

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

2018/FAM/div/00585

BETWEEN:

ALLISTINA ANYA OUTTEN (Nee Brown)

a.k.a. ALLASTINA ANYA OUTTEN

Petitioner

AND

TERRANCE LEROY OUTTEN JR.

Respondent

Before: His Hon. Mr. Justice Keith H. Thompson

Appearances: Mr. Leon Bethel Esq. as Counsel for the Petitioner

Ms. Racquel Hall of Counsel for the Respondent

Hearing Dates: March 29th, 2019;

June 28th, 2019

Submissions were laid over September 06th, 2019

RULING

- [1] The parties were married on May 26th, 2007 and there are three (3) children of the marriage namely _____ born on June 16th, 2006,

, born on November 19th, 2012 and
15th, 2015.

born on June

- [2] An interim order was issued on the 29th March, 2019 and a further interim order on the 6th September, 2019. The parties have not been able to resolve matters as between them and have therefore provided the court with their respective submissions for the court to decide ancillary relief consequent on the dissolution of the marriage.
- [3] Both parties are employed. The wife is employed as a Payroll Officer at the Princess Margaret Hospital and earns a monthly salary of \$1,912.50 out of which various deductions are made leaving a balance each month of available cash in the amount of \$416.93. The wife receives some assistance from her extended family, when in distress. She along with the three children of the marriage reside in the matrimonial home at Lauren Street and Cyprus Avenue, Sir Lynden Pindling Estates until these ancillary matters have been decided.
- [4] The husband is employed as a Police Officer on the Royal Bahamas Police Force and earns a gross monthly salary of \$2,704.14. After deductions he has a gross income of \$1,082.71.
- [5] The wife is asking the court for maintenance, custody and control of the minor children of the marriage. The husband is also seeking custody care and control of the minor children with reasonable access to the wife. The husband, wife and children were seen by Dr. Wayne Thompson of Relationship Management and he concluded that the children are sufficiently comfortable to manage joint custody arrangements. He also concluded that strict guidelines needed to be established to prevent unnecessary disputes between the husband and wife who still retain

negative views of each other. His professional recommendation in this regard is that a quarterly visit by a social services officer should be enshrined in any order so as to guard against any negative impact on the children.

[6] Section 27 (1), (d) of the Matrimonial Causes Act, Chapter 125 (The Act) provides:-

“27. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say –

(a)

(b)

(c)

(d) an order that a party to the marriage shall secure to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments for such terms as may be so specified.

(e)

(f)”

[7] The Court, in keeping with s.27 (1), (d) must necessarily make a decision as to periodical payments to the wife or husband whichever one the Court decides to give custody, care and control to.

[8] Section 29 of the Act provides:

“29. (1) It shall be the duty of the court in deciding whether to exercise its powers under section 25(3) or 27 (1)(a), (b) or (c) or 28 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters that is to say –

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;**
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;**
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;**
- (d) the age of each party to the marriage and the duration of the marriage;**
- (e) any physical or mental disability of either of the parties to the marriage;**

(f) the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

(2) Without prejudice to subsection (3) it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that it to say –

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

- (c) any physical or mental disability of the child;**
- (d) the standard of living enjoyed by the family before the breakdown of the marriage;**
- (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;**

and so to 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 to the marriage in paragraphs (a) and (b) of subsection (1) just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.

3. It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, to have regard (among the circumstances of the case.) –

- (a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for**

which that party discharged such responsibility.

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was no his or her own;

(c) to the liability of any other person to maintain the child.

4. Where a party to a marriage has a beneficial interest in any property, or in the proceeds of sale thereof, and some other person who is not a party to the marriage also has a beneficial interest in that property or in the proceeds of sale thereof, then, before deciding whether to make an order under section 25(3) in relation to that property, it shall be the duty of the court to give that other person an opportunity to make representations with respect to the order; and any representations made by that other person shall be included among the circumstances to which the court is required to have regard under this section.

