

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHMT 2016/0065

BETWEEN:

MELSON McMILLAN

Applicant/Petitioner

-and-

ZOE WALCOTT-McMILLAN

Respondent

Appearances: Ms. Ayodeji Bernard instructed by Samuel Richardson and Co., Counsel for the Applicant
Ms. Marie Lou-Creque, Counsel for the Respondent

2020: 9th April

Re-issued: 23rd April, 2020

JUDGMENT

[1] **ELLIS J:** By an amended Notice of Application filed on 19th September, 2018, the Applicant father seeks to vary the terms of the consent order dated 26th April, 2017 (“the Consent Order”) which had resolved critical ancillary relief matters relevant to the children of the marriage. The application is made pursuant to sections 30 and 44 (5) of the Matrimonial Proceedings and Property Act (“the Act”) as well as the inherent jurisdiction of the Court.

The Consent Order and the modifications sought

[2] Paragraphs 2 - 4 and 6 - 8 of the Consent Order read as follows:

2- *“Care and control of the children is granted to the Respondent, and the children shall continue to live with her in the United States of America”.*

3- *"The Petitioner shall have liberal visitation, which the parties shall continue to arrange between themselves".*

4- *"Notwithstanding the matters set out in (3) above, the Respondent [sic] shall be entitled to have the children with him for half of all major school holidays and alternate Christmas and Easter holidays".*

6- *"The Petitioner shall pay to the Respondent, maintenance in the sum of Three Hundred Dollars (\$300.00) per month each for Rhon and Italia and half of each of their educational and health expenses, until the child turns eighteen (18) years old; or until the age of twenty-one (21) years old in the case where the child remains in full time education".*

7- *"The Petitioner shall pay to the Respondent, maintenance in the sum of Three Hundred Dollars (\$300.00) per month for Tessai until he turns twenty – one (21) years old, whether or not he is in full time education; and half of his educational and health expenses until that time".*

[3] The Applicant seeks the following relief:

Clause 2 to read *"Care and control of Tessai McMillan is hereby granted to the Petitioner; further that the status quo regarding the residential arrangements for him shall remain unless agreed to by consent of the parties.*

Care and control of (Italia McMillan remains with the Respondent and her place of residence and education may change from Valdosta, Georgia provided the parties consent to her changed living arrangements."

Clause 3 to read *"The Respondent shall have reasonable access to Tessai McMillan, provided that the Petitioner is provided with reasonable notice of arrangements regarding her removal of Tessai from his place of residence for the purpose of the Respondent's access."*

The Petitioner shall have reasonable access to Italia McMillan, provided that the Respondent is provided with reasonable notice of arrangements regarding his removal of Italia from her place of residence for the purpose of the Petitioner's access."

Clause 4 to read *"the parties shall be each entitled to have half of all major holidays and alternate Christmas and Easter holidays of each of the minor children."*

Paragraph 6 be deleted and replaced by: *"The Respondent shall pay to the Petitioner, or for the benefit of Rhon, maintenance in the sum of Three Hundred Dollars (\$300) per month for Rhon and half of his educational and uninsured health expenses until he child turns eighteen (18) years old; or until the age of twenty-one (21) years old in the case where the child remains in full time education.*

The Petitioner shall pay to the Respondent, maintenance in the sum of Three Hundred Dollars (\$300) per month for Italia; half of her uninsured medical expenses; and half of her educational expenses insofar as they do not exceed that which the parties would have had to pay had Italia remained in the Georgia school system. That this aspect of the order shall continue until Italia reaches the age of majority or until the age of twenty-one (21) years old in the case where she remains in full time education”.

Paragraph 7 be deleted and replaced by: *“The Respondent shall pay to the Petitioner, maintenance in the sum of Three Hundred Dollars (\$300) per month for Tessai until he turns twenty-one (21) years old, whether or not he is in full time education; and half of his educational and uninsured health expenses until that time.”*

A new paragraph 8 be added to say that: *“The Respondent shall pay to the Petitioner maintenance of \$300 per month for each child of the marriage retrospective from October 2017 to the date of the determination of this matter, except the regarding the child Italia said sum shall be calculated up to the date that Italia was removed from the care and control of the Petitioner by the Respondent.”*

Further that in future any monies due by the *Petitioner and Respondent to one another for maintenance, educational expenses and uninsured medical expenses of Tessai and Italia respectively be set off against one another and to the extent that there is a surplus said surplus should be payable forthwith to the party in whose favour the surplus lies.”*

[4] The Parties have successfully negotiated an amicable resolution to several issues arising in the application. On 25th September 2018, the Parties settled the issues relating to Rhon and as such the issues relating to the current maintenance of Rhon are not currently before this Court. In addition, at the trial, the Applicant/Petitioner indicated that claims concerning the maintenance, care and control of and access to Italia are no longer being pursued. Counsel for the Parties indicated that they will settle those matters amongst themselves.

[5] However a meeting of minds was not possible with regard to the arrangements for the youngest child, Tessai. The Court is therefore required to decide of the claims for relief in regard to this minor child, having regard to all the circumstances illuminated by the evidence placed before the Court. In that regard, the Court notes that there is currently an injunctive order in place preventing the removal of Tessai from his current place of residence pending the determination of the matter herein.

