

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**
3 **FAMILY DIVISION**

4 **CAUSE NO. FAM 46 of 2010**

5
6 **BETWEEN**

7 **KIMBERLEE McLEAN-BRYAN**

8 **PETITIONER**

9 **AND**

10 **DERRON BRYAN**

11 **RESPONDENT**

12 *Appearances:*

13 *The Petitioner represented by Margeta Facey-Clarke*

14 *The Respondent represented by Lynn McDonagh instructed by Samson & McGrath.*



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17 **REASONS FOR DECISION**

18 The parties herein were married on November 11, 2006. There were two children of the
19 marriage: Korey McLean born on August 24, 1999 and Kordan Bryan born on November 11,
20 2007. The Petition was proved on April 21, 2010 and by Order of the Court dated March 16,
21 2011 both parties were granted joint custody of the children of the marriage with care and
22 control granted to the Petitioner.

23 Subsequently a Consent Order dated 25th July 2013 was approved by the Court. Its provisions
24 included the following as summarized:

- 25
26 A. The children would reside with the Petitioner and the Respondent had stipulated contact
27 with them;
- 28 B. By an interim order, the Respondent was ordered to pay \$350.00 per month per child on
29 the 28th day of each month and each party was responsible for 50% of the children's
30 "reasonable educational, medical, dental and optical costs" until a final order was made;



1 C. As long as certain conditions were satisfied, the Respondent was to transfer his interest in
2 the only matrimonial asset being real estate described as Registration Section Prospect
3 Haven, Block 22E, Parcel 223H14.

4
5 The Consent Order also included the following provisions:

6 *"7. That the Petitioner and the Respondent shall each be liable for the amount of CI*
7 *\$4,441.86, being 50% of the Strata Arrears owed in respect of the Property as at the*
8 *Date of Separation. The Respondent shall pay his share of the Strata Arrears directly to*
9 *the Strata within 60 days of the date of filing this Order. The Petitioner shall pay her*
10 *share of the Strata Arrears in such manner as she may agree with the Strata.*

11
12 *8. The Petitioner shall pay all arrears of strata fees, mortgage payments or any other*
13 *utility fees owed in respect to the Property that might have been incurred after the Date*
14 *of Separation and shall in any event indemnify the Respondent as to all liabilities in*
15 *relation to this Property not otherwise dealt with in this Order.*

16
17 *9. The parties shall be responsible for payment of the proportion of any interest and/or*
18 *other fees and/or costs found to be owing in respect to the arrears of strata fees owed to*
19 *the Strata that is equal to the proportion of the total amount of principal debt that is*
20 *owed by that party in accordance with paragraphs 8 and 9 of this order."*

21
22 By Summons to Finalise Ancillaries dated 11th April 2014 the Petitioner sought the following
23 orders:

24 "1. That the Respondent pays an increased amount in maintenance for the two children of
25 the marriage namely: – Korey Mathan McGaw McLean born on 24th August 1999, now
26 14 years old and Kordan Mathew McLean Bryan born on 11th November, 2007, now 6
27 years old.

28
29 2. That the Respondent refunds the Petitioner the sum of CI \$1,200.00 being pre-school
30 fees for Kordan when he attended Shining Stars Pre-School from January, 2012 to June,
31 2012 in accordance with maintenance order dated 22nd March, 2010.

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33 3. That the Respondent refunds the Petitioner half of any or all education, medical, dental
34 and optical expenses for the children of the marriage since he was ordered to do so on
35 25th July 2013.



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4. That the Respondent pays all education, medical, dental and optical expenses for the children of the marriage.
5. That the Respondent pays the total amount owing on the loan obtained from Cayman Islands Development Bank in August, 2009, such balance being a matrimonial debt.
6. That the Respondent pays half of all legal fees owing to Prospect Haven Strata #98.
7. That all orders pertaining to the welfare of the children of the marriage be in effect until each child reaches the age of 18 years or 21 if continuing education.
8. Any other order deems (*sic*) just and equitable by this Court and/or any other order as may be requested by Counsel for the Petitioner.”

In support of this Summons; Counsel for the Petitioner relied on the Petitioner’s Affidavit filed on December 20, 2013.

For his part, the Respondent filed an affidavit on May 4, 2014. The Respondent, apart from challenging claims made by the Petitioner in her Summons, sought a variation of the existing financial orders citing a change in his circumstances.

