

THE EASTERN CARIBBEAN SUPREME COURT  
SAINT VINCENT AND THE GRENADINES  
IN THE HIGH COURT OF JUSTICE

SVGHMT2018/0123

IN THE MATTER OF THE PETITION OF SUDDABELINDA KNIGHTS NEE ASHTON FOR THE  
DISSOLUTION OF MARRIAGE

BETWEEN:

SUDDA BELINDA KNIGHTS NEE ASHTON  
OF DASENT COTTAGE

PETITIONER

AND

ERROL ST. AUBYN KNIGHTS  
OF DORSETSHIRE HILL

RESPONDENT

**Appearances:**

Mr. Cecil "Blazer" Williams for the Petitioner

Ms. Samantha Robertson for the Respondent

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2021: June 17  
September 13  
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**JUDGMENT**

**Byer, J.:**

- [1] By Notice of Application for Ancillary Relief filed on 19 June 2020 the petitioner sought the following reliefs:
- a. Periodical payments under sections 31(1) (a), 31(1) (b) and 31(1) (d) of the Matrimonial Causes Act.
  - b. Lump sum payments under section 31(1) (c) of the Matrimonial Causes Act.
  - c. A property adjustment order under section 32 of the Matrimonial Causes Act.
  - d. A custodial order under section 64 of the Matrimonial Causes Act.

- [2] This application however required leave pursuant to Rule 68(a) of the Matrimonial Causes Rules 1977 and an application seeking such leave was filed on 29 April 2021 and was granted on 4 June 2021. Trial of the matter was undertaken on 17 June 2021. It was a short matter, neither side calling witnesses but sought to rely on the affidavits they had both filed in the matter and the cross examination that was undertaken on that date.
- [3] At trial the petitioner also indicated to the court that she would only be pursuing claims (c) and (d) of the said application namely the property adjustment order under section 32 of the Matrimonial Causes Act and a custodial order under section 64 of the Matrimonial Causes Act. This court will therefore deal with those two issues as raised.
- [4] In dealing with any ancillary relief application, it is always useful to remind the parties and the court itself that these applications are captured by the provisions of the Matrimonial Causes Act Cap 239 (hereinafter referred to as “the Act”) and in particular the factors that the court must consider in making such orders. Under section 34 these are:
- (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 party to the marriage;
  - (f) the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
  - (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party may lose the chance of acquiring;
- [5] It is therefore clear that this power is discretionary and in looking at these factors the court is also mandated to consider all the circumstances of the case.

### **The Property Adjustment Order**

- [6] The petitioner has sought in this regard to invoke the provisions of section 32 of the Act which gives the court the power to make any one or more of the orders provided for by that section. These orders are as follows:
- “(1) ...
- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be so specified in the order for the benefit of such a child, such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion.

- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the Court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- (c) an order varying for the benefit of the parties to the marriage and of the children of the family of either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;
- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement, ...”

[7] The petitioner however did not identify in the notice of application for ancillary relief which of the subsections she wished to invoke and as such the petitioner has run afoul of Rule 74 of the Matrimonial Causes Rules 1977 (Rule 74) which states:

“(1) Where an application is made for a property adjustment order, or an avoidance of disposition order, the application shall state briefly the nature of the adjustment proposed or the disposition to be set aside and the notice in Form 11 or 13, as the case may be, shall, unless otherwise directed, be supported by an affidavit by the applicant stating the facts relied on in support of the application.

(2) The affidavit in support shall contain, so far as known to the applicant, full particulars-

(a) in the case of an application for a transfer or settlement of property-

- (i) of the property in respect of which the application is made,
- (ii) of the property to which the party against whom the application is made is entitled either in possession or reversion;...

(b)...

(c) in the case of an application for an avoidance of disposition order-

- (i) of the property to which the disposition relates,
- (ii) of the persons in whose favour the disposition is alleged to have been made, and in the case of a disposition alleged to have been made by way of settlement, of the trustees and the beneficiaries of the settlement.”

[8] However the affidavit of the petitioner in support of the application filed on 19 June 2020 sets out what the petitioner seeks by way of her application. At paragraphs 15 to 17 she had this to say:

“15. The Respondent unilaterally executed a Deed of Settlement dated 25<sup>th</sup> July, 2018 and Registered as No. 2523 of 2018 in which he purportedly settled the matrimonial home on Sherrol Knights and Ezra Knights with Life Interest to himself and subject to the said Mortgage.

16. That I am requesting this Honourable Court to cancel the said Deed of Settlement.

17. That I am requesting this Honourable Court to grant me a Fifty Percent Share in the said matrimonial home.”

- [9] The application is therefore two fold. One that the Deed of settlement executed by the respondent on 25 July 2018 (hereinafter referred to as “the Deed of Settlement”) be set aside and that two she be given a 50% share in the said matrimonial home.
- [10] In this court’s mind, it is clear that in order for the petitioner to obtain the second relief, the first relief with the setting aside of the deed of settlement must be determined.

### **The Law**

- [11] Under section 47 of the Act, entitled “Avoidance of transactions intended to prevent or reduce financial relief” extensive provisions are set out therein, which empower the court to review and make a determination on transactions entered into, where the intention was to defeat financial relief claimed by either party.
- [12] Section 47 is therefore set out in its entirety here:
- “(1) For the purposes of this section-
- “financial relief”** means relief under any of the provisions of sections 30, 31, 32, 36, 40 (except subsection (6)) and 54, and any reference in this section to defeating a person’s claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of these provisions.
- (2) Where proceedings for financial relief are brought by one person against another, the Court may, on the application of the first-mentioned person-
- (a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;
  - (b) if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;
  - (c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) by the applicant against the other party, that the other party has, with that intention made a reviewable disposition, make an order setting aside the disposition,
- and an application for the purposes of paragraph (b) shall be made in the proceedings for the financial relief in question.

(3) Where the Court makes an order under subsection (2) (b) or (c) setting aside a disposition, it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(4) Any disposition made by the other party to the proceedings for the financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subsection (2) (b) and (c) unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(5) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the Court is satisfied-

- (a) in a case falling within subsection (2) (a) or (b), that the disposition or other dealing would (apart from this section) have the consequence; or
- (b) in a case falling within subsection (2) (c), that the disposition has had the consequence of defeating the applicant's claim for financial relief,

It shall be presumed, unless the contrary is shown, that the person who disposed of, or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

(6) In this section, “**disposition**” does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description whether made by an instrument or otherwise.

(7) This section does not apply to a disposition made before the 1<sup>st</sup> January, 1968.”

[13] However section 47 must be read with Rule 74<sup>1</sup>. In particular, subsections 4 and 5, which state as follows:

“(4) A copy of Form 11 or 13, as the case may be, together with a copy of the supporting affidavit, shall be served on the following persons as well as on the respondent to the application, that is to say-

- (a) in the case of an application for an order for a variation of settlement order, the trustees of the settlement and the settlor if living,
- (b) **in the case of an application for an avoidance of disposition order, the person in whose favour the disposition is alleged to have been made,**
- (c) in the case of an application to which paragraph (3) refers, any mortgagee of whom particulars are given pursuant to that paragraph,

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<sup>1</sup>Subsections (1) and (2) are at paragraph 6 above

and such other person, if any, as the registrar may direct.

(5) Any person served with notice of an application to which this rule applies may, within 14 days after service, file an affidavit in answer.” **(My emphasis added)**

[14] It is therefore clear that in order for an order to be obtained under section 47, the court must consider whether the impugned transaction has as its sole intention of the respondent to defeat the financial relief as sought by the petitioner. In this court’s mind this determination can only be made after an assessment of the evidence that has been led by both parties in this regard.

### **Evidence and Discussion**

[15] The evidence of the petitioner in this regard is contained at paragraph 15 of the affidavit filed on 19 June 2020<sup>2</sup> and paragraph 2 (ix) of the affidavit filed in response on 14 May 2021 which clearly stated that she was unaware of any agreement for the children of the family to benefit and that the respondent concluded the transaction surreptitiously. The respondent on the other hand at paragraph 8 of his affidavit filed on 28 April 2021 defended the transaction by insisting that it was always the intention of himself and the petitioner that his siblings having made significant contributions to the building of the matrimonial home, that they would acquire an interest which would be conveyed to the children of the family.

[16] The submissions of the petitioner on this issue however were that the court ought not to rely on the version of events as given by the respondent when he himself admitted in cross examination that he had never consulted the petitioner before executing the “purported agreement”<sup>3</sup>. The petitioner also asked this court to consider the timing of the agreement. This agreement was executed on 25 July 2018<sup>4</sup> and the petitioner left the home on 30 March 2018<sup>5</sup>. Bearing that in mind, the petitioner submitted that the execution of the deed was only done to “pre-empt the Petitioner/Applicant from successfully pursuing her application for a property adjustment order.”<sup>6</sup>

[17] The respondent on the other hand did not assist the court in this regard, having only it appears, addressed his mind to whether the petitioner was entitled to a share in the property without considering whether the deed of settlement should be set aside. Perhaps this may be a concession on the part of the respondent, however this position was not made clear to the court.

[18] That being said, the exercise that now must be undertaken by the court in this regard has to be undertaken with great care in that acceding to the request to set aside the transaction, the court

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<sup>2</sup> Set out at paragraph 6 above

<sup>3</sup> Paragraph 9 of the Submissions of the Petitioner filed on the 28/6/2021

<sup>4</sup> Exhibit SBKA 6 attached to the Affidavit of the Petitioner filed on the 19/6/2020

<sup>5</sup> Paragraph 7 (i) of the Petition filed on the 26/10/2018

<sup>6</sup> Paragraph 11 of the Submissions of the Petitioner supra

must bear in mind that the effect of doing so is to “deprive somebody who has nothing whatever to do with this dispute of a substantial asset.”<sup>7</sup>

- [19] Thus in looking at section 47 of the Act, it is clear that not only can a disposition be set aside if it had the intention of avoiding the financial relief being sought, but additionally, once that disposition is within three years of the application for ancillary relief, there is an automatic presumption that the disposition was undertaken with that very purpose<sup>8</sup>. In doing this, “[i]t is plain that the section deliberately shifts the onus of proof from the party alleging that a particular disposition is a reviewable disposition within s. 37 (2) (b), to the other party in the event that the disposition has been made within less than 3 years of the date of the application. The method chosen to discriminate between dispositions which are reviewable and those which are not is the qualification that the disposition has to have been made with the intention of defeating the claim for financial relief, within the meaning of that phrase as the section defines it. So the intention leading to the disposition is the criterion which brings a disposition either within or without the provisions of s. 37. Parliament plainly had to make provision, from a practical point of view, to enable the court to arrive at a decision in what is always a difficult matter, i.e. to determine intention in relation to actions taken in the past. So the technique is used of placing the onus of proof in the first place on the party alleging that it is a reviewable disposition, but shifting it where the disposition takes place within a relatively short time of the application. In other words, it leaves the onus of proof in respect of dispositions made in the relatively distant past firmly on the party alleging that the disposition in question is a reviewable disposition but shifts it the nearer one gets to the point of the marriage breakdown.”<sup>9</sup>
- [20] The evidence before the court is that the Deed of Settlement was executed some three and a half months after the petitioner left the home. It would have been clear by then to the respondent, that the petitioner had declared her hand and was not returning. Indeed within a period of just over six months of the petitioner leaving the home, she filed these divorce proceedings.
- [21] In this court’s mind, all these circumstances could have led this court being satisfied that the action of the respondent in this regard was indeed done with the intention of defeating the petitioner on any claim she would have had for financial relief.
- [22] However, unfortunately this petitioner has failed to take an integral step to invoke this court’s jurisdiction to make such a finding. The petitioner has in fact failed to adhere to the requirements of Rule 74<sup>10</sup> which in this court’s mind must be fatal.

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<sup>7</sup> **K v K (Avoidance of Reviewable Disposition)**(1983) 4 FLR 31 at 40-41

<sup>8</sup> Section 47 (5) (a)

<sup>9</sup> **K v K (Avoidance of Reviewable Disposition)** (1983) 4 FLR 31 at 35

<sup>10</sup> Set out in this judgment above at paragraph 13

- [23] In the case of **S v S**<sup>11</sup> the court per Warner J in Trinidad and Tobago considering a similar application in circumstances where the husband had disposed of property in his sole name to the children of the family, made it clear that where the wife has made such a claim she must be required to “nail her colours to the mast”, that is make her claim for all to see and to ensure that all those persons who would be affected had notice of the same.
- [24] Thus, when the Deed of settlement is in fact perused, the trustees established were the sister of the respondent and the daughter of the parties. They were appointed as Trustees for the minor son of the parties and the daughter herself is also a beneficiary of the deed. There was no indication before the court that either of the Trustees or the beneficiary who is of the age of majority were in fact notified of the intention of the petitioner to set aside the Deed of Settlement and advising them of their option to file evidence in that regard.
- [25] In this court’s mind having on the one hand invoked the provisions of section 47 it was also of the essence and incumbent upon the petitioner to ensure that Rule 74 was followed. In this court’s mind, failure to adhere to this Rule is more than merely a procedural defect to which the court may be empowered to make right. Sub rules 4 and 5 go fundamentally to the considerations of natural justice affording the persons who would be affected by the decision of the court should be heard in their own right and more so that the court would be seised of all the pertinent information to make an informed decision. A decision that goes not only to the intention of the transaction but also as to whether it should be set aside in all the circumstances. In failing to do so, this court must “...stop and think before [it] decides that it is the right and just conclusion”<sup>12</sup> on the evidence.
- [26] In the final analysis, this court is unable to set aside the deed of settlement. The petitioner has failed to ensure that this hearing was transparent and fair in that regard. Having failed on that issue, there is no property which belongs to the respondent to which the petitioner can make a claim and seek financial relief. That portion of her application is therefore dismissed.

### **Custody and Maintenance**

- [27] This issue of the custody of the minor child of the family appeared to this court to be a deep source of contention as between these parties.
- [28] The petitioner by her notice of application simply sought a custodial order and invoked section 64 of the Act which on close inspection simply mandates the court to declare that the court is satisfied with the proposed arrangements to enable the granting of the decree absolute. It does not in this court’s mind address what the court must consider in making such a declaration.

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<sup>11</sup> (1992) 51 WIR 286 at 292

<sup>12</sup> **K v K** supra at page 41



- [29] The position of the petitioner is that the minor child resides with her<sup>13</sup>, that she has expenses that are attributable to his care which the respondent does not assist with<sup>14</sup> and that further the respondent is not a proper person to have primary custody, care and control of the minor child<sup>15</sup>. On cross examination this position remained steadfast as did her resolve that the child did not reside with the respondent nor should he do so on a permanent basis.
- [30] The respondent on the other hand, in his evidence in chief made out what appeared to be a compelling case for the minor child to reside with him in the former matrimonial home until he was pressed on cross examination. It was on cross examination that the respondent came across as less than forthright and in fact extremely elusive with his answers to counsel for the petitioner when questioned as to his plans for the residence of the minor child with him. In particular the respondent failed to satisfy this court on a balance of probabilities that the minor child lives with him at present as he had stated in his affidavit of 28 April 2021<sup>16</sup> nor did he convince the court that he would be at home to look after his son and keep him on track<sup>17</sup>. Indeed, it was clear to the court that the respondent, rather than “being always at home” spent just as much time out of the house as the petitioner who did so to work and provide for the very same minor son.
- [31] It has always been clear to the court that the paramount consideration for the court on applications of this nature, must be the welfare of the child or put another way, to seek to ensure that the best interests of the child of the family are met. Section 34(2)<sup>18</sup> sets out those requirements clearly and it is those factors that the court must consider in making a decision for the ultimate benefit of the child.

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<sup>13</sup> Paragraph 19 of the Affidavit of the 19/6/2020

<sup>14</sup> Paragraph 20 of the Affidavit of the 19/6/2020

<sup>15</sup> Paragraph 2 (xi) of the Affidavit of the 14/5/2021

<sup>16</sup> Paragraph 16 of the said Affidavit

<sup>17</sup> Evidence elicited at Trial on the 17/6/2021 on cross examination

<sup>18</sup> **Section 34 (2)**

“(2) Without prejudice to subsection (3), it shall be the duty of the Court in deciding whether to exercise its powers under section 31(1)(d), (e) or (f), (2) or (4), 32 or 33 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 the manner in which the parties to the marriage expected home to be educated or trained,

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

- [32] The petitioner has sought sole custody with reasonable access to the respondent. While the respondent has sought joint custody, care and control to him and access to the petitioner on weekends.
- [33] In order for this court to consider just how far apart these parties are the question must be posed, what therefore do the terms “sole custody” and “joint custody” in fact mean? These terms have been defined in the Canadian case of **Kerri Kalliokoski v Dale Kalliokoski**<sup>19</sup> as follows, “an award of sole custody to one parent grants decision making rights to that parent generally to the exclusion of the other parent to interfere in carrying out these rights and responsibilities ... [t]he term “joint custody” is used to describe situations where both parents are given full decision making authority and responsibility in all areas respecting the child.”
- [34] However whatever decision is made, at the end of it all “the law is clear, the wishes or interests of the parents must give way to the welfare of the child.”<sup>20</sup>
- [35] That being said, it was clear to this court and this court accepts on a balance of probabilities that both parents have a good relationship with the minor child. The petitioner when she left the matrimonial home took her son with her and he has remained living with her as his primary caregiver and residence up until the Covid 19 pandemic in 2020. It is entirely accepted by this court that it was during this period when school was conducted online that the minor child would have spent more time with his father during the week while his mother was at work. However, this court is entirely aware that this arrangement for schooling is one that is temporary and extremely fluid. A fifteen year old boy however cannot have temporary or fluid arrangements. He will need structure and firm schedules to get him through the next few years of his life.
- [36] That being said, it was also indeed telling to this court that the respondent on cross examination clearly stated that the petitioner has been and is a good mother. In this court’s mind therefore the only reason that the respondent has purportedly made his claim for care and control is to avoid having to make structured payments for the upkeep of the minor child, a reason that this court cannot accept is sufficient basis to ground such a serious and life changing request.
- [37] Additionally this court is satisfied that the relationship that exists between the petitioner and the respondent at present would not foster a joint custody arrangement. In another Canadian decision, **Izyuk v Bilousov**<sup>21</sup>, Pazaratz J had these words of comment which this court endorses wholeheartedly, “[i]n the wrong family circumstances, a joint custody order can perpetuate hostilities, indecision, and power struggles. Children - particularly children already exposed to the upset of family breakdown - look to their parents for love, guidance, stability, protection, and

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<sup>19</sup>2016 ONSC 2273 at paragraph 28

<sup>20</sup>**GC v LC** BVIHMT2015/0023 per Ramdhani J (Ag) at paragraph 26

<sup>21</sup>2011 ONSC 7476

consistency. They need to have confidence that adult decisions will be made quickly, properly and uneventfully.”

- [38] In this court’s mind, this is not a case that an order of joint custody would effectively work. I accept that the petitioner has always been the primary care giver for the minor child although this court also accepts that the respondent loves his son. However, “the decision respecting custody of the child[ren] does not turn on the amount of love which he has for [him] them.”<sup>22</sup>
- [39] I therefore order that the petitioner is to have sole custody of the minor child of the family with primary care and control with liberal access to the respondent. The child is now old enough to make his wishes regarding visitation of his father known and the petitioner and the respondent are encouraged to assist in making sure that those wishes are captured.
- [40] With regard to the thorny issue of maintenance. The petitioner in this court’s mind has not been able to prove on a balance of probabilities that the respondent is in a position, to make a monthly payment of \$500.00 towards the maintenance of their minor son. This of course does not mean that the respondent is absolved of any obligation to make payments towards the financial needs of their child.
- [41] In that vein, the respondent is a pensioner. The petitioner was unable to satisfy the court that other than his pension, the respondent is in receipt of a fixed sum every month from any source of income. The evidence of the respondent however made it clear that by his own admission every month he is able to access a further sum in the region of \$400.00 to meet his expenses<sup>23</sup>. By failing to address that anomaly from an income of only \$600.00, this court has drawn the inescapable inference that the respondent has in fact access to additional funds which he has failed to divulge to the court, in whatever sums those may be.
- [42] Taking into consideration therefore all the circumstances, the respondent is ordered to pay the sum of \$250.00 per month for the child of the family to be paid by the last working day of the month until the child shall attain the age of 16 or until he completes his secondary school education whichever one shall come later. These payments are to be made to the office of counsel for the petitioner unless alternate arrangements are duly made and sanctioned by all parties. Such payment is to commence on 30<sup>th</sup> September 2021.

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<sup>22</sup>Kalliokoski supra at paragraph 48

<sup>23</sup>Paragraph 19 of the Affidavit of the Respondent filed 28/4/2021

**The order of the court is therefore as follows:**

1. An order for property adjustment is refused.
2. Sole custody with care and control is granted to the petitioner with liberal access to the respondent.
3. The respondent is to pay the sum of \$250.00 as maintenance for the child of the family until he attains the age of 16 or completes his secondary school education whichever one shall come later. These payments are to commence on 30<sup>th</sup> September 2021.
4. Each party is to bear his or her own costs.

**Nicola Byer  
HIGH COURT JUDGE**

By the Court

Registrar