[6] It follows that the only orders sought by the Applicant before this Court relate to:

A. Care and control of and access to Tessai McMillan, which are seen at paragraphs:

- i. At paragraph 2 which reads: "*Care and control of the children is granted to the Respondent, and the children shall continue to live with her in the United States of America*" to read "*Care and control of Tessai McMillan is hereby granted to the Petitioner; further that the status quo regarding the residential arrangements for him shall remain unless agreed to by consent of the parties.*"
- ii. At paragraph 3 which reads: "*The Petitioner shall have liberal visitation, which the parties shall continue to arrange between themselves*" to read "*The Respondent shall have reasonable access to Tessai McMillan, provided that the Petitioner is provided with reasonable notice of arrangements regarding her removal of Tessai from his place of residence for the purpose of the Respondent's access.*"
- iii. At paragraph 4 which reads: "...*the Respondent [sic] shall be entitled to have the children with him for half of all major school holidays and alternate Christmas and Easter holidays*" to read "*the parties shall be each entitled to have half of all major holidays and alternate Christmas and Easter holidays of each of the minor children*". (Except that based on the indication of the Applicant/Petitioner on the 17th April, 2019 and the settlement of the issues regarding Rhon, this paragraph now only concerns Tessai)

B. Issues relating to maintenance

- iv. That paragraph 7 be deleted and replaced by: "*The Respondent shall pay to the Petitioner, maintenance in the sum of Three Hundred Dollars (\$300) per month for Tessai until he turns twenty-one (21) years old, whether or not he is in full time education; and half of his educational and uninsured health expenses until that time.*"
- v. That a new paragraph 8 be added to say that: "The Respondent shall pay to the Petitioner maintenance of \$300 per month for each child of the marriage retrospective from October 2017 to the date of the determination of this matter, except that regarding the child Italia said sum shall be calculated up to the date that Italia was removed from the care and control of the Petitioner by the Respondent.
- vi. Not pursuing-[Regarding this paragraph pursuant to the indication of the Applicant/Petitioner and the parties in general matters relating to any current or future order regarding the maintenance of Italia is currently not before the court.]

[7] In determining the Applicant/Petitioner's entitlement to the orders sought, the Court will need to consider:

- i. Whether the court is empowered to vary the consent order.
- ii. Whether the proposed variations should be made. In particular, the Court will need to determine to whom should care and control be granted in the best interest of Tessai and whether there ought to be consequential maintenance orders.

POWER OF THE COURT TO VARY THE CONSENT ORDER

[8] Section 44 (1) of the Act gives the Court a wide discretion to make any order it sees fit in the circumstances of the case in respect of custody, access or financial provision. The consent order which Mr. McMillan seeks to vary falls within the parameters of section 44 of the Act which provides as follows:

“The Court may make an order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen,

- a) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree,
- b) where such proceedings are dismissed after the beginning of a trial, either forthwith or within a reasonable period after dismissal,

and in any case in which the court has the power by virtue of this subsection to make an order in respect of a child, it may, instead if it thinks fit, direct that proper proceedings be taken for making the child a ward of Court.”

[9] Section 44 of the Act confers on the Court the discretion to discharge or vary an order made pursuant to the said section. The breadth of this discretion is clear from subsection (5), which provides as follows:

“The Court shall have power to discharge or vary an order made under this section or suspend any provisions of the order temporarily and to revive the operation of any provision so suspended.”

[10] However, the relevant order in this case is a consent order. Such orders are often used to record an agreement reached between parties in respect of certain interim matters or it may also be used

for the same purpose when a full settlement compromise is reached. In either case the order is based on a contract between the parties.

[11] In principle, before the order has been drawn up, it is possible to apply to have it set aside or varied. However, once a consent order is perfected, the court generally has no power to vary it. Because of its nature, a consent order can only be set aside or varied in limited circumstances. These include non-disclosure; fraud or misrepresentation; supervening events which invalidate the whole basis of the order; and undue influence.

[12] The Applicant in the case at bar contends that there has been a change in circumstances so as to warrant a variation of the terms of the Consent Order. The issue of whether there has been a change in circumstances is a question of fact and the determination of that issue is limited to events which arose after the date of the original order. The burden rests on the Applicant to demonstrate such a material change in the relevant circumstances.

[13] The relevant legal principles have been helpfully summarised in Canadian case of **Gordon v Goertz**¹ in which McLachlin J of the Supreme Court stated:

“10. Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made...

11. The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued: **Baynes v. Baynes** (1987), 8 R.F.L. (3d) 139 (B.C.C.A.); **Docherty v. Beckett** (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); **Wesson v. Wesson** (1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.

12. What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: **Watson v. Watson** (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: **MacCallum v. MacCallum** (1976),

¹ [1996] 2 S.C.R. 27 at paragraph 10

30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

13. It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order"

[14] The Applicant's evidence is that at the time of the making of the consent order, he verily believed that the Respondent had been residing with the 3 children of the marriage and had been for well over a year. At paragraphs 5 – 10 of his affidavit, the Applicant recounts the circumstances under which the consent order was signed. The Applicant also relies on the Respondent's evidence where at paragraph 2 of her affidavit, the Respondent essentially agrees that some variation of the Consent Order is warranted because she no longer resides with the children in the United States. This evidence was reiterated when the Respondent was cross-examined. In response to the suggestion that she returned to the BVI in April, 2017, the Respondent confirmed that she returned to the BVI to reside in or about April or March 2017. Counsel for the Applicant submitted that the evidence that the Respondent no longer resides in the United States with the children is therefore not only uncontroverted but agreed to by the Respondent.

[15] Counsel for the Applicant noted that at the time when the Respondent resided in the United States, the relevant child, Tessai, resided with her. The Applicant contends that sometime about a week after Hurricane Maria in 2017, the Respondent told him that she thinks 'he should take the children'. This evidence was not traversed by the Respondent. In fact on cross examination, the Respondent indicated that she recalled meeting with Melson McMillan near the old hospital and during their conversation, she did in fact tell him to take the children.

[16] Following this conversation, the child Tessai was relocated to Valdosta, Georgia and now resides with the Applicant's sister Ruby Brown and her husband Michellangelo (Mike) Brown. That has remained the status quo since October 2017. Counsel for the Applicant submitted that in conjunction with his sister and her husband with whom Tessai resides, the Applicant is now the

parent who has the responsibility for the day to day decisions as it relates to the care and control of Tessai. At paragraph 19 of his affidavit, the Applicant contended that together with Mike and Ruby Brown, he has been carrying out the functions of care and control.

[17] It is in these circumstances that Counsel for the Applicant argued that the Court is bound to treat the Respondent as having relinquished care and control, which demonstrates a material change in circumstances since the making of the Consent Order.

[18] This Court is inclined to agree with the Applicant's submissions.

[19] In **Stockhausen v Willis**,² the court observed that the power of the court to vary a court order is necessary so as to reflect changes in the circumstances of either party, subsequent to the date of the court order. However, in doing so, the Court should be vigilant to restrain the inclination of parties to re-litigate issues by successive applications by restricting such applications to vary to cases where there has been a change in the circumstances of either or both parties, since the grant of the order, which it is now being sought to alter.

[20] Clearly, a change in circumstance, properly understood, has to be factually determined. In other words, the change in circumstance is limited to events post the Consent Order of 26th April 2017. The Court is satisfied that the Applicant has been able to identify material changes which represent a distinct departure from what the Court could have reasonably anticipated in making the previous order. It is clear that the terms of the previous order would have been completely different had the present circumstances prevailed earlier. The Court is therefore satisfied that it has the jurisdiction to vary the terms of the Consent Order under section 44 (5) of the Act.

[21] Having determined that it has the jurisdiction to act, the Court must now consider whether such jurisdiction should be exercised on the facts of this case.

² JM 2008 SC 83 per Anderson, J and see: *Tibbles v Sig (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518.

GENERAL CONSIDERATIONS

[22] Section 3 of the **Guardianship of Infants Act**³ stipulates that:

“Where in any proceeding before the Court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.”

[23] In **J v. C**,⁴ the House of Lords sought to construe the meaning of the words ‘shall regard the welfare of the infant as the first and paramount consideration’. Lord MacDermott stated:

‘...it seems to me that they must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.’

And later;

‘In applying section 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue. While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the investigation the broad nature of which is still as described in the fourth of the principles enunciated by FitzGibbon L.J. in *In Re O’Hara* [1900] 2 I.R. 232, 240.’

[24] It therefore follows that in considering an application for variation of an order for custody and maintenance of a child, a court must have regard to “the best interest of the welfare” of the child.

³ Chapter 270 of the Laws of the Virgin Islands.

⁴ [1969] ALL E.R. 1140.

It is the interests of the child which are to be regarded as paramount and not the personal desires or preferences of the parents so that the welfare of a child encompasses considerations which are above and beyond and before all other factors and concerns of the Parties themselves.

- [25] In conducting to the welfare of a child, the Court is obliged to consider: a) the child's physical, emotional and education needs; b) the child's age, sex and background; c) the likely effect on the child of any change in his or her circumstances; and d) how capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, in meeting the child's needs; e) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding) and f) any harm he has suffered or is at risk of suffering. These factors, which are not set out in order of priority will now be considered.

Age, sex, background and any characteristics of the child which the Court considers relevant

- [26] The facts of this case disclose no peculiar religious, racial, cultural or linguistic considerations. However, it is not disputed that Tessai is a 14 year old male child diagnosed with focal epilepsy (which results in night seizures), developmental delays, intellectual and learning disability, speech and language impairment coupled with physical disability diagnosed as partial left sided hemiparesis (weakness of the left side) resulting in him having a limp left arm and very limited muscle control of his left hand; his left leg is also affected. Although he is 14 years old, his educational level is that of a 6 year old.
- [27] It is therefore clear that he has and will continue to require specialist emotional, physical and educational care. It is therefore incumbent on this Court to ensure that he is afforded the best physical, emotional and educational arrangements possible to ensure that he thrives. The extent of these requirements is explored under the following heading.

Physical Emotional and Educational Needs of the Child

- [28] Physical needs can include the need for adequate accommodation but generally the major concern is for the child's security and happiness not his material prospects. The quality of the home life of the child therefore must not be measured in purely material terms but rather in the amount of time and energy that either parent can devote to his care and upbringing. The child's emotional needs will also be a crucial element. This will involve a consideration of the child's attachment to a particular parent, sibling or even to a family.
- [29] In the case of attachment to family, the courts have generally dealt with this issue in the context of a custody dispute between parent and third parties. Courts have typically held the view that a child is better off being brought up in his own family.⁵ However, it is clear on the evidence before the Court that Tessai does not physically reside with either of his natural parents. Since 2017, Tessai has resided with the Applicant's sister and her family in Valdosta, Georgia. This arrangement came about because of the threat posed to the state of Florida by the passage of hurricanes Irma and Maria in late 2017. It is common ground that the Respondent told the Applicant to take the children and because the Parties desired that Tessai remain in the United States, it was agreed that he would relocate to Valdosta, Georgia (together with his siblings) reside with the Applicant's sister and her family.
- [30] Prior to this the children, who were at the time all under the age of 16 years old, resided in Weston, Florida in the care of paid part-time caregivers. This is because the Respondent had returned to the BVI in March/April 2017 intending to pursue business interests which coincided with her success at the Ms. BVI competition. When she was taxed under cross examination, it became clear to the Court that the care givers afforded limited supervision.
- [31] Generally, a parent who has been granted primary care and control of a child would ordinarily have the right to determine where the child should live. It is abundantly clear that although, there was previously consensus on this issue (they both agreed that Tessai would be placed with his aunt in

⁵ [1996] 2 FLR 441 CA.

Georgia) the Parties now have very different views on this critical issue and this has no doubt informed their respective cases.

[32] However, there is some common ground. This is not a typical case where parental attachment would be in issue. It is clear to the Court that neither parent intends to have Tessai physically live with them as part of their respective households. Although both Parents maintain a loving relationship with Tessai, he has been in the physical custody and care of the Browns since October 2017. The evidence of the Applicant is that he would wish to maintain the status quo. This is a de facto arrangement as there is no formal guardianship order in place. The Browns currently operate on the basis of a power of attorney issued to them by the Applicant exercising primary care and control. On the other hand, the Respondent has clearly indicated that if she is vested with primary care and control of Tessai, it is her intention that Tessai reside with her sister Vernicia and her family in Cape Coral, Florida.

[33] All experts agree that it is a fundamental emotional need of every child to have an enduring relationship with both parents. Under either arrangement, there would be some challenges for parental attachment. The Respondent complains that there has been some alienation because the Applicant and the Browns have failed to communicate critical matters concerning Tessai and have generally not fostered her relationship with him. The Court has no doubt that a similar issue would arise were Tessai to be placed with the Respondent's sister.

