



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2023: No. 51

BETWEEN:

M

Applicant

and

M

Respondent

RULING

Date of Hearing: 9 July 2025

Date of Ruling: 19 December 2025

Appearances: The Applicant, In person

Vaughn Caines, Forensica Legal, for the Respondent

RULING of Cratonia Thompson, Acting Registrar

INTRODUCTION

1. This is an application by the Respondent (hereinafter referred to as the **Husband**) (the **Husband's Application**) seeking to discharge and/or vary my Ruling in these proceedings dated 28 October 2024 in relation to ancillary relief (the **Ancillary Relief Ruling**). The Ancillary Relief Ruling granted, *inter alia*, the following relief to the Applicant (hereinafter referred to as the **Wife**):

- (1) A property adjustment order in relation to the former matrimonial home (the **FMH**);
- (2) Monthly periodical payments in the sum of \$500 for each child (**\$1,000 total**) until each child reaches the age of eighteen years old, or until further order of the Court; and
- (3) A total lump sum payment of **\$63,594.41**, comprised as follows:

Mortgage Arrears	37,156.23
Home Insurance	7,606.67
Land Tax Arrears	8,236.00
Tenant's Rental Deposit	4,000.00
Landscaping Charges	3,000.00
Outstanding Cell Phone Charges	633.51
Outstanding Dental Bills	962.00
Outstanding Child Maintenance	2,000.00
TOTAL	<u>\$63,594.41</u>

2. The Husband's Application is opposed by the Wife, who filed a cross-application dated 11 March 2025 (the **Wife's Application**). The Wife's Application seeks *inter alia* the following relief:
 - (1) An order that the Husband's attorney, Mr Vaughn Caines (**Mr Caines**) be estopped from acting in the manner and capacity he currently purports to act.
 - (2) An Order that the Husband's Application be declared or ruled to be null and void, an abuse of process and substance, and/or unlawful, by reason *inter alia*, that it was filed out of time and incorrectly.
 - (3) Costs be awarded to the Wife on an indemnity and/or wasted costs basis due to the manner in which the Husband has conducted or pursued this matter.
3. It is the Wife's case that the Husband should have commenced his application by way of an appeal, and the time frame for filing an appeal has passed. It is on this basis that the Wife argued that the Husband's Application should be struck out.
4. Further, or in the alternative, the Wife argued that the Husband has not met the evidentiary burden required to succeed on an application to discharge or vary the Ancillary Relief Ruling. In either case, the Wife is of the view that the Ancillary Relief Ruling should stand.

5. It is the Husband's case that the Wife's Application is frivolous, vexatious and unwarranted for the following reasons:
- (1) The Husband was not aware of the Ancillary Relief Application, or the Ancillary Relief Ruling.
 - (2) The Wife is wrong in stating that the Husband's Application to vary or discharge the property adjustment order was filed incorrectly and/or out of time.
 - (3) The procedural irregularity, namely that Mr Caines was not on record for the Husband when the Husband's Application was filed, has been rectified.
6. In the circumstances, the Husband's Counsel invited the Court to dismiss the Wife's Application, and to decline making an order for costs against the Husband or him personally as attorney of record.

REVELANT FACTUAL AND PROCEDURAL BACKGROUND

7. I have set out below the relevant factual and procedural background. Some of the facts set out below are also set out in the Ancillary Relief Ruling but are included below for completeness.
8. The Wife filed for Divorce in May 2023. Upon the making of the Conditional Order for Divorce, matters of ancillary relief were adjourned to Chambers. There are two children of the family, both of whom are under the age of eighteen and reside with the Wife in the FMH.
9. By Notice of Application for Ancillary Relief dated 11 May 2023 (the **Ancillary Relief Application**) the Wife applied for the following relief:
- (1) The Husband pay to her periodical payments for the two children of the family (the **Children**);
 - (2) The Husband pay a lump sum or sums to the Wife;
 - (3) A property adjustment order in relation to the FMH in favor of the Wife.
10. The Husband initially participated in the proceedings through his attorney Mr Caines, with the parties entering into a consent order for directions in respect of the Ancillary Relief Application on 1 September 2023 (the **Consent Order**).

11. Mr Caines accepts that when the Divorce Application was before the Court on 22 March 2024, he made an oral application to be removed as counsel of record for the Husband on the basis that he was unable to obtain instructions from the Husband. Although no order to that effect was filed or sealed, the Court's official record (CourtSmart) reflects that Mr Caines was removed as Counsel of record in the proceedings and no longer acted for the Husband.
12. It is to be noted that the following additional orders were made in these proceedings following applications filed by the Wife:
 - (1) An order dated 22 April 2024, allowing the Wife to dispense with service of the application for divorce and accompanying documents on the Husband (the **Order Dispensing Service**).
 - (2) An order dated 6 June 2024, allowing the Wife to serve the Husband with any documents in these proceedings via email (the **Substituted Service Order**).
 - (3) A further directions order dated 24 June 2024 in respect of the Ancillary Relief Application (the **Directions Order**), whereby the Wife was ordered to file a Supplemental Affidavit of Means, and to serve her original Affidavit of Means electronically on the Husband on or before 26 June 2024. The Directions Order also required the Husband to provide his response to the Wife's affidavit evidence within 14 days of receipt.
13. Mr Caines suggested that the Substituted Service Order and the Directions Order were granted without notice to the Husband, and that there were procedural irregularities in the determination of those applications. It is therefore necessary that I set out the procedural history of each application.
14. On 28 May 2024, the Wife filed an *ex parte* application seeking the following relief:
 - (1) Leave of the Court to make the Conditional Order for divorce granted on the 3 May 2024 a Final Order of the court forthwith.
 - (2) Substituted service on the Husband via email or that service be dispensed with.
 - (3) The hearing of the ancillary relief proceedings be fixed for the next available court date.
 - (4) The Husband pay forthwith interim maintenance for the two children of the family in the amount of \$1,000 per month, i.e. \$500 per month, per child.

(5) The said interim child maintenance be paid via an attachment of earnings.

(6) Costs of the application in her favor.

15. Save for the relief sought at item (2) above, the Court took the view that the Wife was not at liberty to seek the relief sought in the application on an *ex parte* basis. That being the case, the relief sought at item (2) was struck through with red pen on the Summons, and it was directed that the remaining relief be determined on an *inter partes* basis. The Summons was issued returnable 18 June 2024, and the Wife was directed to serve the Summons on the Husband.
16. The Wife then made a separate application for substituted service on an *ex parte* basis. The Court in its inherent jurisdiction can consider an application for substituted service on an *ex parte* basis, and the Wife's application for substituted service was considered on the papers. Therefore, the only order granted on an *ex parte* basis in these proceedings was the Substituted Service Order.
17. The Husband did not comply with the Directions Order and did not participate further in the proceedings until the filing of his present application. Of significant note, the Husband did not file any affidavit evidence in respect of the Ancillary Relief Application.
18. The Ancillary Relief Application was listed for final determination on 14 August 2024. The Court issued a Notice of Hearing dated 5 August 2024 (the **Notice of Hearing**), which was served on the parties via email on 6 August 2024; however the parties were first informed that the Ancillary Relief Application was listed for final hearing via email on 31 July 2024, at which time they were advised that a Notice of Hearing would follow.
19. At the Ancillary Relief Hearing, the Wife sought an urgent determination of the Ancillary Relief Application, and in particular the relief sought in relation to the FMH. The Wife argued that the parties were at risk of losing the FMH to foreclosure. The Husband did not appear at the Ancillary Relief Hearing, albeit the Court acknowledged for the record that the Husband had proper and effective notice of the hearing.
20. At the conclusion of the Ancillary Relief Hearing, I granted the property adjustment order sought by the Wife in relation to the FMH and made a Preliminary Order to this effect (the **Preliminary Order**).
21. My decision in respect of the remaining relief sought in the Ancillary Relief Application was reserved pending receipt of updated financial information from the Wife. The Wife filed her updated financial information on 26 September 2024, and the Ancillary Relief Ruling was handed down on 28 October 2024 by email. Included in the Ancillary Relief Ruling were my reasons for granting the property adjustment order in relation to the FMH in favor of the Wife.

22. The Husband's Application, together with an affidavit in support sworn by Mr Caines was filed on 30 January 2025. The Wife's Application was supported by an affidavit sworn by the Wife dated 10 March 2025 (the **Wife's First Affidavit**).
23. The Husband and Wife's Applications were listed to be heard together. At the first return date of the Husband and Wife's Applications, the Wife raised with the Court that Mr Caines was no longer Counsel of record for the Husband in these proceedings. By an order dated 11 March 2025, Mr Caines was ordered to file a Notice to Act for the Husband, which was subsequently filed on 17 March 2025.
24. The following additional evidence was filed and relied upon by the parties in respect of the Husband and Wife's Applications:
 - (1) An affidavit sworn by the Husband dated 8 April 2025 (the **Husband's Affidavit**) in response to the Wife's First Affidavit.
 - (2) An Affidavit sworn by the Wife dated 4 July 2025 in response to the Affidavit sworn by Mr Caines (the **Wife's Second Affidavit**).
 - (3) An Affidavit sworn by the Wife dated 4 July 2025 in response to the Husband's Affidavit (the **Wife's Third Affidavit**).

THE LAW

25. Section 35 of the Matrimonial Causes Act 1974 (the **MCA**) allows for an application to be made to vary or discharge an order for ancillary relief. It provides as follows:

Variation discharge, etc., of certain orders for financial relief

35 (1) Where the court has made an order to which this section applies, then, subject to this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2) This section applies to the following orders—

- (a) any order for maintenance pending suit and any interim order for maintenance;
- (b) any periodical payments order;
- (c) any secured periodical payments order;
- (d) any order made by virtue of section 27(3)(c) or 31(7) (b) (provision for payment of a lump sum by instalments);
- (e) any order for a settlement of property under section 28(1)(b) or for a variation of settlement under section 28(1)(c) or (d), being an order made on or after the making of a judicial separation order.

(3) *The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.*

(4) *The court shall not exercise the powers conferred by this section in relation to an order for a settlement under section 28(1)(b) or for a variation of settlement under section 28(1)(c) or (d) except on an application made in proceedings—*

- (a) *for the rescission of the judicial separation order by reference to which the order was made; or*
- (b) *for the dissolution of the marriage in question.*

...

(7) *In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.*

[Emphasis added]

26. Rule 55 of the Matrimonial Causes Rules 2023 (the **MCR**) speaks to the evidence that is to be provided on an application for a variation order. It provides as follows:

Evidence on application for variation order

55 (1) *An application for a variation order shall be supported by an affidavit by the applicant setting out full particulars of his property and income and the grounds on which the application is made.*

27. Although the Wife's Application alleges that the Husband's Application was filed incorrectly and/or out of time, I am satisfied Section 35 of the MCA allows the Husband to make this application, and that Rule 55 of the MCR governs the evidence that the Court is required to consider when determining the Husband's Application.

THE HUSBAND'S POSITION

28. It is the Husband's case that he had no knowledge of the Ancillary Relief Application, the Ancillary Relief Hearing, or the Ancillary Relief Ruling. He says that once he was sent the Ancillary Relief Ruling he immediately instructed Mr Caines to make this application on his behalf.
29. To support his application, the Husband referred to Rule 55 of the MCR, and to the case of *X v Y* [2013] SC (Bda) 29 Div, in which Hellman J considered the applicable legal principles governing the setting aside of a consent order made in matrimonial proceedings. It is of note to these particular proceedings that the consent order in *X v Y* provided, in part, for ancillary relief.

30. At paragraph 12 of X v Y, Hellman J stated that he was greatly assisted in his determination by the Judgment of Justice Norma Wade-Miller in Gibbons v Gibbons [2010] Bda LR 31, a case which also considered an application to set aside a consent order for ancillary relief. Hellman J then set out the principles he considered relevant. Although the Husband referred only to paragraphs 12 (9) and (10) of X v Y, for completeness, I have set out paragraph 12 in full below:

The law

12. *It will be helpful to set out the principles governing the setting aside of a consent order made in matrimonial proceedings insofar as they are relevant to the Husband's application. I have been greatly assisted in this task by the judgement of Mrs Justice Wade-Miller in this Court in Gibbons v Gibbons [2010] Bda LR 31. This summary is not exhaustive –it merely sets out those principles that are relevant to my decision in the present case.*
- (1) *When the parties agree the provisions of a consent order, and the court subsequently gives effect to such agreement by approving the provisions concerned and embodying them in an order of the court, the legal effect of those provisions is derived from the court order itself and does not depend any longer on the agreement between the parties. See the speech of Lord Brandon, with whom the other Law Lords agreed, in the House of Lords in Jenkins v Livesey [1985] 1 AC 424 at 435G.*
- (2) *A consent order may be set aside in cases (i) where the order was made on the basis of a mistake of fact by one or both parties, eg because of material non-disclosure by one of them, and (ii) where new events have occurred since the making of the order which invalidate the basis on which the order was made. See the judgment of Mrs Justice Bracewell in the Family Division in S v S (Ancillary Relief: Consent Order) [2003] Fam 1 at para 4.*
- (3) *In ancillary relief proceedings, each party owes a duty to the court to take full and frank disclosure of all material facts to the other party and the court. This is because without such disclosure the court will be unable to comply with its statutory duty in section 29(1) of the Matrimonial Causes Act 1974 when deciding whether to make any financial provision or property adjustment orders to have regard to all the circumstances of the case. See the speech of Lord Brandon in Jenkins v Livesey at 437H – 438A.*
- (4) *Non-disclosure may take the form of either active concealment or passive failure to mention. See the leading judgment of Lord Justice Thorpe, with whom the other members of the Court agreed on this point, in the Court of Appeal of England and Wales in Shaw v Shaw [2002] EWCA Civ 1298 at para 44(ii).*
- (5) *It is only in cases where the absence of full and frank disclosure has led to the court making an order which is substantially different to*

the order which it would have made if such disclosure had taken place that a case for setting aside a consent order can possibly be made good. See the speech of Lord Brandon in Jenkins v Livesey at 445G– H.

- (6) *A consent order can also be set aside in a case of undue influence or duress. See the judgment of Mrs Justice Wade-Miller in Gibbons v Gibbons at para 35, with which I agree. But the point is not free from doubt. In Tomney v Tomney [1983] Fam 15 in the Family Division at 26D, Mr Justice Balcombe (as he then was) held that it could not. In Jenkins v Livesey at 440F, Lord Brandon stated that he was not persuaded that Mr Justice Balcombe’s decision on the question was necessarily correct. In L v L in the Family Division [2006] EWHC 956 at para 95, Mr Justice Munby (as he then was) was prepared to assume for the sake of argument that a consent order could be set aside on the grounds of duress or undue influence. “Duress” means the obtaining of agreement or consent by illegitimate means. See the judgment of the Privy Council on appeal from the Court of Appeal of Bermuda given by Lord Saville in Borrelli v Ting [2010] Bus LR 1718 at para 34.*
- (7) *Pressure, even unfair pressure, falling short of undue influence or duress will not suffice to set a consent order aside. See the judgment of Mr Justice Munby in L v L at para 95.*
- (8) *A consent order can be set aside for undue influence or duress because these factors form part of the circumstances of the case to which the court must have regard when deciding whether to make any financial provision or property adjustment orders. Had the court been aware that consent to the order which it was being invited to make had been obtained from one of the parties by illegitimate means then the court would have declined to make an order by consent and would instead have proceeded to investigate the merits of the case.*
- (9) *Where an application to set aside a consent order is based on events which have occurred since the making of the order:*
 - (a) *Those events must invalidate the basis upon which the order was made such that if they had occurred before the order was made the court would have been certain, or very likely, not to have made an order in those terms.*
 - (b) *The events must have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, it is very unlikely that it could be as much as a year and in most cases will be no more than a few months.*

See the speech of Lord Brandon, with whom the other Law Lords agreed, in the House of Lords in Barder v Calouri [1988] AC 20 at 43B – E.

- (10) *There is an overriding need for finality in litigation. An application to set aside a consent order must therefore be made with reasonable promptness. As happened in Gibbons v Gibbons, an otherwise meritorious application that is not made with reasonable promptness will fail. This is not only on account of the need for finality but also to avoid the risk of an expensive and fruitless trial on oral evidence. See the judgment of Lord Justice Thorpe in Shaw v Shaw at para 44(iii) and (v).*
- (11) *What constitutes reasonable promptness will depend upon the particular facts of the case. The application to set aside cannot precede the discovery of the undisclosed fact or subsequent event, as the case may be, upon which the application is based. The need to obtain competent legal representation, and to find the means to pay for it or alternatively to obtain public funding, may also be relevant. See the judgment of Lord Justice Thorpe in Shaw v Shaw at para 44 (v).*

31. According to the Husband, his application was made with the ‘reasonable promptness’ required in order for his application to be considered.
32. Although the Ancillary Relief Ruling granted other relief to the Wife, including periodical payments for the Children and a lump sum provision, the Husband’s primary concern is in relation to the granting of the property adjustment order in relation to the FMH. It was argued that the decision to grant the property adjustment order in favor of the Wife was made in the absence of financial disclosure from the Husband. The Husband argued that had he been aware of the Ancillary Relief Application, he would have appeared at the hearing and invited the Court to dismiss the Wife’s application for a property adjustment order in her favor.
33. The Husband, who is currently of no fixed abode, takes the view that the granting of the property adjustment order placed the Husband in an unfair and detrimental position. The Husband argued that granting the property adjustment order also negatively impacts his parents, who signed as Guarantors when the FMH was purchased, both fiscally and emotionally. The Husband submitted that had he been given the opportunity to do so, he would have presented an alternative proposal for the Court’s consideration.
34. For context, the FMH is comprised of a main house (where the Wife resides with the Children) and an income producing apartment that is currently rented. It is the Husband’s case that the property adjustment order should be discharged or varied to allow the Husband to reside in the apartment while the Wife and Children continue to occupy the main house. The Husband argued that this arrangement is a reasonable alternative to the granting of the property adjustment order in favor of the Wife. In his view, this arrangement would be equally beneficial to the parties and to the Children, as it would

allow for both parties to meaningfully contribute to the FMH, while also providing a stable environment for the Children.

35. It was submitted, that in the interest of fairness, I should allow the Husband to file an Affidavit of Means setting out the Husband's financial disclosure, and that this evidence would support the Husband's proposal for cohabitation at the FMH.

THE WIFE'S POSITION

36. Unsurprisingly, the Wife wholly objects to the Husband's Application. In doing so, the Wife referred to Sections 29 (1) and (2) of the MCA, which sets out the matters to which the court is to have regard in deciding how to exercise its powers under Sections 27 and 28 of the MCA. Sections 29 (1) and (2) of the MCA provide as follows:

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

- (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 contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contributions by looking after the home or caring for the family;*

(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 is to say—

- (a) the financial needs of the child;*
- (b) the income, earning capacity (if any), property and other financial resources of the child;*
- (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 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.

37. The Wife argued that I have already engaged in the exercise of considering the matters set out in Sections 29 (1) and (2) of the MCA, and that this exercise resulted in my decision to grant the property adjustment order in her favor. The Wife confirmed that the evidence that I considered at the hearing of the Ancillary Relief Application has not changed.
38. At the hearing of the Ancillary Relief Application, the evidence before the Court was that the FMH had been valued at \$825,000, however it was subject to a mortgage, with an outstanding borrowing of approximately \$1.2 million. The evidence also showed that the mortgage was in arrears due to the Husband's failure to enter into a Fixed Rate Agreement with the Bank. The Husband's failure to enter into the said agreement with the Bank ultimately resulted in the monthly mortgage payments increasing to \$12,880.62 per month, which is beyond what the Wife (who had always paid the mortgage) could afford. As a result, the FMH was at risk of foreclosure¹.
39. The Wife highlighted that Rule 55 (1) of the MCR requires an applicant in a variation application to provide an affidavit setting out the full particulars of his property and income, as well as the grounds on which the application is made. The Wife says that the Husband has failed to provide this information, and consequently has not demonstrated that he is able to service the outstanding mortgage.
40. The Wife also highlighted that the case of X v Y, referred to by the Husband, does not support his case. It was submitted that X v Y demonstrates that an application to set aside an order in matrimonial proceedings can be considered "*where new events have occurred since the making of the order which invalidate the basis on which the order was made*". The Wife then highlighted that the Husband has not set out any new events. Similarly, the Wife also pointed out that the Affidavit of Mr Caines speaks to a "*change in circumstance*" as it pertains to the Husband, but he nor the Husband has stated what change in circumstance has occurred. The Wife takes the view that the Husband is relying on his lack of permanent residence as his purported change in circumstance, however this was not expressly argued by the Husband.
41. The Husband did confirm in his evidence that he is of no fixed abode because he does not have enough income to pay rent; however, he averred that this is due to his wages being garnished to cover the child maintenance payments. In any event, the Wife argued that if the Husband is unable to pay rent, he would be unable to pay a mortgage. The Wife reiterated that the costs to maintain the FMH have not changed since the Ancillary Relief Ruling. It was then argued that if I were to discharge or vary the property adjustment order in relation to the FMH, the likely result would be that the home would be lost to foreclosure

¹ See paragraph 12 of the Ancillary Relief Ruling.

as the Husband simply cannot cover the costs. In the circumstances, the Wife is confident that the Ancillary Relief Ruling should stand.

42. In addition, the Wife objects to the Husband's proposal that the parties cohabit the FMH, and his contention that this arrangement would be equally beneficial to the parties and would also be in the best interest of the Children. The Wife is of the view that allowing the Husband to return to the FMH, even if he were to reside in the apartment, would have a devastating impact on her and the Children. The Wife referred to Domestic Violence Protection Orders (**Protection Orders**) that have been obtained against the Husband in the Magistrates' Court, and argued that the Husband's proposal does not take these Protection Orders into account.
43. Notably, the Husband referenced the DVPO proceedings in his own evidence, however the Husband argued that he is not the aggressor as it concerns the strained relationship between him and the Wife, and that the Children do not require protection from him.
44. The Wife raised additional concerns, which in her view, directly impact whether the parties are able to harmoniously cohabit the FMH. Such concerns include the Husband's alleged substance abuse and mental state. All circumstances considered, the Wife is firmly of the view that she and the Children cannot cohabit with the Husband on the same property.
45. The Wife is also seeking an indemnity costs order against the Husband or his attorney as a result of the Husband's conduct during these proceedings. The Wife submitted that the Husband received the notices listing the Ancillary Relief Application for hearing and simply refused to appear. The Wife went on to highlight the many service challenges that she experienced in having the Husband served with these proceedings. The Wife says that the Husband's Application is a manipulation and/or delay tactic, noting that the Husband's Application was filed on the same day that the Husband was required to make a lump sum payment towards his child maintenance arrears. In the circumstances, the Wife seeks an order that she be awarded her costs on an indemnity and/or wasted costs basis. The Husband categorically denies these allegations.

APPLYING THE FACTS TO THE LAW

The Husband's Application

46. It is well established that before the Court can properly apply its mind to the criteria set out in Section 29 (1) of the MCA, the Court must first consider the evidence before it and make such assessment as to the credibility of the witnesses and the discharge of their duty to provide to the Court full and frank disclosure of their finances. In instances where the obligation to provide full and frank disclosure has not been satisfied, if it is appropriate to do so, the Court may draw adverse inferences.

47. It is trite law that where one party fails to provide full and frank disclosure in matrimonial cases, adverse inferences in respect of this non-disclosure can be drawn. This was referenced and addressed in the Ancillary Relief Ruling at paragraphs 21 to 26, which state as follows:

“21. *It is trite law that where one party fails to provide full and frank disclosure in matrimonial cases, adverse inferences in respect of this non-disclosure can be drawn (see Vernetta Mae Shelley Howe v Douglas Colby Howe (SC) No. 55 of 2012 (14 March 2016) at para. 30).*

22. *As it relates to the Applicant’s income and expenses, I have no reason to doubt the reliability of the evidence submitted by the Applicant in her Affidavit of Means, the Supplemental Affidavit or the updated financial information provided on 26 September 2024. Further, given the Respondent’s failure to provide any evidence in reply, or to appear at the hearing, the Applicant’s evidence is not disputed.*

23. *As it relates to the Respondent’s income and expenses, it is reiterated that the Respondent did not file any affidavit evidence. Given the Respondent’s failure to provide any financial disclosure, and his failure to participate in these proceedings, the Court has no choice but to draw adverse inferences as it relates the Respondent’s financial position.*

24. *It is clear that the FMH can be defined as nothing other than matrimonial property. I am satisfied that the only asset for distribution is the FMH, and that the Respondent is in no position to service the outstanding mortgage. I am also satisfied that the current arrears are as a direct result of the Respondent’s failure to enter into the Fixed Rate Agreement proposed by the Bank.*

25. *Further, I am satisfied that the Applicant secured orders in the Magistrates’ Court for the payment of certain sums, and that those outstanding sums are due and owing to the Applicant.*

26. *I am also satisfied, given the Court’s order that the two children of the family remain in the interim custody, care and control of the Applicant, that the Applicant is entitled to receive periodical payments in respect of the said children following the hearing of the Application.”*

48. Therefore, I do not accept the Husband’s submission that I was unable to grant the property adjustment order in the absence of financial disclosure or evidence from the Husband. Furthermore, the Court has discharged its duty in all court appearances in satisfying itself that the Husband had proper notice of each hearing.

49. It is of note that the parties first agreed directions for the filing of evidence in relation to the Ancillary Relief Application by consent, which resulted in the Court issuing the Consent Order. The Husband, who was represented by Mr Caines at that time, did not comply with the agreed directions. In fact, the Husband appears to have disengaged from participating in the proceedings sometime after the Consent Order was signed; however,

it wasn't until 22 March 2024 that Mr Caines was removed as the attorney of record due to an inability to obtain instructions from the Husband.

50. Similarly, I do not accept that the Husband was unaware of the subsequent orders that were made in relation to the Ancillary Relief Application, or that he was unaware that the Ancillary Relief Application had been set down for hearing. That said, even if it is correct that the Husband was not aware that the Ancillary Relief Application had been set down for hearing, he is now fully aware of the Ancillary Relief Application and the orders that were made requiring financial disclosure.
51. The Husband has also had sight of the Ancillary Relief Ruling, and my reasons for granting the property adjustment order in favor of the Wife. It was clear on the evidence provided by the Wife that the Husband was not in a position to service the outstanding mortgage that is attached to the FMH (totaling approximately \$1.2 million), and it was on this basis that the property adjustment order was granted in favor of the Wife². To date, the Husband has not provided any evidence to the Court that suggests otherwise.
52. Instead, the Husband has proposed that the parties cohabit the FMH (albeit in separate dwellings) with both parties contributing financially. As previously noted, I was invited to allow the Husband to file an affidavit setting out evidence in support of this proposal, together with his financial disclosure. In my view, this submission contravenes Rule 55 (1) of the MCR, which requires that an application to discharge or vary an order be supported by an affidavit by the applicant setting out full particulars of his property and income and the grounds on which the application is made.
53. As such, rather than inviting the Court to allow the Husband to file an Affidavit *now*, the Husband should have set out his evidence *in full* in his supporting affidavit when his present application was made. In the circumstances, I agree with the Wife that the Husband has not met the required evidentiary burden.
54. I also agree with the Wife's submission that the Husband has not shown any change in circumstance, nor has he identified any new events since the Ancillary Relief Ruling was handed down that invalidate the basis on which that Ruling was made³. Although the Husband has not argued expressly that his lack of permanent residence represents a change in circumstance, it is my view that this would not amount to a change in circumstance that would warrant varying or discharging the property adjustment order in any event. The Husband stated in his evidence that he has been "*couch surfing*" since being removed from the FMH, which occurred prior to the Ancillary Relief Ruling.
55. Further, I am guided by the principles set out in X v Y concerning setting aside an order in matrimonial proceedings. X v Y confirms that a case for setting aside an order in

² See paragraph 24 of the Ancillary Relief Ruling

³ See principles in X v Y set out at paragraph 30 of this Ruling.

matrimonial proceedings can only be made good in cases where the absence of full and frank disclosure has led to the court making an order that is substantially different to the order it would have made had such disclosure taken place. In this case, I am satisfied that even if the Husband had provided full and frank disclosure prior to the Ancillary Relief Hearing, my ruling, particularly as it relates to the property adjustment order, would have been the same.

56. I reject the Husband's submission that his proposal that the parties cohabit the FMH is a reasonable alternative to the granting of the property adjustment order in favor of the Wife. It is clear that the relationship between the Husband and the Wife is acrimonious. The parties agree that there have been Protection Orders issued in the Magistrates' Court against the Husband, where the Wife and the Children are named as parties. Although the Husband's evidence in these proceedings is that he has not been the aggressor, the fact still remains that the Protection Orders exist. Aside from denying that the Children require protection from him, the Husband has not acknowledged that those prohibitions are directly relevant to his proposal to reside in the apartment of the FMH.
57. That said, even if I were to put aside the existence of the protection orders, I am confident that I would still reach the same conclusion. The law simply does not support divorced couples cohabitating. It was established in the case of Minton v Minton [1979] A.C. 593 (Minton) that, where possible, the Court should aim for finality in financial settlements between divorcing couples. Lord Scarman explained the public policy behind encouraging 'clean break' settlements as follows:

"The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind and to begin a new life which is not overshadowed by the relationship which has broken down."
58. This principle was then reinforced by the Privy Council in De Lasala v De Lasala [1980] 1 A.C. 546 (De Lasala), wherein Lord Diplock spoke of the desirability of a 'clean break' as articulated in Minton.
59. Minton and De Lasala emphasize that the Court should aim for finality in financial settlements, and discourage court-approved financial arrangements that prolong financial disputes between former spouses. It is quite clear that the Husband's proposal would prolong the financial issues that currently exist between the parties, and would likely place the parties in further financial distress, including losing the FMH to foreclosure.
60. In all of the circumstances, I refuse the Husband's Application to vary or discharge the Ancillary Relief Ruling, and in particular, setting aside the granting of the property adjustment order to the Wife.

The Wife's Application

61. While it is correct that on the filing of the Husband's Application Mr Caines was not on record for the Husband, it was ordered at the first return date of the Husband's Application that Mr Caines file a Notice to Act. The Notice to Act was filed on 17 March 2025. Therefore, in my view, the procedural irregularity complained of by the Wife has now been rectified.
62. Additionally, I am satisfied that Section 35 of the MCA allows for an application to be made to vary or discharge an order for ancillary relief. Therefore, I do not accept that the Husband's Application is an abuse of process and substance, and/or unlawful by reason *inter alia* that it was filed out of time and incorrectly. Consequently, I do not accept that the Husband's Application should be struck out as a result.
63. As to the indemnity costs order sought by the Wife, neither party offered any case law in support, however it is well-established that there is a general practice of not awarding costs against a party in family proceedings concerning children. That said, the Court retains a discretion to do so in exceptional circumstances. Exceptional circumstances include cases in which a party has been guilty of reprehensible or unreasonable behavior in relation to the proceedings⁴.
64. Bearing in mind my findings on whether the Husband's Application should be struck out, I am not of the view that Wife has made out a case for an indemnity costs order against the Husband, or that the Court should deviate from the general practice.

CONCLUSION

Husband's Application

Property Adjustment Order

65. For the reasons set out above, I refuse the Husband's Application to discharge or vary the property adjustment order. The Husband has provided no evidence that there has been a change in his circumstances or 'new' events that would invalidate the basis on which the property adjustment order was made. In particular, the Husband has offered no evidence to support that he is able to service the mortgage that is attached to the FMH, a factor that was fundamental in my decision to grant the property adjustment order in favor of the Wife. That being the case, I am firmly of the view that even if the Husband had appeared at the Ancillary Relief Hearing, I would have still granted the property adjustment order in relation to the FMH in favor of the Wife.

⁴ Re E (Children: Costs) [2025] EWCA 183, cited with approval in A v B [2025] SC (Bda) 68 app. (4 July 2025)

66. Additionally, the Husband's proposal that he, the Wife and the Children cohabit the FMH (albeit in separate dwellings) has no basis in law and is similarly unsupported by the evidence. It is deeply unfortunate that the Husband is currently of no fixed abode, however I am not of the view that this supports a variation to the property adjustment order. Additionally, I do not accept the Husband's cohabitation proposition would equally benefit the parties, or is in the best interest of the Children.
67. Lastly, I am satisfied that the Court should endeavor to promote finality in divorce proceedings. Curiously, the Husband's proposal that the parties cohabit the FMH involved both parties contributing financially to the FMH – a scenario that is not at all supported by the law. Therefore, the property adjustment order in respect of the FMH granted in favor of the Wife shall stand as set out in the Preliminary Order.

Periodical Payments (Child Maintenance) and Lump Sum Provisions

68. While the Husband's submissions dealt primarily with discharging or varying the property adjustment order, I have also considered whether it is appropriate to discharge or vary the remaining relief granted to the Wife in the Ancillary Relief Ruling.
69. In accordance with the Ancillary Relief Ruling, the Husband was ordered to pay \$1,000 per month in child maintenance to the Wife. The Wife has received the Court ordered maintenance payments by way of an attachment of earnings, and this order shall remain until further order of the Court.
70. The lump sum provisions awarded to the Wife are set out in paragraph 2 of this Ruling. The Ancillary Relief Ruling required payment of the lump sum provisions to the Wife within three (3) months (i.e. on or before 28 January 2025). It is noted that the Ancillary Relief Ruling granted the Husband liberty to apply within 14 days (i.e. on or before 7 November 2024) in respect of the timeline for payment of the lump sum. No such application was made, and the lump sum payment remains outstanding.
71. It is reiterated that the Wife secured orders in the Magistrates' Court for the payment of certain sums, and that those sums remained due and owing to the Wife at the time of the Ancillary Relief Hearing. As the Ancillary Relief Ruling sought only to confirm the Magistrates' Court's orders regarding payment of those sums, I decline to vary or discharge my Ruling in respect of the following sums, and payment shall be made forthwith:

Home Insurance	7,606.67
Land Tax Arrears	8,236.00
Tenant's Rental Deposit	4,000.00
Landscaping Charges	3,000.00
TOTAL	<u>22,842.67</u>

72. I also decline to vary or discharge my Ruling in respect of the following sums awarded to the Wife, and payment shall be made forthwith:

Mortgage Arrears	37,156.23
Outstanding Cell Phone Charges	633.51
Outstanding Dental Bills	962.00
Outstanding Child Maintenance	2,000.00
TOTAL	<u>40,751.74</u>

73. Should the Husband wish to make an application in respect of the timeline for payment of the abovementioned lump sums, such application shall be made no later than 16 January 2026.

The Wife's Application

74. The Wife's Application to strike out the Husband's Application is dismissed.

Costs

75. There shall be no order as to costs in respect of the Husband's Application or the Wife's Application. Each party shall bear their own costs.

DATED this 19th day of December 2025



ACTING REGISTRAR, CRATONIA THOMPSON