On the date of the hearing, although her Counsel was present, the Petitioner did not appear. The Respondent in the meantime had travelled from the United States of America for the hearing. Both Counsel agreed to have the matter dealt with entirely by way of submissions. The difficulty with this course was that where a claim was based on affidavit evidence which was challenged by the other side; the Court was not assisted in its determination by the cross-examination of the parties. This affected the findings of facts on contested issues.



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The Claims

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The Petitioner sought an increase in the monthly payments for each child stating that the maintenance order had remained the same since March 2010 but the expenses for each child had increased substantially. In her affidavit she itemized expenses as being in excess of \$1300.00 per child per month. These she claimed, were only core expenses. She pointed out that she had other expenses and she was unable to maintain the mortgage payments on the matrimonial property. The Petitioner pointed out that in the past year the Respondent had only paid a total of \$500.00 per month for the children instead of the court ordered sum of \$750.00 per month.

Both Counsel agreed that the Respondent owed arrears in maintenance totalling \$2,000.00 as of April 22, 2015.

Counsel for the Respondent submitted that this was due to the material change in the Respondent's circumstances. In March 2014, the Respondent had relocated to New York to be closer to his father. He found employment in the United States of America and has plans to remain there indefinitely. A reduction in salary was cited as the basis for the variation which he sought.

The Respondent's current net salary in the United States of America was much less than his previous salary. Additionally, he also had another child and partner to support as well as his father. For these reasons, the Respondent sought a reduction in the monthly maintenance payments for the children of the marriage to \$500.00 per month.

He also proposed paying an additional sum of \$100.00 per month until the arrears of \$2,000.00 were repaid.

1 Counsel for the Respondent indicated a desire to cross-examine the Petitioner about her
2 itemized expenses. The absence of the Petitioner made this impossible. It was
3 submitted that the Petitioner's evidence concerning her expenses should not be
4 accepted by the Court in the circumstances.

5
6 Counsel for the Petitioner referred to the claim that the Respondent refund the
7 Petitioner the sum of CI \$1200.00 being pre-school fees at Shining Stars Pre-School for
8 the youngest child for the period January to June 2012.



9
10 The genesis of this claim is an order made in the Summary Court in cause SMA #97/09
11 on March 22, 2010. That order included the provision that the Respondent herein pay
12 the sum of \$200.00 per month to Just for Kids (a pre-school facility) for the youngest
13 child of the marriage commencing March 22, 2010 and continuing "*so long as the child*
14 *be enrolled*".

15
16 This was another area on which Counsel for the Respondent indicated the desire to
17 cross-examine the Petitioner. It was submitted that there was no proof before the court
18 that this expense had accrued. It was not disputed that the child had attended the school
19 but details of the claim were challenged because it was the Respondent's contention
20 that this particular pre-school had been run by the Petitioner's aunt. The Respondent
21 also pointed to evidence before the court from the pre-school that had been named in
22 the order which showed that for the year that the youngest child had attended that
23 school, he had made timely payments of the required fees. Counsel for the Respondent
24 submitted that the court could not properly make an order under this claim without the
25 requisite evidence.



1 According to the Petitioner since the separation of the parties in September 2009 she
2 had had the sole burden of the children's medical and educational needs.

3
4 In response to the Respondent's request for past receipts, Counsel for the Petitioner
stated that her client had no invoices for uniforms and fees and further that many of her
receipts have been destroyed.

8 In response, the Respondent reiterated an intention to pay half of the expenses for the
9 children. However certain expense claims made by the Petitioner were not supported by
10 vouchers. Counsel for the Respondent also detailed certain questions that she would
11 have wished to ask the Petitioner about the claim.

12
13 The Petitioner's claim under paragraph "4" of her Summons that "the Respondent pays
14 **all** education, medical, dental and optical expenses for the children of the marriage"
15 (my emphasis) was not raised during Submissions and as such was treated as having
16 been abandoned.

17
18 With reference to the Petitioner's claim in relation to the loan obtained from Cayman
19 Islands Development Bank ("the CIDB") in August, 2009. The Petitioner set out in her
20 affidavit that she borrowed CI \$14,750.00 from the CIDB in August 2009 in response
21 to the Respondent's request that she do so to enable him to start a small family
22 business. She stated that the Respondent started a business of delivering food. A few
23 months later, according to the Petitioner, the Respondent moved out of the matrimonial
24 home and the business collapsed. It was the Petitioner's contention that the Respondent
25 had made no payments towards the loan and as at July 31, 2013, the principal balance



1 exclusive of interest was CI \$12,537.19. The sum owed was claimed as a matrimonial
2 debt. The original claim was amended in the verbal submissions of Counsel for the
3 Petitioner who submitted that both parties should be liable to repay same.

