



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2022 No. 112

**BETWEEN:**

**R. P.**

**Petitioner**

**v**

**S. P.**

**Respondent**

## **RULING**

**Date of Hearing:** 23<sup>rd</sup> July 2024

**Date of Ruling:** 9<sup>th</sup> September 2024

**Appearances:** Adam Richards of Richards Limited for the Petitioner  
Sara Tucker of Trott & Duncan for the Respondent

*Interim Maintenance Application*

**RULING** of Acting Registrar, Kenlyn Swan Taylor

## **Introduction**

1. The Petitioner and the Respondent were married on 30 June 2001. The divorce petition filed in July 2022 was pronounced in February 2023. There are two children of the family; although for the purpose of this application, the Petitioner seeks relief for only the younger child of the family (“X”)<sup>1</sup>.
2. The Petitioner made an application for interim maintenance pending the substantive hearing of ancillary relief. For the assistance in deciding this application, affidavit evidence had been filed by both sides. Counsel for the Petitioner took the Court through a position statement which outlined the substance of the Petitioner’s application.
3. The application for interim maintenance came before me on 23<sup>rd</sup> July 2024.

## **The Facts**

### ***The Petitioner’s position***

#### **Income**

4. The Petitioner, during the marriage, was employed by the Respondent’s company<sup>2</sup> as a managing director and assisted with the setting up and creation of his businesses. The duration of her employment was in excess of twenty (20) years. During this time, her wages were approximately \$969.23 per week. In addition to these wages, she enjoyed the benefit of pension and the health insurance coverage of the company. This employment was terminated in the summer of 2022; notably around the time or after the filing of the divorce petition.

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<sup>1</sup> This reference is used for anonymity purposes.

<sup>2</sup> The name of the company(ies) has/have not been referenced for anonymity purposes

5. Upon the termination of her employment as the managing director, she sought alternative employment and is currently earning approximately \$3,600 which includes a small amount of additional income from part time work. There is nothing before me indicating differently, I therefore accept this as the monthly income generated by the Petitioner currently.

Expenses

6. The Petitioner, through this application, seeks a lump sum payment of \$64,595.46 which she says is debt incurred by her since the termination of employment and lack of support by the Respondent. This lump sum is in respect of expenses that she says have been reasonably incurred and are broken down as follows:
  - (i) \$44,595.46 credit card debt;
  - (ii) \$15,000 loan to father; and
  - (iii) (iii) \$5,000 loan to a cousin.
7. These debts, the Petitioner says were incurred as a result of maintaining herself and her children. The Petitioner also seeks through her Affidavit reimbursements of expenses incurred as a result of being forced out of the former matrimonial home (producing receipts contained within her exhibit); although this was not pursued during counsel's submissions.
8. The Petitioner estimates her expenses as \$12,500 rent (buttressed by the Respondent's counsel) for the housing in the former matrimonial home, she lists household expenses of \$4,691.85, personal expenses of \$9,098.00 and child maintenance of \$9,346.66. This is supported by a spreadsheet showing these estimated costs.
9. The Petitioner's expenses contained in this spreadsheet were not challenged by counsel for the Respondent or by the Respondent in his Affidavit evidence; the

position merely being taken that it is now for the Petitioner to alter her mindset on her quality of living and reduce her expectations.

10. I will address each accordingly. The Petitioner seeks \$12,500 towards the monthly rental cost of accommodation. The former matrimonial home was a two storey 5,000 square foot dwelling consisting of three bedrooms, three and a half bathrooms, a huge kitchen, family room, office, garage and pool. There was a downstairs studio and pool house; which at times was used as an Airbnb.
11. The Respondent's position in relation to the former matrimonial home is that the home is owned by someone other than him; the homeowner giving notice to the Petitioner that she must either vacate the property or commence paying a monthly rent of \$12,500 (the indication given that the value of the home is in excess of 3 million dollars). As a result of the Petitioner's failure to comply with these requests circa July 2024 the electricity supply<sup>3</sup> (the account which was in the name of the Respondent) was terminated resulting in the Petitioner and her daughter leaving the property.
12. Further, the Respondent's position is that he does not have the authority to allow the Petitioner to remain in the former matrimonial home; and that the Petitioner must understand the need to be relocated to a more suitable yet comfortable housing. The Respondent proposed a newly completed rental property that he had successfully negotiated with the Trust<sup>4</sup> to allow the Petitioner to be relocated to. He agreed to pay the monthly rent of \$4,500 attached to this property if the Petitioner agreed to this relocation.
13. It would be completely inappropriate of me to prefer for the Petitioner to now live in a suggested accommodation which is clearly below the standard of the former

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<sup>3</sup> The account with BELCO was held in the name of the Respondent

<sup>4</sup> The name of the trust has not been referenced for the purpose of anonymity

matrimonial home giving the description of the luxury accommodation in comparison to what the Respondent is now prepared to offer.

14. The Respondent in his most recent Affidavit dated 17th July 2024 at paragraph 5 takes the view that X is an adult who he has educated for the last for the past twenty-two (22) years, that she is not physically or mentally handicapped and needs to get a job like most twenty-two year olds and be financially responsible for herself. That he is no longer legally responsible for her financial welfare; that if he chooses to assist her with her education further that is a moral decision for him alone.
15. Mr. Richards submits, which is accepted, that that is not the position in law; this is because X remains a child of the family as she continues to be in full time education. Further, that s.27 gives provision for the Court to make payment for the benefit of the child.
16. It is difficult to properly establish the Respondent's income as his declared income is \$208,000 net resulting in approximately \$17,333 per month.
17. In the three Affidavits provided by the Respondent, he sets out no expenses for rent, utilities, groceries or other usual household expenses. The disclosure provided by the Respondent does not assist the court as it consists of one pension statement, a wage slip for each business and two (2) bank account statements providing sparse information for a brief and limited time period.
18. It is noted that during a three month period the Respondent received total deposits of \$120,000 which is inconsistent with the information disclosed by him with no obvious expenses save a couple of credit card payments. This begs the questions (i) Where are those payments derived? and (ii) Whether the Respondent is in receipt of additional undisclosed payments?

HSBC Debt

19. Mr. Richards on behalf of the Petitioner took the Court through the Judgment which resulted in the judgment against the Respondent which called attention to his high level of sophistication as a businessman.
20. In November 2023, the Court awarded judgment against the Respondent in the sum of \$3,144,636.26. The hearing of this matter revealed the factual background to the Respondent's wealth and business operations. Essentially, this matter concerned a loan which had been provided by HSBC to the Trustees of the Trust in the amount of \$16,556,000 for the construction of commercial property. This loan was personally guaranteed by the Respondent for an amount in upwards of 3 million dollars.
21. The Court found that the Hideaway Trust was settled and established by the Respondent in the year 2000 and "was used by the Defendant<sup>5</sup> as a vehicle for conducting his commercial activities, and in particular the development of residential and commercial properties".
22. The Court recognized that the Respondent was "an experienced and sophisticated commercial property developer with a history of obtaining financing from the Bank for that purpose ... it was the Defendant who would direct the borrowing activities of the Trust which he had created for the purpose of his business activities".
23. Further in the said judgment, it was found that the Trust was established by the Respondent to facilitate and carry on his residential and commercial construction business and that it was the Respondent and not the Trustees who negotiated the loan. The Court continued "Although the Defendant was not named a borrower under these residential development loan facilities, the Defendant would at all times speak for the Trust, would be the driving force behind the Trust, and would instigate all the discussions and negotiations with the Bank on behalf of the Trust. The Respondent

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<sup>5</sup> The Defendant in the case referred is also the Respondent in these proceedings.

was labeled at paragraph 27 as ‘a sophisticated and astute successful businessman with a significant net worth and a track record of successful property development’.

24. The Court found the Respondent to be “the guiding and driving force behind the Trust in respect of each of the loans; (b) the Defendant negotiated the terms of these loans with the bank; and (c) was the point of contact for the Trust if any loan issue arose, such as extending repayment dates to accommodate construction delays at paragraph 28 and finding that the Respondent was essentially the alter ego of the Trust at paragraph 32.
25. The importance of paragraph 32, Mr. Richards submits that there was a 16 million dollar loan in 2008, whereas the Respondent was the personal guarantee; on the following day for reasons not known or explained, he was removed as a beneficiary; however, continues to benefit from the Trust.
26. The former matrimonial home, the property located in Southampton<sup>6</sup>, was obtained, the family took up occupancy, but shortly after this property was put in trust. Despite this, the Petitioner, Respondent and their family lived there for the duration of the marriage, with the Petitioner and one daughter residing there until approximately a month ago.
27. Mr. Richards advanced that notwithstanding the Respondent being removed as a beneficiary they continued to live in the property. The Respondent’s position set out in his Affidavit of 17th July 2024 is that this property was built by and owned by the Trust.
28. Mr. Richards raised that the Petitioner, during the course of the marriage, was tasked with going to various properties which were built by the Respondent to collect rents in excess of \$15k which was put in the joint account. This same joint bank account received payments of \$3000 per month until May 2023 from the Trust. We do not

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<sup>6</sup> The residential address has been removed and replaced with the Parish only for the sake of anonymity.

know what the true position is regarding the Respondent income and whether these businesses/ventures are solely owned and run by him or jointly owned by another/others.

29. The Respondent accepts owning businesses, wherein he indicates the amount of shares he holds; however, this is not expanded on to include information regarding these businesses or any benefit that he may be receiving. Mr. Richards seeks to convince me that the Court can readily draw two inferences: firstly, that the Respondent is receiving money from two businesses that he runs which have not been disclosed and that he is additionally benefitting from Trusts by receiving income and rent.
30. The Petitioner seeks an Order which includes that the Respondent remains responsible for the costs associated with the rent, school fees and personal costs of X who continues to be a child of the family.

### ***The Respondent's position***

#### *Income*

31. In the Respondent's Affidavit dated 1st November 2023, he advises that his annual income is of an aggregate of \$208,052.00. He accepts that he is the owner of two businesses. Further, he discloses the amount of the shares held in these businesses, however neglects to record any income value of such.

#### *Expenses*

32. Ms. Tucker on behalf of the Respondent says that there has been a significant change in circumstances since the application of ancillary relief because as of November 2023; the Respondent now has a judgment debt of \$3,144,636.26 awarded against



him. There are matters which the court must consider before making a decision of interim maintenance.

33. The Respondent both through his affidavit evidence and submissions of his counsel, advance that this is an application for a lump sum of significant amounts which her client can no longer sustain. The Court must take into consideration the outstanding judgment debt and what is reasonable in the circumstances for the Respondent to afford to pay.
34. Ms. Tucker says that on the 21<sup>st</sup> of March 2023, the Petitioner was given notice to vacate the property by the trustees. He has no standing to permit reentry of the Petitioner without the approval of the trustees. An open letter (produced) should satisfy the Court that there has been a reasonable step to attempt to mitigate the loss in terms of rental income. The Respondent did not give notice to vacate; however the Respondent is willing to allow the Petitioner access to a dwelling house located which would be sufficient for the Petitioner to reside suitably and comfortably. The Respondent is willing to make the monthly rental payment of \$4,500 which would defray the costs of the Petitioner until the matter is concluded.
35. Additionally, since the Respondent is a judgment debtor there is a change of circumstances and the Petitioner must accept that it is necessary for there to be a change to her quality of life. Spousal support must be assessed as to proportionality of what can be provided in a reasonable way.
36. In relation to child X, the Respondent has financed her past her bachelors' degree; therefore, his obligations are now extinguished as result of her tertiary education being completed under his funding. She is now moving on to her Masters' degree and this is a matter for her as he has completed his obligation to her as a child of the family by getting her through her bachelor's education level.

37. Ms. Tucker continues, there has to be a reasonable assessment when a child has taken a decision as an adult to continue to progress their education. The court must make a reasonable decision; before the judgment debt the Respondent was in a position to provide for X, however, he is no longer able to do so. Two affidavits have been provided regarding the two trusts, where the Respondent advised the Court that he has shares and disclosed his annual income of \$208,000; this was reiterated by Ms. Tucker to show that the Respondent does not have the means to satisfy an interim lump sum payment due to this judgment debt.
38. Lastly, that it is outside of the jurisdiction of the Court to order reinstatement into the Southampton residence to allow reentry of the Petitioner into the home. It is rejected that that property is or was the former matrimonial home.

### **The Law**

39. 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.”

40. Mr. Richards correctly submitted the only relief available to the Petitioner for maintenance pending suit is that of monthly periodical payments and as such no other form of relief such as a lump sum payment are available to the Petitioner at this time.

41. Mr. Richards also relied on the case of *F v F* [2001] Bda L.R. 43 which is a case that determined an application for maintenance pending suit by the Kawaley J. Mr. Richards referred me to paragraphs 6 and 7 at page 2 which states as follows:

*“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.”*

42. The case of *BD v FD (Maintenance Pending Suite)* [2016] 1 FLR 390 was a case which was also referred to by Mr. Richards highlighting where Moylan J set out the principles which are to be applied in applications for maintenance pending suit. The principles are summarized at paragraph 33 of the judgment 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 apt(v 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 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 favor of the payee ..."*

43. Mr. Richards indicated that the matter of *F v F* also addressed the issue as to whether a party is entitled to obtain an order for payment of legal costs when the other party lacks the financial resources. Kawaley J determined in such circumstances legal costs orders can be made when:

*"16. [The Court is] satisfied that he can (not perhaps without some difficulty) comply with such legal costs order, in addition to meeting the payment obligations imposed below in respect of the Wife's reasonable living expenses."*

44. I was also referred by Mr. Richards to the Court of Appeal decision of *Curry v Curry (No 2)* [2006] *EWHC Civ 1338* on the issue of the awarding of legal costs awards which in my view support the very same test as set out in *F v F*. Paragraph 21 of *Curry v Curry (No 2)* states as follows:

*"21. Although in making a costs allowance the court has a discretion, I cannot imagine that it would be reasonable to exercise it unless the applicant had thus duly demonstrated that she could not reasonably procure legal advice and representation by any other means ...."*

45. Lastly, Mr. Richards took the Court to the limited provisions for interim lump sums found in Matrimonial proceedings: lump sum orders, Practical Law UK Practice Note 4-531-7233 which sets out the limited circumstances, specifically two exceptions, in which the court can make such orders; listed as follows:

### Maintenance expenses

The court can make an interim lump sum order following a conditional order, provided its purpose is to meet any liabilities or expenses reasonably incurred in maintaining either party or any child of the family (section 23(3) (a) and (b), MCA 1973).

The provision is of limited use as the lump sum order does not take effect and become enforceable until after the final order. In practice, the court's power is only used sparingly and for limited capital sums (for example, school fees).

Mr. Richards asserted that section 23 of the MCA 1973 is equivalent to our legislative provision at section 27, MCA 1974 which allows financial provision orders in connection with divorce proceedings.

### Legal services payment orders

Where a party applies for a legal services payment order to fund interim provision for legal costs, a lump sum may be payable, which can be backed up with an interim order for sale.

## **Conclusion**

46. This is a case where I accept that the Respondent was and still is a sophisticated businessman who was the major wage earner throughout the marriage; during which time the Petitioner and the family, as a whole, enjoyed a high quality of life. As a result of the limited information provided by the Respondent, it is difficult for the court to grasp a true understanding of the income generated by him.
47. The Petitioner appears to have, at all times, received very minimal income in comparison to that of the Respondent; regardless, both she and the family were provided for by the Respondent to an exceptional standard. I find that the Petitioner seeks relief as she has been financially dependent on the Respondent and requires

him to continue to meet the personal and household needs of her and the child of the family.

48. I find the Respondent to be operating at a level of unreasonableness in his behavior and responses to both the termination of the Petitioner's vehicle license, the Bermuda Electric Company Limited account which was in his name and his response that 'they need to get out' when the issue of the electricity disconnection was raised. Ms. Tucker on behalf of the Respondent was unable to dissuade me that this was not the Respondent response to this situation which ultimately led to the removal of the Petitioner and child from the property.
49. I do not find that the Respondent has the ability to unilaterally cease the maintenance of a child who remains in full time education and therefore award the sums indicated for the maintenance of child X.
50. I accept that I do not have the jurisdiction to make an order allowing the Petitioner to re-enter the former matrimonial home or any particular household, as offered by the Respondent as an alternative option of housing.
51. I find that although there is a Judgment debt recorded against the Respondent, there was nothing before me to indicate a decrease or change in his ability to generate income above and beyond what he has disclosed in his Affidavit evidence of \$208,000. Ms. Tucker has given no indication, that I am satisfied with, from an income perspective that there has been a change in his position but for a judgment debt now registered, which has no bearing on his income potential. I do find the affidavit evidence provided by the Respondent to be deficient and I make robust assumptions about his ability to pay.
52. Having heard the submissions of counsel, reviewed the authorities and had all the circumstances under my consideration, I am of the view that an order for interim maintenance will offer immediate financial relief to the Petitioner who lacks

sufficient means to support herself and her child during these legal proceedings. I, therefore, grant relief to the Petitioner as follows:

- 1) An interim lump sum for the repayment of debts incurred in the sum of \$64,595.46;
- 2) (i) The Respondent shall pay to the Petitioner the sum of \$10,000 per month which is specific to the rental accommodation where she will reside with the child(ren) of the family (during their return and/or visits home). This payment to be effective from 30th September 2024;  
*alternatively*  
(ii) Should the Respondent exercise his influence on the Trust which results in the electricity supply being restored and the Petitioner allowed re-entry into the former matrimonial home at the property located in Southampton, this amount associated with the rental accommodation is to be deducted from the sum awarded;
- 3) The Respondent shall pay to the Petitioner the sum of \$7,159.85 per month which represents the costs required to meet her needs for personal and household expenses. Such payment to be made on or before the last day of each month.
- 4) The Respondent shall pay a lump sum of \$20,000 towards the Petitioner's legal fees and payments of \$7,500 per month. This initial sum is payable on or before the 30th September 2024 with payments to be made on a monthly basis on or before the last day of each month to follow.
- 5) The Respondent shall continue to pay in full and directly to the school the tuition fee and to the landlord the housing rental fee for the child of the family; when required.

6) The Respondent shall pay an additional \$1,500 per month for the personal expenses of the child of the family to the Petitioner.

53. In the exercise of my discretion in relation to the determination of costs in matrimonial matters such as these; having taking into consideration what I regard as the unreasonableness of the Respondent in his behavior, together with the adverse inferences drawn from his lack of full and frank disclosure in this matter, I award costs to the Petitioner for this application. Costs are awarded on a standard basis; to be taxed if not agreed.

54. I ask Mr. Richards to draft an Order which sets out the determination of the Court.

Dated this 9<sup>th</sup> day of September 2024



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**Kenlyn Swan Taylor**  
**Acting Registrar of the Supreme Court**