, but the rent is raised by the landlord, then F should also be obligated to pay the full amount including the increased rent, and, to protect F, that will be as long as that new rent figure does not exceed the equivalent of CI\$3,500 (which is, of course, unlikely). The housing allowance order will remain in place until the child reaches 18 or up to 21 if the child is in full-time education (which ever may be the later), although I accept that the quantum may be varied if there is a change of circumstances. For example, if M is unable to remain in the property or if J moves to Australia for his undergraduate studies, then M may be required to find alternative accommodation. If that happens, because I am of the view that the Australian Courts (where the child is habitually resident) would be far better placed to determine the suitability of any new local property and cost of the property, I make no order as to the quantum of the housing allowance that is to then be paid. The only matter that should then require enforcement is if F failed to comply with my order that he now pay AUD3,041/month or the amount of any increased rent due on the same property. If F does that, then there would be no arrears order to enforce. This would mean that if M had to find different accommodation, the Australian Courts would be able to determine a new housing allowance application concerning different housing and the parties could submit the required dismissal order concerning the housing allowance order made in the Grand Court. If the Australian Courts still felt unable to hear such an application, the Grand Court would of course retain jurisdiction.

The Child Maintenance Order

98. Due to the passage of time since 2020, I may review whether child maintenance should be varied upwards or downwards looking at the financial circumstances as they are today having regard to the change of circumstances since 2020. That said, the bulk of the submissions made by F at this hearing in support of his contention that there has been a change of circumstances such that the

child maintenance for the children should be varied downwards could have been made, and mostly were made, when F sought a variation in 2019. The Court reached its' decision reflected in the 2020 Order on the basis that:

- (i) M and the child would be living in Australia;
- (ii) J would be living with F and his wife in Grand Cayman; and
- (iii) that the child maintenance payments for R would soon be ending when she reached 21.

In 2020, as is the case now, there is no dispute that F has the financial means to pay child maintenance for the child at the existing level even though he will also have travel expenses flowing from contact arrangements. One factor apparently not hitherto taken into account in this case when considering F's ability to pay is that the income from F's wife (for which no figure had been disclosed) could form part of the equation to the limited extent that if the wife contributed to the household expenses this could free up some of F's income to pay maintenance.

99. F again relies upon information from the Expatistan Website to support a contention about the costs of living in Melbourne and comparing that to the cost of living in the Cayman Islands. Similar material was placed before Hall J (Actg) at the 2019 hearing, and it seems she placed little weight on it and did not take a percentage approach to the maintenance figure. I am not comfortable making decisions based on such material and would much prefer, if required to consider the maintenance figure *de novo*, to analyse the actual outgoing figures provided. Although I deem it not helpful to take a percentage approach when reviewing the expenses for the child, there is no issue taken that the cost of living is greater in the Cayman Islands than it is in Melbourne. Similarly, there cannot be an issue that the cost of living has increased since 2016 and 2020 globally, and particularly so since the affidavits were filed and after the hearing commenced in July 2022. This would necessitate

some sensitivity when reviewing the financial figures in the affidavits, especially if there is a downward variation of the figure sought.

100. Although F infers that M's figures provided in her evidence may be inflated "*in view of the relative cost of living between Cayman and Melbourne*" he rightly recognises that the Court may not find them manifestly excessive. As F submits, "*no individual items jump out as being obviously inflated*". F agrees that M puts the child's budget at CI\$1,585 per month exclusive of housing. Upon reviewing M's figures, not only do I not find them to be excessive, I find them to be reasonable. M provided a Scott Schedule attached to her Skeleton Argument showing a CI\$2,145/month shortfall which she revised during the hearing to be CI\$2,519 due to an increased figure for monthly groceries. Although not unquestionably accepting all of M's figures, it is evidence that she is struggling financially and is clearly in a far worse financial position than F. It is evident that in fact some of her income is being used to support the child.

101. F submits that both parents should be contributing financially to the maintenance for their children. He rightly highlights that he is shouldering the financial burden for raising and educating J. That is not a change of circumstances, since that state of affairs concerning J was made known to the Court at the 2019 hearing. It is clear that M is not in a position to contribute and even if there was an application made before this Court, due to the considerable disparity in the parents' income⁵⁵ and M's financial circumstances I would not be making a maintenance order or calculating it as an offset against F's payments for the child.

⁵⁵ M's income only US\$43,762 net and F's at least 357,000 a year plus a possible bonus of \$50,000 with a spouse able to contribute to household expenses.

102. I am satisfied that M is already using part of her income to provide for the child which she is required to do even with the current level of child maintenance payments being made by F. Although F is to his credit taking on by far the bulk of child related expenses, there is no margin for reducing M's global income figure if she is to be able to meet the child's needs. It is not appropriate to reduce the child maintenance payments for the period when the child is having contact with F. This is not a normal order to make. There is a need for the primary carer to receive consistent monthly payments to ensure the general and ongoing monthly expenses can be met.
103. Although I find there to be no substantial change of circumstances since the decision reached in 2019, I have conducted a soft touch review and concluded that there is no scope for reducing the level of child maintenance currently being paid. Accordingly, I do not grant a downward variation on the child maintenance figure sought at paragraph 2 of F's Amended Summons dated 7 December 2021.