7 It was the Respondent's position that he had no knowledge of the Petitioner taking out
8 the loan prior to her doing so and he denied receiving any of the money. He indicated
9 that at that point in time the marriage had been close to breaking down and learning that
10 she took out the loan without first discussing it with him was one of the reasons that
11 caused him to leave. It was also his claim that the delivery business that the Petitioner
12 referred to; had been set up long before the loan was taken out.

13 Counsel for the Respondent indicated that at a previous hearing, directions had been
14 given for the loan documentation to be produced. This had not been done. It was
15 submitted that if the loan had been taken out for a family business it would be easy to
16 produce vouchers and other documentation to support this claim.

17 There was no dispute that the Respondent's name was not attached to the loan. Counsel
18 for the Respondent submitted that although the parties had been married at the time, in
19 order to make a determination that this had been a marital debt, the court would have to
20 be satisfied based on the evidence that the Respondent had been aware of it. Again this
21 was a vital area which required the presence of the Petitioner to face cross-examination.

22
23 Next, the Petitioner claimed that the Respondent should pay half of all legal fees which
24 resulted from the non-payment of strata fees in relation to the former matrimonial
25 home, Prospect Haven Strata #98. According to the Petitioner in her affidavit, the



1 Respondent had engaged the services of attorneys to represent him in the Summary
2 Court in proceedings brought against him for the non-payment of strata fees.

3
4 The Petitioner claimed that she did not defend the proceedings and she did not go to
5 court. As such, any legal fees incurred (by the other side) were the result of the
6 Respondent's instructions to his attorneys. She also claimed that fees charged by the
7 Executive Committee of the strata company included legal fees and expenses which she
8 was unable to account for.

9
10 Counsel for the Petitioner submitted that the previous Consent Order had not settled the
11 issue of legal fees. She further submitted that any legal fees incurred should not be
12 divided in half because events commenced when the Respondent left the matrimonial
13 property and had made no contribution towards the mortgage or the strata fees. It was
14 conceded by Counsel for the Petitioner that the Respondent had subsequently paid the
15 court ordered sum towards strata fees.

16
17 It was the Respondent's position that the Consent Order dated 25th July 2013 had
18 settled the issue of legal fees. Counsel for the Respondent submitted that the formula
19 for the settlement of these fees had been outlined in that order.

20

21 **Conclusion**

22 It is accepted that as the children grow older their expenses will increase. There is a
23 deficiency in the evidence concerning the expenses for the children due to the
24 unavailability of the Petitioner at the hearing to answer legitimate questions concerning
25 this claim. The Petitioner's evidence consequently fell short in this area.

1 It was accepted by all that the Respondent had fallen into arrears for his court ordered
2 payments. The Court accepts that this is due to his change in circumstances.
3 Specifically, it is accepted that having moved to the United States of America, the
Respondent's net income is less than it was previously. The Court would not normally
order increased payments in those circumstances.

7 However, the Respondent's financial circumstances are the direct results of a choice
8 that he made. When the Respondent made the decision to relocate to the United States
9 of America, he was already aware of his existing financial obligations to the children of
10 the marriage and his obligations pursuant to orders of the Grand Court. The children of
11 the marriage cannot be deprived of appropriate financial support, because of the choices
12 made by the Respondent. It was not suggested that the decreased amount that he offered
13 to pay would be sufficient to maintain the children.


15 It is incumbent upon the Respondent to take all necessary steps; even in his changed
16 circumstances which would allow him to meet his obligations to the children of the
17 marriage.

19 Consequently, while no increase in maintenance payments is granted, the order for
20 financial provision for the children of the marriage will remain the same and will
21 continue until each child attains the age of 18 years or completes secondary education;
22 whichever is later.

23



1 With respect to the outstanding arrears of child maintenance totalling \$2000.00 as at
2 22nd April, 2015, the Respondent is ordered to pay the additional sum of \$125.00 per
3 month until the sum is repaid.



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7 One difficulty with the claim for the re-payment of pre-school fees for the youngest
8 child is the fact that the order of March 2010 had specified a named pre-school. It is
9 accepted however, that the spirit of this order included any subsequent pre-school that
10 the said child attended. It was the Petitioner's position that in claiming a refund she
11 need not prove that she made any payments to the pre-school; since the Respondent had
12 a duty to pay \$200.00 per month in any event, however the court needs to be satisfied
13 that any fees had accrued.


14 In the context of contentious proceedings, where there is an allegation that a relative of
15 the Petitioner was in charge of the pre-school the suggestion was that the relative may
16 not have charged any fees for the child. The Court would have benefited from the
17 ability to have the issue explored under cross-examination.

18 Due to insufficient evidence, the claim for a refund of pre-school fees failed.

19 It is entirely appropriate that each party pay for half of all reasonable educational,
20 medical, dental and optical expenses for the children of the marriage. The Petitioner
21 claimed a refund of half of such expenses which she claimed that she had spent since
22 the order was made that such costs should be shared. The Petitioner however, did not
23 provide any receipts in support of her claim and she was not present at the hearing, to
24 have her claims tested by questioning. Thus, while the Respondent has an obligation to

1 share in any such costs pursuant to the terms of the Consent Order of July 25, 2013; in
2 the absence of evidence which proves the claim, no order could be made for a refund.

3
4 A loan was undoubtedly obtained from the Cayman Islands Development Bank in
5 August, 2009 by the Petitioner and this was obtained during the subsistence of the
6 marriage. Evidence before the Court established that the parties separated in or about
7 September 2009. The Respondent denied that he had had any prior knowledge of the
8 loan and as such, evidence needed to be presented to establish that this loan was in fact
a marital debt as the Petitioner claimed.



12 There was no documentation presented to the Court from which it could be concluded
13 that the funds had been obtained to start a family business and that such a business had
14 been started; as the Petitioner claimed. Additionally, this was another area in which
15 Respondent's Counsel had a right to cross-examine the Petitioner but was unable to do
16 so because of her absence from the hearing.

17 Due to a lack of evidence, the Petitioner's claim on the Respondent in relation to the
18 loan from the Cayman Islands Development Bank failed.

19
20 Finally, I found that the Consent Order dated July 25, 2013 adequately covered the
21 manner in which strata arrears and its consequent fees and costs should be divided
22 between the parties in relation to Prospect Haven Strata #98.

23
24 Paragraph "9" of the said Consent Order incorrectly referred to the division of
25 interests/fees/costs being made "*in accordance with paragraphs 8 and 9 of this order*".

1 Clearly it was paragraphs “7” and “8” that should have been referred to. I find that
2 paragraphs “7”, “8” and “9” of the said order, as previously quoted; dealt with the
3 division of legal fees in relation to Prospect Haven Strata #98.

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5 The Petitioner’s claim that the Respondent should pay all legal fees owing to Prospect
6 Haven Strata #98 fails.

As a result of the foregoing on May 29, 2015, the following Decision was made herein:

- 10 1. The Respondent is to continue to pay the sum of \$350.00 per child per month or a
11 total of \$700.00 per month in financial support for the children: Korey McLean
12 and Kordan McLean-Bryan. Payments for each child to continue to be made to
13 the Court Funds Office on the 28th day of each month and shall continue until that
14 child attains the age of 18 years or completes secondary education whichever is
15 later;
- 16
17 2. The Court having accepted that the Respondent owes arrears of child
18 maintenance in the sum of \$2,000.00 as at 22nd April 2015; the Respondent is
19 ordered to pay the additional sum of \$125.00 per month commencing June 28,
20 2015 until that sum is paid off. Payments to be made to the Court Funds Office;
- 21
22 3. The Petitioner and the Respondent are each responsible to pay half of all
23 reasonable educational, medical, dental and optical expenses for the children of
24 the marriage: Korey McLean and Kordan McLean-Bryan. In the absence of

1 invoices, no additional order is made with respect to payment by the Respondent
2 for past expenses;

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4 4. The Respondent is not liable to make payment on the loan obtained by the
5 Petitioner from the Cayman Islands Development Bank in August 2009;

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7 5. All payments of arrears, costs and fees to be made in respect of Registration
8 Section Prospect Haven, Block 22E, Parcel 223H14 Strata #98 are subject to the
9 terms of Consent Order dated 25th July 2013 and no further order is made in
10 respect of same;

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12 6. Each party has liberty to apply;

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14 7. No order as to costs.

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16 Dated this 30th Day of December, 2015

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21 Nova Hall
22 Judge of the Grand Court (Actg.)