[34] However, the Respondent further contends that Tessai needs to be placed with his siblings in a home where she can provide meaningful care and attention and fight in respect of the issues which he currently goes through. Courts are generally reluctant to separate children because sibling support is a recognized emotional need especially "in the stormy waters of the destruction of their family".⁶ Although there may be circumstances where this would prove an influential consideration, given the ages of the siblings and the lack of any evidence of emotional or psychological damage suffered as a result of their separation, the Court is compelled to adjust the weight of this factor.

⁶ C v C (Minors: Custody) [1988] 2 FLR 291 at 302

- [35] Finally, the courts have recognized that education is an important aspect of a child's upbringing and the question of which school is to be attended is a relevant factor in deciding who should look after the child. Given Tessai's developmental disabilities, this will be a critical factor and for the same reason also critical will be Tessai's medical needs.
- [36] The Court had the benefit of several individualized education program (IEP) reports. The first report dated 30th August 2017 was produced by the School Board of Broward County Florida, in the summer of 2017 prior to Tessai's relocation to Valdosta. The report indicates that Tessai required individualized instruction in a very small class with low student/teacher ratio for reading, math and language arts and that he required ongoing assistance and prompting for participating in learning activities. Due to Tessai's disability, he has difficulty staying on task and requires extra encouragement and training to work on obtaining this skill.
- [37] On 23rd February 2017, on the Diagnosis Assessments of Reading (DAR), Tessai scored a 2 for word recognition and word meaning; for oral reading and spelling sections he scored a 1-2. Tessai was unable to complete the silent reading section. The report further states that Tessai can read first grade level words and can answer questions at upper second grade level. Overall, the report indicates that due to his disability, Tessai experienced difficulty comprehending grade level text and needed assistance and modification to the curriculum so he can get information from the assigned materials. Further, due to Tessai's disability, he has difficulty in math and needs small group individualized instructions to assist in learning skills that are challenging for him.
- [38] On a personal level, the report indicates that Tessai enjoys interacting with both peers and adults and is very friendly, polite and outgoing. He also enjoys interacting with his classmates and the peer counsellors who assist in the classroom. Tessai likes to go on field trips and participate in Best Buddies with the counsellors. Based on teacher observations, the report indicates that Tessai currently rides the bus in his wheelchair, but is working on strengthening his legs and is walking around the school campus without his wheelchair with hopes of going to school without his wheelchair in the future.

- [39] Tessai is currently enrolled in Valdosta Middle School and is receiving specialized education in keeping with his disabilities and his specialized needs. The second report dated 12th October, 2017 represents Tessai's initial assessment upon being enrolled in that school. This report demonstrates that rather than have Tessai participating in the regular curriculum, it was determined that he will participate in the curriculum which allows for alternative assessment.
- [40] When asked if Tessai mastered his goals set out in the August 2017 IEP report, Mrs. Brown, candidly indicated that Tessai did not master the goals because most of academic year was spent addressing his disruptive behavior. Melson McMillan also testified that he unilaterally made the decision to have Tessai repeat 7th grade because he had become quite disruptive in class and he was satisfied that it was in his best interest.
- [41] There was also a follow up report in 11th April 2018 which was prepared by specialists in occupational and physical therapy which noted that Tessai participates in various activities outside and in the gymnasium (from his physical therapist) and continues to need cues for gait pattern.
- [42] A later IEP report in March, 2019 concluded that Tessai continues to have educational needs that require the provision of special education services. This IEP report also indicates that "Tessai receives direct instructions and supportive instruction in order to be successful in classroom setting. The report also clearly demonstrates Tessai's cognitive disabilities and states that "Tessai's cognitive delays make it difficult for him to participate in the general educational setting. He needs individualized instructions to learn new skills, complete tasks and requires assistance from a teacher or paraprofessional when in a general educational setting".
- [43] Counsel for the Respondent was at pains to point out that the 2017 Florida report which referred to Tessai's February testing indicated that he could read at a grade 1 level and had reading comprehension at an upper grade 2 level. She noted that the March 2019 report has Tessai reading at a lower level. She further noted that the short term (April 2018) were essentially the same target goals set by the Valdosta IEP in October 2017 to be met by October 2018. In essence, she submitted that in the 2 years that Tessai has been in the Valdosta education system, his

reading skills have not improved, he has been compelled to repeat an academic year and is only now achieving the goals which ought to have been achieved a year prior.

- [44] However, Tessai's school report card 2018 – 2019 demonstrates that for term 2 Tessai has only been absent 4 times, further that Tessai's grades now range from 76% to 100%, him having scored 100% in two out of six subject areas. By way of mathematical calculation, Tessai's average would be 86.33%. Further, Mrs. Brown stated in cross examination that Tessai is now on the honour role. This demonstrates that Tessai in spite of his intellectual disability is thriving academically.
- [45] Counsel for the Applicant submitted that this latest school report and several individualized education programme reports have demonstrated Tessai's continued progress academically, physically, socially and behaviorally. Counsel submitted that it is apparent that he is thriving in his current environment and has settled into a school routine at the Valdosta Middle School.
- [46] The Court also had the benefit of three other reports. The first report referred to as the Nemours Report was prepared by the Neurology Division, Neuropsychology clinic located in Jacksonville Florida approximately 6 months after Tessai's relocation to Valdosta, Georgia. The report describes Tessai as having both partial complex seizures and full-blown tonic-clonic seizures and that Tessai is believed to have localization related epilepsy with seizures originating from the right hemisphere.
- [47] The findings revealed a neurocognitive profile consistent with intellectual disability as well as mild language and communication defects. Tessai's social skills and adaptive skills are also more consistent with that of a much younger child and that he is generally compliant, friendly and socially appropriate but immature in test taking aptitude. Further, it concluded that Tessai's skills were often at the 6 year old age adequacy level with his academic skills generally at the upper kindergarten to lower first grade equivalency level.
- [48] Counsel urged the Court to compare that report with the report of the School Board Report of Broward County dated 18th April 2016, a period when Tessai resided with the Respondent in Weston, Florida. At that time, Tessai was in 5th grade at Gator Run Elementary and according to

the school Tessai demonstrated learning as well as behavioral difficulties in the classroom. It confirms that Tessai had focal epilepsy. Further, it indicates that Tessai takes medication for his seizures and underwent a craniotomy in order to remove the seizure causing part of the brain. The report highlights Tessai's frequent absences and tardiness as well as his general lethargy and lack of effort. He was given a ranking significantly below his composite intelligence index. The psychologist noted that he was not yet reading and understanding material of a 2nd grade level and had not demonstrated expected socialization markers.

[49] In comparing the Nemours report and the Florida Broward County report, the Respondent submitted that the Nemours report noted Tessai's estimated full scale IQ as 52 (within the 0.1 percentile) whereas the Florida report which is dated 2 years earlier places Tessai in the same percentile. Counsel of the Respondent submitted that this is hardly indicative of significant progress.

[50] However, Counsel for the Applicant observed that the Nemours report demonstrates that Tessai has grown from dependence and has progressed to being more friendly and sociable. Whereas the Florida Broward County report Tessai is in summary demonstrated as a socially maladjusted child lacking proper social skills, not demonstrating friendship seeking behaviors or recognizing emotions, not playing cooperatively or ending conversations appropriately or saying thank you or please. In the Nemours report he is described as friendly and sociable and socially appropriate. The report notes that despite his disabilities and need for support, Tessai is compliant and not complaining about tasks. This is to be compared with the Florida Broward County report where he is described as complaining about tasks, defiant and non-compliant, adamantly stating "oh no I am not going to do work" and when asked to do math asked "why do you make me do all this work". Finally, Counsel submitted that the Nemours report depicts him as being alert and oriented and walking easily whereas the Florida Broward County report depicts him as restless and dragging his leg as he walked. Counsel submitted that it is quite evident that Tessai has improved leaps and bounds since his relation to Valdosta.

[51] It is common ground between the Parties that the educational and health care systems in the BVI are inadequate to deal with the Tessai's educational and medical needs. The Court has considered

the special characteristics of Tessai. He is a physically and intellectually challenged child who from any objective analysis is thriving under the present arrangements. The Court must therefore consider the likely impact of a further change to his circumstances.

Wishes of the Child

- [52] Despite the fact that it is placed first in the welfare checklist, the child's view is not expressed to be determinative. The courts have held that the child's views must be considered and may, but not necessarily must, carry more weight as the child grows older. Rather, it has been said that where all other factors are even, it is appropriate to recognize the extra significance of an older child's views.⁷
- [53] In **R (CD) v Isle of Anglesey County Council**,⁸ the court held that the wishes of a 15 year old with grave disabilities should carry no less weight than for any other 15 year old. However, in that case, the child had quadriplegic cerebral palsy and was registered as blind. On the other hand, in the case at bar, it is common ground between the Parties that Tessai is a 14 year old male who has both physical and learning disabilities and who functions at the level of a 6 year old. Although he has reached the physical age of 14, the nature and extent of his disability coupled with the fact that he resides outside of this jurisdiction, meant that it would be difficult for the Court to determine his wishes.
- [54] However, there was a report which was relied on by the Applicant and which proved to be useful. The so-called "counselling report" came about after Mr. McMillan received word from Tessai's school that Tessai was distraught about returning to the Virgin Islands and he feared relocation. A decision was taken to enroll Tessai in counselling sessions once per week. The report reveals that Tessai was experiencing stress and difficulty when his mother used profane language towards him and family members. He also experienced some confusion, stress and anxiety about his feelings because he fears he will not return to see his father again. The therapist recommended that Tessai remain in counselling for a period of six months or more in order to remediate ongoing

⁷ Re F (Minors) (Denial of Contact) (1993) 2 FLR 677 CA

⁸ [2004] EWHC 1635 Admin.

presenting problems, that he continue to work on development and implementation of emotional, self-regulation skills, development and implementation of expressive skills to appropriately express his feelings and that he completes a trauma assessment to determine the adverse effects his past trauma has impacted his current functioning.

- [55] The Respondent's case did little to traverse the contents of this report which must carry some weight not only as regards Tessai's feelings but also as regards this likely impact which a change of his circumstances would have on his psychological and emotional well-being.

Likely effect of a change in circumstances

- [56] This factor requires the Court to consider the likely effect on the child of a change in circumstances. In **D v M (Minor) (Custody Appeal)**⁹ Ormrod LJ stated:

"It is generally accepted by those who are professionally concerned with children that, particularly in the early years, continuity of care is a most important part of the child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so."

- [57] It follows that good reasons will have to be adduced to justify moving a child from a well-established home which affords continuity of care. Courts are understandably reluctant to move a child even as an interim measure in the absence of a full investigation of the facts, particularly if there is a doubt about the capability of the person with whom the child is to live.

- [58] However, status quo is only a factor. A court must therefore consider whether the child's welfare would be better served by being moved. In **S v W**¹⁰ Ormrod LJ also observed that:

"the status quo argument depends for its strength wholly and entirely on whether the status quo is satisfactory or not. The more satisfactory the status quo, the stronger the argument for not interfering. The less satisfactory the status quo, the less one requires before deciding to change".

⁹ [1982] 3 WLR 891

¹⁰ (1980) 11 Fam Law 81 at page 82 CA

- [59] As at the date of the application, the Parties had joint custody of Tessai but primary care and control had been effectively transferred to the Applicant who delegated certain responsibilities to the Browns. Together with the Browns, the Applicant has effectively exercised primary care and control of Tessai since October 2017. The evidence of the current arrangements came from Tessai's de facto guardians who were orally examined on their affidavits. In her evidence, Mrs. Brown details the nature and manner of the care given to Tessai since he has been residing with her and her husband. She recounts that when Tessai came to them they had to start from the level of him taking care of his hygiene, picking up after himself and that they had to work on his level of defiance with his siblings and school. Together with her husband they took off time from work to take Tessai to his neurological appointments in Jacksonville, Florida. They eventually found Tessai a tutor but because of his level of defiance the tutor stopped working with him.
- [60] According to Mrs. Brown during the first couple months Tessai displayed significant behavioural issues, refusing to do his assigned work or participate in physical and occupational therapy sessions, talking back to teachers and sleeping in class although he would have 10 hours of sleep from the day before. She states that they were compelled to consider measures which would address these issues. By maintaining consistency and working closely together with the Respondent and Tessai's teachers, they have noticed an improvement in his maturity, academic performance at school and at home.
- [61] They have established rules for discipline and consequences; consequences for not doing chores or school work or involvement in grown up behaviour, dishonesty and disrespect towards adults. They also ensure that medication is administered exactly 12 hours apart in order to limit the frequency of night time seizures.
- [62] Mrs. Brown also details the extent of the Applicant's involvement in Tessai's care. She stated that the Applicant calls every morning to video chat. These video calls allow him to stay involved in school activities, school appointments and medical visits unless there is a connectivity issue. She indicated that "we three co-parent together and the children are very much aware that this is our parenting practice". There is daily consultation with the Applicant regarding discipline and this includes calling from the BVI to speak with Tessai's teacher about his behavior. She further states

that they have jointly discussed strategies for moving Tessai from a dependency mindset to become more independent in spite of his disability.

[63] This evidence was largely untraversed by the Respondent. In fact, when she was questioned by the Court, the Respondent freely conceded that Tessai is settled in his life and routine. Despite this, the Respondent maintains that he should be removed from the Browns and put into the physical custody of her sister Vernicia who resides in Cape Coral. The Court did not have the benefit of any evidence from Vernicia. Other than her address, there was little evidence provided about the proposed accommodation or the arrangements which would be necessary to ensure the physical, emotional and financial support for Tessai. It became clear during the trial that she had experienced some difficulty in child rearing which necessitated the involvement of local and federal authorities. The little evidence which could be gleaned did not convince the Court that she would be a suitable guardian for a teenaged boy who requires an extraordinary level of supervision and support.

[64] When questioned about the steps taken to facilitate Tessai's return to Florida, the Respondent indicated that she had contacted his previous physical therapist discussed more rigorous therapy for Tessai, she also indicated that she had identified an neurosurgeon just 20 minutes away from where he would be residing in Florida. She further stated that she spoke with education department in order to determine which school would be best suited to Tessai's limitations. She indicated that she was given the name of 3 schools in the Cape Coral area. The Respondent provided no more concrete indication than that. As a result, the Court was left with considerable uncertainty about the contemplated care and educational arrangements.

[65] Moreover, when the Court enquired as to whether she had advised herself as to what impact a change in the status quo would likely have on Tessai, the Respondent then indicated that she had consulted with a staff member of the BVI Social Development Department, but it was later revealed that it was not a professional consultation but rather an enquiry of a friend. The Court is not satisfied that the Respondent has provided a detailed or considered plan for relocation of Tessai.

- [66] Counsel for the Applicant has submitted that since residing in the Brown household, Tessai has become more independent. He now takes his medication on his own, he has learned how to take the school bus without the use of his wheelchair and in fact no longer uses a wheelchair. Counsel further submitted that the combined reports also demonstrate that Tessai has since residing with the Browns thrived academically and socially.
- [67] The Court accepts that in assessing what the status quo is the court should examine the whole history of the case and not simply the position immediately before the hearing. However, the maintenance of the status quo becomes a stronger argument the longer it persists.
- [68] Although Tessai's relocation to Georgia may have initially been intended to be a temporary measure, a significant period of time has since lapsed. In that time, Tessai has settled and has no doubt developed strong familial and other personal ties. It is uncontroverted that the Applicant and the Browns have been successfully providing the standard of care that Tessai requires. The Court does not doubt that there may have been some hiccups which would have slowed Tessai's progress when he initially relocated to Georgia but the recorded improvements and advances since then are therefore a powerful argument for maintaining the current care and control arrangements.

Any harm which the child has suffered or is at risk of suffering

- [69] Harm here means both ill treatment and the impairment of health and development. It also includes both physical and psychological trauma. In considering this factor, the Court is cognizant that the standard of proof is on a balance of probabilities and that any conclusion reached must be based on facts, not suspicion or mere doubts.¹¹
- [70] Thankfully, the facts of this case do not disclose any credible allegations of abuse or ill-treatment. There were some vague concerns expressed regarding the circumstances which led to the removal of the Italia from the Brown household but these were addressed by Mr. Brown who gave

¹¹ Re M and R (Child Abuse: Evidence), [1996] 2 FLR 195 at 203 per Butler- Sloss LJ.

evidence that the Respondent had indicated to him that she did not think there was anything nefarious¹² about his actions.

- [71] The Respondent has indicated that she intends to remove Tessai from the Brown's household and to place him with her sister, Vernicia in Cape Coral. For the reasons already indicated, the Court has significant reservations. These are shared by Counsel for the Applicant who urged the Court not to ignore the evidence that Vernicia has had a history with social services regarding her child and she submitted that this is not the ideal environment suitable to raise a child such as Tessai who requires a proper and specialized care regime, structures and routine in order to function and thrive.
- [72] Tessai is a child who clearly requires stability, routine and intimate guidance and supervision if he is to continue to successfully develop and mature. It is not at all clear to the Court that this could be facilitated in the Respondent's proposed arrangements.
- [73] Counsel for the Applicant further submitted that the term "development" includes physical, intellectual, emotional, social or behavioral development¹³ and she submitted that if care and control is not formally given to the Applicant, there is a real and imminent risk that Tessai will be removed from his current stable environment.
- [74] The Respondent's evidence is unequivocal in this regard. She has made her intentions clear to Court. However, other than the proposed living arrangements the Respondent's plans are poorly researched and defined in critical aspects. The lack of a detailed plan in regard to schooling and continued counselling/therapy for Tessai in the Court's view has the potential to adversely impact the significant advancements made by Tessai.

¹² Affidavit of Michellangelo Brown located at Tab 20 page 16 paragraph 137

¹³ Rayden and Jackson on Divorce and Family Matters 1 (2) 18th Edition at chapter 36.31 and n 1

Capability of each parent and any other person of meeting child's needs

- [75] This factor requires the Court to consider a variety of circumstances from the parent's medical condition to their lifestyle. The Court is however also able to consider the capability of any other person in relation to whom the court considers the question relevant. In this case, this requires the Court to consider the capabilities of not only Tessai's parents but also his primary carers, the Browns and the potential carer, Vernicia.
- [76] Despite the terms of the Consent Order, it is clear that since 2017, the Applicant has effectively exercised care and control for Tessai with the assistance of the Browns with whom Tessai resides. Counsel for the Applicant submitted to the Court that the Applicant has demonstrated his ability to continue to care for and maintain control of Tessai. She argued that he has provided uncontroverted evidence of his involvement in Tessai's life, in the decision making process, his interaction with Tessai's place of education, Tessai's therapist, the medical professionals which treat and care for Tessai and importantly with the Browns, with whom Tessai resides. Counsel further submitted that both the Browns have unequivocally demonstrated their ability to care for Tessai. Again the care that Tessai is receiving with the joint effort of Mr. McMillan and the Browns is such that the Respondent has herself admitted that Tessai is settled.
- [77] In contrast, Counsel for the Applicant painted a very unflattering picture of Respondent's role in Tessai's life commencing with her decision to return to the BVI after she was crowned Ms. BVI. Counsel submitted that the Respondent left her three children, who were all under the age of 16 in order to pursue her personal ambitions. During cross examination, it became clear that Tessai and his siblings were left in the care of visiting caregivers which at times left the children unsupervised especially on the weekends.
- [78] Counsel also highlighted the Respondent's disinterest and lack of participation in the relocation and settling of the children on Valdosta and the subsequent and admitted estrangement from the Browns. This led to a demonstrated lack of involvement in Tessai's education. She pointed to the fact that the Respondent had only attended Tessai's school once in April 2018 and that despite the school's interactive website, the Respondent could not identify the name of Tessai's teacher.

Counsel for the Applicant also pointed out that the Respondent has admittedly failed to maintain contact with Tessai's neurologist and has generally taken little interest in providing financial support.

- [79] When she was cross examined under oath, the Respondent indicated that initially she was able to communicate well with Mr. Brown who provided her with information relevant to Tessai. She also testified that Mrs. Brown did communicate to her verbally and in writing that she was free to contact her for information relating to the children. However, the Respondent also claimed that the Browns are keeping her children from telling her things.
- [80] The Respondent was able to identify the number of instances where she was largely kept out of critical decision making regarding Tessai. She was not informed that Tessai was exhibiting disruptive behavior. She was not consulted on the decision to have Tessai repeat grade 7. She was not notified of the IEP meetings. She further stated that the Brown's failed to share information regarding his medical appointments and treatments. The Respondent concluded that the Browns only communicate with the Applicant and that any information which she received was either incomplete or late.
- [81] Counsel for the Applicant submitted to the Court that the evidence of the Applicant discloses that significant efforts were made personally and by the Browns to communicate with the Respondent regarding Tessai. She argued that Mrs. Brown's effort to communicate with the Respondent is replete throughout the evidence. Details of the extent of and nature of the communication with the Respondent are set out in at paragraphs 44 through to 65 of the affidavit of Ruby McMillan. At paragraphs 4 – 11 of his affidavit, Mr. Brown also details the efforts made at communicating with the Respondent, regarding Tessai's behaviour at home and school. Unfortunately, the response was often hostile with the Respondent indicating bluntly to Mrs. Brown that she does not have to speak with her. When cross examined about this, the Respondent denied that she ever responded in this way but she was later forced to resile from that position when she was referred to a WhatsApp conversation between her and Mrs. Brown.

- [82] Counsel therefore urged the Court to find that any lack of communication with the Respondent stemmed from her own negative behaviour. Despite this, the Applicant and the Browns made significant efforts to keep the lines of communication open. She submitted that apart from this the Respondent took no steps herself to establish independent relationships with either Tessai's medical caregivers or educational caregivers despite there being no impediment to her doing so.
- [83] The Court has no doubt that the both Parents love Tessai. It is also apparent that they are both able to provide for him financially. However, it is clear that Tessai requires more than this. Tessai demands a level of attention and monitoring, accommodation, security and consistency which the current arrangements readily afford. Neither Party seeks to have Tessai return to the BVI to reside permanently. It is clearly in his best interest that he remains in the United States where he is in close contact with his physicians and counsellors with whom he has developed a relationship of trust. The Court would only displace the current arrangements, where it is satisfied that there is good reason for doing so.
- [84] Having considered the totality of the evidence, the Court is satisfied that the Respondent's resistance to the Application and her insistence that the child be returned to her care and control stems from the estrangement between herself and the Browns and the consequent lack of meaningful communication between them. She complains that she rarely gets information on the progress and behavior of Tessai from the Applicant or the Browns and has further indicated that by having legal care and control she would be more involved in all matters concerning his welfare and upbringing. The Respondent's frustration was obvious to the Court and it is clear that she feels excluded from Tessai's life. This has no doubt increased the antagonism between the Parties.
- [85] She contends that the application is intended to ensure that Tessai resides with the Applicant's sister so that the Applicant can unilaterally dictate all matters concerning Tessai. It is evident to the Court that the Parties have significant difficulty communicating in a civil and constructive way and this has adversely impacted their ability to co parent effectively and in the best interest of Tessai.
- [86] Doubtless, this antagonism has also sullied the relationship between the Respondent and the Browns who are the primary carers of Tessai. This is indeed unfortunate. Having heard and

observed all of the witnesses under cross examination, the Court is satisfied that they all bear some responsibility for the breakdown. Tessai has two legal parents who share joint custody and so the Brown should have appreciated that they had an obligation to keep both parents equally informed and involved in all decision making and they should have acted accordingly. The Applicant should have appreciated that while he may have had primary care and control of Tessai, he continued to share joint custody with the Respondent and so acting unilaterally was not an option. Further, recognizing that parental attachment is a fundamental emotional need of every child, he should have taken all reasonable steps to facilitate and promote the Respondent's access and visitation.

[87] And importantly, the Respondent recognizing the significant sacrifices being made by the Browns could have been more gracious in her dealings with them. The Court also has some difficulty in reconciling the Respondent's complaints with the evidence that she voluntarily left the WhatsApp group which was created for the purpose of discussing issues relating to Tessai. In response to the Court, the Respondent indicated that she left the group because she felt set upon by the Applicant and the Browns. Rather than seek to address the issue constructively and in the best interest of Tessai, she reacted with aggression and terminated an obvious avenue through which she could obtain regular updates and information regarding Tessai. Her case was not assisted when it became clear that the Browns and Mr. McMillan still continue to share information regarding Tessai in that chat group.

[88] The Court also cannot ignore that she voluntarily relinquished care and control of Tessai to his father. The Court has no doubt that at the time she had good reasons for doing so. However, the Respondent was unable to satisfactorily assure the Court that the circumstances which motivated this decision are no longer relevant. She has not demonstrated a defined change in her circumstances. The Respondent clearly intends that Tessai remain in the United States as this is in his best interest. The Court is satisfied that her proposal to put Tessai in the care of her sister is motivated more by her wish to have a closer connection and control over all matters concerning Tessai rather than a dispassionate assessment of the likely adverse impact of a relocation to Florida. Certainly, the Court is not satisfied that she has put considered thought into the

contemplated arrangements in Florida and for that reason the Court is unwilling to disturb arrangements which have been satisfactorily in place since October, 2017.

[89] The Court has taken into account that the current arrangements do not afford Tessai a close relationship with his siblings who no longer reside in the Brown household. However, in the Court's judgment any concerns regarding parental and sibling attachment could best be resolved with defined orders regarding access and visitation coupled with a course of family counselling which should resolve the ongoing tensions between the relevant Parties.

[90] For all of these reasons, the Court is satisfied that Tessai would be best served by a variation of the terms of the consent order. Such variation is made on the basis that these Parties will engage in co-parenting counselling sessions aimed at improving their ability to dialogue and arrive at a consensus regarding Tessai's care and upbringing in a way which is consistent with an order of joint custody. It will consequently be necessary to have clear orders in place to facilitate access and visitation by both parents and all involved must cooperate to facilitate this.

Maintenance

[91] Sections 23, 24 and 25 of the Act empower the court to make financial provision for a child of the family. The power is discretionary; the court must consider all the circumstances and pay particular attention to the factors set out in section 26(2). These factors are:- (a) the financial needs of the child; (b) the income, earning capacity, 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/she was being and in which the parties to the marriage expected him/her to be educated or trained.

[92] Section 26 (2) of the MPPA also mandates the court to, "so exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties in subsection (1) (a) and (b), just to so do, 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 the child".

- [93] Generally courts take the view that both parents are equally responsible for maintaining the children of the marriage and should therefore equally bear these expenses and it appears that the Parties in the case at bar were of a similar view when they agreed the terms of the Consent Order. At paragraph 7 of the Order, the Parties agreed that the Applicant would pay the Respondent maintenance in the sum of three hundred dollars (\$300.00) per month for Tessai until he turns twenty one (21) years old, whether or not he is in full time education; and half of his educational and health expenses until that time. No doubt these terms were premised on the fact that the Tessai would have been in the physical custody care and control of the Respondent.
- [94] In light of the Court's disposal of the application for variation of the orders dealing with care and control, the Court is satisfied that there should be a consequential variation of the maintenance provisions. The Applicant has submitted that the sum of \$300.00 would be reasonable in the circumstances. In light of the fact that this represents the simple reversal of the order which was already in place and by which it is assumed that the Applicant would be matching that sum, the Court will make the order sought.
- [95] Counsel has asked that this Order be made retroactive from 2017. Counsel submitted that the Applicant has clearly demonstrated that he has been solely maintaining the children since the relocation in October 2017. The Respondent has accepted this as fact in in her affidavit; however, she has stated that at no time did the Applicant seek any financial contribution from her.¹⁴
- [96] Given that the Parties mutually and informally agreed to vary the provisions with regard to primary care and control with no consequential adjustment of the maintenance provisions, the Court must assume that the Parties for reasons known only to them were content with that arrangement. The Applicant's apparent acquiescence since late 2017 cements this assumption. The Court is therefore not minded to make the order retroactive.

¹⁴ Supplemental Hearing Bundle Tab 15 page 87 paragraph 34.

[97] For the reasons set out herein and bearing in mind that the variations of the Order are confined to the Child Tessai, **IT IS HEREBY ORDERED as follows:**

- [1] Clause 2 of the Consent Order is varied to include the following: “save that primary care and control of Tessai McMillan is hereby granted to the Petitioner. The status quo regarding the residential arrangements for Tessai as at 19th September 2018 shall remain in place unless agreed to by consent of the Parties.
- [2] Clause 3 will now read – “Both Parties are to attend mandatory Co-Parenting Counselling to be facilitated by the Social Development Department. The Parties will attend no less than ten (10) sessions.”
- [3] Clause 4 will now read “The Parties are to attend the Social Development Department within 45 days from today’s date in order to agree the schedule for such co-parenting counselling sessions.”
- [4] The Parties will submit their proposals for defined access to and visitation with Tessai McMillan within 14 days of completing the co-parenting counselling
- [5] Clause 3 of the Consent Order (which is renumbered clause 5), is varied to read as follows: “in respect of the Tessai McMillan, the Respondent shall have liberal access provided that the Petitioner is provided with reasonable notice of arrangements regarding her removal of Tessai from his place of residence for the purpose of facilitating the Respondent’s access.
- [6] Paragraph 4 of the Consent Order (which is renumbered clause 6), is varied to read as follows: “The Parties shall be each entitled to have half of all major holidays and alternate Christmas and Easter holidays for Tessai McMillan until further order of this Court.
- [7] Paragraph 7 of the Consent Order be deleted and replaced with the following: “The Respondent shall pay to the Petitioner, maintenance in the sum of three hundred dollars (\$300) per month for Tessai until he turns twenty one (21) years old, whether or not he is in full time education; and half of his educational and uninsured health expenses until that time.”
- [8] The Order of 11th September 2018 is hereby discharged.
- [9] Costs to the Applicant to be agreed or taxed.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar