IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO: FAM 145 OF 2006

BETWEEN:

SD

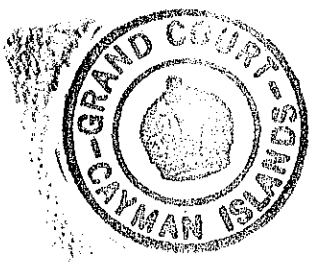
Petitioner

AND

AL

Respondent

Appearances:	Mr. Paul Keeble and Ms. Sulekha Tummala of Hampson and Company for the Petitioner Mrs. Karin Thompson for the Respondent
Before:	Hon. Mr. Justice Richard Williams
Heard:	2 November 2015, 1 February 2016, 26 July 2016 & 6 February 2017
Petitioner's Written Submissions:	24 March 2017
Respondent's Written Submission:	31 March 2017
Circulation of draft Judgment:	5 September 2017
Date of Judgment:	12 September 2017



HEADNOTE

Financial Provision - ancillary relief – variation of periodical payments order - Morris v Morris [2016] EWCA Civ 812, the proportionate exercise that the Court should carry out when determining a variation application consideration of deferred application to make education costs and health costs order - court has the power to order periodical payments for school fees – backdating of education costs order to date of application – duration of periodical payments orders and jurisdiction to vary periodical payments order if child is aged 16 having regard to s.22 Matrimonial Causes Law (2005 Revision) - Practice Circular No.1/2014 Requirement for Strict Compliance with Court Orders Made in the Family Division of the Grand Court - Practice Direction No. 11/2014 Court Bundles in Family Proceedings in the Family Division of the Grand Court – RE L (Procedure: Bundles: Translation) [2015] EWFC 15, need to ensure that contents in bundle are only included if relevant and are to be referred to during the hearing - Duty to conduct matter and incur legal costs in a manner which is proportionate to the issues and sums of money involved.

JUDGMENT

Application

1. I have before me the Petitioner mother's, Summons dated 8 December 2014 in which she seeks a variation of the child maintenance orders in the ancillary relief order made by Levers J. on 20 April 2007. In the Summons an increase from the CI$125 per child per week (CI$537.50/month) maintenance[1] to CI$750 per child per month (increase of CI$212.50 per child per month) to be paid by AL, the Respondent, is sought. The mother also seeks consideration of the deferred education and health contribution provision in the ancillary relief order, as well as an order for 50% contribution from the father towards extra-curricular expenses.

2. For convenience sake, intending no discourtesy, I will refer to the mother as "M" and to the father as "F".

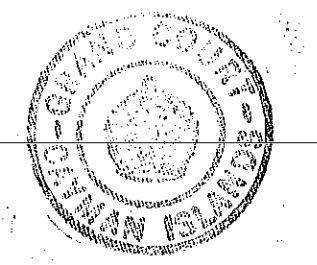
3. Although the Levers J. Order was a comprehensive ancillary relief order, orders relating to F's contribution to their two children's educational, extra-curricular activities and health insurance expenses were deferred to a review to take place within six months. The deferment was made as the father had recently commenced commission based employment and it was felt that he should be afforded the opportunity to build a client base. Despite a number of oral and written requests over the years for F to contribute to these expenses, this first application for the Court to consider the same was not issued until over seven and a half years after Levers J.'s Order. Accordingly in the Summons now before me M also seeks orders that:

[1] Paragraph 1 of the Order of Levers J. wherein such payments to be made until aged 18 or cease full-time education whichever may be the later.

(i) The parties are to share equally the cost of the children's school fees, school uniforms, school books and materials, school trips and extracurricular activities until the respective child reaches the age of 18 or ceases full-time education (up to age 21), whichever is the later: and

(ii) the parties are to share equally the cost of any medical, dental and optical expenses for the children which are not covered by the health insurance, including any insurance co-pay, until the respective child reaches the age of 18 or completes his full-time education (up to age 21), whichever is the later. An order is also sought for the father to be responsible for ensuring that the children continue to be covered on a suitable health insurance policy.

Apart from who is to be responsible for health insurance premiums, the two above clauses are standard clauses which appear in the vast majority of ancillary relief orders where both parents are in employment. The Court may be called upon to determine whether an expense under one of these heads is reasonable, for example whether it is in the best interests of a child to attend private or state school and whether that is feasible in light of the cost and the parties' income and outgoings. Both parties agree that it is in T's best interests to remain at his school, as during cross-examination F stated *"(the school) is a good move for him and he is thriving"* and M says that he has "*excelled*" there academically and on the sports field.



4. M lists (i) the school fees for the academic years due since September 2014; (ii) the fees which she has paid since she filed her Summons on 8 December 2014 to March 2017; and (iii) the fees to be incurred for the 2017/2018 academic year as being:

- **2014/2015**: CI$20,840 ($10,420/child/annum - average $868.33/month over one year) – M says she paid the seven months' fees from December 2014 which total CI$14,588.
- **2015/2016**: CI$21,680 ($10,840/child/annum – average $903.33/month over one year) – M says she paid the CI$21,680 fees.
- **2016/2017**: CI$11,060 (average $921.66/month over one year) – For N-M says that, as of March 2017, she had paid CI$7,938.[2]
- **2016/2017**: CI$21,030[3] (average $1,752.5/month over one year) - For T-M says that she paid the CI$21,030 fees.
- **2017/2018** CI$11,340 (average $945.00/month over one year) - For N.
- **2017/2018** CI$32,123[4] (average $2676.91/month over one year)– For T.[5]

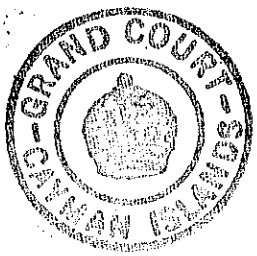
M contends that she has since December 2014 spent CI$68,918.10 meeting the school fees for N and T, without any contribution being made by F.

5. M therefore seeks CI$9,000/annum/child (total CI$18,000) for child maintenance by means of periodical payments, an upward variation of CI$2,550/annum/child (total

[2] As of the date of the Closing Written Submissions – Appears that M paid the full fees which would have included the Summer term and taken the total paid to CI$11,060.
[3] For boarding school in Canada where fees paid after financial aid and bursary deducted were Cdn$34,250/annum.
[4] For boarding school in Canada where fees to be paid after bursary deducted are Cdn$52,250.
[5] As of the date of the Closing Written Submissions for M, she had paid Cdn$6,000 down payment for the 2017/2018 academic year – Not clear if any further fees been paid for the 2017/2018 year yet.

CI$5,100). In addition to the $18,000 periodical payments, for the upcoming academic year M seeks $5,670 (50% of N's school fees) and CI$16,061.5 (50% of T's school fees) which gives an annual total of CI$39,731.50. This is a significant increase of CI$26,731.50 per annum above the CI$13,000 presently due under the 2007 order made by Levers J.

6. M contends that any variation ordered in her favour or additional medical/educational orders made in her favour should run from the date of the Summons filed on 8 December 2014, during which time she claims that school fees totalling $68,918.10 have been met by her. M therefore seeks an additional figure of CI$34,459.05, being 50% of the fees incurred from December 2014 to March 2017 plus 50% of any additional fees paid by her from March 2017 to date.



7. In relation to the health expenses, F indicated that since January 2012, due to M being unemployed at the time, T and N were placed on his wife's employment health insurance policy with BritCay, increasing the cost of the premium by $700-$1,000 per month and deducted directly from her salary. F wrongly gave the impression that an ongoing increased premium was ongoing due to N and T's addition. However, it became clear that the family rate coverage was required (whether or not T or N were covered on the policy) post the birth of F's son with his wife in April 2012.

8. I also have F's Summons dated 7 April 2017 before me. Although the child arrangements may have since changed due to T commencing studies at his boarding school overseas,

Paragraph 1.1 of the Summons has already been dealt with by means of a shared residence order made by consent on 30 July 2017. It is unclear to the Court why, when the proceedings clearly involve the variation of a child maintenance order contained in the ancillary relief order and the consideration of the deferred education and health payments parts of the same order, F made an application, in very general and unspecific terms, at Paragraph 1.2 of his Summons for "*the appropriate orders*" under Schedule 1 of the Children Law (2012 Revision). Throughout the proceedings F's position has been that he seeks a discharge of the monthly child maintenance payments and not the making of any separate replacement orders pursuant to Schedule 1. In her Statement of Preliminary Issue dated 26 October 2017, F's attorney makes no mention of Schedule 1. In her closing written submissions F's attorney states that he "*sought inter alia to bring the terms of the said Order within and as such, subject to the provisions of the Children Law (2012 Revision) ....*" I see no good reason or benefit why these aged proceedings should not remain governed by the Matrimonial Causes Law (2005 Revision) ("the MCL") rather than the Children Law and accordingly, I approach this matter on the basis that no Children Law matters remain before the Court for determination.

Background

9. The parties were married on 19 June 2003, separating in around 2005. There are two children of the marriage, T born on 14/September/2000 and almost aged 17 and N born on 17 July 2003, so aged 14.

10. T has been attending a boarding school in Canada since November 2016, resulting in a considerable increase in the education costs for T to CI$21,030.78[6]. F says he was not consulted about these changes to T's education with the associated increased costs and that he only found out from T that he was going there about two weeks before the start of his first term. Now that T is at boarding school he only resides with M and F during his vacations, with whom he spends almost equal time. N attends a private school in Grand Cayman. M conceded during cross-examination that, to her credit, she approached contact in a flexible manner with N spending additional time with F to that set out in the Court Order, especially if N requests the same. M said that despite the flexibility, it was still not a 50% split between the parents. F states that N spends almost 50% of his active time (when N is awake) with him, being made up of a greater number of weekends at F's home[7], with some week day contact[8] as well as half of all school vacations. It is agreed that N also stays with F when M is out of the jurisdiction on business trips, sports trips or for other reasons.

11. The Divorce Petition was filed on 30 August 2006 and the Certificate of Dissolution was granted on 20 April 2007. On that date Levers J. made the above-mentioned child maintenance orders, capital orders and a joint custody order, granting care and control of the children to M and making a defined access order for the children to see F. F contends that, taking into account the disparity in their income and to ensure that M and the children had the security of a home of their own, he relinquished his share in the

[6] A figure reached taking into account the Cdn$25,000 bursary and also financial aid awarded by the school.
[7] Friday after school until Monday start of school.
[8] Wednesday and Thursday after school until 9:00 p.m.

matrimonial home which he said had an unfurnished value of CI$590,000[9] and his interest in one of the two parcels of land each valued at around CI$90,000. I am satisfied that F agreed to this transfer and gave up his interest in the home to ensure that his children had suitable accommodation. M stated that, due to financial difficulties resulting from her unemployment, she sold that property in May 2012 at undervalue for CI$630,000 and that it realised equity of around CI$100,000 with a reduced commission as F acted as the Realtor. The Seller's Completion Statement dated 23 May 2012 indicates that the net proceed of sale were CI$158,663.22 with the vendor being responsible for payment of any real estate commission from those proceeds. F stated that there was a net equity post sale of about CI$150,000. M also retained an apartment which she had purchased prior to the marriage.

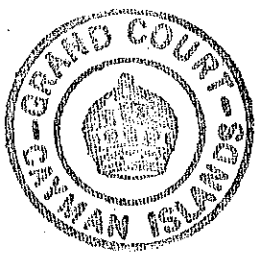
12. I note that in or around September 2012, despite her declaring that her financial situation had been so dire earlier in the year that she had to seek financial assistance from a Social Welfare Programme, M felt able to purchase a new 3 Series BMW motor vehicle for CI$50,000 after trading in one of her old motor vehicles for $20,000 and after taking a $33,000 five-year loan with monthly repayments of CI$750 per month. This was after she started work with her current employer in May 2012. M accepted during cross-examination that the purchase was an *"indulgence"* but added that as she had *"been working my entire life and teens, I (do) not see why I should make a sacrifice and not have something for myself."* Although it is eminently clear that since 2007, unlike F, to her considerable credit M has made massive sacrifices to ensure that N and T received the best available education, I share her view that the vehicle purchase was an

[9] The furniture in that property being valued by F at around CI$20,000.

indulgence. I also note that F told the Court during cross-examination that his wife also bought a new BMW, and that she paid $30,000 for it in 2014.

13. F retained one of the two aforementioned parcels of raw land which he said he sold for around CI$80,000 in 2008 to purchase a $43,000 fishing boat which he used to supplement his income by running "*a few*" charter-fishing trips until selling it to enable him to construct his new house. He used the balance of the proceeds of sale from the land to buy a different piece of land for $128,000 upon which he built the new house for CI$558,800

14. At the time of the consent order approved by Levers J., M had found employment as an attorney with a salary of $12,104 (not including bonuses and commissions) per month. Shortly before the hearing F, recognising that there had been a downturn in the construction industry and that he could not meet his and children's needs from the commission based income he received from working as a Realtor, took up employment as a Sales Associate for a retail company with a base salary of $2,000 per month plus commission payments of at least $300 per month.



15. F remarried on 14 May 2011 and has two children with his wife. One child was born to them on 29 April 2012 and the second was born on 7 November 2015. F and his wife acquired a piece of land with a preferential loan from his wife's employer and in 2013 they constructed their home there. T and N frequently stay at that property with F and his

wife, with whom they appear to have a good relationship. In or around 2011 F and his wife also purchased some land in Cayman Brac as an investment.

16. On 7 January 2014, following the filing of M's Summons and affidavit in support on 8 December 2014 by her first attorneys, M's current attorney came on the record. After F's current attorney came on record on 23 January 2015, he filed a Summons on 15 April 2015 in which he sought a shared residence order and financial provision orders under Schedule 1 of the Children Law. In F's Summons he did not specify what variation in maintenance he sought, simply stating it be for "*appropriate orders.*" In his affidavit in support sworn on 17 April 2015 F submitted that the children were spending equal time with each parent and he simply asked the Court to "*make such orders and grant such relief as shall be deemed to be appropriate.*"

17. At the first appointment mention hearing, held on 21 April 2015, the Court gave fairly standard directions about the filing of affidavit evidence and any requests for additional information. Both of the parties were represented by Counsel. At that hearing the Court endeavoured to clarify what the issues were and it was evident that this should have been a straightforward matter and not proceedings one would expect to be involve protracted and adversarial litigation. My notes from that hearing record as follows:

> *"In relation to the review of the ancillary relief order partly brought about by the deferral paragraph 3... It does appear that the parties are in agreement that the standard order now used be adopted. In other words that the parties will share equally the educational expenses (which includes school fees and reasonable extracurricular activities) and that the parties will share any health expenses which are not covered by*

insurance (I note that the children are on the father's health insurance policy at this time).

Therefore appears that the only issue that may require determination is the level of child maintenance, presuming that the above arrangements are put in place. My calculations, the parties are approximately $420 apart per month. The previous figure was set back in 2007 without really having to review, it is evident to me that there would be a change of circumstances because of the children's ages and requirements that come with that, and both parties agree that the order that was made back in 2007 was one at a transitional stage in the husband's career.

I'm hopeful that the parties when they are (provided) with each other's figures (will) be in a position to negotiate that. If a comprehensive final order is reached, I've indicated to the parties, although I'm not seized of it to the extent that I must hear the contested hearing, that I would be more than happy to review that order and approve it if the terms are similar to those outlined today. This of course will keep the cost down for both parents. Any order would need to be signed by both the parties.

I would add that to avoid additional costs, I feel that any order for maintenance and education and health expenses should be made until relevant child is 18 years of age or ceases full-time education (up to 21) whichever may be the later. Again that is a standard order, and even if I needed to be persuaded that there was a justification for extending beyond 16 in this case, I can clearly see the these are children that one would hope would go on to higher education (and) take (a) similar professional path (as) the parents have."