5. Without prejudice to subsection (1) where the court grants a divorce on the basis of the ground specified in section 16(1)(d) the court, in exercising the powers referred to in subsection (1), shall have particular regard to the conduct of the petitioner where the evidence discloses that but for the misconduct of the petitioner the parties would not have lived separate and apart.

[9] Sections 73, 74 and 75 provide:

Protection, Custody, etc., of Children

73. (1) The court shall not make absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied –

(a) that for the purposes of this section there are no children of the family to whom this section applies; or

(b) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that –

(i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; or

(ii) it is impracticable for the party or parties appearing before the court to make any such arrangements; or

(c) that there are circumstances making it desirable that the decree should be made absolute or should be granted, as the case may be, without delay notwithstanding that there are or may be children of the family to whom this section applies and that the court is unable to make a declaration in accordance with paragraph (b).

(2) The court shall not make an order declaring that it is satisfied as mentioned in subsection (1)(c) unless it has

obtained a satisfactory undertaking from either or both of the parties to bring the question of the arrangements for the children named in the order before the court within a specified time.

- (3) If the court makes absolute a decree of divorce or of nullity of marriage, or grants a decree of judicial separation, without having made an order under subsection (1) the decree shall be void but, if such an order was made, no person shall be entitled to challenge the validity of the decree on the ground that the conditions prescribed by subsections (1) and (2) were not fulfilled.**
- (4) If the court refuses to make an order under subsection (1) in any proceedings for divorce, nullity of marriage or judicial separation, it shall, on an application, by either party to the proceedings, make an order declaring that it is not satisfied as mentioned in that subsection.**
- (5) This section applies to the following children of the family, that is to say –**
 - (a) any minor child of the family who at the date of the order under subsection (1) is –**
 - (i) under the age of sixteen, or**
 - (ii) receiving instruction at an educational establishment, or undergoing training for a trade, profession or vocation, whether or not he is also in gainful employment; and**

- (b) any other child of the family to whom the court by an order under that subsection directs that this section shall apply;**

and the court may give such a direction if it is of opinion that there are special circumstances which make it desirable in the interest of the child that this section should apply to him.

- (6) In this section “welfare”, in relation to a child, includes the custody and education of the child and financial provision for him.**

74. (1) The court may make such 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 or on granting a decree or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute);**

- (b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal; and in any case in which the court has 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 the court.

- (2) Where the court makes an order under section 31 the court shall also have power to make such order as it thinks fit with respect to the custody of any child of the family who is for the time being under the age of eighteen; but the power conferred by this subsection and any order made in exercise of that power shall have effect only as respects any period when an order is in force under that section and the child is under that age.**
- (3) Where the court grants or makes absolute a decree of divorce or grants a decree of judicial separation, it may include in the decree a declaration that either party to the marriage in question is unfit to have the custody of the children of the family.**
- (4) Where a decree of divorce or of judicial separation contains such a declaration as mentioned in subsection (3) then, if the party to whom the declaration relates is a parent of any child of the family, that party shall not on the death of the other parent, be entitled as of right to the custody or the guardianship of that child.**
- (5) (Where an order in respect of a child is made under this section, the order shall not affect the rights over or with respect to the child of any person, other than a party to the marriage in question unless the child is the child of one or both of the parties to that marriage and that person was a party**

to the proceedings on the application for an order under this section.

- (6) The power of the court under subsection (1)(a) or (2) to make an order with respect to a child shall be exercisable from time to time; and where the court makes an order under subsection (1)(b) with respect to a child it may from time to time until that child attains the age of eighteen make a further order with respect to his custody and education.
- (7) The court shall have power to vary or discharge an order made under this section or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

75. (1) Where the court has jurisdiction by virtue of this Act to make an order for the custody of a child and it appears to the court that there are exceptional circumstances making it desirable that the child should be under supervision of an independent person, the court may, as respects any period during which the child is, in exercise of that jurisdiction, committed to the custody of any person, order that the child be under the supervision of a welfare officer designated by the court.

(2) Where a child is under the supervision of any person in pursuance of this section the jurisdiction possessed by a court to vary any financial provision order in the child's favour or any order

made with respect to custody or education under this Act shall, subject to any rules of court be exercised at the instance of that court itself.

(3) The court shall have power from time to time by an order under this section to vary or discharge any rules of court be exercised at the instance of that court itself.

[10] It is trite that where children are involved they are the primary concern of the court. Their welfare, mental and physical health is always to be of paramount concern.

[11] Starting with section 29, it is clear as to what the court is to take into consideration when deciding how to exercise its powers in these types of proceedings. I need not enumerate them as they are clear and unambiguous.

[12] Section 73, which comes under the rubric **“PROTECTION, CUSTODY ETC., OF CHILDREN”**. In particular, Section 73 (5) and (6) and Likewise Section 74 are also applicable in the instant case. Section 75 (1) and (2) is also applicable and speaks to the recommendation made by Dr. Thompson as it relates to the minor children of the marriage.

[13] The parties are not rich people. There is the matrimonial home on which a mortgage still exists and the children who are still of school age. There is very little therefore to be shared between husband and wife.

[14] When we look at what is fair in the circumstances, the case of **MILLER V. MILLER** and **McFARLANE V McFARLANE [2006] UKHL 2 42 WLR 1283** is very

instructive. LORD NICHOLLS OF BIRKENHEAD at page 1287 paragraphs 4 – 16 opined:

24 May, LORD NICHOLLS OF BIRKENHEAD:

“My Lords, these two appeals concern that most intractable of problems; how to achieve fairness in the division of property following a divorce. In *White v White* [2001] 1 AC 596 your Lordships House sought to assist judges who have the difficult task of exercising the wide discretionary powers conferred on the court by Part II of the Matrimonial Causes Act 1973. In particular the House emphasized that in seeking a fair outcome there is no place for discrimination between a husband and wife and their respective roles. Discrimination is the antithesis of fairness. In assessing the parties contributions to the family there should be no bias in favour of the money-earner and against the home-maker and the child-carer. This is a principle of universal application. It is applicable to all marriages.

In the *White* case the capital assets were more than sufficient to meet the parties’ financial needs. The two appeals now before the House again involve large amounts of money but they raise different issues from those in the *White* case. The first appeal concerns the division of capital assets where the marriage was short-lived. The *White* case concerned a lengthy marriage, of over 30 years. The marriage between Alan and Melissa Miller lasted less than three years. The second appeal concerns the marriage between Kenneth and Julia McFarlane. This lasted for 16 years. The parties’ capital was insufficient to enable an immediate clean break, but Mr. McFarlane was a notably high earner. The principal issue in the McFarlane appeal concerns the role of a periodical payments order in this type of case.

The facts in both cases are unusual. But before summarizing these facts and identifying the issues in these cases it will be convenient to consider some general principles.

The requirements of fairness:

Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of local reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.

At once there is a difficulty for the courts. The Matrimonial Causes Act 1973 gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a “clean break”. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.

Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be

an acceptable degree of consistency of decisions from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach.

This is not to usurp the legislative function. Rather, it is to perform a necessary judicial function in the absence of parliamentary guidance. As Lord Cooke of Thorndon said in *White v White* [2001] 1 AC 596, 615, there is no reason to suppose that in prescribing relevant considerations the legislature had any intention of excluding the development of general judicial practice.

For many years one principle applied by the courts was to have regard to the reasonable requirements of the claimant, usually the wife, and treat this as determinative of the extent of the claimant's award. Fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed. The glass ceiling thus put in place was shattered by the decision of your Lordships' House in the *White* case. This has accentuated the need for some further judicial enunciation of general principles.

The starting point is surely not controversial. In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provisions made on divorce by one party for the other, still typically the wife, is not in the nature of largesse. It is not a case of "taking away" from one party and "giving" to the other property which

“belongs” to the former. The claimant is not a supplicant. Each party to a marriage *is entitled to a fair* share of the available property. The search is always for what are the *requirements of fairness* in the particular case.

What then, in principle, are these requirements? The statute provides that first consideration shall be given to the welfare of the children of the marriage. In the present context nothing further need be said about this primary consideration. Beyond this several elements, or strands, are readily discernable. The first is financial needs. This is one of the matters listed in section 25(2), in paragraph (b): “the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.”

This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties’ housing and financial needs, taking into account a wide range of matters such as the parties’ ages, their future earning capacity, the family’s standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.

Another strand, recognized more explicitly now than formerly, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance, the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss: a diminution in her earning capacity and the loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss of the breakdown of a marriage because of their traditional role as home-maker and child-carer.

When this is so, fairness requires that this feature should be taken into account by the court when exercising its statutory powers. The Court of Appeal decision in SRJ v DWJ (Financial Provision) [1999] 2. FLR 176, 182, is an example where this was recognized expressly.

Compensation and financial needs often overlap in practice, so double-counting has to be avoided. But they are distinct concepts, and they are far from coterminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.

A third strand is sharing. This “equal sharing” principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie’s observation that “husband and wife are now for all practical purposes equal partners in marriage”. R. v. R [1992] AC 599, 617. This is now recognized widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase: “unless there is good reason to the contrary”. The yardstick of equality is to be applied as an aid, not a rule.”

- [15] Very critical to issues involving children is the CHILD PROTECTION ACT, Chapter 132. As mentioned earlier, it is trite that the guiding principle in making any determination with respect to a child is to be found in Section 3 of the Child Protection Act which provides;

PART 1 – RIGHTS OF THE CHILD

“3. (1) Whenever a determination has to be made with respect to

–

(a) the upbringing of a child, or

(b) the administration of a child’s property or the application of any income arising from it,

The child’s welfare shall be the paramount consideration.

(2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the guiding principle mentioned in subsection (1) and that any delay in determining the question is likely to be prejudicial to the welfare of the child.

(3) In determining any question relating to circumstances set out in paragraphs (a) and (b) of subsection (1), the court or any other person shall have regard in particular to -

(a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;

(b) the child’s physical, emotional and educational needs;

(c) the likely effects of any changes in the child’s circumstances;

(d) the child’s age, sex, background and any other circumstances relevant in the matter;

- (e) any harm that the child has suffered or is at the risk of suffering;**
- (f) where relevant, the capacity of the child's parents, guardians or other persons involved in ...**

[16] Thus Section 3 (3) also sets the parameters of what is to be regarded in determining any question relating to the circumstances set out at (a) and (b) subsection (1). In all of the sections set out so far the court is to strive to place the child so far as is practicable and just to do so in the financial position the child or children would have found themselves had the marriage not broken down and each of the parents would have properly discharged his or her financial responsibility to them. All circumstances of the particular case are to be taken into account.

[17] In paragraphs 24 – 28 of the case of **YASMINE MECHELLE JOHNSON nee MILLER V ANDREW SIMEON JOHNSON SCCiv App No. 20 of 2015.**

ALLEN P. said;

“24. The learned judge was obviously alive to the court's responsibility as directed by section 3 of the Child Protection Act, to regard the children's welfare as paramount when deciding questions relating to custody or upbringing of children. Inexorably, her responsibility in carrying out this mandate was to have regard to all of the relevant circumstances, including the need to attain a financial result which is just as between husband and wife.

- 25. In this vein, the learned judge correctly made reference to subsection (2) of section 29 of the Act which sets out the duty of the court when exercising the power under section 27 (1) (d) for the benefit of a child, namely, to so exercise its powers as to place the child, so far as is practicable and just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of his parents had properly discharged his or her financial obligations and responsibilities to him.**
- 26. In striving to do so, the court is mandated to have regard to all of the circumstances, which include those matters prescribed by section 29 (2) of the Act, such as the financial needs of the child; the income, earning capacity (if any), property and other financial resources of the child; any physical or mental disability; the standard of living enjoyed by the family before the breakdown of the marriage; and the manner in which he was being and in which the parties to the marriage expected him to be educated or trained.**
- 27. Lord Scarman in Trippas v Trippas [1973] Fam. 134 at 144 was called upon to construe an identical provision to our section 29 (2); and commented that the section called for a consideration by the court of all of the circumstances of the case and was not confined to the specified matters prescribed; but rather should also investigate all other circumstances, past, present and, in so far as one can make a reliable estimate, future – which arise on the facts of any particular case.**
- 28. As previously noted, in exercising its powers under section 27 for the benefit of a child, the court, in addition to ensuring the welfare of the child, must also strive to arrive at a just financial result for the parties. In doing so, the court must have regard**

to some of the specified matters in section 29 (1) of the Act, such as the income, earning capacity, and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; and the standard of living enjoyed by the family.”

[18] The Interim Order dated 29th March, 2019 and filed June 13th, 2019, ordered the Respondent to vacate the matrimonial home so as to make suitable living arrangements for the children of the marriage.

[19] The children of the marriage are 14, 7 and 5 years of age respectively. As is set out in the Child Protection Act, Section 3 (1), (a) and (b); it is the child's (in this case the children's) welfare which is of paramount consideration.

[20] I am fully aware of the various principles for example MILLER V MILLER, McFARLANE V McFARLANE (supra) as it relates to the equality and the like. However, the overriding and paramount concern is the welfare of the children.

[21] The parties have disclosed their respective earnings and that has also been taken into consideration. Having taken into consideration all of the circumstances and the various authorities and the children needing stability in a fixed and comfortable environment, I therefore Order the following;

1. That the Petitioner is granted custody and care of the minor children of the marriage namely .

, with liberal access to the Respondent.

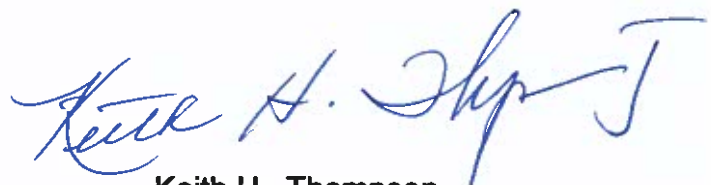
2. That the Respondent pay to the Petitioner the sum of \$600.00 per month for the general maintenance of the children of the marriage until the children obtain the age of eighteen (18) years.
3. That the Respondent pay to the Petitioner the sum of Six Hundred dollars (\$600.00) on or before the first day of August of each year to assist with preparing the children for the ensuing school year commencing December 1st of 2021 and August 1st in each subsequent year.
4. That the Respondent continue the payments of tuition for the oldest child of the marriage in the amount of \$1,270.00 per term inclusive of any increases which may be instituted from time to time.
5. That the Petitioner shall commence the payments to the Allerdyce Day Care at Police Headquarters in the sum of \$80.00 per month for
6. That the Petitioner and Respondent shall share equally all medical, dental and optical expenses for the three children of the marriage.
7. That the Respondent shall vacate the matrimonial home thereby allowing the Petitioner and the children of the marriage to return,

while continuing his contribution to the monthly mortgage payments and utilities.

8. The Petitioner within five (5) years or before from the date of this Order pay to the Respondent 25% of the present value (i.e. as at the date of this Order) of the matrimonial home and at such time the Respondent shall execute any and all documentation divesting himself of any further interest in the said matrimonial home.
9. As of the date of this Ruling, quarterly visits by a Social Services Officer shall be arranged by the Petitioner and shall include the participation of the Respondent as directed by the Social Services Officer.
10. Each party to bear their own costs.

I so order.

Dated this 16th day of February, A.D., 2021.



Keith H. Thompson
Justice