

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

3 **CAUSE NO: FAM 165 OF 2018**

4
5 **BETWEEN:** **TW**
6 **PETITIONER**
7 **AND**
8
9 **MW**
10 **RESPONDENT**
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13 **Appearances:** **Mr. David Holland of Cayman Family Law for the Petitioner**
14 **Respondent in Person**
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16 **Before:** **The Hon. Justice Cheryll Richards Q.C.**
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18 **Heard:** **26th October 2021**
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20 **Draft Judgment:** **30th November 2021**
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HEADNOTE

*Family Law, Section 19 and Section 23 of the Matrimonial Causes Act (2005 Revision),
Principles on an application to vary child maintenance order.*



1 **JUDGMENT**

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3 1. By Summons filed 24th August 2021, the Respondent seeks the variation of a Consent Order made on
4 the 11th April 2019 and a Final Ancillary Consent Order (FACO) made on the 3rd October 2019. The
5 variations sought are as follows:
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- 7 (1) An order to the effect that the Respondent will no longer be liable to pay the school fees
8 for the children of the marriage L and C whilst they attend private school.
9 (2) An order to the effect that L and C shall be enrolled in ‘a public government school’ with
10 effect from 1st September 2021.
11 (3) Such further and other relief as this Honourable Court may deem just and equitable.
12

13 2. The Respondents’ application is opposed by the Petitioner. In this judgment I will refer to the
14 Respondent as ‘the husband’ and the Petitioner as ‘the wife, although the marriage was dissolved on
15 the 14th October 2019.
16

17 3. The parties were married on the 22nd March 2008. The husband is 57 years old and the wife is 48 years
18 old. There are two children of the marriage, both boys, L aged 13 years and C aged 11 years.
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20 4. By the Consent Order made on the 11th April 2019, residence arrangements were made by which the
21 children L and C reside with the husband every other week during the school term from Wednesday at
22 6pm until Sunday at 6pm. On alternate Wednesdays when the husband is not to have the children
23 overnight, he is to have contact with them from the end of the school day until 7pm. During school
24 breaks and holidays each party is to have equal time with the children as far as is possible.
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26 5. By the FACO orders were made for division of property and child maintenance. It is of significance to
27 the present hearing that the agreements and declarations to the FACO included the recognition that the
28 wife was then unemployed and that the maintenance arrangements therein made would continue for the
29 foreseeable future even if she secured employment. Also included was the continuation of the earlier
30 agreed residence arrangements. The FACO stated *inter alia*:
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4 “viii. AND UPON it being recognized that the Petitioner is presently unemployed but is actively
5 pursuing work and it being agreed by the parties that it is intended that the maintenance
6 arrangements contained at paragraph 4 of this Order shall persist for the foreseeable future even if
7 the Petitioner secures employment.

8 ...

9 ix. AND UPON the child residence arrangements having previously been agreed by Consent Order
10 dated 11th April 2019 and those arrangements remaining in effect.”
11

12 6. With respect to maintenance arrangements, no order was made for spousal maintenance. By paragraph
13 4 a) and b) of the FACO the husband agreed to pay US \$500.00 per month per child (US \$1000.00 or
14 CI \$840.00) until age 18 years or completion of high school education whichever is the later, as well
15 as monthly health insurance premiums for both children.

16
17 7. By paragraph 4 c) of the FACO the husband agreed to continue to pay the school fees of the children
18 whilst they attend the private school.

19
20 8. All other reasonable costs incurred over and above school fees for the children and insured costs were
21 agreed to be shared by the parties equally.

22
23 9. The former matrimonial home was sold, and by the FACO there was distribution of the proceeds of the
24 sale, to the parties in agreed proportions (40/60), after payments of certain outstanding expenses. A
25 pension transfer order in the sum of \$80,000.00 was made in favour of the wife. Each party retained
26 other items of property. In particular the wife retained all her interest in a one-bedroom apartment in
27 the district of Spotts Newlands. This had been owned by her prior to the marriage.

28
29 10. The husband has 2 children from a first marriage T, a son now 19 years of age and H, a daughter 17
30 years of age. At the time of the FACO, all four of the husband’s children attended the same private
31 school. The school offers discounted rates for school fees where multiple children from the same
32 household are enrolled. This meant that the fees for the third child to attend, L were discounted by 25%
33 and no fees were payable for the fourth child, C.
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4 11. In the two years since the FACO was made, T has now graduated from the school and is now enrolled
5 in tertiary education overseas. He is on a full scholarship. The husband makes no payments towards his
6 education. H will complete her studies there at the end of this school year. She is also on a full
7 scholarship. The changed position following T’s graduation has been highlighted by the husband. This
8 is because the monthly school fee for L, who would be the second rather than third child from the same
9 household in attendance at the school is \$1,265.00 and for C it is \$948.75. In the next school year
10 commencing in 2022 when H graduates, if L and C continue to attend the school, there will be only
11 two children attending from the same household and the full rate will be payable for C.
12

13 **THE POSITIONS OF THE PARTIES**
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15 12. The husband’s position on this application is that his financial situation has changed substantially and
16 he can no longer afford to pay the fees for the private schooling of L and C. He says that he has changed
17 employment and that as a result his earning capacity has changed. He no longer receives an end of year
18 bonus of some \$24,000.00. He used to rely on this to pay the school fees. His expenses are said to be
19 more than his earnings. He also says that the only alternative which he sees is either for the wife to pay
20 the school fees herself or for the two children to be moved from the private school to a public
21 government school where no fees are payable. He has produced excerpts from the school inspection
22 reports for both schools and says that the public school is rated as ‘good’ while the private school is
23 only rated as ‘satisfactory’. He asks that this Court make an order “regulating which school the children
24 should attend.”
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26 13. The wife’s position is that the husband’s application should be dismissed as it is not in the best interests
27 of the children. She states that to move the children from the only school that they have ever known
28 since kindergarten would be disruptive and detrimental to their well-being. They are doing well at the
29 school as is evidenced by their end of year term reports. The wife also says that there has been no
30 material change in circumstances that was not contemplated by the FACO and further that there has
31 been no significant change to the husband’s income. The assertion is that the husband’s income position
32 has actually improved in that his base salary has increased and he is no longer paying for school for his
33 two older children.



1 **THE STATUTORY PROVISIONS**

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3 14. The Court’s power to vary the terms of an ancillary order is set out in s.23 of the *Matrimonial Causes Act* (2005 Revision) which provides as follows:

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6 *“Either spouse or the personal representatives of 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.”*

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10 15. Section 19 of the said Act provides that:

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12 *“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.”*

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16 **THE APPLICABLE PRINCIPLES**

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18 16. In 2008, in the case of *VB v. JP*¹, the wife in that case applied pursuant to s.31 (7) of the English *Matrimonial Causes Act 1973* for an increase in the amount of periodical payments payable under a consent order dated June 2001. This was about 6 years after the order had first been made. She applied on the basis that the sums which were being paid in respect of spousal and child maintenance were inadequate based upon her needs and upon the principle of compensation as detailed by the House of Lords in the case of *Miller v. Miller, McFarlane v. McFarlane*². She claimed an entitlement to a premium over budget, over and above need, for loss of her earning capacity (relationship generated disadvantage).

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27 17. In the course of the judgment in the case of *VB v. JP*, Sir Mark Potter, President of the Family Division, reviewed the case of *Miller v. Miller, McFarlane v. McFarlane* and a number of cases following. The learned Judge concluded *inter alia* that where periodical payments are necessary, any element of compensation is best dealt with by a generous assessment of a wife’s continuing needs unrestricted by

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¹ [2008] EWHC 112

² [2006] UKHL 24



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4 18. purely budgetary considerations.³ The questions arising for the Court’s consideration on the matter
5 included, whether the strand of compensation also falls for consideration upon a variation application.
6 The Court noted that in the case of *Lauder v Lauder*⁴, the matter had been rightly reconsidered in the
7 light of the guidance provided in *Miller v. Miller, McFarlane v. McFarlane*. The learned Judge
8 approached the question of a variation by considering, in some detail, the s.25 (2) factors.

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

17
18 20. The issue for the Appellate Court included the extent of the Court’s considerations on a variation
19 application. Counsel on behalf of the husband submitted that, in determining such applications, the
20 court must consider the matter *de novo* and that the learned Judge at first instance had approached the
21 matter with an extremely “*light touch*” which had led to focus on the single factor of the increased
22 earnings of the wife. The Appellate Court dismissed the husband’s appeal, holding that the court, on a
23 variation application, is not required to consider the matter *de novo*. What is required is that the court
24 conducts an exercise which is proportionate to the requirements of a case. The Court has the flexibility
25 to determine what is required in each case. This may, in some circumstances, require a complete review,
26 but, in others, a *light touch* review may be justified. The Court also referred to the distinction between
27 an appeal against an order made and a variation of an order which would usually require the justification
28 of some change in circumstances.

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³ Supra, paragraph 59

⁴ [2007] 2 F.L.R. 802

⁵ [2016] EWCA Civ. 812



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2 21. The Court stated:

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

10
11 88. I do not consider that the authorities on which Mr Duckworth relies support his submission
12 that the court must undertake the exercise de novo. He can point to the passage in Ward
13 LJ’s judgment in *Flavell v Flavell* when he says (at p. 357): “the court is not required to
14 proceed from the starting-point of the original order but looks at the matter de novo.” But,
15 this has to be seen in context, namely that it was in response to a submission that the court
16 does not have jurisdiction to vary an order unless the applicant can show exceptional
17 circumstances or, at least, a material change. Further, Ward LJ’s observation is not the
18 same as saying that the court is required to consider the matter de novo. That Ward LJ is
19 not saying this is clear because he agrees “entirely” with what Cazalet J had said in
20 *Garner v Garner* [1992] 1 FLR 573:

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22 “Almost invariably, an application to vary an earlier periodical payments order will be
23 brought on the basis that there has been some change in the circumstances since the
24 original order was made; otherwise, except in exceptional circumstances, the application
25 will, in effect, be an appeal. If an order is not appealed against, or is made by consent,
26 then the presumption must be that the order was correct when made. If it was correct when
27 made, then there will usually be no justification for varying it unless there has been a
28 change in the circumstances.”

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30 89. In addition, in *Lewis v Lewis* [1977] 1 WLR 409, that great family judge, Ormrod LJ, also
31 does not say that the court must start de novo: “I am bound to say that it has always seemed
32 to me ... that the powers of variation, which were given by statute to this court in a series
33 of enactments going right back to 1857, have been, if anything, progressively enlarged,



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3 *and that the intention of Parliament is that, in handling these family matters where money*
4 *is concerned, the court should have as unfettered a discretion as possible to deal with the*
5 *situation as it is when the matter comes before it” (p. 412F).*
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7 ...
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9 92. *The court has “enormous flexibility” to determine the “nature” of the substantive hearing.*
10 *This includes, as Mr Duckworth accepts, focusing on the relevant factors and in my view*
11 *also, where appropriate, conducting a light touch review. Specifically, to require the court*
12 *to undertake the exercise de novo would be contrary to the overriding objective and the*
13 *obligation for a case to be dealt with proportionately.”*
14

15 22. In reaching a conclusion on the appeal the Appellate Court noted the recency of the final order which
16 had been made only two years earlier in August 2014 and the absence of sufficiently significant changes
17 in the circumstances. With respect to the issue of varying the term of periodical payments, the Court
18 stated:

19 *“Given that the final order had only been made in August 2014, the husband’s application*
20 *to alter the term imposed by that order, so soon after it was made, would have required*
21 *more significant changes that have occurred in this case.*
22

23 ...
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25 *Changes in employment and changes in income, as occurred in this case are not unusual*
26 *and they are not sufficient to support the need for a substantive review of this element of*
27 *the 2014 order.”*
28

29 23. The dicta in the case of *Morris v. Morris* has been approved in this jurisdiction in the Grand Court case
30 of *SD v. AL*⁶ In the judgment in that case Williams J. provides helpful guidance on the approach to
31 variation applications of the kind sought in the instant case. With respect to s. 23 of the *Matrimonial*

⁶ Judgment dated 5th September 2017



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4 *Causes Act*, the learned Judge stated that this provides the Court with a broad discretion to make
5 variation orders for which applications is made, once it has heard from the parties. In doing so a court
6 will have regard not only to s. 19 of the said Act but will also be guided by the relevant factors raised
7 in s.25 (2) of the English Act. These include:

- 8
9 i) The income, earning capacity, property and other financial resources which each of the
10 parties to the marriage has or is likely to have in the foreseeable future, including in the
11 case of earning capacity any increase in that capacity which it would in the opinion of the
12 court be reasonable to expect a party to the marriage to take steps to acquire;
13
14 ii) The financial needs, obligations and responsibilities which each of the parties to the
15 marriage has or is likely to have in the foreseeable future;
16
17 iii) The standard of living enjoyed by the family before the breakdown of the marriage;
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19 iv) The age of each party to the marriage and the duration of the marriage;
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21 v) Any physical or mental disability of either of the parties to the marriage;
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23 vi) The deserts of the parties including the contributions which each of the parties has made
24 or is likely in the foreseeable future to make to the welfare of the family, including any
25 contribution by looking after the home or caring for the family;
26
27 vii) The conduct of each of the parties, if that conduct is such that it would in the opinion of
28 the court be inequitable to disregard it;
29
30 viii) The value to each of the parties to the marriage of any benefit which, by reason of the
31 dissolution or annulment of the marriage, that party will lose the chance of acquiring.”⁷

⁷ Statutory Factors in England and Wales



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2 24. As to the manner in which the discretion ought to be exercised the learned Judge stated:
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4 *“Having regard to Morris, the following principles are appropriate as a guide to the Court*
5 *in the exercise of its discretion:*

6
7 (i) *The practice has developed where the Court looks for a material change in*
8 *circumstances since the last order when considering varying periodical payments*
9 *order. However the wording of s. 23 and s. 19 MCL give the Court wide powers to*
10 *vary its ancillary relief orders and contemplates that there may be other*
11 *circumstances other than a change of means which would justify a variation in the*
12 *original order;*

13
14 (ii) *Whilst the Court has a broad discretion when determining variation applications,*
15 *such discretion should be exercised in a proportionate manner :proportionate to*
16 *the money involved, the cost and complexity;*

17
18 (iii) *In conducting its s. 23 MCL exercise the Court should have sufficient information*
19 *available to it for the relevant issues to be addressed in a way which is fair and*
20 *proportionate against the backdrop of the Overriding Objective. The provision of*
21 *information for the exercise is a mutual and reciprocal obligation; and*

22
23 (iv) *A full, exhaustive and expensive representation of a final ancillary relief hearing*
24 *should be avoided. That would be contrary to public policy, detrimental to the*
25 *parties interests and a drain on the limited resources of the Court.”*
26

27 **APPROACH**

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29 25. I approach this matter with the above statutory and guiding principles in mind. I am not necessarily
30 required to proceed *de novo*. I am required to carry out a review which is proportionate to the
31 circumstances of this case. I must have in mind first of all the best interests of the two children of the
32 marriage. Their requirements continue to include adequate housing, education and on-going general

1 maintenance. I will consider to the extent that it is necessary to do so, the responsibilities, needs,
2 financial and other resources, actual and potential earning power and the deserts of the parties as well
3 as the relevant factors raised in s.25 (2) of the *Matrimonial Causes Act 1973*.
4

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

9
10 “... are by their very nature ongoing, concentrate upon continuing need and are themselves subject
11 to later variation.”
12

13 27. The primary issues are whether it is in the best interests of the children to remain at the private school
14 and whether the expense for this is feasible in light of the cost and the income and outgoings of the
15 parties.
16

17 THE EVIDENCE



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19 28. The material before the Court initially consisted of the following Affidavits:

- 20
21 (i) Husband's Affidavit dated 24th August 2021
22 (ii) Wife's Affidavit in Reply dated 8th October 2021
23 (iii) Husband's Affidavit dated 14th October 2021 with exhibits of financial information in
24 response to a request for further and better particulars.
25 (iv) Husband's Affidavit dated 7th June 2019
26

27 29. Additionally, the wife provided documents in response to a request for further and better particulars.
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29 30. On the morning of the hearing, the husband indicated that he wished to produce further evidence to
30 include summaries of school inspectorate reports, a revised income and expense schedule and some
31 other factual information. He produced a note setting this out. At the request of the Court, he undertook
32 to provide a further Affidavit formally producing this material in a matter of days. Counsel for the wife

1 took no issue with this course and indicated that an adjournment was not required. The further Affidavit
2 produced by the husband is dated 28th October 2021.



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4 **PROPOSED CHANGE OF SCHOOL**

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6 31. The two children, L and C have been attending the private school for eight years since 2013, when C
7 was enrolled in the Nursery at the school and L in Reception. T and H had been attending the school at
8 the time and a decision was made by all parents for all four children of the husband to attend the same
9 school.

10
11 32. Two years ago in 2019, at the time of the divorce and FACO, the parties were both agreed that it was
12 in the best interests of L and C for them to remain in attendance at the private school. The husband was
13 pointed in his statements to this effect and offered at that time despite his then indication of a monthly
14 deficit of \$2,094.90 that he would shoulder the responsibility of making the school payments.

15
16 33. At that time with four children in attendance at the school the husband's payments amounted to
17 CI\$1,866.40 for the two older children and CI\$745.00 for L. The total was \$2,611.40. The table below
18 shows the school fees for 2021 with H still in attendance at the school and the projected school fees for
19 2022 if L and C remain at the school.

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School fees 2019 -	School fees 2021-	Projected School fees 2022-
\$2,611.40	\$2,213.75	\$2530.00

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24
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26
27 34. The above table also illustrates that in each case for 2021 and 2022 there is and would be a reduction
28 rather than increase in total school fees since the FACO was made. The material change is that the fees
29 are higher for both L and C because the two older children have either completed or are about to
30 complete their education at the school. However, the husband no longer has to pay school fees for T
31 and H.
32

1 35. In cross-examination, the husband was asked about the statements previously made by him at the time
2 of earlier applications and the making of the FACO. He admitted making these statements and sought
3 to say that his position has only changed because of his inability to afford the fees.

4
5 36. The fact is that he made a series of statements emphasizing the importance of education and his desire
6 for the children to remain in private school because it is in their best interests.

7
8 37. In response to the wife’s application for maintenance pending suit, (“MPS”) in an Affidavit sworn on
9 the 7th June 2019, under the heading the importance of education, he stated:

10
11 *“20. The Court will recall that I have 4 children in total, and almost everything I earn is devoted*
12 *to looking after my children and ensuring all four of them have the best education we (in essence*
13 *now I) can afford. In my affidavit, filed in support of the Children’s Law issues, I stated at page*
14 *117 that:*

15
16 ***Paragraph 69 – Educational Needs:*** *I would like to stress that this is a very important*
17 *consideration for me. I want the children to receive consistent and good quality schooling,*
18 *which is and which I hope will continue to be at ... It is a very good school. Whilst keeping*
19 *4 children at private school is expensive, I am a firm believer that it is the best gift we as a*
20 *parents can give them.”*

21
22 38. In that Affidavit he also asserted that there was no point to the wife’s’ maintenance application and
23 referenced the fact that he would shoulder the burden of making all the school fee payments for the
24 children in the monthly sum of approximately C\$2,622.90 and would have no surplus funds thereafter.
25 Under the heading school fees he stated:

26
27 *“41. As previously alluded to, I view quality education as the most important gift a parent can give*
28 *a child. I am of the view that all my children should benefit from a private education and enjoy the*
29 *stability of attending the same school (namely ..) if at all possible. I have somehow managed to*
30 *pay school fees throughout this process, albeit at times with the help of loans from my parents as*
31 *alluded to otherwise herein.”*





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3 39. He also stated that he had no doubt that keeping the children in private school is in their best interest
4 and that there is huge importance that is attached to their stability to continue their education at the
5 private school:
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7 *“58. I have been able to pay 1 month of L’s school fees since the Petitioner stopped paying the fees*
8 *and will endeavor to somehow find the arrears. I am determined to continue to keep the children*
9 *in private school as I have no doubt that is in their best interests. The Petitioner has indicated that*
10 *I must pay the school fees, otherwise they would (in her words) have to be transferred to the public*
11 *school system. In an email dated 3 January 2019 (page 23) T. admits that such a course would be*
12 *a “very traumatic, emotional experience for the boys”. I agree that we must not inflict this trauma*
13 *if at all possible, upon the children. There is a huge importance that is attached to the boys’ stability*
14 *with regard to continuing their education at ... They need and want that stability to continue, not*
15 *only from an educational perspective, but also from a social and sporting perspective.”*
16

17 40. In cross-examination in the course of this hearing in response to a direct question, the husband gave
18 evidence that he accepts and stands by what he said at paragraphs 20 and 21 of his earlier Affidavit. He
19 said:
20

21 *“I am not saying that if there was another way, I would prefer that they stay at ... but I*
22 *cannot afford it.”*
23

24 41. He said that he agrees that trauma should not be inflicted on the children by changing their school and
25 that he is sure that the change would not be pleasant for them. He also said that it is possible that the
26 age at which they are now at, social stability is even more necessary. However, he was adamant that
27 affordability is the issue and said that:
28

29 *“Not if it means that their father is homeless and will not have a place to stay.”*
30

31 42. The evidence of the wife is that the first communication of the husband’s change of position to her was
32 on Tuesday 11th May 2021. This was in response to her inquiry made of him on the 10th May 2021, as

1 to whether the usual signed financial commitments for the new school year commencing August 2021
2 had been completed. It was at this time that the husband indicated that he did not intend to pay the
3 school fees and would be advising the school that he was no longer responsible for the payments. He
4 said also that he would be signing up the children for public school. The wife objected to the unilateral
5 change and various correspondence followed between them. Given the wife's objection, on the 10th
6 June 2021 the husband filed a Notice to Act in Person and a Notice of Intention to Proceed in the case.
7 In the interim the wife has paid the school commitment fee of \$300.00. The wife said that she did this
8 because the children would otherwise have lost their place at the school and no alternative arrangements
9 had been made for them to attend another school. On the 30th August 2021 the children commenced the
10 school year at the private school.

11
12 43. In her responsive Affidavit of the 23rd August 2021, the wife states that the husband has offered no
13 reasons or basis for his view that the government school would be a good choice for the children and
14 as to how their educational needs would continue to be met at this school. She states that the children
15 are currently happy and have a number of friends at the private school. They are doing well at the
16 school. In support of this statement, exhibited to her Affidavit are copies of their reports, graduation
17 and merit certificates for the school year ending June 2021. It is her view that to take them out of the
18 school at this time would cause them much emotional distress after they have already had to deal with
19 the aftermath of the divorce and the ongoing pandemic. The wife states further that:

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21 *“The Government school system is completely different from that of the school which they now*
22 *attend. Government schools are recognized to be of a lower standard with much bigger class sizes*
23 *and hence many people choose to pay and prioritize their children's education at the sacrifice of*
24 *their own priorities where possible.*

25 ...

26 *“The Government schools are known to have many behaviour issues along with bullying, gangs*
27 *and use of drugs. Although I accept that these behaviors can occur anywhere, to my knowledge,*
28 *the children have never been exposed to such conduct at... and they are thriving in their current*
29 *setting. I also feel that it is in the children's' best interests to be in a smaller focused setting which*
30 *cannot be received at the Government School.”⁸*



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⁸ Affidavit of wife dated 8th October 2021, paragraphs 29 and 31

1 44. In answer to questions from the husband in cross-examination the wife did not accept the suggestion
2 that the private school was rated as ‘satisfactory’ at the end of 2020. She said that there are different
3 grades for the various areas in the school and that while the overall average grade was probably
4 ‘satisfactory’ due to administrative issues, the teaching and learning components of the school were
5 rated excellent. She said that this is what is important. She said that she had not seen the report on the
6 public school and does not in fact know whether it is rated as good and that there are different social
7 issues there.