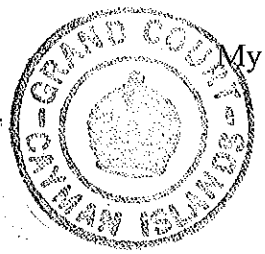
18. F filed his affidavit on 19 May 2015.[10] M filed her Request for Further and Better Particulars on 1 June 2015.[11] Regrettably, despite chasing correspondence seeking

[10] Although directed to be delivered by or on 15 May 2017.

compliance with the Court's directions being sent to F's attorney by M's attorney, F failed to file a Reply to the Request for Further and Better Particulars by the directed date of 12 June 2017 or at all.

19. When the matter came back before the Court on 30 July 2015, the parties agreed to the making of a shared residence order. The parties had an issue after the hearing about the arrangements under the Shared Residence Order. When M's. Counsel submitted a draft order containing defined contact provisions, I refused to approve the same and indicated in writing to the parties on 7 August 2015 that:

> *"I did not define the days (the) children would reside with each parent. I thought the parties had agreed that, the general pattern being the father on some evenings in the week and weekends/holidays split."*



My note from that hearing states:

> *"Flexible arrangements between the parties as to where the children will reside the order, presently children spend time with the father in the evening and at least weekends and holiday split."*

It was evident that the parties could not agree the wording of the Children Law elements of the order. The Court wrote to the parties on 19 August 2015 indicating that The Court had made a shared residence order by consent and the preamble should contain the words:

> *"AND UPON it being agreed that in principle the current arrangements where the children spend time with the father on Wednesday and Thursday evenings during the week, alternative weekends and half the school holidays."*

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[11] Although directed to be filed by or on 29 May 2015, but delay likely caused due to F's affidavit being filed 4 days late.

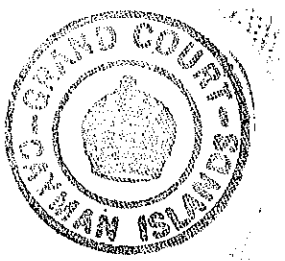
20. I am satisfied that since T has attending boarding school that he is spending roughly equal time with his parents during his vacations. No application has been made pursuant to s.11 of the Children Law (2012 Revision) to extend the Residence Order to aged 18, so the Shared Residence Order will cease for the relevant child when that child reaches the age of 16, which T has already done. There does not need to be a residence order in favour of a party in existence for that party to be able to apply for child maintenance, and having regard to the no order principle at s.3(5) this may often be the prevailing situation in a case.

21. My notes from the 30 July 2015 hearing record that when the parties came into chambers following discussions between them that morning, M's Counsel told the Court that an agreement had been reached about the maintenance issues, namely that the order of Levers J. would remain in place as long as F now paid the 50% of educational expenses and 50% of health expenses not covered by F's health insurance. If this was the case, it is important to note that this was before T started attending his boarding school in Canada and at that time F would have been unaware of that intention and the fact that the cost of T's high school education would as a consequence in the longer term increase massively. In any event, at the hearing F's Counsel disagreed that such an agreement had been reached, stating that F believed that the agreement reached was that he would no longer pay any periodical payments for the children if he was to pay an equal share in the educational and the health expenses not covered by the health insurance policy. As a consequence, the matter needed to be case managed with directions to a final hearing on the first open date after 26 August 2015.

22. On 30 July 2015 I noted the content of Ms. Tummala's[12] Affidavit sworn on or around 24 July 2015 alleging F's failure to comply with my directions relating to disclosure made on 21 April 2015 and I reserved the costs of that hearing. At the hearing on 30 July 2015 I had concerns about the need for proportionality in the disclosure sought and to be given in relation to the issues and the sums involved. My note from that hearing highlighted that concern when it records that prior to giving detailed directions I stated:

> *"...indicate to the parties disclosure must be proportionate to the issues in the case, and that in a case such as this, all the court is seeking to determine is to the parties' household income and outgoings. Therefore the type of disclosure is more limited than in a fully blown ancillary relief case. I also feel it would not be proportionate to have an extended hearing on disclosure today incurring costs for these privately paying parties. Instead I feel it better that I relate to the parties my expectations about disclosure."*

I then added:



> *"Although Mr. Keeble seeks unless orders, I'm not able to do that as I haven't carried out the exercise of determine whether there has been no disclosure and secondly this is one of those cases where the best approach in line with the overriding objective is to warn the parties that if at the hearing the court determines they have failed to disclose information that would clarify an issue in fact requires determination, then inferences may be drawn against the party that has failed to produce the type of information that is listed above."*

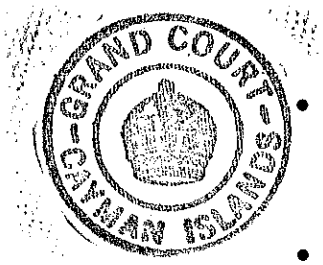
I had hoped that by making my position clear (i) F would recognise his duty to give proportionate full disclosure including required explanations about the disclosure actually

[12] Attorney employed at M's retained firm of attorneys.

given and that (ii) M would recognise that the disclosure sought and costs expended on the such an exercise must be proportionate and that there may be a different approach to issuing disclosure summonses.

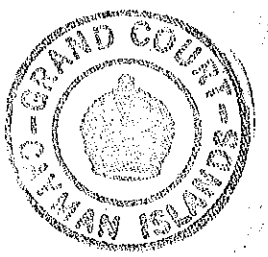
23. As I was not in a position on that day to conduct a disclosure hearing to substantiate the allegations, having made the general remarks about proportionality and disclosure, I relayed to the parties my expectations about disclosure moving forward by making updated orders for the following disclosure I required to be given by 19 August 2015:

- Production of the last 12 months bank and credit card accounts from 1 July 2014;
- Breakdown from employer of last 12 months income with monthly figures from 1 July 2014;
- List of self-employed income since 1 July 2014 rental income statement from all properties since 1 July 2014;
- Mortgage statements from 1 July 2014;
- Copies of loan applications and agreement taken out since 1 July 2014; and breakdown of health insurance policy showing the element of the amount payable for the children.



24. On 20 August 2015 M filed her affidavit sworn on 19 August 2015. Regrettably, F failed to comply with the direction made on 30 July 2015 - the affidavit he filed on 9 September 2015, which had been served on M, did not provide all of the directed disclosure.

25. Despite my observations made to the parties at the earlier hearings, the Summonses before me, which contain straightforward applications relating to narrow issues, have most regrettably spawned a disproportionate number of hearings and pleadings resulting in escalating costs and over use of Court time. I reiterate that it is important that matters are dealt with in a way that is proportionate (i) to the amount of money involved; (ii) to the importance of the case and (iii) to the complexity of the issues. After the July 2015 hearing there was a significant amount of correspondence dealing with a straightforward issue arising out of the parties' inability to agree the terms of the consent order reached on 30 July 2015. Although some of the requests may have been a little excessive for a case of this nature, that does not excuse non-compliance with Court Orders, especially if that causes delay. I find myself, yet again, having to remind a party of the requirement for strict compliance to Court Orders as set out in ***Practice Circular No.1/2014 Requirement for Strict Compliance with Court Orders Made in the Family Division of the Grand Court.***



26. This case has also highlighted problems with the bundles which are being filed in the Family Division. Apart from the fact that the content and format of the bundles before me failed to fully meet the requirements under ***Practice Direction No. 11/2014 Court Bundles in Family Proceedings in the Family Division of the Grand Court*** ("PD 11/2014"), a large number of the documents in the five large lever arch were irrelevant and not referred to. Although not applicable in this case, it often appears like an attorney has simply photocopied their file, then placed those copies in lever arch files which they present to the Court (often after the deadline for filing) without any thought as to

whether the content is relevant or not. The time has now come for this to be addressed, otherwise the excessive costs wasted by the photocopying and time wasted by judges having to pre-read the same will continue unabated. The time may well have come to replace the current wording of paragraph 5.1 of PD 11/2014 with something along the lines of the following:

> *"Unless the Court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, the bundle shall be contained in one letter size ring binder or lever arch file limited to no more than 350 sheets of letter paper and 350 sides of text.* [13]
>
> *All documents in the bundle shall (a) be copied on one side of paper only, unless the court has specifically directed otherwise, and (b) be typed or printed in a font no smaller than 12 point and with 1½ or double spacing."*

27. Attorneys who appear before the Family Division would be well advised to read all of the Judgment of Sir James Munby, then President of the Family Division in ***RE L (Procedure: Bundles: Translation)*** [2015] EWFC 15. In the Judgment he expressed dismay that PD 27A in relation to the preparation of bundles was frequently being ignored. The President reminded practitioners of the following remark he made eight years earlier in **Re X and Y (Bundles)** [2008] EWHC 2058 (Fam), [2008] 2 FLR 2053, (paragraph 2):

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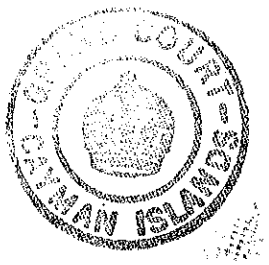
[13] My emphasis by underlining – 350 pages is taken from paragraph 5.1 PRACTICE DIRECTION 27A – FAMILY PROCEEDINGS: COURT BUNDLES (UNIVERSAL PRACTICE TO BE APPLIED IN THE HIGH COURT AND FAMILY COURT - ("PD 27A").

"Th[e] continuing failure by the professions to comply with their obligations is simply unacceptable. Enough is enough. Eight years of default are enough. Eight years are surely long enough for even the most casual practitioner to have learned to do better." I added (para 7) that: "there is, and can be, absolutely no excuse for [practitioners] not being completely familiar with the Practice Direction and its contents and complying meticulously with its requirements".



If I were to replace the words "*eight years*" with "*three years*", I see no reason why the same sentiments should not apply to the Cayman Islands.

28. The President stressed that defaulters could expect to be exposed in public condemnation in judgments in which they would be named and they could find themselves subject to financial penalties. He went so far as to suggest that there be a delinquents' court if matters did not improve. In the Cayman Islands non-compliance may already result in the Registry refusing to accept the bundle or as stated in paragraph 11.1 of the Grand Court PD 11/2014 may result in a judge removing the case in the list or putting the case further back in the list. It may also result in a wasted costs order or some other adverse costs order.

29. The President stressed at paragraph 20 that PD 27A required only documents to be included which were relevant and would be used (read or referred to) in the proceedings. He clearly had in mind, as I do, the need for restraint for the expenditure of public funds (to which I would also add private paying litigants' funds) and for money to only be spent on what was necessary to enable the Court to deal with the proceedings justly.

30. I have little doubt that the costs expended on these proceedings are massively disproportionate to the monetary value of the issues in this case. My grave concerns about the excessive costs of litigating this matter when having regard to what should have been straight forward proceedings, if approached in the correct manner, involving a clearly defined issue relating to relatively small sums of money, have been borne out when I read in M's Closing Written Submission that by 24 March 2017 she had expended the extraordinary and "*wholly disproportionate*" amount of US$52,610.32 in legal fees and disbursements as well as a further US$15,000 for unbilled work in process.

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 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."*

33. On 30 September 2015 M issued a Summons[14], alleging that F had failed to comply with the Order made on 30 July 2015, and seeking (i) an unless order; and, rather unusually for maintenance proceedings, (ii) an order to strike out F's affidavits as well as (iii) an order to debar F from defending M's application. That Summons came before Mangatal J. on 26 October 2015, when, after reading H's latest affidavit filed on 23 October 2015, the Learned Judge directed that F "*comply fully*" with my order of 30 July 2015 and in particular that F file and serve an affidavit by 4:00 p.m. on 29 October 2015 addressing the points set out at paragraphs 12 to 17 of M's Statement of Issues dated 22 October 2015. Mangatal J. reserved the costs of that hearing. F filed a disclosure affidavit on 29 October 2015, and M contends that this is the first time that he gave disclosure that complied with the terms of orders made by the Court.

34. The current hearing commenced way back on 2 November 2015. At the outset of the hearing M was still seeking an increase of maintenance to $750 per child per month (total of $18,000 per annum) as well as the orders concerning the sharing of medical and educational expenses. The fact that CI$18,000/annum periodical payments are still sought is confirmed in paragraph 16 of the Closing Written Submissions filed on behalf of M,

[14] Supported by an affidavit sworn by M on 20 October 2015.

where her attorney states it is not because the mother seeks to be "*oppressive*" or *overreaching*" or to recover the full cost to her of the children's maintenance, but it is "*on account of her basic expenses*[15] *in raising the children.*" On the first day of the hearing, after M gave her evidence and F was part way through his evidence-in-chief, the case was adjourned for a full half-day hearing to be fixed.

35. On 8 January 2016 M filed a Summons "*to enforce outstanding and ongoing disclosure*" set out in a letter from M's attorney on 10 December 2015. That Summons came before the Court on 1 February 2016, the date for the continuation of the part-heard substantive Summons. On the morning of the hearing F's attorney belatedly filed an affidavit sworn by F on 29 January 2016. By the end of that day, F had completed his evidence in chief, but was only part way through cross-examination. Therefore, the matter was further adjourned part-heard and directions were given to ensure that the Court had updated evidence. The parties were directed to provide all bank statements from accounts they had an interest in from 1 July 2015 and a schedule of their monthly income from 1 January 2015. It was recorded in the preamble of the Order that F would use his best endeavours to get the profit – loss accounts for the mobile restaurant business which he has an interest in and that he would provide details about the sale of a property and a copy of the register for the mobile restaurant business.

36. The part-heard hearing was scheduled to continue on 18 April 2016, but that hearing date had to be vacated due to the non-availability of the Judge. M filed a further disclosure affidavit on 25 May 2016 to provide a further update about her financial circumstances. F

[15] Underlining made in the Closing Submissions.

filed his updating affidavit on 27 May 2016. The rescheduled date of 3 June 2016 had to be adjourned due to F's attorney being unwell. On 22 July 2016 F filed an affidavit detailing his income from his work as a Realtor. When the matter next came before the Court on 26 July 2016 the cross-examination of F could not be completed because Mr. Michael Day's oral evidence was interposed[16]. The hearing did not proceed on 28 September 2016 as the Judge was involved in another hearing that week.

37. On 6 February 2017 F concluded his oral evidence and M was recalled to give additional updating evidence. The matter was adjourned for a Reserved Written Judgment to be given. The parties were directed to provide Written Closing Submissions by 17 March 2017. M's Written Submissions were received on 24 March 2017 and F's Written Submissions were received on 31 March 2017. This is the Reserved Written Judgment.

The Law

38. Section 23 of the Matrimonial Causes Law (2005 Revision) ("MCL") states:

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

This section provides the Court with a broad discretion as to whether or not to make any variation once it has heard from the parties. The only limit on that discretion appears to be that the Court may only make a variation sought by way of application, and not some other variation. I am conscious that the orders sought in relation to medical and educational expenses are not strictly a variation of the dated order of Levers J, as a

[16] Attended following a subpoena being applied for by M and issued by the Chief Justice on 1 June 2016

decision in relation to them has been "*deferred*", albeit for a surprisingly long number of years.

39. S.19 MCL provides the guidance as to the principles to be followed when exercising the discretion conferred by s.23 MCL where it states: *"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."*

40. Section 19 and s.21 of the MCL give the Court a wide discretion when it comes to financial provision. The Courts in the Cayman Islands, in deciding whether or how to exercise their powers under s.21 or their powers to vary any order made under s.21 when considering what is fair in all the circumstances of the case, traditionally had regard not only to the matters set out in s.19, but also have been guided by the relevant factors raised in s.25(2) of the English Act.[17] The factors to be considered include:

(i) The income earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future;

(ii) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(iii) The standard of living enjoyed by the family before the breakdown of the marriage;

(iv) The age of each party to the marriage and the duration of the marriage;

[17] ***Doak v Doak and Riley*** [2002] CILR 224, [17], [21], [22], ***Wood v Wood*** [2009] CILR 255, [12] and ***McTaggart v McTaggart*** (2011) 2 CILR 366[39].

