

**IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**Family Division
2014/FAM/div/00219**

J. D. R. (nee S.)

Petitioner

AND

D. A. R.

Respondent

Before: **The Hon. Madame Justice J. Denise Lewis-Johnson MBE**

Appearances: Tanya Wright of Counsel for the Petitioner
Donna Dorsett Major of Counsel for the Respondent

Hearing Dates: 12th January 2023; 19th July 2023; 13th March 2024; 27th May 2024; 24th
June 2024, 16th August 2024

*Family Law - Variation of Order - Enforcement of Arrears - Maintenance of children –
Reimbursement of Mortgage payments*

JUDGMENT

Introduction

1. The Petitioner sought a Variation of an Order dated 11 March 2016 by filing a Summons dated 15th February 2023 and one dated 19th July 2023. Both seeking:-

“1. That the Order of Justice Rodger Gomez dated 11 March A.D., 2016 be varied to provide for the general maintenance of the children of the marriage until they would have completed tertiary education.

2. Pursuant to Section 36 of the Matrimonial Causes Act, Chapter 125 that the Petitioner be granted leave to enforce the payment of arrears due in excess of twelve (12) months under the Order of the late Justice Rodger Gomez.

3. The Plaintiffs to pay the costs of and incidental to this application to be taxed if not agreed.”

Background

2. The parties were married on 13th September 1997. The marriage produced two children D.L.R, a female born on 30th December 1997 and D.J.D.R, a male born 4th May 2004 (“the children”). Both children are sui juris.
3. A Decree Nisi was granted on 1st October 2015 to the Petitioner on the ground that since the celebration of the marriage the Respondent has committed adultery.
4. On 11th March 2016, then Justice Roger Gomez made an Order with respect to custody of the minor child, D.J.D.R, mortgage payments and school fees/ college tuition for the children.
5. The Petitioner has filed numerous applications before the Court alleging that the Respondent has not complied with the Order granted by Justice Gomez.
6. A Decree Absolute was filed on 8th November 2017. There has been several Orders granted in respect of this matter.
7. The Petitioner is requesting a variation of the Order granted by Justice Gomez.

The Petitioner’s Evidence

8. The Petitioner relied on the following evidence:
 - i. Petitioner’s Affidavit of Means filed 8th December 2015;
 - ii. Petitioner’s Affidavit of Means filed 18th April 2018;

- iii. Respondent's Affidavit of Means filed 3rd February 2016;
- iv. Petitioner's Affidavit of Means filed 15th February 2016
- v. Petitioner's Affidavit filed 31st October 2017
- vi. Respondent's Supplemental Affidavit in Response filed 23rd January 2018;
- vii. Respondent's Affidavit Opposing Committal and Variation filed 15th February 2018;
- viii. Respondent's Affidavit in Response to the Petitioner's Further Affidavit filed 15th February 2018;
- ix. Respondent's Supplemental Affidavit of Means filed 20th April 2018;
- x. Petitioner's Affidavit filed 28th February 2020;
- xi. Respondent's Affidavit in Support of Summons to Discontinue Salary Deduction filed on 22nd June 2022;
- xii. Respondent's Supplemental Affidavit in Response to the Petitioner's Affidavit filed 14th February 2023;
- xiii. Respondent's Supplemental Affidavit in Response to the Petitioner's Supplemental Affidavit filed 1st December 2023;
- xiv. Petitioner's Supplemental Affidavit of Means filed 1st December 2023

The Respondent's Evidence

9. The Respondent relied on the following evidence:

- i. Petitioner's Affidavit filed 27th June 2019;
- ii. Respondent's Affidavit filed 22nd June 2022 in support of Summons filed on even date;
- iii. Respondent's Affidavit filed 17th July, 2023;
- iv. Respondent's Affidavit filed 11th December 2023

The Orders granted by the Court

10. It is important to note the Orders granted in this matter following the grant of the Decree Nisi to the Petitioner.

The Gomez Order

11. Then Justice Roger Gomez granted an Order on 11th March 2016 with regards to the ancillary matters. The relevant parts of the Order are mentioned below.

1. "That the Petitioner and the Respondent be granted joint custody of the minor child of the marriage namely: D.J.D.R born on the 4th day of May 2004.

2. That the matrimonial home be sold and the proceeds of the sale shared equally between the Respondent and the Petitioner subject to the remaining balance owed on the mortgage to Scotiabank (Bahamas) Limited being satisfied.

3. That the Respondent continues to pay the mortgage in the amount of One thousand five hundred and twenty (\$1,520.00) dollars per month and until the matrimonial home is sold.

4. That the Respondent is to pay to the Petitioner one half (1/2) of the school fee for the minor child of the marriage namely D.J.D.R and One Thousand dollars (\$1,000) per month for the college tuition of D.L.R.

5. That the Petitioner and Respondent shall share the cost of school supplies i.e. books, uniform, extracurricular activities, dental and optical expenses for the said children of the marriage each until the said children attain the age of eighteen (18) years or the completion of tertiary education...”

The Bain Order

12. Justice Rhonda Bain (as she then was) granted several Orders in relation to this matter.

The two Orders that are relevant to these proceedings are dated 1st and 29th November 2017. In both Orders, Retired Justice Bain granted leave to the Petitioner to enforce repayment of arrears in excess of twelve months. She further granted leave to the Petitioner to commence committal proceedings against the Respondent.

13. On 20th April 2018, Justice Bain ordered the Respondent to pay the sum of \$2,333.00 on or before the 20th day of June 2018, towards the school fees for the minor child of the marriage namely: D.J.D.R. Failure to pay would result in the Respondent being committed to Prison, (Bahamas Department of Correctional Services.)

The Bowe-Darville Order

14. Justice Ruth Bowe-Darville (as she then was) granted an Order dated 22nd October 2019 in which it was ordered that:

- (1) *“The Respondent shall transfer his one half (1/2) right title and interest in the matrimonial property situate at Lot #29 At. Andrews Beach Estates in the Eastern District of the Island of New Providence on the payment by the Petitioner of the sum of Sixty thousand dollars (\$60,000.00)*
- (2) *The Petitioner shall on or before the 22nd December 2019 pay to the Respondent the said sum of Sixty thousand dollars (\$60,000.00) in consideration of and in full and final settlement of the Respondent’s right title and interest in the matrimonial home.*
- (3) *The Petitioner shall pay the cost associated with the preparation of the Deed of release and or Assignment and all fees associated with the stamping and recording of the Deed of release and/ or Assignment.*
- (4) *The Respondent shall vacate the matrimonial home within forty-eight (48) hours...”*

The Lewis-Johnson Order

15. This Court made an Order which was granted on 12th January 2023. The Order stated:

1. *“The Royal Bahamas Defence Force is to discontinue as of this date, the 12th day of January, 2023, salary deductions in the amount of one thousand five hundred and twenty (\$1,520.00) Dollars, from the Respondent, D.A.R. which represented Mortgage payments to Scotiabank (Bahamas) Ltd and the Petitioner J.D.R (Nee S) is to take over the said Mortgage.”*

The Petitioner’s Submissions

Breach of the Court’s Orders

16. The Petitioner's Counsel submitted that the Respondent breached the Gomez Order, prompting the Petitioner to seek the Respondent’s imprisonment for contempt of court.
17. The agreed consent order shows that both parties intended for each child to attend school through to tertiary education.

18. Counsel states that under the Bain Order, the Respondent was required to pay \$2,333.00 by June 20, 2018, for D.J.D.R.'s tuition at St. Anne's school, or face committal to the Prison Correctional Services Department.
19. According to receipts in the Respondent's Affidavit, the \$2,333.00 due by June 20, 2018, was in fact paid toward D.J.D.R.'s St. Anne's school fees, which amounted to a total of \$7,681.00.
20. The Petitioner relied on a breakdown of the account obtained directly from St. Anne's school, attached to the Petitioner's Affidavit filed in December 2023, showing a total of \$3,131.00 paid toward D.J.D.R.'s school fees.
21. Although the Respondent was supposed to resume paying 50% of St. Anne's school fees in the fall of 2018 according to the evidence, he only began doing so after making the final payment under Bain J's Order of \$2,333.00 due by June 20, 2018. The Respondent's outstanding arrears for St. Anne's totaled \$4,607.00.
22. That it is important to emphasize that Bain J did not revoke or amend any part of Gomez J's Consent Order. Therefore, the Respondent continued to remain under the Court Order to pay 50% of St. Anne's school fees, contribute \$1,000.00 per month toward D.L.R.'s college expenses, and share equally the costs of school supplies (books, uniforms, extracurricular activities) as well as dental and optical expenses for the children, until each child reached 18 years of age or completed tertiary education whichever occurs later.
23. That the Petitioner's evidence, which remains unchallenged by the Respondent, is that the Respondent has not made a single \$1,000.00 payment to the Petitioner since the date of Bain J's Order.
24. Regarding the Bowe-Darville Order, Counsel submitted that it was entered by consent and served to vary the Gomez J. Order concerning the matrimonial home. Specifically, the original Order for the sale of the home was modified by agreement to allow the Petitioner to purchase the Respondent's interest in the property.
25. The Bowe-Darville J Order did not revoke or vary any part of Gomez J's Consent Order.
26. That the Petitioner denies that the agreed purchase price was linked to or dependent on the Respondent's arrears. Both parties had competent legal representation, so if either counsel intended for the purchase price to be connected to any separate agreement, they

would have ensured it was included in the Order or recorded by the Judge for future reference.

27. Therefore, the Respondent remained under Court Order to pay 50% of St. Anne's school fees, contribute \$1,000.00 per month toward D.L.R.'s college expenses, and share the costs of school supplies (books, uniforms, extracurricular activities), as well as dental and optical expenses for the children, until each child turned 18 or completed tertiary education.

Arrears

28. Counsel submitted that the Respondent's arrears for D.L.R. amount to \$36,000.00, from fall 2018 to fall 2021.
29. From April 2018 to graduation in June 2021, the arrears for D.J.D.R are calculated as follows:
1. Three (3) school years \$4,616.00 per year for 3 years = \$13,848.00 divided by 50% = \$6,924.00 PLUS \$2,333.00 arrears ordered by Bain J., to be paid on or before 20th June 2018 for a total of \$9,257.00
 2. The total payments made by the Respondent supported by the non-duplicated receipts he submitted is \$4,650.
30. The Respondent's arrears for the St. Anne's school tuition totaled \$4,607.00.
31. D.J.D.R is enrolled at Thompson Rivers University and commenced his 3rd year in the fall 2024. The parties' intention was for each child of the marriage to attend school up to tertiary education as agreed in the Consent Order of Gomez J.
32. Thompson Rivers University annual tuition is \$19,494.00 per year. Taking into account that the parties are to share equally the educational expenses for the children, fifty percent of the college fees for D.J.D.R would be \$9,747.00 for the three years including the fall 2024 for a total of \$29,241.00.
33. The Petitioner submitted that there are outstanding arrears for school supplies such as books, uniforms, extracurricular activities, dental, and optical expenses for the children from May 2018 onward. These arrears cover until each child reached 18 or completed

tertiary education in June 2021 for D.L.R., and ongoing for D.J.D.R., who will begin his third year of university in the fall 2024.

34. Paragraph 26 of the Petitioner's Affidavit dated February 14, 2023, stated that the total tuition and educational expenses amount to \$65,409.61 for D.J.D.R. and \$40,330.00 for D.L.R. as of the date of the application.
35. It is submitted that the total arrears owed by the Respondent to the Petitioner for his multiple serious and willful breaches amount to \$146,349.61.

Enforcement of arrears exceeding twelve months

36. Counsel for the Petitioner submitted that throughout the entire period, the Petitioner did not have to contribute financially toward housing for the children, which provided her some financial relief, especially since the Court had not made any specific order for monthly maintenance for the minor children.
37. The authority of **J v G [2010] 2 BHS J No. 16** was relied on by the Petitioner where Barnett CJ (as he then was) opined "*Although the Court has a discretion to enforce arrears in excess of twelve months prior to the commencement of enforcement proceedings, that discretion should not be exercised unless there are special circumstances which justify permitting the enforcement of such arrears. A party cannot permit arrears to accumulate for years and then simply come to the Court asking it to enforce those arrears.*"
38. Similarly in **Russell v Russell [1986] 1 FLR 465**, Sir John Donaldson, Master of the Rolls opined that "*The philosophy underlying the rule must... have been that if the complainant waited a year to seek enforcement of the order, she did not need money, or at least had managed well enough without it, and the husband might reasonably regard the liability as something which he could forget about.*"
39. The Respondent's failure to pay is described as egregious and contumelious. It emphasizes that, in today's legal context, compliance with Court Orders is essential. If the Respondent expects the Court to strictly enforce the Petitioner's compliance with her Consent Order, then fairness demands mutual compliance. This justifies enforcing the arrears over a 12-month period and may constitute an exceptional circumstance, especially where both parties are in breach. This situation is distinguishable from cases

like 2006/FAM/DIV/00148 ABC v ECM, K v K [2005] 1 HKC 303, and J v G [2010] 2 BHS J No. 16. It would be unreasonable for the Court to shield the Respondent from the consequences of accumulated arrears under a consent order, while he simultaneously seeks to enforce the Petitioner's financial obligations under a similar order.

40. That the Respondent claims he should be reimbursed for the period during which salary deductions continued after the Bowe-Darville Order and until the Order was later varied.
41. The outstanding balance of the purchase price is also over twelve (12) months old, and the Respondent has not filed any application to enforce compliance within twelve (12) months of the Petitioner's default.
42. It is submitted that the Petitioner has established sufficient grounds for the Court to grant leave to enforce the full amount of arrears dating back to May 2018. Accordingly, the Petitioner requests that the Court declare the Respondent's arrears to total \$146,349.61.

Mortgage payments

43. The Respondent's suggestion that the Petitioner should reimburse him for these payments contradicts the very principles of fairness and equity that the Respondent himself relied upon in his affidavits concerning the Petitioner's alleged nonpayment of the balance of the purchase price for the former matrimonial home.
44. Counsel submitted that the parties' respective breaches may potentially cancel each other out except for the critical distinction that the Petitioner's breach concerns an obligation to the Respondent, while the Respondent's breach involves a consent order creating obligations toward the children of the marriage. Since the children's interests are of paramount importance to the Court, they take precedence over the Respondent's interests.
45. Counsel further submitted that the Petitioner should not be required to repay any of the mortgage payments in question. Instead, principles of equity dictate that those payments should be credited toward the Respondent's previously stated arrears.
46. At the outset of these proceedings, the Petitioner invited the Respondent to agree to a clean break arrangement, where both parties would forgive any debts they believed were owed by the other and move on with no further obligations. The Respondent rejected

this offer, instead insisting on being paid the outstanding balance for the home, while providing support for his children only under the threat of imprisonment.

Set off

47. Counsel submits that, consistent with accepted practice of this Court, the Petitioner is entitled to sums that may be used to offset the balance owed for the purchase of the former matrimonial home. This would result in a net balance payable by either the Petitioner or the Respondent, as seen in *ABC v ECM 2006/FAM/DIV/00148*. The Court may choose to disallow any remaining net balance after the set-off or address it as it sees fit.

The Respondent's Submissions

48. Counsel for the Respondent submitted that on June 25, 2019, the Petitioner formally documented her “Clean Break / Debt Free” proposal, offering a lump sum of \$33,000.00 to the Respondent. However, the Respondent rejected this offer. This proposal is referenced in Paragraph 28 of the Petitioner’s Affidavit filed on June 27, 2019, in the matter before the Honourable Justice Ruth Bowe-Darville. In that paragraph, beginning at line 2, the Petitioner states: *“I have offered the sum of \$33,000.00 free and clear, which leaves the Respondent debt free.”*
49. Further, in the second-to-last paragraph of the Petitioner’s Affidavit, she stated that if the Respondent agreed or if the Court so ordered, Scotiabank would be willing to provide her with the necessary funds to pay the Respondent.
50. On October 22, 2019, the Respondent submitted a counter “Clean Break / Debt Free” proposal, to which both parties consented. As a result, the Honourable Justice Ruth Bowe-Darville ordered, among other things, that the Petitioner was to pay the Respondent the sum of \$60,000.00 on or before December 22, 2019.
51. Notwithstanding that paragraph 1 of the Order clearly stated that the Respondent’s obligation to transfer his one-half interest in the matrimonial property at Lot #29, St. Andrews Beach Estates, was contingent upon the Petitioner’s payment of \$60,000.00, the transfer proceeded based on written representations made by the Petitioner’s then attorney. In email correspondence to the Respondent’s attorney, it was represented that

the Petitioner could not secure financing unless both the Order and the Deed of Assignment had been executed by the Respondent.

52. Further, on October 22, 2019, as a direct result of the Clean Break Agreement reached between the parties, the terms of that agreement effectively varied, to some extent, the earlier Order of the late Honourable Justice Roger Gomez.
53. The Respondent was ordered to vacate the matrimonial home within 48 hours of the issuance of the Order, and he complied with that directive.
54. That the fact remains that if a “clean break” had not been agreed upon regarding the outstanding ancillary matters, the only issue remaining at that time would have been the college fees for D.L.R. There was no issue concerning D.J.D.R., as the Respondent was up to date with his share of the school fees for Saint Anne’s High School in relation to him.
55. If this was not the case, the Petitioner’s then attorney, together with the Petitioner, would have ensured that any outstanding arrears were addressed simultaneously by the Honourable Justice Ruth Bowe-Darville.
56. Subsequently, further issues arose concerning their daughter, D.L.R., including a significant breakdown in communication between the parties. As a result, the Respondent was unable to communicate with his children and could not confirm his daughter’s whereabouts including whether she was attending college, which college, if she was on a partial or full scholarship, or her academic performance.
57. It is noted that D.L.R. is now married. All fees related to her were ultimately set off against the Respondent accepting nearly a 50% reduction in his interest in the matrimonial property, which at that time was valued at over \$100,000.00.
58. Regarding D.J.D.R., who graduated from Saint Anne’s High School in 2021 and is currently attending college, the Petitioner has again failed to communicate either verbally or in writing, with the Respondent about his welfare. According to the Order of the late Honourable Justice Roger Gomez, the Respondent does not owe any outstanding payments related to D.J.D.R.
59. That the Respondent’s attorney inadvertently omitted the receipts for D.J.D.R.’s 2021 school fees from the Respondent’s Affidavit filed on December 11, 2023. However, these receipts are included in the Respondent’s Affidavit filed on July 17, 2023, at tab

“I” Exhibit DR8N, showing payments made by him to Saint Anne’s School for D.J.D.R.’s 2021 fees.

60. According to the Petitioner’s Affidavit filed on June 27, 2019, at page 6, paragraph 28, it can be assumed that the bank provided financial arrangements to the Petitioner to facilitate the \$60,000.00 payout to the Respondent, in exchange for the Respondent releasing his interest in the matrimonial property to the Petitioner.
61. That given the Petitioner’s nature, it is not surprising that she has refused to pay the Respondent the full amount agreed upon, instead paying only \$20,000.00, despite the Respondent’s “Clean Break” agreement.
62. Despite the foregoing, monthly deductions of \$1,520.00 continued to be taken from the Respondent’s salary for thirty-nine (39) months after the Order of Justice Ruth Bowe Darville. A balance of \$40,000.00 related to the Respondent’s interest in the matrimonial property remains outstanding.
63. The total amount owed to the Respondent is \$99,280.00, subject to any adjustments or deductions the Honourable Court may deem appropriate.

The Issues

64. The issues for the Court’s determination are:
 1. Should the Gomez Order be varied to provide maintenance for the children of the marriage until they complete tertiary education?
 2. Whether the Petitioner and/or Respondent is in arrears? If so, what is the amount owed to each party?
 3. Should the Court grant the Petitioner or the Respondent leave to enforce arrears in excess of 12 months?
 4. Is the Petitioner obligated to pay the balance owed on the transfer of the Respondent’s interest in matrimonial home to her under the Bowe-Darville Order?
 5. Is the Respondent entitled to reimbursement for the period when salary deductions were being made after the Bowe-Darville Order?
 6. Should there be a set off of the amount owed to each party?

The Law

65. The law in relation to arrears is specified under s. 36 of the Matrimonial Causes Act, Ch. 125. This section provides:

“36. (1) A person shall not be entitled to enforce through the court the payment of any arrears due under an order for maintenance pending suit, an interim order for maintenance or any financial provision order without the leave of that court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.

(2) The court hearing an application for the grant of leave under this section may refuse leave, or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment or the making of payment by instalments) as the court thinks proper, or may remit the payment of the arrears or of any part thereof.

(3) An application for the grant of leave under this section shall be made in such manner as may be prescribed by rules of court.”

Decision

66. The court’s jurisdiction to vary a property adjustment order is grounded in Section 35(1) of the MCA which provides as follows:-

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

(2) This section applies to the following orders, that is to say —

(a) any order for maintenance pending suit and any interim order for maintenance;

(b) any periodical payments order;

(c) any secured periodical payments order;

(d) any order made by virtue of section 27(3)(c) or 31(7)(b) (provision for payment of a lump sum by instalments);

(e) any order for a settlement of property under section 28(1)(b) or for a variation of settlement under section 28(1)(c) or (d) being an order made on or after the grant of a decree of judicial separation;

(f) any order made under section 25(3) for the sale of property.

67. When considering if it is an appropriate case to grant a variation, the court is guided by Section 35(7) which provides:-

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

68. Both parties have breached Court orders, whether intentionally or unintentionally. I accept that the Respondent is in breach of the Gomez Order and that the Petitioner is in breach of the Bowe-Darville Order. There are significant changes in the circumstances of this case that would justify a variation of the Order, such as the age of the children, income and expenses of the parties, lack of communication/consultation.

69. It is important to note that this matter commenced in 2014 and has been ongoing for the past eleven years. The Petitioner brought two applications for the Court's determination.

70. The Petitioner submits that the Respondent is in breach of the Gomez Order. The Respondent failed to make certain financial contributions towards the children school/college fees. The Gomez Order ordered the Respondent to pay half of the school fees for D.J.D.R and \$1,000.00 per month towards the college tuition of D.L.R.

71. It is clear from the receipts provided by the Respondent that he made payments towards the St. Anne's school fees for D.J.D.R. When his son completed high school and proceeded to attend college, the Respondent did not contribute towards his expenses. According to his Affidavit of 11th December 2023, the Petitioner did not discuss with him college enrolment with respect to D.J.D.R.

72. The Petitioner states the tuition for Thompson Rivers University was \$19,494.00 per year and he has been enrolled for a period of three years. The Respondent's share of the expenses would be \$29,241.00.

73. Similarly, the Petitioner submits that the Respondent did not contribute to D.L.R.'s college tuition. The Respondent stated in his July 2023 Affidavit that he paid \$10,500.00 towards his daughter's school fees however, upon review of the receipts it could not be determined whose account the funds were being deposited to, there was no account name indicated on the receipts.
74. What is of note is that the Respondent in his Affidavit of Means dated 3rd February 2016 provided his pay slip and he indicated that his salary after deductions were made was approximately \$719.71. The deductions from his salary did not include fees towards school/ college fees for the children other than a \$77.00 monthly deduction made to Heritage/Educational/daughter. It is clear that at the time of making the Gomez Order on 11 March 2016, the Respondent was unable to literally comply with this order, per his pay slip of \$719.71. It was an impossibility mathematically for him to pay \$1,000 towards college tuition, ½ school fees for the minor child, save and except he had another source of income. The Respondent therefore sought a variation of the Gomez Order and at paragraph 21 of his Affidavit filed on 17th July 2023 in response to the Petitioner's Affidavit filed on 14th February 2023 and in support of his application for variation of the Consent Order of Justice Gomez, he stated:

"21. It would have been virtually impossible at that time while also paying the mortgage, when after the mortgage and other deductions, the Respondent only took home seven hundred and nineteen dollars & seventy one cents (\$719.71), which was already short two hundred plus dollars in order that he pay the \$1,000.00 monthly towards D.L.R expenses, this too was argued before Justice Rhonda Bain."

75. It is clear from his Affidavit of Means that the Respondent did not have the means to contribute towards his daughter's college tuition. In considering the authority of **K v O [2008] 3 BHS J. No. 5** where Hall CJ stated at paragraph 37 of the judgment:-

"37. The court cannot compel a parent to contribute to school fees in the absence of evidence that such a parent can afford to do so and that it is unreasonable for him not to contribute having regard to the needs of the children notwithstanding the necessity of the other priorities following the breakdown of the marriage..."

76. Additionally, Sir Burton Hall CJ, in **Brown v Brown et al** BS 2004 SC 134 opined:-

“... the inestimable value of a tertiary education which all parents having the means to do so should - morally - afford their children, the expense of such education, which can prove unpredictable, cannot be legally fixed on a parent according to the arbitrary choice of the other parent or a child who is of full age unless there is the clearest evidence that the parent against whom an order is sought is in a position to do so and it is right for the court to so order.”

77. In that regard, the Respondent filed an application for variation of the Gomez Order on 14th February 2018. Unfortunately, the application was not heard by Justice Bain as at paragraph 25 of his Affidavit of 17th July 2023, the Respondent stated:-

“That an application for variation of the terms of the Consent Order of the Honourable Justice Mr. Roger Gomez, (deceased), had been filed, and was due to be heard before the Honourable Madam Justice Rhonda Bain, however, only the Opposing Committal issue was heard and Justice Bain informed both Counsel that she was retiring, accordingly, she was unable to hear the issue with respect to the Variation...”

78. I accept that there were no discussions with the Respondent regarding which university DLR would attend and to determine if the Respondent was financially capable of contributing to the cost. The Court will not make an order for contribution to tuition when a party was not consulted and does not have the financial resources to make such payments. The Petitioner was obligated as a matter of law to discuss university fees, which university the child would attend with the Respondent, thereby affording the Respondent the opportunity to state his ability to pay and views. I rely on Hall CJ in **K v O** and **Brown v Brown** stated above. A parent must not be compelled to contribute to school fees whether tertiary or high school what he/she cannot afford. There ought not be an arbitrary choice of university and the expectation that the other parent will/could/must contribute to the fees. I accept that there was no consultation on choice of university and that the Respondent could not afford to contribute.

79. The court is of the view that the present obligations of the parties are to be determine based on the Bowe-Darville Order which represented a clean break order. This approach

to property adjustment is encouraged. The Court of Appeal in the case of **Rosemary Edith Burrows v Sylvester John Burrows SCCivApp. No.58 of 2021**, stated at paragraph 30 that “30. ... *the best approach is always a clean break approach. This allows the parties to get on with their lives...*” Similarly, the principle of “clean break” was discussed in **Minton v Minton [1979] AC 593**. By Viscount Dilhorne where at page 608 of the judgment he opined that “*An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.*”

80. At the time of the Bowe-Darville Order, the children were ages 21 and 15, still within the Court’s purview. Any order made by the Court would have had them in its contemplation. I accept the evidence of the Respondent that the parties engaged in discussions/negotiations toward a clean break. This was evidenced in the Petitioner’s Affidavit of 27th June 2019 (the offer of \$33,000.00 for a clean break) and the 22nd October 2019 counter offer by the Respondent. I find that the parties agreed to the counter offer and Retired Justice Bowe-Darville made the order of 22nd October 2019 and this was done in the context of a clean break, all previous outstanding arrears of each party were waived.
81. Under the Bowe-Darville Order the Petitioner has failed to pay the outstanding balance of \$40,000 albeit the Respondent in compliance with the Order assigned his interest in the matrimonial home to the Petitioner and vacated the home. It is agreed that this order varied the Gomez Order.
82. I do not accept counsel for the Petitioner’s argument that any arrears owed by the Respondent beyond 12 months should be enforced or used to set off what is owed by the Petitioner to the Respondent. A number of unfortunate circumstances occurred which were not in the control of the parties nor was it of their doing, namely, the inability of the variation application to be heard by Retired Justice Bain, and the delay in then assigning this file to another Justice. It may very well be that the Respondent’s application to vary the Gomez Order remains extant.
83. With the 2019 Order as a fresh start, the financial obligations as to D.J.D.R. continued as he was 15 years old, particularly as to high school fees. I do not accept the Petitioner’s calculation that 3 years from 2018 to graduation were due. Due to the 2019 Order, it

would be two years at \$4,616 per year, the Bain Order was settled in the clean break order of 2019. Thus the Respondent was obligated to pay \$4,616 and it is accepted that he contributed \$4,650.

84. D.J.D.R. enrolled in University and the Petitioner is requesting the Respondent contribute half of the tuition costs of \$19,494 per annum. This would be reasonable had the Respondent been consulted and given an opportunity to agree to university or if he indicated his ability to contribute to university fees, he was however, denied the opportunity via consultation to possibly suggest University of The Bahamas or a university that cost less. I have addressed the law and my ruling on this point above. I therefore reject that the Respondent owes the Petitioner for university fees for D.J.D.R.
85. The Gomez Order is silent as to a monthly maintenance payment for DJDR. The parties were to share equally the expenses of the children. While the Bowe-Darville Order cleared old debt between the parties via a clean break, it did not vary the other terms of the Gomez Order as to maintenance obligations to the children. Thus the obligations continued. I find that the Respondent was obligated to contribute \$1,000 monthly toward education for D.L.R. which continued from October 2019 to December 2020 when she turned 23. Thus \$15,000 was owed to the Petitioner, I do not grant the Petitioner leave to enforce payment of this sum.
86. As to D.J.D.R., he graduated high school in 2021 and enrolled in university in January 2022. No evidence was provided by either party as to whether during this break he was engaged in full time employment or otherwise. The financial obligations towards him per Section 27 (1) (d) of the MCA continued up to age 18 or up to age 21 if he was “pursuing full time education” per Section 57 (2) of the Child Protection Act. This obligation to contribute to tertiary level cost has long been predicated on consent of the parties, the ability to pay and that proper consultation between the parties taking place as to which institution the child would attend. I accept the Respondent’s evidence that he could not afford half of the tuition, that he was not consulted and thus there was no consent.
87. I shall once again quote Sir Burton Hall CJ in **Brown v Brown** “*the expense of such education, which can prove unpredictable, cannot be legally fixed on a parent according to the arbitrary choice of the other parent or a child who is of full age unless*

there is the clearest evidence that the parent against whom an order is sought is in a position to do so and it is right for the court to so order.” The Respondent struggled to pay high school tuition, I am satisfied he could not afford university tuition at Thompson Rivers University in Canada. I refer to all that was stated above in relation to contributing to university tuition. I am satisfied that the Respondent should contribute to the tuition of DJDR’s and I Order that it be sum at a half of undergraduate tuition fees of a full time student at the University of The Bahamas, this is for the academic period January 2022 to December 2025. The Respondent should also provide maintenance for this period of \$300.00 monthly.

88. It is clear that the Petitioner is seeking to avoid paying the \$40,000.00 balance owing for the transfer of the Respondent’s interest in the matrimonial home. To that end she seeks to ignore the clean break agreed to in the Bowe-Darville Order. I find this very unfortunate, particularly as the Respondent’s salary was assigned to the mortgage and deductions continued for more than 3 years after he released his interest and moved out of the matrimonial home. The Petitioner had the benefit of the home, mortgage payments being made and she failed to pay the balance of funds.
89. Per the Affidavit of the Petitioner filed on 14th February 2023, she alleged that the Respondent owes \$65,409.61 for D.J.D.R school fees and \$40,333.00 towards the college tuition for D.L.R. bringing the total to \$105,742.61. In her Supplemental Affidavit of Means filed on 1st December 2023 she stated that the Respondent is actually in arrears \$6,118.00 for D.J.D.R St. Anne’s school fees.
90. The Respondent averred at paragraph 5 of his Affidavit of 11 December 2023:

“5. ... Further, any arrears relative to our daughter D.L.R were set off for a clean break, due to the fact that I agreed to vacate the matrimonial home within 24 hours, while simultaneously settling for approximately one hundred thousand dollars less than my one half interests in the matrimonial home, as I was tired of fighting with the Petitioner, now the Petitioner, wants it all as usual, she is now refusing to pay me the balance of the sixty thousands (\$60,000.00) dollars as agreed.”

91. I find that the Respondent agreed to accept a reduced amount of \$60,000.00 for his interest in the matrimonial home. The Petitioner having only made a partial payment of

\$20,000.00 under the clean break order remains obligated to pay the balance of \$40,000.00 and I so order that it is to be paid with interest.

92. After the Respondent complied with the order, by signing the conveyance and vacating the matrimonial home, mortgage payments for the matrimonial home continued to be deducted from his salary. The bank refused to discontinue the deductions without a court order. The Petitioner did not return these funds to the Respondent, she accepted the payments knowing they were to be discontinued, she was not entitled to it, she was in receipt of the conveyance of the Respondent's interest and that he had vacated the matrimonial home. That was wrong and unfair. The Respondent has requested repayment of those funds and I Order that the Petitioner is to reimburse the Respondent the sum of \$59,280.00 being \$1,520.00 monthly mortgage deductions for 39 months.
93. Under Section. 36 of the MCA, the Petitioner has one year in which to bring an application to enforce arrears otherwise she would have to request leave of the Court for arrears in excess of twelve months.
94. The Petitioner filed two applications for enforcement of arrears in excess of twelve months which was granted by Justice Bain in 2017. The two extant applications, however were made on 15th February 2023 and 19th July 2023 respectively. In both applications the Petitioner seeks to vary the Gomez Order made on 11th March 2016 and request maintenance for the children and leave to enforce arrears beyond twelve months.
95. Section 29 of the MCA provides the criteria in respect of maintenance. Sir Michael Barnett in J v G [2010] 2 BHS J No. 16 cautioned that the discretion to enforce arrears after a year should not be done unless special circumstances exist. I find no such special circumstances here. In Russell v Russell [1986] 1 FLR 465 the court considered that the funds may not be needed or the party was able to manage without it. The Court's discretion is to be exercised with those considerations in mind. In Richard Stephen Wilson v Jason Smith and Joan Ferguson (Personal Representatives of Estate of Yvonne Elizabeth Cammaert Wilson) SCCivApp. No. 136 of 2016 it was stated at paragraph 28 of the judgment that:

"28 The courts "must proceed on the general principle that 'stale arrears' as Sir John Donaldson described them, are not to be enforced unless a good reason is

demonstrated or special circumstances are shown” See K v K [2005] 1 HKC 303 at paragraph 12. The burden is on the applicant to show the good reason.”

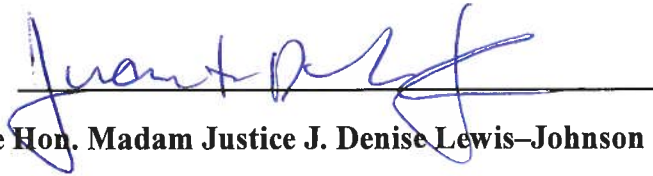
96. There are no special circumstances in this case that have been explained in the evidence of the Petitioner to cause the Court to exercise its discretion to grant leave to enforce arrears. Further, I accept that any and all arrears due to the Petitioner were waived in the Bowe-Darville clean break order.
97. The parties are allowed to set off the sums owed to each other.
98. The Court’s objective is always to be fair and just having regard for all the circumstances of the case. Thus for all the reasons stated above, the Court having considered the evidence and relevant law finds as follows:-

- I. That the Order of Justice Roger Gomez (deceased) is varied in that the Respondent is to contribute toward the maintenance of DJDR in the amount of \$300.00 monthly for the period January 2022 – December 2025. \$13,500.00 presently being owed;
- II. That the Respondent is to contribute to toward the university tuition of DJDR being a sum equal to half the tuition cost of a full time student attending the University of The Bahamas for the period January 2022 – December 2025;
- III. That the Petitioner is not granted leave to recover the sum of \$15,000.00 from the Respondent being contribution to DLR’s college tuition;
- IV. That leave is not granted to enforce any arrears prior to the Bowe-Darville Order.
- V. That the Petitioner is to pay the balance of \$40,000.00 owing to the Respondent for his interest in the matrimonial home plus interest at the statutory rate from the date of his signing the conveyance.
- VI. The Petitioner is to pay the Respondent the sum of \$59,280.00 being reimbursement of mortgage payments made by the Respondent after executing the conveyance to the Petitioner.
- VII. Should the Petitioner fail to pay the Respondent all sums owing as stated above within ninety (90) days hereof, the home is to be sold and the

Respondent to be paid the said sums plus interest at the statutory rate from the date of his signing the conveyance to payment.

- VIII. The Petitioner is to pay 50% of the Respondents cost to be taxed if not agreed.

Dated this 15th day of October, A.D. 2025



The Hon. Madam Justice J. Denise Lewis-Johnson MBE