



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2019 No: 57

**BETWEEN:**

**A. B.**

**Petitioner**

**and**

**F. B.**

**Respondent**

**Ruling**

*Maintenance Pending Suit*

**Date of Hearing:** 28 and 29 August 2019

**Date of Ruling:** 10 October 2019

Matthew Watson of Cox Hallett Wilkinson Limited for the Petitioner  
Georgia Marshall of Marshall Diel & Myers Limited for the Respondent

JUDGMENT of Registrar Alexandra Wheatley

### **INTRODUCTORY**

1. The Petitioner and the Respondent were married on 11 April 1990 and as such have had a long marriage of approximately 29 years. There is one child of the family who is now 18 years old and is enrolled in full-time tertiary education.

2. The divorce petition was filed on 3 May 2019; however, the Respondent filed an Answer on 5 July 2019. The defended divorce hearing has been set down for three days on 25, 26 and 27 November 2019.
3. Prior to the Petitioner filing the divorce petition, the Respondent commenced proceedings in the Magistrates' Court under the Domestic Violence Protection Order Act 1997 ("the DVPO Act") in April 2019. A Temporary Domestic Violence Protection Order ("the DVPO") was granted to the Respondent on 18 April 2019 which *inter alia*, ousted the Petitioner from the former matrimonial home located at 4 Sanz Lane, Pembroke ("the FMH") as well as required the Petitioner to pay the following for the Respondent:
  - (a) the rent of the FMH in the sum of \$4,000 per month;
  - (b) continue to pay the Respondent's major medical insurance; and
  - (c) a weekly maintenance payment of \$500 per week for maintenance for the Respondent and the child of the family.
4. I am not required to make any findings in relation to the DVPO as this was done by the Learned Magistrate and that decision was not appealed by the Petitioner. However, Counsel for the Petitioner continually made submissions which heavily criticized many facets of this application. Mr Watson also purported the sums requested for the DVPO application would have been sums sufficient to cover the Respondent's and the child of the family's needs which therefore made the application to this court unnecessary. I will address these specific submissions later.
5. The Respondent filed her Notice of Application for Ancillary Relief on 17 July 2019 ("the Application"). The Application sets out the relief being sought by her as follows:

*"...Order (1) the Petitioner be ordered on an urgent basis to pay periodical payments for the Respondent and the child of the family.....and (2) the Petitioner be ordered to pay periodical payments for the Respondent [and the child of the family].*

*The Respondent also seeks an order that the Petitioner pay the costs of this application."*
6. The Application was listed for directions on 30 July 2019. The parties reached an agreement regarding directions and filed a Consent Order dated 5 August 2019 ("the Consent Order"). The parties entered into the Consent Order on the following basis:

*"...without prejudice to any and all arguments that may be made on the Application by either party, including but not limited to whether the Respondent is entitled to any urgent interim maintenance or interim maintenance at all..."*
7. The Consent Order sets out the following financial provisions for the benefit of the Respondent and the child of the family:

“ ...

4. *The rent of the Petitioner and the Respondent shall be paid from the business bank account of [the Business<sup>1</sup>] as and when it falls due;*
5. *The utilities associated with the Respondent's residence at 4 Sanz Lane, Pembroke shall be paid from the business bank account of [the Business] as and when they fall due;*
6. *Commencing the week of Monday, 29 July 2019, the Respondent is at liberty to spend a maximum of \$500 per week from the business bank account of [the Business] in respect of the ordinary reasonable living expenses of herself and the child of the family...;*
7. *The Petitioner shall maintain the Respondent's existing health insurance and the Respondent is at liberty to pay any reasonable co-pays from the parties' joint HSBC savings account;*
8. *[The child of the family's] school and health related expenses shall be paid from the parties' joint HSBC savings account;*
9. *This Consent Order is conditional upon the discharge effective 26 July 2019 of the Order made on 3 May 2019 in Magistrates' Court case number 19FS0035;*
10. *To the extent that there are insufficient funds in the business bank account of [the Business] to pay the amounts in paragraphs 4, 5 and 6 as and when they fall due, such amounts shall be paid from the parties' joint HSBC savings account;...”*

8. I reserved Judgment at the close of submissions, but provided the parties with further directions in the Order dated 29 August 2019 as follows:

“(1) *Judgment is reserved.*

(2) *The Petitioner shall respond to the letters from Marshall Diel & Myers Limited dated 27 August and 28 August as well as provide all documents requested therein within fourteen (14) days from the date hereof;*

(3) *The Respondent shall respond to the letter from Cox Hallett Wilkinson Limited date 21 August 2019 within fourteen (14) days from the date hereof;*

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<sup>1</sup> I have not used the referred to the name of the business in order to keep this Judgment anonymized.

- (4) *The terms of the Consent Order set out at paragraphs 4 through 10 shall continue until the final determination of this application.*
- (5) *This matter shall be set down for mention on 1 October 2019 at 9:30 a.m. to review whether the parties have complied with the terms of this Order and whether any further directions are necessary pending the outcome of the defended divorce proceedings listed for 25, 26 and 27 November 2019.”*

## **THE FACTS**

### **Respondent’s position**

9. The Respondent relies on her second affidavit and corresponding exhibit sworn on 17 July 2019 (“the Respondent’s Second Affidavit”), as her evidence in this application.

### ***Income***

10. The Respondent currently has no source of income other than the monthly sums she receives from the Consent Order. Paragraph 67 and 68 of the Respondent’s Second Affidavit speak to her inability to be employed at this time and particularly at the Business due to “*The Petitioner’s physical and verbal domestic abuse of [her], both at the home and at the premises of the Business*”. Psychological reports were exhibited to support this position. The fact that the DVPO was granted by the Learned Magistrate required were findings of domestic violence to be made against the Petitioner in accordance with the DVPO Act.
11. The Petitioner challenges the basis on which the DVPO was made and criticized the Respondent for making such an application being made *ex-parte*. Furthermore, the Petitioner has made allegations the Respondent has been earning more than she has disclosed and alleges she has been working other jobs since she has been employed at the Business (paragraph 93 to 96 of the Petitioner’s Affidavit). However, the Petitioner has not provided any supporting evidence to establish his position.
12. Whilst Mr Watson prepared an analysis in relation to the Respondent’s alleged income since 2012 (produced by his firm) in his correspondence to the Respondent’s attorneys on 21 August 2019, Mrs Marshall was in no position at the hearing to respond to this analysis. This letter was sent the day prior to both parties leaving to take the child of the family to university and had only returned the day prior to the hearing.
13. The Petitioner further purports that the Respondent is fully capable of obtaining alternative employment and should have done so since she ceased employment with the Business in April 2019. He disputes the psychological reports provided by the Respondent supporting the position that she should not be working.

### ***Expenses***

14. Paragraphs 28 through 31 of the Respondent's Second Affidavit set out the household expenses, her personal expenses as well as those for the child of the family. They are summarized as follows:

**Household expenses**

Rent	\$4,000.00 <sup>2</sup>
Cablevision	\$120.00
Electricity (on average)	\$300.00
Food/Groceries	\$800.00 <sup>3</sup>
Gas (Cooking)	\$32.50
Water (\$420 per annum)	\$35.00
Internet/telephone	\$150.00
Total:	\$5,437.50
<b>Total less the rent payable for the FMH:</b>	<b>\$1,437.50</b>

**Respondent's personal expenses**

Car Insurance (\$1,200 per annum)	\$100.00
Car maintenance (\$500 per annum)	\$41.66
Car gas	\$433.00
Parking	\$75.00
Clothing	\$200.00
Toiletries	\$41.66
Doctor and Dentist Co-Pay (\$920 per annum)	\$76.66
Hairdresser	\$50.00
Cellphone	\$145.00
Fitness Club	\$95.00
Entertainment	\$100.00
Gifts	\$50.00
Dr Hancock	\$300.00
Travel	\$150.00
Storage	\$135.00
Dog-related expenses (food, vet, etc.)	\$50.00
Personal/beauty care	\$50.00
Legal fees	NIL <sup>4</sup>

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<sup>2</sup> Counsel for the Respondent confirmed now the child of the family has commenced university, there is no need for her to continue renting the FMH and as such she will commence looking for alternative accommodation. Mrs Marshall confirmed the notice period for the lease of the FMH is three months.

<sup>3</sup> This figure was reduced from \$1,300 given that the child of the family is attending university.

**Total:** **\$2,092.98<sup>5</sup>**

15. At the hearing, Counsel confirmed the parties had agreed that payment of the child of the family's tuition, room and board (meal plan) for this semester be paid from the parties' joint savings account given she was leaving the island prior to the hearing of this matter.
16. Mrs Marshall submitted that whilst this was agreed by the parties, she is reserving her client's position to seek these expenses to be paid by the Petitioner subsequent to financial disclosure being provided by him. Therefore, the child of the family's ongoing expenses that have to be addressed in relation to this application are as follows:

**Child of the family's expenses**

Clothing	\$250.00
Doctor and Dentist	\$40.00
Hairdresser	\$66.66
Cell phone	\$65.00
Entertainment	\$100.00
Pocket money	\$100.00

**Total:** **\$621.66**

17. Counsel for the Respondent asserted on several occasions that the terms of the Order dated 18 April 2019 obtained via the DVPO application, were not predicated by the Respondent accepting this would be a long-term solution. It is the Respondent's evidence that she was still made to believe by the Petitioner even on this date there was hope for reconciliation, but unbeknownst to the Respondent it was the same date the Petitioner filed the petition for divorce in the Supreme Court.
18. Furthermore, Mrs Marshall confirmed the financial relief sought in the Magistrates' Court was based on receiving no financial disclosure from the Petitioner of any kind and reiterated it was merely meant to be a stop-gap given the order was effective for less than twenty-eight days. Even now, despite not having any adequate financial disclosure from the Petitioner, it was submitted the order sought in the Magistrates' Court should have no bearing on this application given this rationale.
19. Therefore, Mrs Marshall confirmed at the hearing the Respondent is seeking the following relief based on the amended expenses presented to the Court during the course of the hearing:

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<sup>4</sup> Counsel for the Respondent confirmed during the hearing that it had been agreed between the parties that each party would draw from the joint savings account to cover legal fees so this reduced the Respondent's monthly expenses by \$1,500, which had been set out in the Respondent's Second Affidavit.

<sup>5</sup> This figure was incorrectly calculated as being \$2,632.98 inclusive of legal fees; however, this total should have been \$3,592.98.

- (a) The rental payment of the FMH of \$4,000 per month shall continue to be paid from the Business account.
- (b) \$750 per week for spousal maintenance to be paid from the Petitioner's salary as opposed to being paid from the Business account;
- (c) \$500 per month for the child of the family, or such other reasonable sum the Court deems fit to be paid from the Petitioner's salary as opposed to being paid from the Business account;
- (d) The position is reserved in relation to the payment of the child of the family's medical being paid from the parties' joint savings account until such time as financial disclosure is provided by the Petitioner;
- (e) 50% of the airline miles obtained from the parties credit card;
- (f) The Petitioner shall maintain the Respondent's existing health insurance and the Respondent is at liberty to pay any reasonable co-pays from the parties' joint savings account;
- (g) To the extent that there are insufficient funds in the Business account to pay the rent of the FMH, such amounts shall be paid from the parties' joint savings account;
- (h) This relief be backdated to the date the Petition was filed; i.e. 3 May 2019; and
- (i) Costs of the application.

- 20. Mrs Marshall for the Respondent argued the funds being paid to the Respondent for her and the child of the family's maintenance should not be paid by the Business or the parties' joint savings account. The responsibility lies on the Petitioner to pay maintenance and not the Business and nor should maintenance payments erode the parties' capital assets which may have to be dispersed should the Petitioner's divorce petition be granted.
- 21. It was further submitted that adverse inferences should be drawn in relation to the Petitioner's lack of financial disclosure which is required to be included in his affidavit evidence.
- 22. Mrs Marshall reiterated the content of the Petitioner's Affidavit was not helpful to the Court given its lack of content surrounding the Petitioner's financial circumstances. This alone would require the Court to accept the Respondent's evidence over the Petitioner's and supports the position an order for costs being made against the Petitioner.

**Petitioner's position**

23. The Petitioner relied on his affidavit sworn on 16 August 2019 with attached exhibits (“the Petitioner’s Affidavit”) for his evidence in this application. The Petitioner’s Affidavit was in response to the Respondent’s Second Affidavit.

***Income***

24. Paragraphs 102, 105 and 106 are the only references made in the Petitioner’s Affidavit which speak to his income. However, there is nothing in these paragraphs which actually confirm the Petitioner’s salary. The relevant excerpts from these paragraphs state as follows:

“102. [The Respondent] believes that a salary of \$1,000 per week for the work I perform in the restaurant is “unwarranted, unfair and highhanded” ...I spend up to 70 + hours a week working in the restaurant....Except for public holidays, I have one day off a week, Sunday. The allegation that my remuneration for the work I do for the restaurant is unwarranted, is not only false but is unkind and extremely hurtful...

...

105. The bottom-line truth is that after taking out of the business what we needed for our living expenses (when we were together) whether as salary or otherwise, we were more or less just breaking even...Now that money is being taken out of the business has to support two households there is an even bigger strain on the business; and an erosion of what little retained earnings remained in the business.

106. ...There is no reason why I should not receive a salary net of other expenses that are not business related expenses. If all expenses which are personal were deducted from my salary, I would have no salary at all; and would end up owing the Company money. I do not, for example, make \$6,000 per month; i.e. the total paid from the business account for (i) the rent on the former matrimonial home and (ii) for my rent....” [Emphasis added]

25. The Petitioner’s Affidavit provides no true confirmation as to his net weekly (or monthly) salary and in addition has not produced any documentary evidence to confirm his income position. He has not even confirmed that the level of income purported in the Respondent’s Second Affidavit (paragraph 32) is accurate.

26. Further, the Petitioner accepts that in addition to his salary from the Business, he receives gratuities (paragraph 91 and 92 of the Petitioner’s Affidavit). Regrettably, neither has the Petitioner confirmed in his evidence what his weekly (or monthly) gratuities are, nor has he produced any supporting documentation to show what this additional income is that he admits he receives. All that is provided is a lengthy diatribe of how he is offended the Respondent has made the allegations she did and attempted to discredit psychological reports without any contradictory evidence. It is important to note the Petitioner also



does not come he receives any other source of income in addition to the salary and gratuities he receives from the Business.

### ***Expenses***

27. The Petitioner has provided no evidence whatsoever confirming his monthly expenses. The only expense which can be adduced from the Petitioner's Affidavit is at paragraph 106, where based on the fact the Respondent's rent for the FMH is \$4,000 his reference to paying \$6,000 for rent alone, it can be adduced that his rent is \$2,000:

*"106. ...There is no reason why I should not receive a salary net of other expenses that are not business related expenses. If all expenses which are personal were deducted from my salary, I would have no salary at all; and would end up owing the Company money. I do not, for example, make \$6,000 per month; i.e. the total paid from the business account for (i) the rent on the former matrimonial home and (ii) for my rent...." [Emphasis added]*
28. Again, the Petitioner has provided no proof or even explicitly stated this is his monthly rental payment. Moreover, in the Petitioner's Affidavit which encompasses 24 pages and 117 paragraphs, there is absolutely no reference or indication as to his assets; i.e. bank accounts or the like.
29. The Petitioner purports in relation to the Respondent's expenses, "*Some of the items of her expenditure are simply incredible and do not reflect our standard of living*" (paragraph 69 of the Petitioner's Affidavit). The items which the Petitioner specifically disputed are as follows: \$200 per month for the Respondent's clothing; \$250 per month for the child of the family's clothing; \$1,000 per month for the child of the family's winter clothing; \$433 per month for gas for the car; and \$75 per month for parking (paragraphs 68 and 69 of the Petitioner's Affidavit).
30. It was confirmed during the hearing that some items of clothing were purchased by the Petitioner whilst he and the Respondent accompanied the child of the family in August 2019 to commence the first semester of university. It was accepted by Mrs Marshall that whilst some items had been purchased for winter clothing, the child of the family still required some monies to have the appropriate attire for the different climate. However, the sum of \$1,000 per month for the child of the family's winter clothing was not being sought as it was accepted this was an error. Counsel confirmed the \$250 per month which was included in the child of the family's personal expenses would address this cost.
31. The Petitioner also disputed the expense of legal fees; however, as stated previously, Counsel were able to agree each party would be responsible for his and her respective legal fees at this time.

32. Throughout the Petitioner's Affidavit as well as in Mr Watson's submissions, the Petitioner relied greatly on alleging this application is an "*abuse of process*" and that this application should only deal with the Respondent's "*immediate*" needs.
33. Furthermore, the Petitioner's Affidavit attempted to discredit the DVPO obtained in Magistrates' Court despite confirming no appeal was lodged as well as no requests were made to the Magistrates' Court for the audio recording of the hearing. The Petitioner also attempted to rely heavily on the Respondent's lack of response to an offer for settlement and lack of agreement to mutually exchange financial disclosure. Additionally, Mr Watson averred if \$500 per month was what was sought in the DVPO proceedings, then that sum was sufficient to support the Respondent and the child of the family's needs.
34. Therefore, the Petitioner's position submitted by Mr Watson in relation to this application, is that it should be dismissed as the terms of the Consent Order meets the needs of the Respondent and the child of the family. Mr Watson further submitted the Petitioner should be granted the costs of this application due to it being an abuse of process and entirely unnecessary given the terms of the Consent Order.

### **The law**

35. Section 26 of the Matrimonial Causes Act 1974 ("the Act"), provides the Court with the statutory jurisdiction to grant maintenance pending suit. Section 26 states as follows:

***"Maintenance pending suit***

*26 On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable."*

36. The only relief available to the Petitioner for maintenance pending suit is that of monthly periodical payments and as such no other forms of relief such as a lump sum payment are available to the Respondent at this time.<sup>6</sup>
37. The case of *F v F* [2001] Bda L.R. 43 is a judgment of Kawaley J, in which he determined an application for maintenance pending suit. The relevant paragraphs are 6 and 7 at page 2 which states as follows:

*"6. Mrs Marshall for the wife referred the Court to authorities in respect of the following three key principles upon which she relied. Firstly, since section 26 of our Act is derived from section 22 of the Matrimonial Causes Act 1973 (England & Wales), counsel emphasized the breadth of the*

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<sup>6</sup> Rayden and Jackson on Divorce and Family Matters, Sixteenth Edition, Chapter 29, Section II. Relief Pending Suit, paragraph 29.3 on pages 535 to 536

Court's discretion as explained by French J in Offord v Offord (1982) 3 FLR 309 (transcript, page 4):

*"Maintenance pending suit...is governed by s. 22 of the 1973 Act which gives the court as wide and unfettered discretion as can well be imagined. It provides that the court may order such periodical payments until the hearing as "the court thinks reasonable", reasonable, that is to say, in the light of the means and needs of the parties and any other relevant circumstances."*

7. Mr Kessaram did not challenge this proposition which I accept governs the present application". [Emphasis added]

38. The case of *BD v FD* (Maintenance Pending Suit) [2016] 1 FLR 390, was a case which Mr Watson relied and a case which I relied on in my recent judgment of *M v M* [2018] SC (Bda) 80 Div. Mr Watson relied on paragraph 28 where Moyston J commenced setting out what factors should be taken into consideration in the determination of an application pending suit:

"28....

*I would endorse, indeed emphasise, the word 'immediate'. The purpose of the section is to give the court the power to address income needs which cannot await the final resolution of the substantive claims either by agreement or court determination."*

39. However, Mr Watson has applied this reference in a vacuum and failed to consider the totality of *BD v FD* where at paragraph 33 Moyston J summarized all the principles which should be considered in the determination of an application for maintenance pending suit. Paragraph 33 states as follows:

"33. ...From these cases I derive the following principles:

(i) *The sole criterion to be applied in determining the application is "reasonableness" (s 22 Matrimonial Causes Act 1973), which, to my mind, is synonymous with "fairness".*

(ii) *A very important factor in determining fairness is the marital standard of living (F v F). This is not to say that the exercise is merely to replicate that standard (M v M).*

(iii) *In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long term expenditure more aptly to be considered on a final hearing (F v F). That budget should be examined critically in every case to exclude forensic exaggeration (F v F).*

(iv) Where the affidavit of Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee... [Emphasis added]

40. I fully accept these are the principles which are the benchmarks for the determination of this application.

41. The Matrimonial Causes Rules 1974 (“the Rules”), are also explicit in requiring a party who is filing an affidavit in relation to application for ancillary relief that the evidence therein should contain “*full particulars of his property and income*”. Rule 73 of the Rules states as follows:

**“General provisions as to evidence etc, on application for ancillary relief**

73 (1) *A petitioner or respondent who has applied for ancillary relief in his petition or answer and who intends to proceed with the application before the registrar shall, subject to rule 83, file a notice in Form 13 and within four days after doing so serve a copy on the other spouse.*

(2) *Where a respondent or a petitioner is served with a notice in Form 11 or 13 in respect of an application for ancillary relief, not being an application to which rule 74 or 75 applies, then, unless the parties are agreed upon the terms of the proposed order, he shall, within 14 days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and income, and if he does not do so, the court may order him to file an affidavit containing such particulars.*

(3) *Within 14 days after service of any affidavit under paragraph (2) or within such other time as the court may fix, the applicant shall file an affidavit in reply containing full particulars of his property and income.”* [Emphasis added]

42. It is trite law that the failure of one party to provide full and frank financial 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). The Petitioner’s failure to provide any financial disclosure of any kind in this matter is a clear-cut case where this principle applies.

## **Findings**

43. I accept the Respondent’s employment position being as it is given the evidence she has presented. The Petitioner’s suggestion that she could have remained working at the Business or found other employment simply based on his opinion is unconvincing. The Respondent has been put in her current position as a direct result of the Petitioner which

effectively amounts to constructive dismissal. I also find the Respondent's expenses are reasonable in all of the circumstances.

44. The Petitioner at paragraph 20 of his Affidavit states:

“20. *The interim maintenance application of [the Respondent] before the Supreme Court is abusive as it amounts to a second bite at the cherry.*”

45. I find this an incredulous assertion for the Petitioner to make. It denotes a clear misunderstanding of the law as it relates to obtaining an order made under the DVPO Act, as well as completely disregards that it was he who filed the divorce proceedings who put this matter in the jurisdiction of the Supreme Court.

46. Counsel for the Petitioner could rightly have obtained a copy of the audio recording of the DVPO application upon request and the payment of a fee, as could he have requested to view the Magistrates' Court file as to the submissions which were made on 18 April 2019. The Petitioner as well as this Counsel's numerous criticisms regarding the *ex-parte* application under the DVPO Act, were simply unhelpful and irrelevant to the application before this Court. The crux of obtaining temporary order based on hearing an *ex-parte* application under DVPO Act is to protect the complainant who is before the Court making allegations of domestic violence of the respondent. There are clear provisions in the DVPO Act which allow such relief to be obtained *ex-parte* due to the nature of the proceedings. These are not civil or commercial applications where such applications may at times be made on notice. In any event, any criticism of the DVPO is *res judicata*.

47. The Petitioner's lack of focus in his affidavit regarding his financial circumstances has been extremely detrimental to him as I have drawn adverse inferences in relation to his non-disclosure. Particularly as it relates to the Petitioner's income, I accept the Respondent's evidence. As a consequence, I have placed little to no weight on the Petitioner's evidence.

48. The time and energy devoted in the Petitioner's Affidavit challenging entirely irrelevant issues such as, the DVPO proceedings, his opinion of the Respondent's ability to work and her emotional state (all which spoke of the DVPO application), his assertions that this application is an “*abuse of process*”, the history of the Business and the like, would have been better utilized in providing actual financial disclosure for the Court to take into consideration.

49. For the sake of clarity, neither is there a requirement for Counsel to mutually exchange financial disclosure in matrimonial proceedings, nor is there a requirement to give notice to the other party prior to filing an application to the court. Rule 73 of the Rules is explicit in what evidence is required to be set out in the parties' affidavit evidence and Rule 77 denotes the principles for requests for further financial disclosure.

50. Furthermore, I do not criticize the Respondent's lack of response of the Petitioner's proposal to provide her with a lump sum when she is not in receipt of the Petitioner's financial disclosure. Moreover, one of the principles of law of in maintenance pending

suit applications is that of not diminishing capital assets. Additionally, the Court has no jurisdiction to award lump sum payments in maintenance pending suit applications even if this position had been agreed between the parties.

## Conclusion

51. The law is clear on how to determine an application for maintenance pending suit. It requires the application of fairness, consideration of the standard of living during the marriage, the exclusion of dissolving capital assets which may later have to be divided between the parties and robust assumptions being made where the payer has not made full and frank disclosure.
52. I have considered all of the affidavit evidence which was before me at the hearing, the additional correspondence provided to me by Counsel for both parties and submissions made by Counsel. Taking into account my findings and the application of those findings to the law, I grant the following relief:
  - (i) The rental payment of the FMH of \$4,000 per month shall continue to be paid from the Business account until further order of the Court;
  - (ii) The Petitioner shall pay to the Respondent \$750 per week by way of spousal maintenance to be paid from the Petitioner's salary and not from the Business account. This sum has been awarded based on the total expenses for the Respondent (personal and household) amounting to \$3,530.48. These payments shall be backdated to take effect from the filing of the Petition; i.e. 3 May 2019; and proof shall be provided to the Respondent these monies are being distributed from the Petitioner's salary and not the Business account. The backdated payments which are to take into consideration the sums paid by the Petitioner in accordance with the Order dated 3 May 2019 and the Consent Order shall be paid within fourteen (14) days from the date hereof, such payments should also be paid by the Petitioner personally and not be taken from the Business account or the parties' joint savings account;
  - (iii) The Petitioner shall pay to the Respondent \$500 per month by way of child maintenance to be paid from the Petitioner's salary and not from the Business account. These payments shall be backdated to take effect from the filing of the Petition; i.e. 3 May 2019; and proof shall be provided to the Respondent these monies are being distributed from the Petitioner's salary and not the Business account. Additionally, the backdated payments shall be paid within fourteen (14) days from the date hereof and should also be paid by the Petitioner personally and not be taken from the Business account or the parties' joint savings account;
  - (iv) I will make no order in relation to the payment of the child of the family's university expenses at this time, given the parties agreement for the first semester expenses to be paid from the parties' joint account.

There shall be liberty to apply in relation to the determination of this matter;

- (v) The Petitioner shall continue to maintain the Respondent's existing health insurance and the Respondent is at liberty to pay any reasonable co-pays from the parties' joint savings account until further order of the court as previously agreed by the parties in the Consent Order; and
- (vi) To the extent that there are insufficient funds in the Business account to pay the rent of the FMH, such amounts shall be paid from the parties' joint savings account; however, the Petitioner must provide the Respondent with evidence supporting the position there are insufficient funds in the Business account to pay the said rent seven (7) days in advance of the said payment falling due. The parties have liberty to apply in the event there is disagreement in relation to the level of funds available in the Business account.

- 53. The request by Mrs Marshall for the Respondent to be allocated 50% of the air miles in order for her to travel abroad is not within my jurisdiction given the nature of this application, so this request is refused.
- 54. In relation to costs, I find the Petitioner shall pay the costs of this application on a standard basis, to be taxed if not agreed. The Petitioner's woefully inadequate financial disclosure along with his most unhelpful evidence which attempted to paint the picture of the Respondent's application as being an abuse of process strongly influenced me in reaching this decision. These actions speak directly to the Petitioner's unreasonableness and his litigation conduct which must be taken into account.
- 55. My hope is that the Petitioner now has better insight as to the requirements he must meet in providing full and frank financial disclosure. Had the Petitioner provided adequate financial disclosure to the Respondent (and in a timely manner), this application may very well not have been necessary. The fact that the Respondent did not give the Petitioner notice she would be making an interim maintenance pending suit application, her non-responsiveness and/or acceptance of an open offer and not agreeing to mutually exchange financial disclosure are not factors I accept are relevant in consideration of the determination of this matter as a whole or as it relates to costs.
- 56. I invite Counsel for the Respondent to prepare the order reflecting the terms of this ruling for my review and consideration.

10 October 2019

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**ALEXANDRA WHEATLEY**  
**REGISTRAR OF THE SUPREME COURT**