

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT

FAMILY LAW DIVISION  
2019/FAM/div/00185

BETWEEN

Petitioner

AND

Respondent

**Before:** The Hon. Madam Justice Renae McKay  
**Appearances:** Mr. Alexander Maillis for the Petitioner  
Mr. Kevin Farrington for the Respondent  
**Hearing Dates:** 22<sup>nd</sup> October, 2019, 31<sup>st</sup> October 2019, 3<sup>rd</sup> December 2019, 11<sup>th</sup>  
December 2019, 9<sup>th</sup> January 2020, 30<sup>th</sup> January 2020, 28<sup>th</sup> February  
2020, 12<sup>th</sup> March 2020, 21<sup>st</sup> July 2020, 21<sup>st</sup> September 2020, 23<sup>rd</sup>  
March 2021  
**Ruling Date:** 19<sup>th</sup> May 2021

**RULING**

**Family Law – Ancillary Relief – Interim Order – Decree Nisi - Variation of Order – Respondent seeking reduction of maintenance payments – Petitioner – Equality Principle – Overriding objective is fairness – Maintenance – Children of the marriage paramount**

1. By the interim order made on 4<sup>th</sup> July 2019 and filed on 22<sup>nd</sup> July 2019 certain orders were made with respect to the maintenance of the 2 minor children of the marriage. The Respondent seeks a variation of the interim order while the Applicant seeks to have the terms of the order made final.
2. The interim order was upon the granting of a Decree Nisi to the Petitioner on 4<sup>th</sup> July 2019. The couple had been married on the 28<sup>th</sup> February, 2015.
3. The interim order is set out as follows:

1. That the Respondent shall pay to the Petitioner the sum of One hundred and Fifty dollars (\$150.00) per week for the maintenance of the children of the marriage commencing Friday the 5<sup>th</sup> July, 2019 and continuing until further Order of the Court;
2. That the payments shall be made through the chambers of Maillis and Maillis, details of the account to be communicated forthwith to the Respondent;
3. That the Respondent shall have supervised access to the children of the Marriage for a period of two (2) hours every Monday, such 2 hour period to be agreed by the parties.
4. That there be general liberty to apply.

(the "Interim Order")

4. While the petition was uncontested, the maintenance of the children proved to be a point of contention between the parties. As a result, both parties filed Affidavits in support of their respective position. The relevant portions of the parties' Affidavits are set out as follows:

5. By the Petitioner's Affidavit of Means filed 7<sup>th</sup> October, 2019, the Petitioner averred:

"5. That since the making of the Interim Order through to September 20<sup>th</sup>, 2019, Seven (7) payments were believed to be received to Maillis and Maillis Client Account – I say "believed" because the Respondent does not confirm what amount he sends or when he sends it – for a total of \$750.00. Attached hereto and marked "Exhibit JCS#1" is a copy of the transaction summary for Maillis and Maillis BS Account showing all entries that their records reflect for monies paid in and believed to be \_\_\_\_\_, and the two draws I have made thus far.

6. That the Respondent is behind in his weekly obligations through to the 4<sup>th</sup> October (14 weeks @150.00/week = \$2,100.00 LESS \$750.00 paid =) in the amount of \$1,350.00.

The Means of the Petitioner

7. That I am employed as a Secretary / Personal Assistant at the Lawfirm of Maillis and Maillis where I earn a monthly salary of \$2,000 which is paid to me bi-weekly. I usually also receive a year end Christmas bonus which averages about \$3,000 depending upon the year we have had.

8. That save for the above, I have no other source of income save the occasional assistance rendered to me by family. I have received about \$2,000.00 overall in assistance over the months since the Respondent left.

9. That I presently drive a 2008 Nissan Note. During the marriage we owned a Honda Accord which the Respondent took with him when he left, leaving me without transportation. I arranged to purchase a second hand vehicle (Japanese) for \$4,000.00 borrowed from my employer but which I have not made any payments on as yet.

10. That I have the following (in some cases averaged) monthly expenses for myself and the children:

Rent	\$800.00
BPL	\$120.00
School Fees	\$465.00
Nursery Fees	\$240.00
Groceries	\$240.00

FCIB personal loan	\$123.00
Online courses fees	\$60.00
Cellphone (prepaid)	\$60.00
Kids clothing	\$50.00
Car Licence	\$16.25
Car Insurance	\$26.44
Gasoline	\$100.00

6. By his Affidavit of Means filed 21<sup>st</sup> October, 2019, the Respondent averred:

“5. That I have the following monthly expenses: -

Description	Amount
a) Groceries	\$200.00
b) Gas	\$120.00
c) Rent	\$700.00
d) Electricity	\$150.00
e) Loan – Commonwealth	\$118.60
f) NIB	\$10.00
g) Cellphone	\$60.00
<b>TOTAL</b>	<b>\$1,358.60</b>

6. That I have the following annual expenses:-

Description	Amount
a) Car License	\$200.00
b) Car Insurance	\$300.00
<b>TOTAL</b>	<b>\$500.00</b>

- 7.....
- 8.....
- 9.....
- 10.....
- 11.....
- 12.....
- 13.....
- 14.....

15. That I have a personal loan with Commonwealth Bank which is expected to mature on or about the 13<sup>th</sup> day of August A.D., 2027 and has a balance of \$28,973.25. I have had this loan since the parties got married and restructured on several occasions to assist with getting our apartment, vehicle and other related expenses.

Petitioner’s Affidavit of Means

Arrears

16. That prior to being presented with the filed Interim Order and based on my presence as a layman at the hearing of the 4<sup>th</sup> day of July A.D., 2019, I did verily believe that the Court Ordered an initial payment of \$150.00 followed by a payment of \$100.00 per week (which is what I paid).

17. That I have made payments totaling \$750.00, however, I have fallen behind in payments owing to the partial closure of Atlantis during the month September 2019 following hurricane Dorian when renovations were being carried out and I was only working 21.5 hours per week.

18. That I am now seeking to borrow further funds from the bank to assist with paying the arrears and my other expenses.

19.....

20.....  
21.....  
22.....  
23.....  
24.....

**Requested Orders**

25.....  
    a.....  
    b.....  
    c. That the Petitioner and the Respondent share equally the educational (uniforms, school text books, shoes, lunch money, exam fees), medical expenses and dental expenses relative to the said children.  
    d.....  
    e. That the Petitioner establish a bank account for the sole purpose of the receipt of maintenance payments in relation to the said children and provide the Respondent within fourteen (14) days with the account information. That the Respondent pay \$100.00 per week (i.e. \$400 per month) in relation to maintenance in addition to \$68.75 per week towards the arrears to allow the arrears to be paid within 6 months.”

7. The application for Ancillary Relief commenced on 22<sup>nd</sup> October, 2019 and the following orders were made as reflected in the order filed 30<sup>th</sup> October, 2019 (the “22<sup>nd</sup> October Order”):

1. “That the matter herein be referred to the Department of Social Services for investigation as it related to custody of the children of the marriage and that the Department of Social Services do provide the Court with a Social Inquiry Report to assist in this matter;
2. That the arrears in the amount of \$1,650.00 owed to the Petitioner by the Respondent to the date hereof be repaid by weekly installment of \$30.00 payable over and above the weekly amount of \$150.00 already ordered in this matter until the arrears are paid in full. The Respondent is at liberty to pay more on the arrears or settle the amount in full at any time should his means allows;
3. That the matter herein is adjourned to the 31<sup>st</sup> day of October, A.D., 2019 at 9:00 o’clock in the fore-noon for mention.
4. That there be general liberty to apply.”

8. The amount owed at paragraph 2 of the 22<sup>nd</sup> October Order was disputed. As a result, the Respondent was directed to provide proof of his income and filed the Supplemental Affidavit of Means on 10<sup>th</sup> December, 2019 (the “Supplemental Affidavit of Means”) and the Second Supplemental Affidavit on 27<sup>th</sup> February, 2020 (the “Second Supplemental Affidavit of Means”). Thereafter, he filed a Third Supplemental Affidavit on 17<sup>th</sup> September, 2020 (the “Third Supplemental Affidavit”).

9. By his Supplemental Affidavit of Means he averred:

“3. That in paragraph 3 of my Affidavit of Means, I indicated that my base salary was \$197.88. That further to that, the amount of my base salary is based on the

number of hours that I am scheduled to work at Atlantis in addition to tips. I always try to work the most available hours; however, I do not have ultimate control over the number of hours that I work as it is dependent on the season in which the Atlantis hotel is in.

4. I do verily believe that the figure of \$196.88 is an average of my base salary.....
5. That in paragraph 5 of my Affidavit of Means, I indicated that my monthly loan payment from Commonwealth Bank was \$118.60. That the information was an error/oversight in the drafting of the Affidavit as the weekly loan payment to Commonwealth Bank is \$141.00.”

10. Subsequently, by the Respondent’s Second Supplemental Affidavit, he averred:

“2. That I reviewed the Petitioner’s Affidavit dated October 7<sup>th</sup>, 2019 in which she lists expenses that would apply in proportion for the children as follows:

a. Grocery	\$240.00
b. school fee	\$465.00
c. Nursey fees	\$240.00
d. Kids clothing	<u>\$50.00</u>
TOTALLING	\$995.00

3. That I never agreed for \_\_\_\_\_ y to attend a private high school and I cannot afford to assist with the tuition of \$465 per month for the same. The decision to enroll the said child in a private institution was made solely by the Petitioner, and as such, it is only fair that she absorb the cost of tuition solely. I am prepared however to share equally in any other educational expenses for Jaedon.
4. That the remaining expenses as aforesaid mentioned totals B\$530.00. If these maintenance expenses are divided equally, they amount to B\$265.00 per month, per parent. As the court seeks to do fairness between the parties, I propose contributing \$300.00 per month until the youngest child joins primary school. Additionally, I propose sharing equally in all medical, dental and optical expenses outside of tuition for both children until they attain the age of 18. I again recommend that our eldest is enrolled in a public school having regard to our means.”

11. In response, by the Petitioner’s Affidavit in Reply, the Petitioner stated:

“3. That as to Paragraph 2 of the Respondent’s Affidavit, the Respondent has clearly not considered the fact that by virtue of my rent, the children benefit from a roof over their head, and that by virtue of my vehicle and its related expenses the children benefit from transportation and by virtue of my utility bills the children benefit from light, water etc....and in the circumstances the exercise the Respondent has engaged upon in paragraphs 2 and 4 of the Respondent’s Affidavit is fundamentally flawed.

4. That as to Paragraph 3 of the Respondent’s Affidavit, I deny that the decision to put \_\_\_\_\_ into private school was made solely by me, but if I have to I will do whatever it takes to meet the school fees for my children, which is why I was prepared to accept the Respondent’s offer (above). The Respondent and I had many verbal conversations about Jaedon going into private school. Sometimes those conversations spilled over into texts/Whatsapp messaging and I will refer to some of those hereinbelow.....

6.....The “remaining expenses” to which he refers are not therefore limited to \$530.00 per month, as alleged by the Respondent. The Current Interim Order is for \$150.00 per week. That is \$600.00 per month. I note that in Paragraph 4 the Respondent offers \$300.00 per month, but he does so on the basis of what he perceives or calculated the need to be, not as a result of what he says he can or cannot afford. I have demonstrated that his calculation of the needs of the children falls short of reality. I note the offer of splitting all medical, dental and optical expenses. The Court has ordered that I have custody of the children, and as such I am not prepared to take Jaedon out of Aquinas College – if the Respondent is not able or willing to assist with the expenses in that regard, so be it. I will make ends meet, somehow.”

12. The Petitioner also filed a Second Further Supplemental Affidavit filed 26<sup>th</sup> March, 2021. By this affidavit, the Petitioner sought to clarify the status of her access to information at Commonwealth Bank which arose during the hearing. In that regard, she highlighted a deposit of \$70.00 on the 27<sup>th</sup> July, 2020 by the Respondent which was confirmed by an email from him the following day. Thereafter, she made reference to 2 deposits of \$70.00 on the 18<sup>th</sup> and 21<sup>st</sup> August, 2020 but added that she did not receive an email from the Respondent.
13. The Petitioner averred that the only email she received from the Respondent regarding visitation with the children of the marriage was received on the 24<sup>th</sup> March, 2021. She wished for the court to be aware that once the Respondent complied with counselling and family counselling, she was not opposed to re-introducing him into the lives of their children. The Petitioner added however, that the Respondent’s previous failure to obey the court’s directive was of deep concern to her.
14. The Petitioner further averred that in order to keep a proper account of monies she received from the Respondent from the date of the Interim Order to the end of 2020, she took 3 of the payments received and deposited them into her attorney’s firm’s client account in order for them to form a part of the record. She continued that notwithstanding the Respondent’s claim that he was unemployed, her bank account reflected 3 payments in January 2021 in the amounts of \$50.00, \$40.00 and \$50.00 and 2 payments of \$50.00 in February, 2021.
15. During cross examination the Petitioner averred that she used her and the Respondent’s joint bank account about a year and a half before the Respondent left.
16. Thereafter, by his Third Supplemental Affidavit, the Respondent averred that:

**“4. In my Affidavits filed on the 21<sup>st</sup> day of October A.D., 2019, and the 10<sup>th</sup> day of December A.D., 2019, I asserted that my approximate base salary at Atlantis was \$196.88 per week.**

**5. In addition to my approximate base salary that I received from Atlantis, I sold CDs and DVDs beginning in or about 2014. Although the CD and DVD business venture yielded minimal profit, it supplemented the income I received from Atlantis and assisted me with my financial obligations.**

6. In or about March 2019, there was a decline in my CD and DVD sales, which resulted in the business becoming non-profitable. In addition to the business not returning any profit, I was subsequently advised and verily believed that the selling of CDs and DVDs without the proper permit or business licence, contravened the statute laws of the Commonwealth of The Bahamas, which further disrupted by efforts to supplement the income I received.
7. In or about September 2019, I started a mobile steam pressing service. The response to the mobile steam pressing service was very minimal, and a result, I was forced to discontinue offering that service after four (4) weeks of operation.
8. In my Supplemental Affidavit filed on the 27<sup>th</sup> day of February A.D., 2020, in an effort to settle the outstanding ancillary issues in these proceedings, I reluctantly consented to the maintenance payment of One Hundred and Fifty Dollars (BS150.00) per week for both children of the marriage until each child attains the age of majority. In addition to paying the monthly maintenance instalments for the children of the marriage, I agreed to pay the amount of Three Hundred Dollars (BS300.00) per child during the months of June and December until each child attains the age of majority.
9. At the time when I consented to the maintenance payments, I was experiencing difficult financial hardship and found it difficult most months to meet my personal financial obligations. Nevertheless, I reluctantly agreed to the maintenance payments, hoping that I would receive joint custody and access to the children of the marriage, and that these proceedings would be completed. Notwithstanding my consent to the maintenance payments, I have not had any access to either child of the marriage.
10. On the 20<sup>th</sup> day of March, A.D., 2020, the Emergency Powers (COVID-19) (No. 1) Order, 2020 (the "Order") was issued, which resulted in the temporary closure of Atlantis.
11. On or about the 24<sup>th</sup> day of March, A.D., 2020, I was formally advised by my manager, Ms. Jasmine Russell, that as a result of the Order, Atlantis would be closed until otherwise advised. The closure of Atlantis further compounded my already volatile financial circumstances, especially because I had no savings in the bank.
12. Following the closure of Atlantis, I was furloughed from my duties. Thereafter, Atlantis assisted me in applying for unemployment assistance from the National Insurance Board, which was deposited directly to my Commonwealth Bank account number.....
13. The unemployment assistance that I received from National Insurance are as follows:

April

- a. 30<sup>th</sup> April, 2020 - \$324.60

May

- a. 7<sup>th</sup> May, 2020 - \$324.60
- b. 14<sup>th</sup> May, 2020 - \$324.60
- c. 21<sup>st</sup> May, 2020 - \$324.60
- d. 28<sup>th</sup> May, 2020 - \$324.60

June

- a. 26<sup>th</sup> June, 2020 - \$324.60

July

- a. 9<sup>th</sup> July, 2020 - \$324.60
- b. 24<sup>th</sup> July, 2020 - \$162.30

September

a. 4<sup>th</sup> September, 2020 - \$300.00

14. Notwithstanding the fact that I was receiving unemployment assistance from National Insurance, I actively sought employment to assist me with my living expenses and meeting my financial obligations to my children.
  15. On or about the 27<sup>th</sup> day of May, A.D. 2020, I obtained employment with Super Value Stores Limited ("Super Value") as a groceryman. As an employee of Super Value, I currently receive a weekly salary in the amount of Two Hundred and Fifty Dollars (B\$250.00), which is paid to me by direct deposit into my CIBC First Caribbean International Bank ("First Caribbean Bank") account number .....
  16. In or about 2015, the Petitioner and I opened the First Caribbean Bank account; however, neither the Petitioner nor myself have used that account within the last five years. Therefore, I verily believed, notwithstanding the content of the Petitioner's Further Supplemental Affidavit filed on the 26<sup>th</sup> day of August, A.D., 2020, that the Petitioner no longer had access to that account as a result in the passage in time.
  17. As it transpired, on or about the 20<sup>th</sup> day of August, A.D., 2020, while on duty at Super Value, I was involved in an accident that resulted in me receiving injuries to my right hand. I sought medical assistance at the MediCenter Clinic, which is located in the Eastern District of New Providence, one of the Island of the Commonwealth of The Bahamas and was attended to by Dr. Ian Archer. I was also x-rayed at the Department of Radiology at the Princess Margaret Hospital where I was diagnosed as having a "mild soft tissue surrounding the 2<sup>nd</sup> metacarpal phalangeal joint." A bandage was placed on my hand as a result of my injuries.
  18. My job description at Super Value necessitates the use of both of my hands. Regrettably as a result of, the injuries I received, I have been unable to return to work since that date.
  19. I swear this Affidavit to explain the circumstances surrounding my current inability to comply with the Court's order that I pay maintenance for my children. 20. As a result of the change in my employment circumstances, I seek the assistance of this Honourable Court and ask that the Court vary its Interim Order made on the 30<sup>th</sup> day of October A.D., 2019 and grant an Order that I pay the sum of Thirty-Five Dollars (B\$35.00) per week per child towards the maintenance of the children of the marriage and the sum of Twenty Dollars (\$20.00) per week towards the arrears owed until the said arrears is paid in full.
17. Upon cross-examination, the Respondent averred that it was at 19<sup>th</sup> May 2020, that he was employed at Super Value and earned a salary of \$250.00 per week. He confirmed that he worked for Atlantis for 14 years but that he had been furloughed since 24<sup>th</sup> March 2020 and that his position was not made redundant. Prior to this position, he worked as a bellman with a base salary of \$196.00 per week and while he received tips, they were not guaranteed.
18. He continued that Atlantis had applied for National Insurance benefits on his behalf and that thereafter he had received a few payments however, during the month of April the payments ceased and then recommenced in June in the amount of \$150 per week. The Respondent then recalled that he had attended Court on 4<sup>th</sup> July 2019 and that an interim



order was made. In that regard, he stated that at the time the Interim Order was made, he was able to pay \$150.00 per week.

19. The Respondent further averred that the last payment he made was in February 2020 and admitted that he was not regular with his payments. He went on to say that he had had three lawyers, none of which explained full and frank disclosure to him which was the reason why there were no bank statements attached to his affidavit, despite having two bank accounts at Commonwealth Bank.
20. The Respondent then stated that he and his girlfriend were living together and that while she had children, the two did not have any children together. He explained that he paid the rent and that his girlfriend contributed to the electricity bill in addition to whatever else she was able to pay.
21. He confirmed that during the course of the marriage he sold CDs and that there would not be anything in any of his Affidavits that would speak to income generated from any other source. However, he did state that one month after leaving the matrimonial home there was a decline in his CD and DVD sales and that he was advised that the selling of CDs and DVDs without a permit or license was against the law.
22. The Respondent denied that he had sold any CDs since March 2019, although he tried to, and that he had not obtained a business license to do so. He also denied that he had made any payments to the company that supplied SD cards on 21<sup>st</sup> July 2020. Instead, he claimed that they were not to make any sales but that they were for his personal use.
23. As to any other business, the Respondent added that he did not obtain a business license for that either nor present any financial information with respect to its operation during the one month that it was open. He denied that he had only closed down the business after his previous Counsel was made aware of its existence.
24. The Respondent then agreed that the vehicle the Petitioner drove, serviced the transportation needs of the children but disagreed that the rent the Petitioner paid to keep the roof over the children's heads was also an expense that benefitted the children because they live with her.
25. With respect to the private school fees of \_\_\_\_\_, the Respondent denied that he had agreed for him to attend the private high school Aquinas and further denied paying for him to take the examination fee for the school as it was his mother who paid it. He added that if his mother paid for it then he would approve of it. The Respondent however, denied that there were text messages between him and the Petitioner with respect to the arrangements made for the private school fees.
26. The Respondent did not agree with the notion that the remaining expenses of \$530.00, which included the Petitioner's vehicle or putting a roof over the children's head, accurately represented what the Petitioner had to pay to keep the children.

27. He then claimed he that he had reluctantly agreed to the payment of \$150.00 and that it was his previous Attorney who wanted to make it easier for him since he could not afford to pay the \$120.00. He added that he had also partially agreed in order for him to have a shot at getting his children but denied lying to do so. He however claimed that he was unaware that custody had been previously granted to the Petitioner.
28. The Respondent then said that he was aware of the court order which suspended his rights of access to the children pending the determination of a series of psychological tests. On that note he stated that he attended the counselling sessions however, he did not know whether the psychologist reached out to the Petitioner to resolve any issue.
29. He confirmed that he had received an ex gratia payment from Atlantis and agreed that it was received by direct deposit, in three separate payments, with the last payment being received on 20<sup>th</sup> August 2020. He then stated that while he provided all of his bank statements from his personal account to his Attorney's, they were not exhibited to an Affidavit.
30. The Respondent confirmed that while he was furloughed around the 24<sup>th</sup> or 29<sup>th</sup> of March 2020, he did not receive any monies toward unemployment until the 30<sup>th</sup> April along with payments during the months of May, June, July and September but not August. He added that he also still received ex gratia payments which were two sources of income.
31. With respect to maintenance payments made, the Respondent stated that he could not recall whether he had made a deposit of \$170.00 on 25<sup>th</sup> February 2020. He confirmed however, that he had deposited \$70.00 to the Petitioner on 27<sup>th</sup> July 2020 in addition to two payments of \$70.00 on the 18<sup>th</sup> and the 21<sup>st</sup> of August.
32. With respect to the work related injury sustained at Super Value, the Respondent confirmed that there was nothing broken however, he still could not return to work. He also added that he did not receive any benefits for injury on the job.
33. Upon being re-examined, the Respondent reiterated that he never agreed to pay private school fees. He concluded by denying that he had closed down his steaming business to avoid paying child support or maintenance for the children of the marriage.

#### **Submissions of the Parties**

34. The Petitioner submits that the Court was vested with the jurisdiction to make a financial provision in family matters, pursuant to section 27 of the **Matrimonial Causes Act** ("MCA"), which states as follows:

**27. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say —**

- (a) an order that either party to the marriage shall make to the other such periodical payments, for such term, as may be specified in the order;
- (b) an order that either party to the marriage shall secure to the other to the satisfaction of the court such periodical payments, for such term, as may be so specified;
- (c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified;
- (d) an order that a party to the marriage shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments, for such term, as may be so specified;
- (e) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments, for such term, as may be so specified;
- (f) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified;

subject, however, in the case of an order under paragraph (d), (e) or (f) to the restrictions imposed by section 33(1) and (3) on the making of financial provision order in favour of children who have attained the age of eighteen.

- (2) The court may also, subject to those restrictions make any one or more of the orders mentioned in subsection (1)(d), (e) and (f) —
  - (a) in any proceedings for divorce, nullity of marriage or judicial separation, before granting a decree; and Financial provision orders in connection with matrimonial proceedings.
  - (b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal.
- (3) Without prejudice to the generality of subsection (1)(c) or (f) —
  - (a) an order under this section that a party to a marriage shall pay a lump sum to the other party may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section in his or her favour;
  - (b) an order under this section for the payment of a lump sum to or for the benefit of a child of the family may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this section in his favour to be met; and
  - (c) an order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.
- (4) The power of the court under subsection (1) or (2)(a) to make an order in favour of a child of the family shall be exercisable from time to time; and where the court makes an order in favour of a child under subsection (2)(b) it may from time to time, subject to the restrictions mentioned in subsection (1) make a

further order in his favour of any of the kinds mentioned in subsection (1)(d), (e) or (f).

**(5) Without prejudice to the power to give a direction under section 71 for the settlement of an instrument by counsel, where an order is made under subsection (1)(a), (b) or (c) on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.”**

35. The Petitioner also submits that the welfare of a child/children of the marriage is the paramount concern when determining the appropriate ancillary relief. As such, it must be dealt with as a matter of priority. In that regard, she submitted that the needs of the children are a matter of fact, have been set out and have not been challenged. She added that their needs are clearly outlined separately from her needs.
36. The Petitioner additionally submits that it was difficult for her to cover her monthly expenses of \$2,300.00 an amount that was not controverted by the Respondent, and as a result she needed assistance from the Respondent with covering those expenses that related to the children of the marriage.
37. She urged the Court not to accept the Respondent's supplemental evidence as to his means as it was he who initially agreed to the sum of \$150.00 per week by his Affidavit filed 17<sup>th</sup> September, 2020. She added that when the amount of arrears was calculated and added to the payment amount, there was no alteration to the same.
38. The Petitioner invites the Court to refuse the Respondent's evidence as to his means and instead accept her position that the Respondent's means have not been fully or properly disclosed to the Court. In support of this submission, the Petitioner referred to the Respondent's lack of evidence with respect to his cash tips received at Atlantis, the lack of evidence from the CD sales and steam press business and the failure to mention the three extra ex gratia payments that he (and every other Atlantis employee) received.
39. Mr. Maillis contended that the Respondent, through cross-examination, stated that he was receiving 3 separate sources of income during the Emergency Orders – the ex gratia payment from Atlantis, the NIB unemployment benefit and at 27<sup>th</sup> May 2020, the Super Value income. He added that despite that, from the end of February to 27<sup>th</sup> July, 2020, not a single payment was made towards the maintenance of the children.
40. The Petitioner's Counsel highlighted that one of the main points of contention was the payment of the oldest child's school fee for the attendance at a private school. He pointed out that while the Respondent denied agreeing to send the child to private school, in cross-examination he claimed that his mother paid it. However, his client was able to provide evidence of the discussion between she and the Respondent discussing the *various private schools, along with the reference to the payment of the entrance exam fee.*

41. Counsel for the Petitioner contended that she resides on her own, with their two children and that her living circumstances remained the same, with the exception of no longer being assisted by the Respondent, who was now assisting another woman instead of his children. In that regard, the Petitioner submitted that the law did not allow a man to create the circumstances of his own reality and then use it as a means to defeat or obfuscate the statutory and moral obligation that he has to provide for the welfare of his children.

42. The Petitioner concluded that the weekly payment of \$150.00 ordered was not unreasonable and that the Interim Order should be upheld and made final. She added that the payments would amount to \$600.00 a month and that they were only a quarter of the monthly expenses of the Petitioner. She continued by requesting an additional order to be made for the shared payment of medical, dental and optical expenses.

43. The Petitioner seeks the payment of the arrears of \$1,650.00 and for a declaration pursuant to Section 73 (1) (b) (i) of the MCA which states,

**“73. (1) The court shall not make absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied —**

**(a) .....**; or

**(b) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that —**

**(i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances”**

44. In turn, the Respondent relies on sections 29 (1) and (2) of the MCA which he claims provides a statutory checklist for a court to consider when determining how to exercise its discretion with respect to the maintenance of the children of the marriage. Sections 29 (1) and (2) of the MCA provides as follows:

**29. (1) It shall be the duty of the court in deciding whether to exercise its powers under section 25(3) or 27(1)(a), (b) or (c) or 28 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters that is to say —**

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

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

**(c) the standard of living enjoyed by the family before the breakdown of the marriage;**

**(d) the age of each party to the marriage and the duration of the marriage;**

**(e) any physical or mental disability of either of the parties to the marriage;**

**(f) the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;**

**(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;**

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

(2) Without prejudice to subsection (3) it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that it to say —

(a) the financial needs of the child;

b) the income, earning capacity (if any), property and other financial resources of the child; Matters to which court is to have regard in deciding how to exercise its powers under sections 25, 27 and 28. 9 of 1983, s. 11.

(c) any physical or mental disability of the child; (d) the standard of living enjoyed by the family before the breakdown of the marriage; (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1) just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.”

45. In relation to the payment of the oldest child’s school fees, the Respondent cited **Henry v. Thurston v Mornette McKenzie [2011] APP/MAG/00001** in which Barnett CJ (as he then was) cited **K v O [2008] 3 BHS J No. 5** and stated as follows:

“When considering the reasonable maintenance of children, the court can never assume the correctitude of the view common in this society that schooling at a private, fee-paying school is superior to that offered by publicly funded institutions. It would be impossible for the court, the judicial arm of the state authority, to presume the inadequacy of the educational system which the state, in another manifestation, sustains from the taxes which support other institutions of state, including the courts. The adequacy, or otherwise, of a particular school – public or private – would have to be established by evidence in any case in which the issue became relevant. Moreover, experience does not support the popular fallacy of the inherent superiority of fee-paying schools. Accordingly, the court cannot compel a parent to contribute to the payment of school fees in the absence of evidence that such a parent can afford to do so and that it is unreasonable for him not to contribute having regard to the needs of the children, notwithstanding the necessity to re-order priorities following the breakdown of the marriage. More so, when the custodial parent, as does K in this case, include items such as “piano lessons” and “vacation”, in calculating the maintenance needs of the children, the court would regard these as extraordinary expenses, luxuries, which, if the parent is able to afford them, so be it, but to which the other parent should not be compelled to contribute.”

46. The Respondent contended that the Court did not have any knowledge of the Respondent’s income, earning capacity, property and other financial resources nor his financial needs, obligations and responsibilities, until his affidavit was filed on 21<sup>st</sup>

October 2019, prior to the Interim Order. In that regard, he submitted that he was placed in an unfair position where he could not comply with the Interim Order.

47. He further contended that at the time the Interim Order was made, he appeared pro se and therefore did not have the benefit of receiving advice from Counsel. Accordingly, he submitted that he had not been disingenuous nor dishonest when he agreed to the amount ordered but simply did not fully appreciate the gravamen of agreeing to the amount.
48. The Respondent additionally submitted that at the 22<sup>nd</sup> October, 2019 hearing, the Respondent's former Counsel advised that he would not be able to comply with the Interim Order based on his financial circumstances however, the amount was not varied and the arrears continued to accrue.
49. He added that his affidavit clearly showed that he was unable to pay the amount of \$150.00 per week, in addition to the \$30.00 towards the arrears as ordered by the Interim Order. The Respondent continued that the amount represented 75% of his salary and therefore, coupled with his living expenses, created a circumstance where the Respondent could not pay the amount nor the arrears.
50. The Respondent further submitted that after a review of the Petitioner's affidavit evidence, it was clear that she made double his earnings. He went on to say that despite the salary received from Super Value and the 3 ex gratia payments from Atlantis, his financial circumstances did not improve significantly and that he still remained at a disadvantage compared to the Petitioner.
51. In reply to the Petitioner's submission about his failure to provide information on the income from the DVD sales and the mobile steam pressing service, the Respondent submitted that revenue from the DVD sales had dwindled and the revenue from the latter was minimal which resulted in both businesses being discontinued.
52. He went on to say that he would endeavor to contribute more towards maintenance once his financial circumstances changed however, that he could not contribute towards the private school fees for the children. In that regard, he relied on Barnett CJ's dicta in **Henry H. Thurston v Mornette McKenzie (supra)** where he stated that **"the circumstances in which that jurisdiction should be exercised was restricted"**.
53. In further support of this contention, the Respondent again submitted that it was his mother who paid for Jaedon to sit the entrance examination for the private school and that he did not give his consent for the attendance of the same as he could not financially commit to it. He added that the decision was made by the Petitioner unilaterally.

## Discussion

54. The Petitioner wishes for the provisions set out in the Interim Order to become the final order with respect to ancillary relief. The Respondent on the other hand seeks to have the maintenance amount varied to an amount that can be reasonably paid by him.
55. When the Interim Order was made, it was made prior to the parties being heard on Ancillary Relief and no evidence was provided with respect to either of the parties' means. In the circumstances, it was likely that either the Petitioner or the Respondent would have provided evidence that would have potentially caused a variation of the Interim Order.
56. While these proceedings have been contentious and considerably paper heavy, the only issue that I need to address my mind to is maintenance, more particularly the maintenance and custody of the children. During the course of the marriage, the parties did not acquire any real or personal property. Accordingly, that is not an issue for determination.
57. The guiding principle for an ancillary application is the equality principle. Notwithstanding, I am bound to consider the provisions of section 29 of the MCA as rightly submitted by the Respondent and as set out above. This conforms with the overriding objective, which is fairness towards the parties of the marriage. On an application of these principles, the children of the marriage must be placed in the position that they were in prior to the breakdown of the marriage as much as practicable.
58. While the Petitioner's Affidavits are full and frank, the Respondent's Affidavits were not. I emphasize the critical importance of full disclosure by both parties in ancillary proceedings. It is crucial to the proper exercise of the court's discretion, that the court has adequate information with respect to the parties' assets, in order to come to the best conclusion for the parties involved.

#### **Private School Fees**

59. The Petitioner seeks a portion of the sum of \$465.00 from the Respondent, which represents payment of school fees at Aquinas College. She claims that she and the Respondent had previously agreed to send \_\_\_\_\_ to the private school. The Respondent denies this agreement.
60. As I have not found the Respondent to be full and frank with his evidence, I do not consider the Respondent to be a credible witness and prefer the evidence of the Petitioner over the Respondents. However, there is no dispute that his income has been stifled as a result of being furloughed from his employer Atlantis and that any subsequent income would not be sufficient.



61. As Barnett CJ (as he then was) submitted in Henry v. Thurston v Mornette McKenzie (supra) and I accept, the Court cannot compel a parent to contribute to the payment of school fees in the absence of evidence that the parent can afford to do so. In the instant case, it would be unreasonable to order that the Respondent should contribute to the payment of the private school fees as he is not in a financial position to do so. Additionally, it was not the status quo prior to the breakdown of the marriage.

### Maintenance

62. The Petitioner submits that the needs of the children are as follows:

a. Grocery	\$240.00
b. School fee	\$465.00
c. Nursery fees	\$240.00
d. Kids clothing	<u>\$50.00</u>
TOTALLING	\$995.00

63. In addition, the Petitioner submits that any amount awarded should be sufficient to assist with her rent, transportation and utilities as the children benefit from living in her home, being transported in her vehicle and enjoying the utilities.

64. I have considered the income of both the Petitioner and the Respondent. While the Petitioner has a steady income of \$2,000.00 a month, the evidence of the Respondent reflects that he does not. Prior to being furloughed the Respondent earned a weekly average salary of \$196.88 per week plus tips. However, due to the continued existence of COVID-19 the Emergency Orders remain in place and many remain furloughed from the hotel industry. Apart from a minor injury sustained, there is no evidence before me that suggests that the Respondent is unable to gain employment elsewhere.

65. Both the Petitioner and the Respondent have the responsibility of rent, utilities, groceries, cell phone bills, insurance payments and licensing fees, gas payments and personal bank loans and for the 2 children of the marriage. Both have given evidence that their family members have assisted financially where there was a shortfall.

66. I have additionally considered that the children do not have any medical or physical disabilities.

67. Accordingly, the total of the needs of the children with the exclusion of the private school fees amounts to \$530.00. In consideration of the evidence of both parties, I find it prudent and fair to vary the terms of the Interim Order to reflect a monthly payment by the Respondent of \$400.00 per month, which sum represents half of the children's monthly expenses.

### Arrears

68. By the Interim Order, the Respondent was ordered to pay \$150.00 per week. By the 22<sup>nd</sup> October Order it was agreed that the Respondent was in arrears in the amount of \$1,650.00. Therefore, in addition to the weekly sum of \$150.00 he was ordered to pay \$30.00 per week until the arrears were paid in full.
69. The Respondent suggests a variation of that amount to \$20.00 per week. I do not consider it necessary to vary the amount. Accordingly, the order to pay \$30 per week until the arrears are paid in full still stands. The parties shall calculate the amount outstanding to be paid.

### Custody

70. On the 22<sup>nd</sup> October 2019, the Respondent's Counsel, agreed that supervised access was the appropriate order to be made with respect to the children of the marriage. It was also suggested that a social inquiry report was required as the oldest child of the marriage appeared to be struggling.
71. Thereafter, on the 31<sup>st</sup> October 2019, the Respondent's Counsel, after making contact with the Department of Social Services ("**Social Services**"), informed the Court that the Court in fact had to request the said report which it so did. Additionally, it was submitted that the Respondent should have access to the children in a neutral place and that he should be accompanied by his mother or father when he saw the children.
72. As a result of the request, Mrs. Tammi-Clarke Rahming, a social worker with Social Services, assigned to the Child Protective Unit ("**Mrs. Clarke-Rahming**") was assigned to the parties. Mrs. Clarke-Rahming averred that after meeting with the parties, she recognized that the parties were still angry which placed  in an awkward position. She told the Court of an incident which occurred at Fusion Superplex, which the Respondent denied but  confirmed.
73. This resulted in  indicating that he did not want to have unsupervised visits with the Respondent and counselling as a unit and individually being recommended. Subsequently, counselling was ordered but not specifically conformed to as set out below. The court received 2 reports in that regard.
74. The first was the report of Dr. Edrica D. Richardson of the Department of Social Services. She informed the Court of the Respondent's unwillingness to participate in the family sessions and his failure to report to her at all despite his agreement to meeting with her on his own.
75. The second report was that of Barrington H. Brennen, a Marriage and Family Therapist and Counseling Psychologist, who stated that he had seen the Respondent for three

sessions and that he had the welfare of his children paramount in his heart. He added that the Respondent wanted to be able to provided loving care for his children to minimize the impact of the divorce and that he was willing, within the limitation of his income, to do all he reasonably can to meet the needs of his children, *inter alia*.

76. Mr. Brennen recommended that the Respondent should be allowed to be active in his children's lives by being involved in school drop offs and or pickups, that he should have the opportunity to negotiate proper times to have his children stay with him and that if proper co-parenting plans failed that the parties should have at least 3 post-divorce co-parenting sessions.

77. The irony of Mr. Brennen's last mentioned recommendation was that the co-parenting sessions was the very thing the Respondent attempted to evade. While<sup>t</sup> expressed wanting to resume his relationship with his father, the Respondent failed to offer himself for the court ordered counselling. Where possible, a child should not be deprived of the upbringing by his/her father. The existence of a father in a child's life greatly affects a child's cognitive and social development. It also instills an overall sense of well-being and self-confidence.

78. It will certainly not be seen to be the position of this Court to deprive a child of such right. In that regard, the parties are mandated to attend both parenting lessons and family counselling arranged by the Department of Social Services. Accordingly the Respondent shall have supervised access to the children of the marriage, after the commencement and completion of mandatory counselling sessions. These counselling sessions shall be conducted by Dr. Edrica D. Richardson of the Department of Social Services for a period of three months. Thereafter, the Respondent shall have supervised access one day per week.

### Conclusion

79. I have considered the evidence and submissions of both parties. I have additionally considered this jurisdiction's Court of Appeal decisions of **Richard Russell v. Christine Russell SCCiv App No. 119 of 2017**, **Floyd Sawyer v. Flora Sawyer No. 134 of 2014**, **Edwardd Munroe v. Avis Munroe SCCiv App No. 120 of 2018**, **Henry Gay v. Lorraine Gay SCCiv App No. 292 of 2016** authorities and find it necessary to vary the Interim Order as follows:

1. The Respondent shall pay to the Petitioner the sum of \$400.00 per month for the maintenance of the children of the marriage.
2. The Petitioner and the Respondent shall equally bear the burden of all educational (uniforms, school text books, shoes, lunch money, exam fees), medical expenses and dental expenses.

3. The Petitioner shall be granted sole custody of the children of the marriage, with reasonable access to the Respondent subsequent to the completion of the court ordered counselling sessions.

80. I find that these arrangements are the best that can be devised in the circumstances. A Declaration is made pursuant to Section 73 (1) (b) of the Matrimonial Causes Act.

81. With respect to costs, I make an order that the parties shall each bear their own costs and they shall have liberty to apply.

Dated this 19<sup>th</sup> day of May, 2021



The Hon. Madam Justice Renae McKay