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9 45. In response to a direct question from the husband, she stated that if the Court decides to move the
10 children, she would support them in whatever way is needed.

11
12 46. In response to questions from the Court as to the possible effect of any transition if this had to be
13 undertaken, she described the personalities of the children. Both are said to be emotional in personality,
14 with L being an expressive child while C internalizes his emotions. She said that she thought that it
15 would be extremely difficult for them to make the transition to a new school and that this would set
16 them back. They are presently going into years 7 and 8 and over time have established ‘friend groups’
17 including homework groups and other support groups. A new school would be a new setting for them.
18 She said that she believed that they would have to have some sort of counselling in order to make the
19 transition at this point. She said that she has attended parent teacher conferences and all the teachers
20 have spoken about how well they are doing at the school. She does not know whether moving them
21 would be in their best interests and does not know how well it would be taken by them. She was asked
22 further questions by the husband as to whether their interaction with students from other schools such
23 as during sporting events would not make it easier for them to make the transition. She agreed that there
24 was interaction for example during inter school football matches but said that the interaction was not
25 at the friendship level which they have with other students who attend their present school.

26
27 47. The wife maintained that she thought that the change of school would be detrimental for them at this
28 point and that the support required for them, if the change is to take place would require additional
29 expenses. The husband suggested to the wife and to the Court that the change would not be as
30 detrimental as the wife stated. The husband also sought to re-enforce this suggestion by stating that he
31 attended public school in the past.



1 48. In his Affidavit of 28th October 2021, the husband formally produced summaries from the school
2 inspectorate reports for both schools. These indicate that the public school in question is rated as good.
3 It is said to have made significant improvements and to have excellent leadership. There are high
4 standards for students in subject areas and teaching and learning are good. In contrast the private school
5 had a lesser grade of satisfactory. It was found to have weaknesses in leadership and governance.
6 However, many aspects of its educational provision were found to be good with students achieving
7 well. The summary stated in part that:

8
9 *“Students achieved well, due to dedicated and effective teaching staff who developed motivating*
10 *lessons and used effective teaching strategies.”*

11
12 49. As I understood the summaries, the teaching and learning components were rated as good across both
13 schools. This is not a case where the quality of learning is said to be substandard at one as against the
14 other, such that other considerations would arise on this application.

15
16 50. From the evidence of the husband given in 2019, he accepted that it was in the best interests of the
17 children for them to remain at the school. From all of the evidence now before the Court it is plain that
18 the husband recognizes that there will be some trauma attendant upon any change of schools. He
19 repeatedly said that if there was another option for him to pay the school fees, he would pay the fees in
20 order for them to remain at the school. Implicit in these statements is the recognition and continued
21 acceptance that it is in fact in the best interests of the children for them to remain at the school.

22
23 51. One area of concern is the possible unfortunate manner in which the husband has gone about this. The
24 wife suggested that the timing is significant coming as it did in May 2021 only about two months after
25 his remarriage in late February 2021, when he had never before raised the issue of affordability. I do
26 note that the purchase of his new home was in November 2019 and that he commenced new
27 employment on June 1 2020, some eleven months before May 2021. I give him the benefit of the doubt
28 as to possible motives. It may be that there was genuine urgent panic on his part at a particular point in
29 time when he looked at his finances. However, I do consider that it was deeply undesirable to seek to
30 tell the children without warning or forward planning only two months before the start of the new
31 school year that they would have to change schools.



1 52. The first issue as I see it when considering the best interests of the children, is not whether one school
2 is public or private, the issue is uprooting them from the only school they have ever known, without a
3 period of preparation, and just two years after the divorce. This means taking them from established
4 study support systems as well as from their friends and social groups in circumstances where the rating
5 of the teaching and learning components of both schools is the same or comparable. The timing is also
6 a serious concern, in particular that this should be a few months before or during a school year. I would
7 have expected to see some significant transitional planning and preparation over a period of time such
8 that the parents could be assured of the environment at any new school and also that each child would
9 be comfortable making any proposed change.

10
11 53. Having considered all of the available evidence including the clear statements previously made by the
12 husband, I conclude that the best interests of the children would be for them to remain at their present
13 school if that is at all economically feasible.



14
15 **INCOME OF THE HUSBAND**

16
17 54. The husband's evidence is that at the time of the FACO he was employed with an income of \$10,735.00
18 per month, net of pension deductions it was \$10,010.49. He also received a discretionary bonus of
19 \$24,000.00 per annum or \$2,000.00 per month. He says that he effectively used this bonus to pay school
20 fees. On the 1st June 2020, he commenced new employment. His monthly salary is \$ 10,609.75 and he
21 no longer receives a bonus. He states:

22
23 *"As can be seen, there has been a significant reduction in the amount of money that I have after*
24 *paying my outgoings, and I quite simply cannot afford to continue paying the school fees for L and*
25 *C."*
26

27 55. He points to what he says is a monthly deficit between his income and expenses even before factoring
28 in the payment of school fees.
29

⁹ Affidavit of husband dated 23rd August 2021, paragraph 14

1 56. His evidence is that in addition to his salary, he has two additional income streams. He has continued
2 as a consultant to his former employer and receives a quarterly director's fee of US \$2,225.00, which
3 amounts to US \$741.66 or CI \$615.00 per month.

4
5 57. At the time of the FACO the husband was living in rented accommodation. In November 2019, he
6 purchased a house using funds received from the divorce settlement and an additional voluntary
7 contribution from his pension funds. The house has three rental properties. The total rental income is
8 \$2,850.00 per month. His total income inclusive of these two income streams is therefore \$14,074.00
9 per month.

10
11
12 **2021 INCOME OF THE HUSBAND**



13

		\$
1	Salary (before pension)	10,609.75
2	Consultancy	615.00
3	Rental Income	2,850.00
	Total	14,074.75

14

15
16 58. By way of assets the husband says that he has no savings. His only asset is the recently purchased home
17 which is presently valued at \$665,000.00 with an outstanding mortgage of \$554,220.26. Thus, the
18 equity is about \$110,780.00.

19
20 59. In response to questions in cross-examination, the husband accepted that he now has more income than
21 when the FACO was agreed. His income in 2019 inclusive of a bonus of \$19,800.00 was CI
22 \$148,500.00 per annum. In 2021 it has increased by \$20,000.00 to CI \$168,888.00 per annum. This
23 includes consultancy fees and rental income. He also accepted that he is no longer paying school fees
24 for T who is now enrolled in tertiary education on a full scholarship. Neither is he paying school fees
25 for H who also has a full scholarship. He used to pay 60% of the fees for both which was about
26 \$1800.00 per month. Their mother paid the other 40%.

27
28 60. He said that the mortgage which he now pays of \$4,698.00 is not necessarily offset by the income of
29 \$2,850.00 from tenants. This is because the income from the tenants is reduced by related expenses

1 such as electricity, water and cable. Additionally there are insurance fees and other costs and the
2 properties may not be rented continuously.

3
4 61. He agreed that in 2019 at the time of the MPS hearing that the deficit which he declared was \$2,094.00
5 and that at that time he had said his bonus was discretionary and was not guaranteed.

6
7 62. He said that the declaration made in his signed Statement of Information for the Consent Order that:
8

9 *“H wants to keep the children at.. school and the order provides for that.”*

10
11 was based on his getting a bonus which he no longer receives and that his additional income is offset
12 by his expenses. He said that despite the fact that his total household income is over \$17,000.00, the
13 school fees of about \$2,200.00 are not affordable.

14
15 63. He accepted that by the FACO the wife’s employment position is not the important factor and that the
16 FACO states that irrespective of her employment position he would be still responsible for the school
17 fees.



18
19
20 **EXPENSES OF THE HUSBAND- 2021**

21
22 64. The husband’s evidence is that his total expenses amount to \$19,381.00 when school fees are factored
23 in and that he has a short fall of \$1,806.97. He points out that in addition to financial support for the
24 children by way of maintenance payments, he also provides for them when they are staying with him.

25
26 65. The husband re-married on the 27th February 2021. There are no children from this marriage. His wife,
27 R earns a small income of \$3,500.00 from two jobs. Forty two percent of this income, \$1,500.00 is used
28 to support her own family overseas and \$600.00 is used by her for her own personal needs. Based on
29 the calculations provided by the husband, R makes a contribution of \$1,400.00 towards the household
30 expenses.

31
32 66. Excluding at this stage, the income and contribution from R, and excluding the payment of school fees
33 for L and C, the husband gives his expenses in a revised schedule as follows:



1
2
3

Table of Husband's Expenses -2021

	Description	\$
1	Pension	636.59
2	Mortgage	4,698.00
3	House Insurance	647.14
4	Home Gas	50.00
5	House Maintenance	300.00
6	Medical Insurance includes coverage for L and C	152.91
7	Medical Co-Pay	400.00
8	Dental Expenses for C – ½ payment for outstanding bill	200.00
9	Maintenance for L and C as per FACO	840.00
10	School lunches for L and C	160.00
11	School for H, L and C, at \$100.00 each	300.00
12	Children's activities	200.00
13	H- CC	200.00
14	H- Life Insurance pay 2'nd	527.48
15	H- Monthly	300.00
16	Domestic Helper / Transport	925.00
17	Domestic Helper / Medical	160.00
18	Phone	300.00
19	Electricity including provision for tenants	800.00
20	Internet and Cable TV including provision for tenants	305.85
21	Internet including provision for tenants	65.00
22	Water – includes provision for tenants	300.00
23	Food	2,000.00
24	Gasoline	300.00
25	Car Insurance	150.00
26	Car maintenance	150.00
	Total \$	15,067.12
	Total \$ less pension of \$636.59	14,430.53



- 1
2
3 67. The husband was cross-examined about various expenses and whether or not any savings could be
4 made from any of these items. In each case he disagreed that any savings could be made.
5
- 6 68. With respect to his spending of \$2,000.00 per month on groceries, he says that this is for three adults
7 to include the live-in helper, his daughter H who resides with him two weeks per month and L and C
8 who reside with him eight nights in every four-week period during the school terms. T no longer resides
9 with him. He said that while the amount for groceries in 2019 of \$1,600.00 was at a time when more
10 children were living with him, that was some time ago and food is more expensive now.
11
- 12 69. He accepted that the wife has more day-to-day expenses than he does but says that he does not think
13 that there is a significant difference. He said that he also contributes to food and expenses for the
14 children when they are with the wife.
15
- 16 70. As to his spending on gasoline of \$300.00 per month, he agreed that he lives fairly close to his place of
17 work but said that this amount is for three vehicles because his daughter H also uses a vehicle which
18 her boyfriend drives.
19
- 20 71. His evidence was that the majority of the cable/internet bill of \$365.85 is for the tenants and he did not
21 agree that there are other cable packages which could be purchased at a lesser cost. The phone bill of
22 \$300.00 per month is a package for himself, his wife and H.
23
- 24 72. It was suggested to him that a full-time helper is not an absolute necessity given the ages of the children
25 and that a part time helper would be sufficient. His response was that he does not have the ability to
26 leave work in order to transport the children from school or events. He said that if the children stay
27 after school it would be \$10.00 per hour and he would have to arrange with people to pick them up. It
28 was suggested that he could make arrangements for R, his friends or the wife to pick them up. In
29 response he referred to past communication issues with the wife.
30
- 31 73. He denied the suggestion that he was embellishing his expenses slightly and also denied having a
32 tendency to inflate some of the figures which he had provided.
33

1 74. In response to an inquiry as to the difficulty of verifying some of his spending with documents, he said
2 that he uses cash on occasion because he receives cash from his tenants.

3
4 75. He was asked about a payment from his accounts in September 2021 of \$500.00. He said that this was
5 a payment to the Department of Commerce and Investment for the establishment of a mobile business
6 that he intended to commence but which has not yet come to fruition. In response to the question how
7 he could be investing in a new business when he says that he cannot afford to pay school fees, he said
8 that this was an attempt by him to identify other options in order to be able to provide for the children.

9
10 76. He acknowledged that the school fees are presently in arrears in the amount of some \$6,000.00. He has
11 made no payments towards this since the start of the school year.

12
13 77. He said that over the two summer months he had obtained a waiver from his Bank in relation to the
14 payment of his mortgage. The waiver was granted because his property had received some damage
15 during the recent storm and needed repairs. Some shingles had come off the roof and some trees had
16 been uprooted. He accepted that he had not provided evidence of this in the disclosure which he filed
17 and that despite the significant mortgage savings, he still had not paid any school fees. He said that he
18 could have contributed to the children's school fees but that this would have been at the expense of
19 other things.

20
21 78. He said that at his age, his mortgage is already up to age 70, the equity in the house is less than
22 \$100,000.00 and that "he would think that it is fairly obvious that he would not be able to access
23 personal loans because of the level of his expenses".



24
25 **INCOME AND EXPENSES OF THE HUSBAND- 2019**

26
27 79. The evidence of the husband¹⁰ is that shortly before the FACO his income was \$10,010.49 net after
28 pension deductions. His expenses amounted to \$12,305.38. The deficit of \$2,094.89 (including school
29 fees) was initially met by the bonus payment which he received and thereafter by pension withdrawals.
30 The living arrangements at the time were two adults, being the husband and a domestic helper and the
31 four children when they reside with him. His expenses were therefore said to include utilities and food
32 for six people.

¹⁰ Affidavit of the husband dated 7th June 2019



1 **2019 INCOME**

2

3

4

	Description	Income \$
1	Net salary after pension deduction	10,010.49
2	Payment from sister being contribution towards her use of domestic helper	200.00
3	Bonus payment (CI \$19,680/12)	1,640.00
	Total	11,850.49

5 **2019 EXPENSES**

6

	Description	Expenses \$
1	Estimated payment for medical co-pay	200.00
2	Domestic Helper – salary plus health	930.00
3	Rent	3,000.00
4	Electricity	400.00
5	Water	150.00
6	TV and internet	225.00
7	Cellphone	225.00
8	Life Insurance	527.48
9	Medical Insurance	436.00
10	Car Insurance	50.00
11	Car Maintenance	200.00
12	Gas	250.00
13	School fees – 1 st child -T	933.20
14	School fees – 2 nd child – H	933.20
15	School fees - L	745.50
16	Children’s Activities and Lunches	600.00
17	Children’s Clothing	200.00
18	Food for self, helper and 4 children	1,600.00
19	Personal Clothing	100.00
20	Personal Expenditure	600.00
	TOTAL	\$ 12,305.38
	Monthly deficit of \$2,094.90	

7

8

9 80. Based on the figures he provided in 2019, he paid and was able to pay \$2,611.90 in school fees while

10 earning a lower level of income and with more people living in his household.

11



1 **THE WIFE'S INCOME AND EXPENSES**

- 2
- 3 81. The wife has obtained employment since the FACO was made. She earns a gross salary of \$5,586.06
- 4 per month which after pension deductions is \$5,111.90 per month.
- 5
- 6 82. In February 2020 the wife used pension funds to complete mortgage loan payments on the one-bedroom
- 7 apartment referred to above. The Pensions Department has caused a restriction to be entered on the
- 8 Land Register for the property under s.133 of the *Registered Land Act* (2004 Revision).
- 9
- 10 83. The wife was initially living in a three-bedroom rental property which she has now been able to
- 11 purchase from her landlady at a discounted price. The discounted price was offered on the basis of the
- 12 improvements which she had made to the property while a tenant. The purchase was completed in
- 13 September 2021. She gave evidence that the reason for the purchase was to obtain a home in which the
- 14 family could live. The one-bedroom apartment which is too small for the family was used as collateral
- 15 for the purchase of the three-bedroom property. An outstanding car loan was also consolidated with the
- 16 mortgage on this property.
- 17
- 18 84. The wife receives rental income from the one-bedroom property of \$1,550.00 per month and child
- 19 maintenance of \$840.00 per month together with payments for school lunches. She says that the amount
- 20 of child maintenance which she receives is reflective of the fact that the children spend more time with
- 21 her than with the husband. Her total income is set out below:
- 22

23 **THE INCOME OF THE WIFE**

24

		CI \$	CI \$
25	1 Salary	5,586.06	
26	Less Pension	335.20	
27	Medical	139.00	
28	Net Salary		5,111.86
29	2 Rental Income (1 bedroom)		1,550.00
30	3 Children Maintenance		840.00
31	4 School Lunch (10 months)		160.00
32	Total \$		7,661.86

1 85. The wife's evidence is that she has tried to structure and reduce her expenses as much as is possible in
2 order to live within her means. She says that she does not have a full-time helper as she came to the
3 realisation that this is not affordable on her budget. The children are older and she encourages them to
4 do their own chores.

5
6 86. She also states that it would be a great financial strain for her to bear the full expense of the children's
7 private schooling. She could not do so on her own. Whereas the school fees would amount to a
8 substantial portion of her income, it would be only about 15% of the husband's income. She gives her
9 expenses as follows:



10
11 **THE EXPENSES OF THE WIFE**
12
13

	Description	\$	Note
1	Mortgage (3 bedroom)	1,865.00	
2	Strata (3 bedroom)	775.00	
3	Apt Maintenance (3 bedroom)	200.00	
4	Strata (1 bedroom)	354.43	
5	Maintenance (1 bedroom) (AC etc.)	150.00	
6	Food	1,200.00	
7	Electricity	500.00	
8	Water	100.00	
9	Internet/Cable	170.90	
10	Phone house, personal phone, pre-paid phone for children	185.00	
11	Credit Card	250.00	
12	Gasoline	240.00	
13	Car maintenance & licensing	100.00	
14	Car Insurance	79.83	958.99 ann.
15	Afterschool classes for L	220.00	
16	School lunch	220.00	
17	Medical Co-Pay etc. (children and wife)	200.00	
18	Life Insurance	132.67	
19	Clothes, football and track gear etc. for children	200.00	

20	Children Misc (Haircut, Birthday Parties, School trips, etc., projects)	200.00	
21	Children Clubs (Football \$450.00 per child and \$100 track yearly)	50.00	900.00 is to be split 50/50
22	Cleaner	160.00	(Bi weekly for deep cleaning) \$80.00 per cleaning)
	Personal	100.00	
	TOTAL	\$7.653.33	
	Monthly surplus	\$8.53	



1
2
3 87. In her evidence the wife questions the timing of the husband’s application and expresses surprise that
4 if the husband was genuinely experiencing financial difficulty this was not made known earlier than
5 May 2021. She states that one month after the husband remarried in February 2021, in March 2021 he
6 began to “renege on his maintenance support.” This was in reference to his one month arrears of
7 maintenance and unwillingness to pay medical co-pay for podiatrist appointments for L. He also refused
8 to authorize dental treatments needed by C.

9
10 88. She says that it is not true that in the past the husband relied on his bonus payments to pay school fees.
11 She said that these were paid monthly and did not await the end of year. The bonus payments when
12 received were used for vacations and other activities. It is her view that he is seeking to absolve himself
13 of responsibility for paying the school fees despite what he specifically agreed to and ‘pushed for’ when
14 he agreed to the FACO.

15
16 89. The husband highlights the wife’s asset position. He says that she owns two properties and has rental
17 income from one. In his cross-examination he focused on two main areas. Firstly, as to whether the
18 wife had capital which could have been used towards school fees and secondly that presently she is still
19 in a better position than he is with respect to capital assets. He suggested to her that she chose to
20 purchase the three bedroom property and to use the one bedroom apartment as collateral when she could
21 have used the capital in the first apartment to pay school fees.

22
23 90. The wife responded that the one-bedroom apartment was not sufficient space for the three of them. She
24 explained that she had been renting the three-bedroom property at \$1,900.00 per month and that her
25 landlady offered to sell her the property at a price below market value. She was grateful for the



1
2
3 opportunity to make the purchase. It was valued at \$350,000.00 and the agreed sale price was
4 \$250,000.00. As she had no funds, she used the one bedroom apartment and pension funds. There is
5 now a charge on that apartment of \$150,000.00 and the restriction from the Pension Board mentioned
6 above.

7
8 91. The wife accepted that she had spent in total about \$1,500.00 on a recent overseas trip to include
9 \$700.00 on an airline ticket. She said that the purpose of her travel was to visit a friend who is seriously
10 ill with cancer. The children did not travel with her.

11
12 92. She said that she is not able to and cannot further draw down on pension funds in order to pay school
13 fees. The amounts withdrawn on the divorce have already been taken into account. She has to pay back
14 an additional 1% because of the funds which have been previously withdrawn.

15
16 93. She agreed that she does not contribute to the school fees for the children but says that she does pay for
17 extra classes in mathematics for L.

18
19 94. The husband suggested to her that she has two properties “tied up” and that if she was to liquidate her
20 holdings she would have \$400,000.00 and be able to pay for the education of the children at the private
21 school. The wife responded that the children need a home and that this would mean that she would then
22 have to pay rent of about \$2,500.00. Her present mortgage is \$1,865.00 with strata fees of about
23 \$600.00. She said that she would lose the additional income from the one bedroom apartment.

24
25 95. She said that she has endeavoured to structure her expenses to meet her budget and to consider how
26 best to make things work. She is not able to pick up the children after school because of the distance of
27 the school from her place of work. She manages with the help and support of other parents at the school.
28 She said that the children are now 13 and 11 years old and should be taught responsibility.

29
30 96. In answer to the suggestion of the husband that he cannot afford to pay the school fees, the wife said
31 that she believes that if he structured his household expenses properly he would be able to afford it.

32
33 97. In response to a question from the Court as to whether if she is required to make a contribution to the
34 school fees, whether she would be willing and able to do so. She said that she would have to try to

1 structure her finances but some things could not change such as mortgage and insurance payments.
2 Additionally she said that she has been given notice of departure by her tenant who will vacate the
3 premises by 1st November 2021. She will have the expenses of changing and fixing items before she
4 could seek a new tenant.
5

6 THE SUBMISSIONS

7

8 98. In closing submissions, the husband submitted that on the facts he is not in a position to pay the school
9 fees. He says that he is struggling on a personal level in a way that he has never struggled before. He
10 says that at age 57 years, he has a limited time to work, he has no pension, no assets and is in a far
11 worse financial position than the wife who has eight more years to work than he does.
12

13 99. Counsel on behalf of the wife submitted that there is no material change in the husband's circumstances
14 from two years ago when the FACO was made. He is in fact better off than before. On the figures the
15 ability to pay does exist, the husband can afford to pay his mortgage and school fees and would have
16 \$10,000.00 left to meet his responsibilities. The reference to the absence of a bonus which was
17 previously used to cover school fees is said to be a 'red herring'. It is also submitted that it is very
18 difficult to assess the husband's expenses because he refers to cash payments which are unsupported
19 by documentation.
20

21 100. Counsel submitted further that the husband has acknowledged that it is in the best interests of the
22 children for them to remain at the private school and that he has not considered the dramatic impact
23 that the proposed change would have on them. Counsel also submitted that the husband is making a
24 specific issue application for which other than inspectorate reports, it is devoid of any information as
25 to the basis for belief that this is the appropriate school choice for the children.
26

27 101. With respect to a possible contribution from the wife, Counsel said that it is difficult to see what can
28 be afforded on the wife's budget, but that if she was required she would be willing to try to assist with
29 the differential for the 2022 school year.
30
31
32
33





1 **DISCUSSION**

2
3 102. Both parties entered into the FACO in 2019, only two years ago. At that time the husband was insistent
4 that the children should remain at the private school and that he would pay the fees. He was clear that
5 he wished all his children, both younger and older to be educated at the private school. It is evident that
6 the wife relied on and structured her finances around that arrangement. She was entitled to do so. On
7 the husband's part it appears to be the case that despite making that arrangement and knowing full well
8 what the Court order required, he thereafter made a series of commitments as to the purchase of a home
9 at a particular cost with a resulting high-level mortgage and as to various high expenses. It appears that
10 this may have been done without any priority given towards or planning for his responsibility for the
11 private school education of his two younger children. He would have known that the two older children
12 would have completed their studies at the school before the two younger ones and the resulting changes
13 in the discounts offered by the school. This cannot have taken him by surprise.

14
15 103. While I bear this background in mind, it is but one element. I must consider all the relevant statutory
16 factors and in so doing give due consideration to the present circumstances of both parties.

17
18 104. The bank account statements provided indicate that neither party has any significant savings. Both have
19 made withdrawals from their pension funds to cover the down payments on house purchases or other
20 expenses. Further pension withdrawals are said to be unobtainable. Other than their monthly income,
21 there is no indication that either party is likely to have other financial resources in the foreseeable future.

22
23 105. The wife is some eight years younger than the husband and will as he points out, have the ability to
24 work for a longer period. She will thus have more time to contribute towards the payment of a mortgage.
25 However, it is the case that her income level and earning capacity is significantly less than the husband
26 who is employed in an executive role. She does not appear to have the earning capacity to make
27 mortgage contributions at a high level. Even if an additional loan could possibly be obtained by her
28 which is doubtful, it is difficult to see how she would be able to meet any additional loan payments on
29 her present income.

30
31 106. Other than personal motor vehicles, the only major assets owned by both is real property. While the
32 wife has a one-bedroom apartment which is free of mortgage loan it has been used as collateral towards
33 the recent purchase of the three-bedroom apartment in which she resides with the two children. Sale

1 of the properties would generate equity of about \$100,000.00. I cannot see how this would be an
2 optimum solution given that it would deprive the children of a stable home and would also lead to rental
3 payments for a new home which would likely be more than or the same as the mortgage and strata fees
4 which are currently being paid. Additionally, the sale of the one-bedroom apartment would deprive the
5 wife of the small rental income which she presently receives.

6
7 107. The husband has the house which he recently purchased. The equity in it is about \$110,000.00. He has
8 obligations by way of outgoings in respect of this property, mortgage, maintenance and insurance costs
9 which are to some extent fixed and are high. He too must provide a home for his children and for his
10 new family. While he made the choice to purchase a property with a high mortgage cost, I accept that
11 home ownership and equity build is the optimum course. I note also and take into account that at his
12 age, the time which he has to complete payment of his mortgage is not extensive.

13
14 108. The level of income, outgoings and obligations of each party are of particular issue in this case and any
15 changes thereto since the FACO was made. The wife is now employed. This was contemplated by the
16 FACO and the husband accepts that this cannot by itself now be a basis for his non-payment of school
17 fees.

18
19 109. The wife has primary care for the children who are resident with her for most of each month during the
20 school terms. She earns less than one half the amount earned by the husband. The husband pays child
21 maintenance of \$840.00 and school lunch contribution of \$160.00, a total of \$1,000.00 per month. The
22 husband recently agreed to the above mentioned dental treatments and the wife now has an additional
23 \$200.00 per month in medical co-pay. The wife's outgoings for the children amounts to \$1090.00 per
24 month:

- 25 i) After school math classes \$220.00
- 26 ii) School lunches \$220.00
- 27 iii) Medical copay \$200.00 - payable for a year and ½
- 28 iv) Kids club – \$50.00
- 29 v) Clothes – \$200.00
- 30 vi) Misc, hair cuts, projects, school trips, birthday parties – \$200.00



31
32
33 110. This \$1,090.00 per month does not include food for the children and utility costs such as water and
34 electricity.

1
2 111. The total school fees of \$2,213.75 amounts to about 16% of the husband's total income while they
3 would be about one third of the wife's income excluding the child maintenance which she receives. I
4 have reviewed the budget of the wife and accept her evidence that it is structured to reduce expenses as
5 much as is possible. She appears to have accepted that the standard of living enjoyed by the family
6 before the breakdown of the marriage cannot be maintained. For example she has accepted that she can
7 no longer afford a full time helper. There has been some change in her circumstances. Not only was
8 this contemplated by the FACO but it does not appear to be such as to justify a variation of the FACO
9 for her to bear the education costs. She does not have the means and would be unable to bear these costs
10 on her present income.

11
12 112. With respect to the husband, he has urged that there is a significant change to his income position as he
13 no longer receives a bonus. Having reviewed his income and expenditure schedules, it is difficult to
14 see what significant negative change there has been to his overall income position. He now receives a
15 consultancy fee and rental income. He says that the rental income which he receives is less than the
16 amount of the additional housing costs. It is noted that the mortgage and house insurance costs amount
17 to \$5,345.14, a difference of \$2,345.00 above the rental cost of \$3,000.00 which was payable before
18 the purchase of the house. He calculates that when this \$2,345.00 is taken together with internet costs
19 and one-half utility costs for his tenants, the total is \$3,114.56, which is higher than the \$2,850.00 which
20 he receives as rental income.¹¹

21
22 113. However, it is of note that this is a difference of only \$264.00. This means that the increase in his
23 outgoings is not as a result of a significant increase in housing costs. The increased housing costs are
24 mostly offset by the rental income. The tables below show the comparison between his 2019 and 2021
25 incomes.

26
27 **INCOME 2019**

	Description	Income \$
1	Net salary after pension deduction	10,010.49
2	Payment from sister being contribution	200.00



¹¹ Paragraph 4 of his Affidavit dated 28th October 2021

	towards her use of domestic helper	
3	Bonus payment (CI \$19,680/12)	1,640.00
	Total	11,850.49



INCOME 2021

		\$
1	Net salary after pension deduction of \$636,59	9,973.16
2	Consultancy	615.00
3	Rental Income	2,850.00
	Total	13,438.16

114. The change in his circumstances is not as he says. a reduced income, it is in the level of his expenses.

EXPENSES 2019

Total (including school fees for 3 children)	\$12,305.38
--	-------------

EXPENSES 2021

Total excluding school fees for all children	\$14,430.53
--	-------------

115. It is my view that the percentage of the husbands' income which is to be paid towards the school fees in this case, is reasonable and fair and that his expenses can be structured in such a way as to make them affordable.

116. The husband in his Affidavit of 28th October 2021 and in submissions expressed concern that the income of his wife R is to be taken into account with respect to the maintenance of the two children. In the case of *Gillooly v. Gillooly*,¹² the Court following the dicta of Wood J. in *Macey v. Macey*¹³ held

¹² [1990-199] CILR Note 14b

¹³ [1982] 3 F. L. R. 7

1 that the husband's cohabitee's financial contribution to the joint living expenses was also to be
2 considered since this allowed the husband to make a greater contribution to the expenses of the wife
3 and children.

4
5 117. In the case of *SD v. AL*¹⁴, Williams J, stated:

6
7 *"58. Although it is not for F's wife to pay for child maintenance for N and T, her income is relevant.*
8 *... Having regard to the Court's duty under s. 19 of the MCL to have regard to F's responsibilities,*
9 *needs, financial and other resources, F was asked to voluntarily provide details of his wife's income*
10 *and expenditure. ..."*

11
12 118. I consider the contribution of R to be a relevant factor in this case. This is another resource which the
13 husband has. When the contribution of \$1,400.00 towards the household expenses is taken into account,
14 the husbands' expenses are reduced to \$13,030.53 per month. He actually has a small surplus income
15 over expenses of \$407.63 before payment of school fees. The total school fees are \$2,213.75. He would
16 need to find an additional \$1,806.12.

17
18 119. I have taken a non-detailed look at the husband's spending patterns. I noted the evidence of the wife in
19 the course of the hearing that perhaps reducing his spending was one option he could consider.

20
21 120. I reviewed the period in his bank and credit card statements shortly before and after the 11th May 2021,
22 when he indicated that he could no longer afford to pay the school fees. The following was seen:

23

Date	Payment Bank	Description - Bills	\$	Hearing Bundle Page ¹⁵
15 th April 2021		Bar and Lounge	165.63	147
15 th April 2021		Bar and Lounge	119.38	147
28 th April 2021		Bar and Lounge	121.25	147
10 th May 2021		Bar and Lounge	129.00	114
10 th May 2021		Bar and Lounge	32.50	114
10 th May 2021		Four bills	109.98	114
21 st May 2021		Bar and Lounge	98.00	119
23 rd May 2021		Bar and Lounge	90.88	149



¹⁴ Supra

¹⁵ Affidavit of husband dated 14th October 2021

24 th May 2021	Bar and Lounge	53.50	119
7 th June 2021	Bar and Lounge	62.00	116
	Total	\$982.12	

1
2
3 121. This spending appears to be separate from the \$2,000.00 per month budgeted for food. In respect of a
4 request for grocery receipts or bank statement evidence in support of that amount the husband
5 responded, *“As cash is paid by the tenants, \$1,000.00 and \$600.00, some of this cash is used for*
6 *groceries and other items. I do not keep receipts.”*

7
8 122. While it is understandable that the husband would wish to maintain the standard and quality of life to
9 which he is accustomed and he cannot be faulted for this, it does appear that there is room in his
10 spending budget to achieve modest savings for the remaining three to four years that the children will
11 take to complete high school at their present location. Reducing some monthly non-essential bills by
12 one half or even one third may assist him in his endeavor to meet his responsibilities.

13
14 123. I have also given consideration to the nature of some of the husband’s expenses as set out in his budget.
15 In my view a broad assessment of his non-fixed expenses shows that some are elective and can be
16 reduced if there is the will to do so. This is not to be taken as meaning that any of these individual items
17 are irrelevant or unimportant. If he chooses, he could utilise the services of a part time rather than full
18 time helper. I do not think that it would be unfair or unreasonable for him to be asked to do so. This
19 would be similar to what the wife has done. His primary objection to this was transport of the children
20 from school in the afternoons. The wife has made arrangements with other parents to assist because of
21 the distance of the school from her place of work. I cannot see that it would be difficult for the husband
22 to make the appropriate arrangements including if necessary, asking the wife to make them. The food
23 budget may possibly be reduced in light of the number of persons in the home and the funds spent on
24 meals outside the home some of which are listed above. Modest savings can also be achieved by
25 changing various home packages.



1 124. While the structure of his budget is a matter for him, one way in which possible savings can be achieved
2 is set out below:

3
4 **POSSIBLE SAVINGS ON EXPENSES**

Description	Present \$	Saving \$
H-Monthly	300.00	-100.00
Domestic Helper / Transport	925.00	- 765.00
Domestic Helper / Medical	160.00	-160.00
Phone	300.00	-100.00
Internet and Cable TV including provision for tenants	305.85	-100.00
Food	2,000.00	-500.00
Gasoline	300.00	-100.00
Total available to meet school fees \$		1825.00



5
6
7 125. This would provide the ability to meet the school fees with funds remaining for small savings.

8
9 126. From his evidence, the view I had of the husband as to his willingness to make efforts to pay the school
10 fees was not entirely positive. This is in part because the position which he put forward appeared to me
11 to be inexplicable and somewhat self-serving. Perhaps recognizing that the income level of the wife
12 does not provide her with the means to pay the school fees, he suggested in summary that the wife's
13 purchase of the three bedroom apartment using all her capital in the one bedroom apartment was
14 'convenient' and a poor choice. He said that this could have been used to pay the school fees. He also
15 suggested that if the wife liquidates all her assets now i.e. sell both apartments, she would likely have
16 some \$400,000.00 and could put this towards the school fees. As to where the children would live for
17 the majority of the month, the rent which would need to be paid thereafter and whether there would or
18 could be the ability to purchase yet another home sometime in the future appeared to be of little concern
19 to him.
20

1 127. Despite his position in respect of the wife, he maintained throughout these proceedings, that if he has
2 to pay the school fees, he will lose his home and be “homeless”. He was adamant that this would be
3 the effect despite various alternative scenarios for reducing expenses which were put to him in cross-
4 examination. He was forceful in his responses that this must be avoided at all costs. The inconsistency
5 in his approach to his home as distinct from the home of the wife is questionable. The unfortunate
6 impression with which the Court was left is that he is now singularly unwilling to meet or make any
7 effort to meet any part of the obligation which he undertook to meet in 2019 at the time he agreed to
8 the FACO.

9
10 128. He was cross-examined about the fact that in September 2021 he paid \$500.00 to the Department of
11 Commerce and Investment. This he says was towards the possible establishment of a new business.
12 While he justifies this as seeking another source of income, it does illustrate that despite the heavy
13 expenses which he says he has, he was able to find \$500.00 when he had the will to do so. It also
14 suggests that plans can be made for alternative sources of income. In August and September 2021 his
15 mortgage was waived, due to the need for house repairs, a saving of \$9,396.00. He made no payments
16 towards school fees, not even in a minimal amount.

17
18 129. The above analysis shows that with reasonable savings in respect of outgoings, the school fees are
19 affordable in tandem with his other fixed obligations. This is not a case where he is likely to be homeless
20 if he has to pay the fees.

21
22 130. At various points, the husband said that the income of R is variable as she works in the service sector.
23 I have also considered the position if the husband received no contribution towards the household
24 expenses from R. He committed to the payment a short two years ago. Nothing that has happened since
25 on the expense side was outside his own control. On the income side he is better off than he was. In
26 my view it would be for him to reduce his level of expenses such as to be able to use the equity in his
27 home to qualify for a short-term loan if he receives no contribution towards household expenses from
28 R.

29
30 **CONCLUSIONS**



31
32 131. I have considered all the evidence before the Court and all the submissions made. I conclude that on
33 the evidence it is in the best interests of the children of the marriage, L and C that they remain at the

1 private school in which they are presently enrolled. I have reviewed the relevant factors to the extent
2 necessary given the nature of this case. I conclude that the children remaining at the private school is
3 feasible in light of the cost, the income and expenses of the husband and the proportion of his income
4 which would be required to make payment of the fees. There is no significant change in the husband's
5 circumstances such as to justify a variation of the FACO which requires that he pays the said fees. I
6 have reviewed the income and expenses of the wife. There is no significant change in her circumstances
7 which was not contemplated by the FACO. The fees are not affordable on her income and there do not
8 appear to be any expense items in her budget which can be reduced such as to allow her to make a
9 contribution. To require her to sell the apartments in order to meet the payments would deprive the
10 children of a stable home and deprive her of rental income. This would not be fair or reasonable in the
11 circumstances of this case.

12
13 132. The application of the husband to vary the FACO so that he pays no school fees for the private school
14 attendance of the children is refused. The application of the husband for the children to be moved from
15 the private school to a government school is refused.

16
17 133. The husband is to commence the monthly payment of the said school fees on or before the 20th
18 December 2021. These payments are to continue until the children complete their education at the said
19 school. On the said date, 20th December 2021, he is also to commence partial payments of \$500.00 per
20 month towards reducing the arrears of school fees incurred since 30th August 2021. These partial
21 payment are to continue until the arrears are paid off in full.

22
23 134. The wife has indicated that there may be a possible application for costs. Should she wish to make such
24 an application, this may be made within 14 days of the date of this judgment.

25
26 **Dated this 13th day of December 2021**

27 

28 **Honourable Justice Cheryll Richards Q.C.**
29 **Judge of the Grand Court**