(v) Any physical or mental disability of either of the parties to the marriage;

(vi) The deserts of the parties, including contributions made by each of the parties to the welfare of the family (to include contributions made by each of the parties to the accumulation of matrimonial assets as well as non-matrimonial property) and any contribution made by looking after the home caring for the family;[18]

(vii) The value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring; and

(viii) The conduct of each of the parties. If that conduct is such that it would in the opinion of the Court be inequitable to disregard.

41. In the Court of Appeal decision in ***Morris v Morris*** [2016] EWCA Civ 812 Moylan J. spoke about the proportionate exercise that the Court should carry out when determining a variation application. In light of the protracted nature of these proceedings, the volume of irrelevant historical detail and the disturbing level of costs expended, I see merit in now fully sharing this recent and most helpful guidance herein:

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

[18] ***Wight v Wight,*** Zacca P. at para 33.

88. I do not consider that the authorities on which Mr Duckworth relies support his submission that the court must *undertake the exercise de novo. He can point to the passage in Ward LJ's judgment in Flavell v Flavell when he says (at p. 357):*

> *"The court is not required to proceed from the starting-point of the original order but looks at the matter de novo."*

But, this has to be seen in context, namely that it was in response to a submission that the court does not have jurisdiction to vary an order unless the applicant can show exceptional circumstances or, at least, a material change. Further, Ward LJ's observation is not the same as saying that the court is required *to consider the matter de novo. That Ward LJ is not saying this is clear because he agrees "entirely" with what Cazalet J had said in Garner v Garner [1992] 1 FLR 573:*

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

89. In addition, in Lewis v Lewis [1977] 1 WLR 409, that great family judge, Ormrod LJ, also does not say that the court must start de novo:

> *"I am bound to say that it has always seemed to me ... that the powers of variation, which were given by statute to this court in a series of enactments going right back to 1857, have been, if anything, progressively enlarged, and that the intention of Parliament is that, in handling these family matters where money is concerned, the court should have as unfettered a discretion as possible to deal with the situation as it is when the matter comes before it" (p. 412F).*

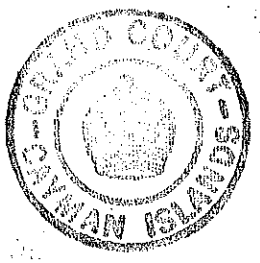
90. Further, although not referred to during the course of the hearing, the overriding objective requires the court to deal with cases proportionately.

Thus, although section 31(7) requires the court to have "regard to all the circumstances of the case", this is not the same as requiring the court to undertake the section 25 exercise de novo. It is instructive to see what the Supreme Court said recently in respect of case management in a financial remedy claim. In Wyatt v Vince (Nos 1 and 2) *[2015] 1 WLR 1228 Lord Wilson JSC (with whom the rest of the court agreed) said (para 29):*

> *"... by rule 1.4(1) of the family rules, the court must further the overriding objective by actively managing cases, which, by rule 1.4(2)(b)(i)(c), includes promptly identifying the issues, isolating those which need full investigation and tailoring procedure accordingly. This exercise will dictate the nature, and in particular, the length of the substantive hearing."*

91. In Sharland v Sharland [2015] 3 WLR 10170, Lady Hale (with whom the other six Supreme Court Justices agreed) said, at para 43:

> *"This court recently emphasised in Wyatt v Vince* (Nos 1 and 2) *[2015] 1 WLR 1228 the need for active case management of financial remedy proceedings, "which ... includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly": para 29. In other words, there is enormous flexibility to enable the procedure to fit the case. This applies just as much to cases of this sort as it does to any other".*



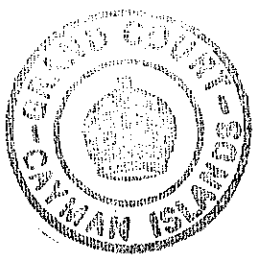
92. The court has "enormous flexibility" to determine the "nature" of the substantive hearing. This includes, as Mr Duckworth accepts, focusing on the relevant factors and in my view also, where appropriate, conducting a light touch review. Specifically, to require *the court to undertake the exercise de novo would be contrary to the overriding objective and the obligation for a case to be dealt with proportionately."*

42. Having regard to ***Morris***, the following principles are appropriate as a guide to the Court in the exercise of its discretion:

(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.[19] 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 in 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;

(iii) 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



(iv) 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.

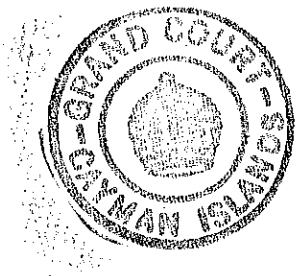
43. Although F told the Court during cross-examination on 1 February 2016 that the children should "*continue at (their private school in Grand Cayman) and the goal is they go to college - I want best and provide best for them and see them go on*", before I move on to

[19] Henderson J. Judgment dated 16 February 2010 in ***Maria-Constanza Lindsay Fear v Richard David Fear*** Cause No. D129 of 2005 at paragraph 3, Levers J. Judgment dated 23 June 2005 in ***John Michael Dinan v Elizabeth Marie Dinan Cause*** No.D131 of 1990 at page 4.

consider the evidence, there is one further legal issue raised by F for me to address. F contends that the Court does not now have the jurisdiction to vary the periodical payments order in relation to T, whether that be as to quantum or duration as T has reached 16 years and no provision was made in Levers J,'s Order to extend the duration of the Order beyond that date. It is also contended that T is no longer a child of the marriage as defined in s.2(1) of MCL, as he is no longer "*a child under the age of sixteen years.*"

44. Section 22 of MCL provides:

> *"(1) Where an order is made under section 21 for periodic payments such order, unless varied by the Court, shall remain in force..... in respect of payments for the benefit of a child of the marriage until .... such child attains the age of 16 years:*
>
> *Provided that in the case of payments for the benefit of a child of the marriage, the Court may extend the period of such payments so long as the child is receiving education and is under the age of twenty-one years:*
>
> *..."*



45. It is contended on behalf of F in his Closing Written Submissions that the periodical payments order in relation to T ceased to exist on his sixteenth birthday on 14 September 2016 and therefore there is no existing maintenance order to vary. It also seems to be contended that no order can be made in relation to T as there is no application to extend the duration of an existing order. However, his argument is flawed, as F fails to recognise that at paragraph 3 of the Order of Levers J. the duration of the periodical payments was

"*until the age of 16 or end of full time education.*"[20] The omission in the drafting of that Order was the exclusion of the wording that the Order would last until 16 or until ceases full-time education (up to the age of 21), whichever may be the later. The Order was clearly intended to run until past 16 if in full-time education, as these parents never intended these children to leave school before they were aged 16 years old and, even if they had done, no Court would approve an order giving a clean break in relation to child maintenance before a child reached 16.

46. The guidance given in England and Wales in the ***Registrar's Direction*** [1987] 2 FLR, although not binding, is a helpful reminder of how such an order should be drafted. The Registrar's Direction was dealing with circumstances in which orders provided for periodical payments in respect to a child lasting until the child attains the age of 17 or ceases full-time education. The issue was that the Inland Revenue in England treated such orders as ceasing when the first event occurred, but it would accept the latter if the order contained the words "*whichever is the later*" or "*further order.*" The Registrar's Direction provides that orders which are intended to run until a date determined by age or ceasing full-time education "*should clearly indicate whether the order is to cease on the happening of the earlier or later event.*" However, the Registrar's Direction also goes on to provide that the Court could correct that order to include the expiry date or the words "*whichever is later*" pursuant to its inherent jurisdiction if that was the parties' intention when the Order was made. Although not specifically mentioned in the Registrar's Direction, I respectfully conclude that the intention was that the correction could be made whether or not the child had reached 17 years old.

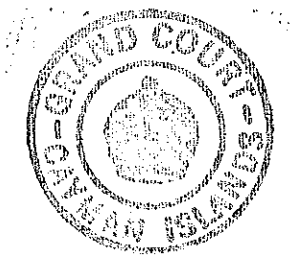
[20] My emphasis by underlining.

47. If the wording of paragraph 3 in of itself is not sufficient to defeat F's non-jurisdiction argument, there are additional reasons why I find that it does not apply in this case. M's Summons to vary filed on 8 December 2014, therefore before T's sixteenth birthday on 14 September 2016, does not specifically state that the periodical payments should be extended to an age beyond 16. This may well be because it could already be extended past 16 due to the wording in paragraph 3 of Levers J.'s Order. As I stated in ***RE v CD*** Fam 119 of 2012 (18 February 2016), maintenance orders may contain an element in respect of school fees.[21] The same principle applies to medical expenses orders for children. Section 21 of MCL gives the Court the power to make payments for school fees which, like cost allowances orders, are regarded as being a type of periodical payment order. I note that paragraph 10.25 in Jackson's Matrimonial Finance (9th Edition) states that it is *"...conventional for school fees to be discharged by means of periodical payments...."* Educational and health expenses orders requiring a party, or often both parties, to meet these costs when they arise frequently appear in ancillary relief orders made by the Grand Court in the Cayman Islands. In her Summons, M specifically applies for any education and medical orders to be made until 18 or cease full-time education up to aged 21. A clear intention that she sought by application, prior to either child reaching 16 years old, that F's child maintenance obligations should extend until 21 if the relevant child remained in fulltime education.

[21] See ***L v L (School Fees: Maintenance: Enforcement)*** [1997] 2 FLR 252; ***Practice Direction Periodical Payments - Ancillary Relief: Payment of School Fees*** (1983) 4 FLR 513; and ***Practice Direction Periodical Payments – Ancillary Relief: Payment of School Fees*** (1987) 2 FLR 255: - Although the Court is not bound by the English Practice Directions they illustrate the relationship between school fees and periodical payments.

48. If all or any of the above was not enough to ground the Court's jurisdiction, paragraph 1 of M's Statement of Issues dated 30 July 2017 makes it abundantly clear that she seeks periodical payments up to aged 21 if in full-time education. On the first day of this final hearing on 2 November 2015, which was when T was aged 15, both parties were aware that the increased periodical payments order being applied for by M was sought until 16 or complete full-time education up to the age of 21. In addition, my notes from the hearing of 21 April 2015 record my following statement:

> *"I feel that any order for maintenance and education and health expenses should be made until relevant child is 18 years of age or ceases full time education (up to 21) whichever may be the later. Again that is a standard order, and even if I needed to be persuaded that there is a justification for extending beyond 16 in this case, I can clearly see that these are children that one would hope go on to higher education and take the same professional path (that) their parents have."*



Therefore, well before T's sixteenth birthday, there could be no doubt that the parties knew that this was an application that the then existing order requiring periodical payments to be made until 16 or until ceasing full-time education would be to the later of those two events, but only up to the age of 21. I am satisfied for all the reasons above that there is jurisdiction to vary the periodical payment orders in relation to both N and T if the Court deems such an order to be appropriate in the circumstances o of this case.

M's Employment, Income and Outgoings

49. M is a qualified attorney. In M's affidavit sworn on 16 April 2015 she informed the Court that she had taken up the post of a Vice-President at the Fiduciary Service arm at a major

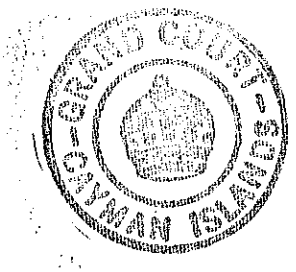
law firm in Grand Cayman in May 2012 and that her salary had increased over the years from US$135,000/annum to US$190,550/annum. She is now a non-executive director in the Firm's Financial Services arm and she earns US$230,000 and in December 2016 she also received a discretionary bonus of US$16,000. Her take home pay is CI$15,125.85 per month, but the pro-rata would increase if a bonus was paid as it was in December 2016.

50. M's monthly outgoings[22] are claimed to be:

Mortgage	$4,582.02
Home insurance	$653.44
Life insurance	$350.00
Landline/internet/TV	$250.00
CUC electricity	$400.00
Water/sewerage	$125.00
Groceries	$1,000.00
Cell phone	$300.00
Hair and nails	$200.00
BMW vehicle loan	$735.00
Petrol	$350.00
Vehicle insurance	$125.00
Pet grooming	$40.00
FCIB credit card	$410.00
Butterfield Visa card	$820.00

[22] Excluding family trips/holidays, presents and other non-basic expenditure.

Sub Total:	**$10,340.46**
N Orthodontics	$250.00
Childcare	$840.00
'Nanny's' Health Insurance	$198.00
Clothing, school uniforms[23]/ school trips[24]	$750.00
Sub Total:	**$2,038.00**
N school fees	$921.66
T school fees	$1,752.57
Sub Total:	**$2,674.23**
Loan to mother for legal costs	$1,000.00
Total Outgoings:	**$16,052.69**



F's Employment, Income and Outgoings

51. F has more than one source of income. He has income from his employment as a Realtor. A clearer picture of his income from that work was not obtained until MD, a half owner of the business, attended the hearing on 26 July 2016, having filed an affidavit on behalf of F on 22 July 2016. During cross-examination F admitted that information about his income was missing in his affidavits and stated:

[23] M's evidence is that $2,000 was spent on school clothes in December 2015.
[24] M's evidence is that school ski trips were $2,150 in February 2016.

"That found after the fact. When I asked (MD) to give me the statement I assume all there and true (and correct) – not until sat down (and) took more time documents his spreadsheet as well took account, that I found (out)."

Although this may partly explain the incomplete nature of the income from this source which F had disclosed prior to MD's late evidence, F would still have been expected to recognise that the figures were wrong as he had been the one who actually received the income and should have seen, when checking his other financial records, that substantial payments were missing. When it was then put to F in cross-examination that he had made a conscious decision not to disclose his Realtor income to mislead the Court F answered

"I agree that some, I agree with you. I have no explanation, at particular time I go up to... I not have excuse for it."

In light of this, I have had to very carefully analyse all of the other figures provided by F in relation to his finances.

52. The belated accurate evidence from MD in exhibits "MD1" and "MD2" showed that F's income was:

2014	CI$22,730.50 + US$3,855[25]	=	CI$26,585.50
2015	CI$22,531.79 + US$90,949.32[26]	=	CI$97,110.24

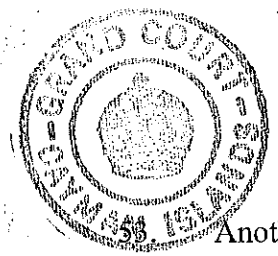
It is clear that the income can vary and will depend on a number of circumstances. When MD was asked by me why F's sales figures in 2016 were so low he stated:

[25] Converts to CI$3,161.00/
[26] Converts to CI$74,578.45.

"About sales, not uncommon to go three of four months with no income, then hopefully... he has been busy with (his mobile catering business). It is the business you can have a dry run and then have a purple patch. Not through lack of trying, I have not sold anything for a few months."

MD added under further cross-examination:

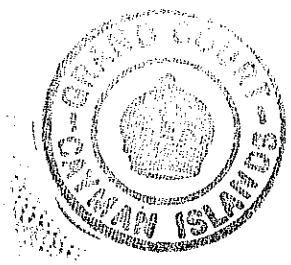
"Difficult to quantify in this business if work get harder get more – can work 3 contracts fail, out of your hands.... Three year history not much time he without a commission 7 months, maybe just a coincidence with business – he say half hobby, half business."



Another source of income exists as F set up a mobile catering business via a Limited Company formed on 26 February 2015 and registered on 7 April 2015. F and his wife each hold 30% of the share in the business and are Co-Directors. The Trade and Business licence was granted by 5 May 2015 and business accounts were opened with Butterfield Bank by 21 May 2015. Regrettably in his affidavit sworn on 15 May 2015 F failed to disclose the existence of this business which could be seen as one giving him a foreseeable income and is relevant when considering his income capacity. When he stated that the catering income was a "*one-off*" and that it was "*not the case*" that he derived income for *"my alleged "catering business"",* then by elaborating no further he gave the impression that no such business had been set up. At the time F failed to disclose that he was purchasing a $70,000 food truck and that he had paid $8,952.35 to his business partner for equipment purchases shortly before swearing the affidavit. An unsecured CI$63,000 "*business loan*" was purportedly arranged with F's wife's uncle. No formal loan agreement has been shown to the Court, but only a one paragraph letter from the uncle dated 28 August 2015 stating that it is a ten year loan at a rate of 5%.

Although accepting that he did not provide the detail F said this was because the business was not yet up and running. The above lack of frank disclosure provides an additional reason why I have had to very carefully analyse all of the other figures provided by F in relation to his finances.

54. F informed the Court that the profits from the mobile catering business are split equally with his business partner. In the Closing Written Submissions submitted on behalf of F no figures are given for his income from this source. Rather unhelpfully at paragraph 38.4 the submissions simply state:



> *"The bank statements and related documents produced by the Father during the course of the proceedings are self-explanatory as the same relates to the financial affairs of the business and its potential to generate (any) meaningful form of income for the four owners within the immediate or foreseeable future."*

55. F belatedly exhibited what he termed a *"Profit and Loss Statement"* running from when the business started in June 2015 until February 2016 to his affidavit sworn on 26 May 2016, along with bank statement from three corporate accounts held by the catering business. F failed to call the person who prepared and drafted this document. It showed a net income of only CI$18,407.77. As highlighted by M's attorney it does not show the monthly turnover and one cannot discern how the business has since been developing and performing. From F's evidence it appears that cash was often not banked, but simply divided between him and his partner. There were no figures given for the income from February 2016 up until the last day of this hearing a year later in February 2017. I am not satisfied that the accounts accurately reflect the state of the income derived from that

business. The business is no longer in its infancy and I can take judicial notice that the food truck can be seen at different parts of Grand Cayman trading and selling delicious food from its small menu on a normal day, often until late in the evening and that he has the lease to provide a food service at the George Town Hospital. On both F and MD's evidence, F is dedicating more time to the running of the business and less time to being a Realtor. On the evidence before me I cannot put a precise figure on that income, but cash is often removed directly and not properly accounted for. The net profit and income is clearly more than the impression F seeks to give to the Court that all the sales income barely covers the operating costs and the loan, although no figure has been provided on his behalf in the Closing Submissions.

56. After payment of the mortgage there appears to be no net income from the rent received on the Spinnakers Rental Property in which F is a third owner in common with F's self-employed contractor brother and one other. During cross-examination F stated that all of the expenses for this property are being met from his and his wife's income. The partly developed property was purchased at a quick sale price with the intention to complete the works and sell for a *"fair profit."* F's evidence is that the property has been listed for sale for CI$485,000. It appears from the mortgage statement exhibited at tab 17 in one of the bundles that the mortgage has a balance of CI$293,681.25, so if sold for the asking price F would have a third share in equity of CI$191,318.75, namely CI$57,453. This sum might cover any backdated maintenance figure the Court deemed appropriate including for school fees.

57. In the Closing Submissions prepared on behalf of M, a number of credit entries on F's banking records belatedly produced by him have been rightly highlighted. There are entries for around $50,000 in the Butterfield Bank investment accounts and F has been unable to explain these payments. In addition a number of cash and cheque deposits were made during the 12 month period up to July 2015 into various bank accounts totalling CI$99,933. One of the cash payments credit entries was for $29,000. Again, F was unable to explain what this large deposit and the other deposits were for and their source. In the absence of an adequate explanation, despite ample opportunity being given to F to do so, I am satisfied that F's global income is greater than the amounts he discloses.

58. Although, it is not for F's wife to pay for child maintenance for N and T, her income is relevant. F stated that the maintenance order coupled with education/health provision would cause financial hardship in the household in which he and his wife have two young children. Having regard to the Court's duty under s.19 of MCL to have regard to F's responsibilities, needs, financial and other resources, F was asked to voluntarily provide details of his wife's income and expenditure. F chose not to provide either.

59. F's wife is a long-term employee with one of the largest business entities/groups in the Cayman Islands. She started as the Executive Assistant to its CEO and has since risen to her current post as the Senior Manager Organisational Development and Administration. The banking records disclosed by F tend to show that the wife's income with bonus is around $109,137/annum with bonus (pro-rata CI$9,094.77/per month) after deduction of CI$2,600/month mortgage payments to her employer on a preferential mortgage of over

$644,000 at Cayman prime rate minus 1%. She is also a Director of a mail services business and is a 60% owner of a coffee shop business operating from three locations in Grand Cayman. Regrettably there is no clear evidence before the Court from F, unlike with her main income, which can be obtained from painstakingly analysing the documents that can assist with determining the quantum of her income from those sources, as well as the sums of money that she is holding in her undisclosed bank accounts.

60. Although F said that he and his wife did not pool all of their money in their accounts, he informed the Court that there was no division between him and his wife of the money in their accounts. He confirmed that they lived in a one million dollar home and stated that all of the family's expenses come from the family account. When looking at what F says are the family outgoings for his current household, the Court, having regard to the disclosed financial arrangements in his household, may approach it in such a way that his wife's income may be used to cover the family's expenses, freeing up F's income for any responsibility he has to meet the needs of N and T.

61. When reviewing the Closing Written Submissions filed on behalf of F to see what is being submitted about the figures for his outgoings, all that one can find are general statements about he and his wife supporting T and N and their two children. F states that when N and T stay with him he ensures that they know that they have a home there and he provides "*food, clothes, health, entertainment, holidays, sports equipment and lessons.*" He said for example that he split the costs of T's ski trip which amounted to a

payment from him of about CI$1,100. There is no schedule of regular outgoings in the Written Submissions, in F's affidavits or in his oral evidence and this is a further reason why it has been difficult to conduct the s.19 exercise in relation to his finances. That being the case, if he only provides general comment about his outgoings and incomplete details about his income and gives no disclosure about his wife's income[27], it may be viewed as inappropriate for F to later contend that the Court has reached inaccurate conclusions about his income and outgoings. It is evident from the credit card statements disclosed by F that there is a high level of discretionary spending including a number of overseas trips. He is clearly enjoying a good lifestyle.

Conclusions

62. It is in T and N's best interest to keep them at their current private schools. I have this in mind when I consider what their needs are and how that should be met by these parents having regard to their respective financial circumstances.

63. The school fees for the current year total CI$43,463 and the parties should share this responsibility equally. I order that each parent is to equally contribute to education costs for N and T, including any school fee payments already made for this academic year and until the respective child reaches the age of 18 or ceases full-time education (up to the age of 21) whichever may be the later. The education costs include school fees and ancillaries on the school bill, any Canadian health insurance if required for T, school uniforms, stationary and T's flights at the beginning and end of each semester if flying to

[27] Save for what has been determined by a review being conducted during the hearing by the Court and M to bank statements.

the Cayman Islands or to stay with family members in Canada. Education costs also include reasonable extra-curricular activities for T and N. Any extra-curricular activities costing over CI$200 per month or any extraordinary school or sports trip expense require joint pre-approval. Accordingly, I order that F do pay or cause to be paid to M for the benefit of T and N periodical payments of an amount equivalent to half of the billed school fees and ancillaries. I direct that the school fees and ancillaries shall be paid to each school's Fees Office as agent for M as and when they fall due and the receipt of that payee shall be a sufficient discharge.[28] However, M must consult with F if she is considering changing N's high school as he has parental responsibility, and if a move would involve an increase in fees, the equal contribution to education costs order may need to be revised. At the appropriate time, the parties should also consult about which universities N and T may attend as, again, the equal contribution Order may need to be revised if the education costs greatly increase. If a child intends to go to university/college then the parties may agree how to apportion the ongoing education expenses or, failing agreement, apply to the Court.

64. In the Cayman Islands it is well-established law that the Court has an inherent jurisdiction to vary its own previous orders and it may backdate application of the order (***Rea v Gibbs, Commissioner of Police and Attorney General*** [1996] CILR, Note 2; ***Lisa Andrea Franklin v Gary Oliver Franklin*** Fam D 183 of 2011, (2 June 2014) Smellie C.J.). Whilst applications to backdate under Schedule 1, s.6 (3) Children Law (2012 Revision) are precluded from extending back beyond the date of the application, the same

[28] The terms of this School Fees Order is based on precedent No.71 in Solicitors Family Law Association publication "Precedents for Consent Orders" (5th Edition).

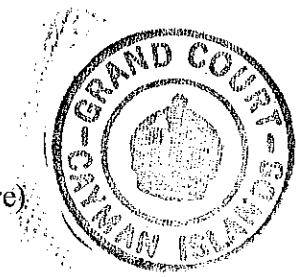
prohibition does not apply to MCL applications. There is no guidance in s.23 MCL on the issue of backdating. The general principle to be derived from the case law in England and Wales is that whilst the Court has an almost unrestricted power to vary its order retrospectively, in practice maintenance orders are rarely backdated beyond the date of any variation application (***S v S [1987]*** 2 All ER 312, CA). It has to be an exceptional case for backdating of an order over a period of a number of years. However, in this matter M only seeks a variation of the periodical payments and a 50% payment of education and health costs back to the date of her application. As a school fees/education order forms a part of the periodical payment considerations, I am satisfied that such payments may also be backdated to the date of the application.

65. I am satisfied from the email in the bundle that M has over the years since the Order of Levers J. frequently written to F asking him if he is going to pay his contribution to the fees. It appears that F wrongly felt that the periodical payments were intended to cover education expenses, but that view was clearly without merit due to the clear deferment provision in the Order. M has clearly shouldered the burden for the fees for the last 10 ten years. That has been an inequitable position which has arisen as F has been fortunate that M did not seek to bring this issue back to Court, as she should have done, in 2008. In 2015 F, just from his Realtor income would have been in a position to contribute to the fees for that year. I am satisfied that F should pay 50% of the school fees for the school terms from January 2015 onwards. I have regard to the fact that M unilaterally decided to send T to his boarding school in Canada, thereby greatly increasing the level of school fees to be met. F has parental responsibility and he and his wife have always played an

active and important role in T's life and therefore his consent should have been obtained or a specific issue order sought concerning this major decision about T's education, especially if, as now is the case, M expected him to pay towards the increased fees. With this in mind I do not feel that F should pay 50% of T's fees at the boarding school fees level for the 2015/2016 academic year, because, as for any parent deciding to send their child away to school at increased cost, he should have been afforded the opportunity to adjust their spending accordingly. I will order that he pays 50% at the St. Ignatius rate for that year. Therefore F is to pay backdated school fees as follows:

- Academic Year 2014 to 2015 $7,294
- Academic Year 2015 to 2016 $10,840
- Academic year 2016 to 2017 $11,060 (using N's St. Ignatius figure)

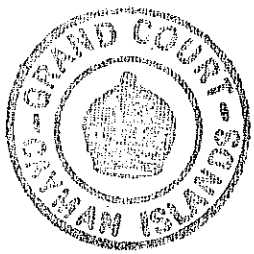
Total: $29,194



Although there are unexplained sums in the family investment accounts, as I am ordering F to make the education expenses set out in paragraph 63 above for this academic year and ongoing, I feel it appropriate for F to be given some time to pay. Payment in full of the above ordered backdated school fees should be made by 1 April 2018 or if the Spinnaker property sells sooner, the payment in full must be made within seven days of receipt of his portion of the proceeds of the sale. F is to keep M informed about any developments in relation to the marketing and sale of that property and to provide her with a copy of the Completion Statement when it is sold.

66. I also order that F pay half of T and N's medical expenses not covered by his wife's health insurance policy. This is to include 50% of the outstanding orthodontic expenses for N, as and when they fall due. I do not back date any contribution to health payments already made by M and when doing so I have regard to fact that since 2012 T and N have been on F's wife's employment family health insurance plan, although that has not resulted in an increased premium as they would have needed the same policy to provide coverage for the children of their marriage.

67. T now only resides in the Cayman Islands during his school holidays. He also spends short periods of time with F's family members in Canada. The reality is that he moves freely between M and F's properties, and when at each house his respective parent is responsible for his care and meeting his needs. Having defined and clarified what is covered by the education costs element of the periodical payments order, it is appropriate for the periodical payments order in relation to T to be varied to a nominal sum of one dollar per year. That order will last until T is 18 or ceases full-time education (up to the age of 21), whichever may be the later.



68. N resides in the Cayman Islands and his situation is different to his brother's. Although I accept that he spends a great deal of time at F's property at which time F and his supportive wife commendably meet his needs, his primary home is still to be regarded as being with M. I accept that the father may also buy him clothes and other items, but M still bears a greater financial responsibility for his day to day needs and her disclosed outgoings do not cover all child related expenditure. M's outgoings for each child, which

she quantifies as $2,038, in light of my above-related wider maintenance orders will be reduced. Apart from the fact that I have reduced the order in relation to T to a nominal sum, I have made provision for school uniforms and school trips under the Education Order. I accept that M has greater expenditure for clothing and general items for N, and although I do not wish to spend time analysing the parties' dispute about the merits of Nike or Walmart clothing or of Apple phones and Nokia type phones, I am conscious that reasonable expenditure on the former brands would be in line with their peers at their schools. I have also made provision for N's remaining orthodontic payments under the Health Costs Order which M includes in the $2,038 figure. There is no need for there to be a child carer for T even when he is at home and it is arguable whether one is still required for N who, due to his age, could attend after school activities whilst M was at work if he is not with F. That said, I am satisfied that there may be a limited need and therefore a part of that $1,038 monthly expenditure may be regarded as being justified. Some of M's disclosed general household expenses have a child element, as would the father's.

69. As a consequence of the Education Costs and Health Costs Orders that I have made, M will now have a disposable income on the figures that she has provided. That does not mean that F should not contribute to any of the general expenses for N. I am unable to come up with definitive figures for F's income and outgoings from the evidence provided by F and the submissions made on his behalf. What is clear, is that in 2015 he earned around at least $100,000, and that may be regarded as a fair indication of his minimal income capacity. On top of that it appears that he has other sources of income, especially

when one has regard to a number of deposits coming into the family bank accounts which he was unable to adequately explain, and as such the Court is entitled to form a view that he has a greater income than the figure he provides to the Court. Although F has failed to provide adequate details of his wife's income and a clear schedule of the family's outgoings, the Court is still able to deduce that his wife is a very significant income earner and that her income can meet the majority, if not all, of that household's reasonable expenses. This frees up F's income to make a reasonable contribution to N and T. As the Education Costs Order and the Health Costs Order form a part of the periodical payment considerations, I do not feel it appropriate to vary the current maintenance figure for N. Therefore the Periodical Payment Order will remain for N at CI$541.67 per month. This Order will expire when N reaches the age of 18 or ceases full-time education (up to the age of 21), whichever may be the later. If any of the children leave private school then the monthly child maintenance figure should increase.

70. I ha***ve noted the case of Moon v Moon (1980) 1 FLR 115 and Macey v Macey (1982) 3 FLR***. The Order I make has regard to F's responsibilities to both families and I am satisfied it ensures that both sets of children's disclosed needs are met. F and M have been separated for many years and they are both entitled to set up homes with new partners and new children. The intention when an ancillary relief order is made is to give finality to the parties, to enable them to move on with their lives and to make decisions as to their futures which includes relationships, new children and financial commitments. Unfortunately, in this case finality was not given. The deferred education and health costs issues were left unresolved and were not restored, as they should have been and as Levers

J. had intended, for the Court to consider and determine in a timely fashion. Understandably, since 2007 both parties have progressed with their lives and made significant decisions in relation to their finances and their personal lives. It is hoped that the Orders that I now make will provide the parties with more certainty about their financial obligations until the children of their marriage cease full-time education up to the age of 21.

Costs

71. If either party seek to make any application for costs, they should make the appropriate application. However, if they intend to do so, I invite them to have regard to the proportionality points addressed by me herein, as well as the fact that costs have been allowed to reach a shocking level for what is in reality a child maintenance case.

Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT

The judgment was delivered in private, but the Judge hereby gives leave for it to be published.

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.