

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.

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

**Cause No.: FAM 86 of 2019
(LACV 24/2019)**

BETWEEN

SC

Petitioner

AND

DH

Respondent

CHAMBERS VIA ZOOM

Appearances: **Ms. Sheridan Brooks-Hurst QC of Brooks and Brooks for
the Petitioner
Mr. David McGrath of McGrath Tonner for the Respondent**

Before: **Hon. Mme. Justice Margaret Ramsay-Hale**

Heard: **28 and 30 April 2020**

**Ex Tempore Judgment
Delivered:** **30 April 2020**

**Written Transcript of Ex Tempore
Judgment delivered to parties:** **16 June 2020**

**Anonymised and perfected
Judgment released for publication:** **5 October 2020**



HEADNOTE

Family Law - Maintenance pending suit - principles to be applied - income-based order

TRANSCRIPT OF EX TEMPORE JUDGMENT

1. This is the decision on the husband's application to vary a Consent Order entered on 3 July 2019 ("the Order") granting maintenance pending suit to the wife and the three children of the marriage, so there be no maintenance payable by him to the wife and that he be released from the several undertakings set out in the Order. Also before the Court is the wife's cross-application for arrears of maintenance.

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2. The relevant Order is found at Tab 7 of the Bundle.
3. The brief facts are that the husband, who has been described as a senior insolvency attorney whose practice was adversely affected by a long period of economic boom, lost his employment in 2019.
4. The husband entered into the Consent Order while he still had the proceeds of his employment, hopeful that he would be able to find a new job. He was not, and he now resides in Canada where he can benefit from that country's social security system which, among other things, permits two of the family's three children to attend school free of cost.
5. He continues to seek work, but his current financial position is such that he has no means from which to satisfy the Order.
6. The wife remains in the Cayman Islands. She lives in the family home with the youngest child of the marriage. She asks the Court to continue the Order in respect of her own maintenance and that of the youngest child in addition to the various undertakings given in respect of the outgoings, so far as those undertakings continue to be relevant.
7. Mr. McGrath contends that, as a matter of principle, an Order for interim maintenance cannot be made, or if made, cannot be continued or enforced, if the paying party has not the means to satisfy the order.
8. Mr. McGrath relies on the dicta of Williams J of the Cayman Islands Grand Court in *DF v JJ*, Coleridge J in *Moore v Moore* and Moylan J in *BD v FD* in support of his submissions. These cases establish that an interim order may be made for the purpose of addressing the immediate needs of a party by making income-based orders, until final orders are made dealing with family assets and finance on divorce.
9. The Orders are "income-based". A more recent decision of Coleridge J in *S v M* [2012] All ER (2) 175 illustrates the point. In that case, an award was made against a husband who had no personal income but received financial support from his father. The husband's appeal against the award of maintenance pending suit was allowed on the grounds that the court had failed to have proper regard to the husband's resources, the parties' needs and the husband's own ability to pay, in the circumstances where the father made it clear he would not continue such financial support. The court held that the order should not have been made.



10. Ms. Brooks submitted that in the absence of any disclosure of the husband's historical or current financial records, the Court should be slow to revoke the Order for maintenance pending suit for the wife and child who remain in the Cayman Islands, based simply on the husband's say so.

11. I recognise the concern raised but in response I make two observations:

(1) The husband is an officer of this court, having been admitted to Cayman Bar and is a senior attorney who is aware of his responsibilities to be full and frank in his dealings with the Court. Unless and until the contrary is proved, I accept him as a witness of truth and will not seek to go behind the matters to which he has deposed on oath in his affidavit and make adverse findings against him in respect of his putative income.

(2) That maintenance pending suit orders are retrospectively variable so if it transpires at the final hearing that the amount ordered was inadequate, any shortfall will form part of the final lump sum order when the family capital assets are realised. This should reassure the wife that, if indeed her husband is misleading the Court, their rights in the funds realised when the capital assets are sold will be adjusted accordingly.

12. As it stands today, the wife has the benefit of being the only spouse in employment. While she may not be able to afford the standard of living she had become accustomed to in the marriage, she has an income whereas he does not.

13. With respect to the arrears, in the absence of an available pool of funds, like a pension fund for example, the Court will not make an order for payment of the arrears. I express my gratitude to Mr. McGrath for researching the provisions of the *National Pensions (Amendment) Law 2020*. It appears from that research that those funds are not presently available to the husband and that no payment can be made therefrom for the benefit of the wife. I therefore adjourn the application for arrears, the quantum of which is in any event disputed, to the final ancillaries hearing.

14. I say again for the wife's benefit, that those arrears, if any, can be dealt with at the final hearing and can be recovered from the sale of the matrimonial home and other realizable assets.

15. Moving to consider the wife's application for a nominal order to be made to preserve the children's rights to maintenance after they've attained the age of 16 years, the position is that the *Matrimonial Causes Law* provides that, *at the time of pronouncing the decree*, the court shall make provision for the children of the marriage. "Child" is defined as a child under the age of 16 years. If a final order is made before the child is the age of 16 years, then the order may be extended, but not otherwise.

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16. Mr. McGrath submits, and I accept, that for “M” (born 6 May 2003) there is no power in this Court to make a maintenance order for him under section 20 or under section 21. In respect of “F”, that power is in the Court making final orders on a decree of dissolution of marriage under section 21.

ORDER:

1. The Consent Order for maintenance pending suit made by Williams J be revoked;
2. Directions given for the hearing of final ancillaries;
3. Formal order to be filed, including directions for the hearing of any application for custody, care and control of the children of the marriage, if agreement cannot be reached by the parties.



THE HON. JUSTICE RAMSAY-HALE
JUDGE OF THE GRAND COURT