Contact Orders

104. The child contact orders occupied a minor part of the hearing. This is illustrated by the brevity of the submissions received. The parties' Written Closing Submissions on the child order issues only run to 5 paragraphs each. M indicates a view that most of F's Summons in relation to contact has fallen away. She noted that by a Consent Order dated 6 October 2022, the parties agreed that:
- (i) the child would have contact with F from 15 December 2022 to 28 January 2023; and
 - (ii) that M would courier the child's New Zealand passport to F forthwith.

M indicated in the Written Submissions that:

"Direct contact going forward also was agreeable provided that it did not involve the child missing school and M was able to share time over the Christmas holidays in the future."

105. In his Written Submissions, F still invites the Court to vary the 9 February 2020 order on the basis of the contact set out in paragraphs 1 (i)⁵⁶ to (vi) and 5 in his Amended Summons. Although I have reviewed the affidavit evidence, in particular F's affidavit sworn on 1 July 2022, paragraphs 50 – 64, there is insufficient detail and submissions before me to make an informed decision to make a consent order that is not expressly agreed.
106. However, I can comment that it would be in the child's best interests to have contact with F for an extended period of time in March 2023 and around roughly the same period each year. The Court would expect the arrangements to be agreed between the parties and for them to provide each other with the required dates and make the necessary arrangements around the child's schooling. The Court would not expect there to be a need for a further hearing but if there were ongoing contact issues, especially practical issues 'to be ironed out' the Court suggests that the parties may attend mediation (which is free and can take place with parties attending remotely). I would be content to refer the issue of contact to mediation without the need for any Summonses to be issued if requested by the parties. I am unable to order that the child have contact with F for every day over the actual Christmas holiday as sought. However, if one removes Christmas Day from the equation, it would be in the child's best interest to have extensive time with F around December/January, especially as that coincides with the child's main school holidays in Australia. It is important that the child has the opportunity to have contact with F in New Zealand where her wider family live as well as at her second home in the Cayman Islands. Of course, F should be able to stay in Australia and have extended periods of contact with the child there. The Court, in principle, would be content to approve the consent order in similar terms to that set out in the Amended Summons if it were agreed

⁵⁶ Albeit with updated dates for paragraph 1 (i).

by the parties. I respectfully recommend that the parties work out dates using F's suggestion as a starting point, but with both parties being flexible. It is important for the child to have a meaningful relationship with F and the parties must put aside their negative feelings for each other to reach that goal.

107. In relation to the indirect contact sought at paragraph 5 in the Amended Summons, I am again unable to make the order with the specificity sought based on the evidence and submissions before me. I can indicate that indirect contact is extremely important for the child and that if this can be arranged to take place on a daily basis at agreed times then that would be admirable. However, although it is inappropriate for me to now set the precise times, it is clear that the parties must take into account the time difference between the countries and enable the child's activities to not be curtailed.

Costs

108. My preliminary view is that, having regard to the orders made and not made, neither party can be viewed as being the successful party in these proceedings. With that in mind my provisional view would be to make no order for costs relating to the summonses before me. However, if either party wishes to be heard on costs, they should communicate that to the Court within 14 days of receiving this Judgment.

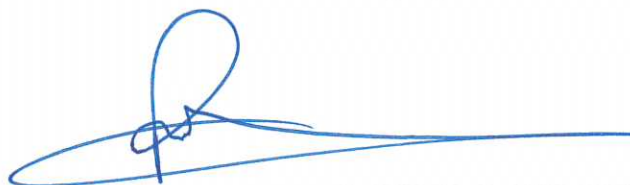
Foot note: The Australian proceedings

109. The Court has been informed that, in proceedings brought by the Petitioner in the Family Court in Melbourne, at a hearing held on 30 August 2020, the Learned Judge indicated that the most appropriate Court to deal with ongoing parenting and financial matters was the Grand Court. Although I can see why the Learned Judge may have reached this conclusion about the registration

The Judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.

and enforcement of any Grand Court financial order, I respectfully commend a different approach in relation to future financial provision and child arrangement issues. The child is habitually resident in Australia and the Family Court of Australia, with local knowledge about the cost of living and welfare issues for a child and being able to draw upon local social services' input if needed, is clearly best placed to make any informed determination in relation to such issues in the future.

110. Following any order I may make in this Judgment, I would hope that the parties would be able to agree that any future application to reconsider the financial provision or, especially, child arrangements orders in relation to the child should be brought in the Family Court in Australia. I accept that enforcement of Grand Court financial orders may still have to be determined by this Court, unless the parties agree to incorporate any financial obligation arising under a Grand Court order as a new provision in a financial order made in Australia. If orders are made in Australia which would impact the orders made here, the parties should thereafter notify the Grand Court of the orders made and file the appropriate Grand Court order to reflect that, thereby enabling the Grand Court file to be kept up to date.



**THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT**