

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2004HCV 2313

BETWEEN **DAPHNE BURTON** **CLAIMANT**
AND **ERROL BURTON** **DEFENDANT**

Mrs. T. Jordan instructed by Jacqueline Samuels-Brown for Claimant.
Ms. S. Jarrett instructed by the Kingston Legal Aid Clinic for the Defendant.

Heard: 11, 14 December 2007, 7 March and 18 April 2008.

IN CHAMBERS.

Mangatal J:

1. This is a Claim by the Claimant "the mother" against the Defendant "the father" for maintenance in respect of the parties' son Ryan Burton, born 15th June 1987. The claim is for the husband to pay 50 % or such other percentage as the Court deems fit of Ryan's educational expenses in respect of tertiary education at the University of Charleston, West Virginia, United States of America, until he reaches the age of 21 years on the 15th June 2008. The mother is also asking the Court to order the father to make some reimbursement to her of sums already spent by her on Ryan's education.

2. This claim was filed many years ago and circumstances have undergone a number of changes since then. Originally there had been a claim by the mother for occupancy of the matrimonial home which the parties own as joint tenants at 37 Lily Way, Mona Heights, Kingston 6, Saint Andrew, seeking that Ryan be allowed to remain in the matrimonial home until he completes his tertiary education. However, this is no longer an issue since Ryan is now studying abroad, the mother is in occupation of the premises at Lily Way and although the property disputes between the parties are still being sorted out, when Ryan is in Jamaica he has without any problem or contention been staying at Lily Way.

3. The father has in turn filed a counter-application seeking the following orders:

- (a) That the father pays to the mother the sum of \$15,000.00 monthly for the maintenance of Ryan until Ryan attains the age of 21 or completes tertiary education, whichever is sooner;
- (b) That the father be responsible for half the educational, medical, dental, optical expenses for Ryan, subject to paragraph (d);
- (c) That the mother is required to consult and seek the written agreement of the father in relation to any educational, medical, dental, optical and air travel expenses for Ryan, such consent not to be unreasonably withheld; if the parties fail to agree, an application to be made to the court;
- (d) That Ryan enroll in a tertiary institution in Jamaica, unless the mother undertakes to be financially responsible for any expenses incurred

above what it would cost if Ryan lives and attends school in Jamaica;

(e) That the Defendant not be called upon to repay any debts incurred by the Claimant without his prior knowledge and consent.

4. The issues in this case have crystallized as follows:

(a) How much maintenance should the father be ordered to pay?

(b) Should the father be required to reimburse the mother for sums already expended by her in relation to Ryan's education in the United States?

(c) Should the father be required to contribute to the cost of Ryan's education in the United States or should the mother be responsible for any expenses incurred above what it would cost if Ryan lived in Jamaica and attended school here?

(d) Does the father owe any money to the mother based on previous orders made in this matter or other matters between the parties, and if so, how should such sums be dealt with?

5. The parties were married on January 31 1987. They separated in or about September 2003. When the Claim was filed in 2004 the Mother in her Affidavit sworn to on the 1st October 2004 had stated that the father earned at least \$ 150,000.00 per month and she was asking for an order that the father pay \$150,000.00 per month as maintenance for Ryan or such other sums as the court deems fit. At this time the mother wants the father to contribute by paying 50% of what Ryan's expenses are, and if not 50%, such other percent as the Court deems reasonable.

6. In her Affidavit sworn to on the 1st October 2004 the mother had set out in her list of estimated expenses to do with Ryan's education some fairly substantial sums regarding SAT classes, i.e Scholastic Achievement

Tests. In his Affidavit sworn to on the 18th January 2005, the father stated that as far as he was concerned, there was no necessity for the child to be doing SAT classes because from all accounts Ryan if he kept performing consistently at the standard at which he had been performing, would be fully qualified to enter the University of the West Indies.

7. In Suit No. 570 of 2004 between the mother and the father in relation to the matrimonial property at Lily Way, a consent order was entered by the parties on the 27th day of September 2005 agreeing that each party was entitled to a 50% interest in the property and agreeing that each would pay and be responsible for half of the monthly mortgage payments, which at the time of the court order amounted to \$48,710.56.

8. In paragraphs 3 and 5 of his Affidavit filed April 25 2005, the father said that he paid the whole of the mortgage and loan to First Caribbean Bank in respect of the matrimonial home which at the time meant that he paid monthly the sum of \$56,245.56. He states that the mother is responsible for one half of the sum of the mortgage, which he has asked her to apportion in the tranches, \$20,000.00 for maintenance of Ryan, and \$8,122.78 to be deposited to the father's account at Scotia Bank.

9. At paragraph 4 of her Affidavit sworn to on 22nd of May 2006, the mother claims that as an employee of BNS, who is a Senior Banking Officer, employed to BNS for close to 27 years, the father enjoys several benefits including an overdraft facility which is similar in nature to a loan, and which has a low interest rate of only 3 ½ %. The mother also states that the father is able to access Education Loans at very preferential rates.

10. In her Affidavit sworn to on the 22nd of May 2006, at paragraph 35 the mother states that since September 2005, Ryan has been pursuing under-graduate studies in the field of computer sciences at the University of Charleston in the United States of America where his undergraduate programme will last for five years. She then sets out the

costs of Ryan's maintenance, well-being and educational expenses since September 2004 and states that she has been the one meeting these expenses since September 2004 without any contribution from the father. These expenses up to the date of that Affidavit totalled in excess of \$26,360.00 U.S. or \$1,737,400.00 Jamaican at a conversion rate of US\$1.00 to Ja. \$65.00.

11. In paragraph 37 of the same Affidavit the mother states that she has had to borrow various sums of money, from her employer and other commercial banks totaling approximately \$550,000.00.

12. The mother states that her staff loan is repaid at a concessionary interest rate of about 10% while the commercial loans are being repaid at interest rates of about 25%. The mother in paragraphs 38 and 39 of her Affidavit goes on to state:

38. While I undergo these hardships, it has recently come to my attention that in or about the 13th September 2005 the(father) purchased property located at Lot 272 in the Aviary, St. Catherine, which is registered at Volume 1383 Folio 641 of the Register Book of Titles.....

39. I therefore have good reason to conclude that the (father) is not undergoing severe financial constraints as he claims or at all.

Both the father and Phyllis Orlebar are registered as joint tenants on the title to the property at the Aviary.

13. In the same Affidavit the mother goes on to set out the projected cost for the remainder of Ryan's tertiary education and related expenses, which was projected for the next 3 years, at US \$67,400.00 or J\$4,381,000.00. At that time the mother was asking for an order that the father pay half of Ryan's educational and other expenses since September 2003, as well as half of the cost for the 4 years of Ryan's undergraduate studies.

14. In his Affidavit in response sworn to on the 15th of November 2006, the father states at paragraph 3 that BNS no longer grants personal overdraft facilities to its customers or employees . He said that he sought assistance by way of an Education Loan for Ryan in August 2005, but he was informed by BNS that they do not grant unsecured Education Loans to employee's children pursuing studies overseas, if the same programme is offered locally.

15. According to the father (paragraphs 20-28 of his Affidavit); Ryan is studying Information Technology at the University of Charleston and not Computer Science. He states that Ryan was successful in his application to the University of the West Indies, Mona, where he could pursue his under-graduate studies in the field of computer science, which was what Ryan really wanted to pursue and which would cost approximately \$189,807.00 for the academic school year. The father says that although he too wants the very best for Ryan, based on his income it is impossible for him to find one half of the educational expenses for Ryan to study overseas. The father states that if Ryan was pursuing his undergraduate studies at the University of the West Indies, Mona Campus in the Parish of Saint Andrew it would have cost approximately \$569,421.00 to complete the three year studies, as opposed to the approximately J \$6,004,400.00 which is estimated for Ryan's study overseas. The father says that if Ryan had studied here in Jamaica then the mother would not have had to borrow the sums amounting to \$550,000.00 which she claims to have borrowed.

16. According to the father, the University of the West Indies is the best tertiary institution in the region and a BSc. in Computer Science is more recognized and more established than a BSc. in Information Technology, hence Ryan would have received more for less if he had pursued studies at U.W.I here in Jamaica and which would have been more affordable to the father.

17. The father also states that it only came to his attention that the mother intended to have Ryan study overseas when he saw this in the mother's October 2004 Affidavit. This was never discussed with him prior to that Affidavit or at any time after. Upon fully knowing that he could not afford this venture the father says that he instructed Ryan to seek entrance into the University of the West Indies, which Ryan did and was accepted.

18. In response to the mother's Affidavit and to her request for information, the father also filed an Affidavit by Phyllis Orlebar on the 23rd April 2007. Ms. Orlebar states that she is a pensioner and the father is her cousin. Ms. Orlebar states that she is the sole and rightful owner of the property located at Lot 272, The Aviary, Saint Catherine registered at Volume 1383 Folio 641 of the Register Book of Titles. She bought the property for long term investment in order to improve her monthly income and offset her obligations.

19. Ms. Orlebar states that her monthly pension and interest earned from savings was not sufficient to satisfy her monthly obligations and her livelihood. In order to purchase the property she obtained a loan from First Caribbean International Bank in June 2004, for the deposit. The balance purchase price was financed by way of mortgage from Jamaica National Building Society.

20. Ms. Orlebar states that she was advised by a representative at the Jamaica National Building Society that it would be difficult to obtain a mortgage because of her advanced age and it was recommended that she add someone else's name to her Title for this reason. This is the reason that she added her cousin's name to the Title. Ms. Orlebar says that she is very attached to her cousin and has had a long and close association with him and his mother for many years. Ms. Orlebar said that the father's name has always been on her accounts. He lives in her house

and pays rent of \$8,000.00. per month. She intends for the father to stay in her house until he is financially able to move on.

21. Ms. Orlebar states that the father made no contribution to the acquisition of her house save for the fact that because of his age she was able to secure a mortgage. She states that the father has no interest in her property.

22. In her Affidavit sworn to on the 7th May 2007, paragraph 4, the mother stated that the programme which Ryan intends to pursue is not offered either at the University of the West Indies nor at the University of Technology. He is currently pursuing a degree in Information Technology/ Research Programme. This programme allows him to do courses required for Graduate Studies specializing in Artificial Intelligence and Programme Language. His career objective is to develop and design microprocessors.

23. At paragraph 24 the mother states that the father supported the decision for Ryan to study overseas. She invited him to the house and they discussed the pros and cons of Ryan's decision. The father's only concern at that time was not to do with the expenses, but was in relation to the fact that Ryan was a sheltered child and could have difficulty managing on his own. As a matter of fact the father supplied the United States Embassy with a job letter in support of the application for a student visa. In her Affidavit sworn to on the 10th December 2007, at paragraph 11 the mother states that the decision for Ryan to study abroad was a joint decision and that the father undertook to aid in Ryan's tertiary education. In cross-examination the mother said that the father was in agreement that he would assist in whatever way he could in relation to Ryan's pursuit of studies abroad.

24. Mrs. Burton in paragraph 26 of the Affidavit of 7th May 2007 states that Ryan became depressed since the father left the family as he and his father were very close. She says that to a large extent her decision to support Ryan in pursuing his studies overseas was because of the

trauma he was experiencing. The mother states that it has proven advantageous for Ryan to be away from the situation at home as he is performing well at school abroad and is no longer depressed. In her Affidavit of November 2006 the mother had indicated that Ryan made the University's Dean's List.

25. As regards the mother's contention that the father supplied a job letter for Ryan, the father in paragraph 16 of his Affidavit sworn to on the 24th May 2007 states that the mother called him requesting a job letter to take to the United States Embassy, and stated that without it Ryan would not be able to obtain a student visa. The father says that at that time Ryan had already rejected the University of the West Indies' acceptance offer. The father says that he and the mother have never discussed Ryan going to school overseas.

26. In his Affidavit filed May 14th 2007, at paragraph 5 the father exhibited a pay slip indicating a net monthly income of \$65,766.89. In that Affidavit, the father offered to pay the sum of \$5,000.00 per month towards Ryan's maintenance, claiming that this sum is all he can afford. The father stated that he barely manages to meet his monthly expenses made up as follows:

	\$
Mortgage for Lily Way	48,710.55
Rent	8,000.00
Car Loan	9,135.75
Staff Loan	13,515.85
Transportation	8,800.00
Credit Card	8,000.00
Laundry	2,840.00
Food & Laundry	<u>5,000.00</u>
	\$104,002.15

Prior to that the father in Answer to a Request for Information had exhibited paylips which seem to have indicated that he earned a monthly income in the range \$92,000.00 to \$102,000.00.

27. **Orders made herein**

At the first hearing of the Fixed Date Claim Form on January 20 2005 an interim order was made for the father to pay the sum of \$20,000.00 per month plus half medical expenses commencing on January 31 2005. On the 25th of May 2005 the Court ordered the father to pay half the costs of the educational and incidental expenses of Ryan in the amount of \$255,000.00 by July 31, 2006. In December 2006, an interim order was made for the father to pay \$15,000.00. per month.

28. In her closing submissions on behalf of the father, Miss Jarrett set out two tables; (a) one dealing with and headed "maintenance payments which were to be made by (the father) pursuant to court orders", from 2005, and (b) one dealing with and headed "mortgage payments made by (the father) on behalf of (the mother) after court ordered her to pay her half share". Miss Jarrett closed her submissions as follows:

Contrary to the Claimant's affidavit filed November 9, 2007 the Tables show that the Respondent's payment of the maintenance (via the mortgage) surpasses what she claims he owes her.

<i>Mortgage payments made on behalf of Daphne</i>	<i>\$657,592.56</i>
<i>Less payment pursuant to court order</i>	<i>\$560,000.00</i>
	<i>\$ 97,592.56</i>

29. In the Maintenance Act 2005, it is provided as follows:

Section 9-(1) a maintenance Order for the support of a child

a. Shall apportion the obligation according to the capacities of the parents to provide support....

(2) *In considering the circumstances of a dependant who is a child; the Court shall have regard to the following matters in addition to the circumstances specified in section 14(4)-*

- (a) that each parent has an obligation to provide support for the child;*
- (b) the child's aptitude for, and reasonable prospects of, obtaining an education;*
- (c) the child's need for a stable environment.*

Section 14 (4):

In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including....

- (a) the respondent's and dependant's assets and means;*
- (b) the assets and means that the dependant and the respondent are likely to have in the future;*
- (c)*
- (d)*
- (e) The mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;.....*
- (m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

I note in passing that under the **Matrimonial Causes Act**, section 25(2), the Court had power to make maintenance orders up to the age of 21 years in the case of a child engaged in a course of education after attaining the age of 18 years. This section was the applicable section at the time when these proceedings were filed. However, under section 18(2) of the Maintenance Act 2005, the order can be made up to the date on which the child attains the age of 23 years. The Court would therefore in

this case have the power to make an order that would subsist beyond the 15 June 2008 when Ryan attains the age of 21 years if his course of study is still continuing beyond that time.

30. Counsel Miss Jarrett on behalf of the father cited two authorities. She cited a brief extract from Blackstone's Family Law Index Case Precedents 1900-1997 with regard to **Parry v. Meugens** [1986] 1 F.L.R. 125;... where it is stated that FamD Magistrates ought not to have ordered payment of arrears of children's maintenance so as to meet a debt run up by the mother. She also cited **Hohn v. Hohn** (1979) 16 J.L.R. 364 from our local jurisdiction . In **Hohn** the petitioner, a mother of three children, sought an order that she be at liberty to remove them out of the jurisdiction of the court for the purpose of permanent residence in the United States of America. The marriage of the parties had been dissolved, with custody of the children being granted to the petitioner, and extensive rights of access being granted to the respondent. In supporting her application the Petitioner stated that she was desirous of broadening her children's horizons and making available to them unrestricted educational opportunities and these could only be secured by their living and attending school abroad. The respondent opposed the application on the ground that the children were currently attending public schools in Jamaica which were at least as good as public schools in the United States. It was held that the paramount consideration is the welfare of the children. Notwithstanding the fact that the petitioner had previously been granted custody of the children, in all the circumstances the welfare of the children was in favour of their remaining in the jurisdiction as it was wrong to pluck them from a known situation which had worked well and thrust them into an uncertain, unknown environment overseas. Carberry J.A. stated at page 369:

...These admissions of the Petitioner constitute testimony enough that the Respondent is not only ready and willing

but also eminently able to provide for the material needs of his children in Jamaica. He also on the admission of the Petitioner has a well-appointed house where the children visit and spend time with him.

The Petitioner accepts the fact that having regard to the foreign exchange constraints the Respondent would not be able to maintain her or the children in the United States of America.

31. In my view one of the main issues in this case is similar to the issue of whether a parent should be required to contribute to educational expenses relating to private as opposed to public schools, a topic which has been well-discussed in the Australian jurisdiction. I found paragraph 9.17, page 396 of the Text **Family Law in Australia**, 6th Edition, by Geoff Monahan and Lisa Young, in a chapter headed "Financial Support of Children" instructive:

*9.17. Section 66J of the FLA(Family Law Act) makes specific reference, as one of the factors relevant in determining a child's financial needs, to "the manner in which the child is being, and in which the parents expected the child to be, educated or trained." This provision, has principally given rise to litigation concerning the payment of private school fees. The authorities treat this issue as one to be dealt with having regard to all the circumstances in each particular case; in other words, there are no hard and fast rules. Beyond this, the formulation adopted in 1981 by the Full Court in **Marriage of Paradine** (1981) 7 Fam.L.R., FLC 091-056, was approved by a differently constituted Full Court (Ashe ACJ, Fogarty and Cooke J.J.) in **Mee & Ferguson** (1986) 10 Fam. L.R. 971; F.L.C. 91-716, ;*

" Where the non-custodian has agreed to the child attending such a school that person is liable to contribute to the fees involved so long as and to the extent that he or she has a reasonable financial capacity to continue to do so. Where the non-custodian has not agreed to the child attending such a school he or she is not liable to contribute to those expenses unless there are reasons relating to the child's welfare which dictate attendance at that school rather than at a non-private school. Then the non-custodian, as an aspect of the welfare and maintenance of the child, is required to contribute to the extent that he or she has a reasonable financial capacity to do so. However, the mere fact that the non-custodian can afford to pay the fees, or indeed if he or she is a wealthy person, is not in itself a reason for imposing that liability."

It has been held that the relevant expectation of the parties regarding the child's education are those which are held by both parents during cohabitation (footnote-**Evans & Evans** [1978] F.L.C. 90-435). What benefit is to be derived from attendance at a private school is a question of fact to be determined in the particular case. In **Paradine** (above) the child had experienced problems at a state school (however, in that instance a retrial was in fact ordered on the ground that no precise information on the child's needs had been produced at the hearing). In 1984's **T & T** [1984] [F.L.C. 91-588] the court ordered a father to contribute, so long as he was able to afford it, to private school fees where he had earlier insisted on that particular form of education and the children had commenced secondary school on that basis, even though the court found that there was "no overwhelming reason why the children needed to attend private school as such". Such an order gives weight to the educational status quo in the determination of a child's welfare. In **Coan v. Cox** (1993) 17 Fam.

L.R. 682, Nicholson C.J. ordered the payment by the father of the relatively modest fees of a school at which the child was doing well.

32. One of the factual issues which arises for determination in this case relates to the welfare of Ryan, and whether there are reasons dictating that he should study abroad at the University of Charleston rather than at a tertiary institution here in Jamaica.

33. Another issue which arises for determination in this case is whether the father did or did not discuss with the mother and agree for Ryan to study overseas.

34. On the 14th December 2007 evidence had been completed and I had reserved judgment. However, on the 7th March 2008 an Application by Miss Jordan, Counsel for the mother was heard by me for further evidence to be admitted, i.e the Affidavits of Tameka Jordan and the mother, both sworn to on the 28th February 2008. Counsel for the father, Miss Jarrett, admirably and candidly indicated that she was not opposing the application for further information to be placed before the Court and in fact, the father also filed an Affidavit in Answer sworn to on the 6th March 2008. I allowed the application and thus have had to consider the further evidence and information placed before me.

35. In her Further Affidavit, the mother states as follows:

3. Contrary to what was said in his Affidavit in the maintenance proceedings sworn to on the 4th December at paragraph 11 and his prior Affidavits of 11th May 2007 and the 24th May 2007 it is now revealed that the Respondent has not been paying any mortgage since April of last year.

4. In fact on instructions from the Respondent, his Attorney-at-Law submitted at the final hearing of the maintenance proceedings in December 2007 that the Respondent paid the mortgage up until the date of the hearing.

5. I have however discovered that the mortgage has been placed on a moratorium without my knowledge, input or consent and presently the property is before the Credit Recovery Centre at the Bank of Nova Scotia because of the outstanding mortgage payments.

6. I learnt of this from the Respondent's Affidavit sworn to on January 30, 2007 and filed in the division of property proceedings HCV 570 of 2004, where he stated at paragraph 11 "... the mortgagee has given me a four months moratorium on the mortgage payments, wherein the property is to be disposed of by the end of February 2008". ...

7. Subsequently, my Attorney has written to the Bank of Nova Scotia on the 12th February 2008 in this regard and the bank responded on the 13th February 2008.

8. The Bank wrote back to my Attorney confirming that mortgage payments by the Defendant had ceased as early as April 2007 but refused to release documentation and correspondence relating to the mortgage and the moratorium. Subsequently, on my instructions, my Attorney-at-Law sought the Court's intervention and obtained an order for a witness summons to produce all documents, correspondence pertaining to the mortgage and the moratorium.

9. Further, upon serving the witness summons on the Bank of Nova Scotia a meeting was arranged. At that meeting with the Senior Vice President of Human Resources, a copy of an email sent by Mr. Burton outlining his reason for the moratorium was shown to

myself and my Attorney. Among one of the reasons he cited for the non-payment of the mortgage was the fact that he was ordered by the Court on the 20th January 2005 to pay the maintenance of \$20,000.00. Mr. Burton has only paid three of these maintenance payments, the last being April 2005. The e-mail was dated November 2007.

35. (a) Although in paragraph 6 the mother speaks of the father's Affidavit as being sworn to 30th January 2007, it is really 2008. This means that it is only in January 2008 that the father has gone on record and indicated that he has not paid the mortgage payments fully from April 2007. The records from the Bank indicate that he has paid nothing at all towards the mortgage accounts since July 2007.

36. In his Affidavit in Answer, the father states:

3. In response to paragraph 3, the Claimant stated that I have not made any payment since April 2007. This is not so as in fact letter dated February 12, 2008 (from Scotiabank) exhibited by the Claimant reveals that partial payments were made from April 2007 to July 2007.

4. Further I still regard myself as being committed to making all payments as stated in my previous Affidavits filed herein. The Mortgagee, the Bank of Nova Scotia, who are also my employers, hold me liable for all payments and I have given them my assurance that I will make all payments and honour my obligations to them as soon as I am able to do so. My said Employers are also sympathetic to my situation.

5. For the past four years I have been encashing my Employee Share Ownership

Plan(ESOP) to offset the shortfall in my monthly income, to settle my personal living expenses, which include my school fees, and monthly mortgage for the matrimonial home.

6. I have changed my living address since about March 2007, as it became inconvenient for me to continue to live at Central Avenue, Kingston 10 in the Parish of Saint Andrew. I now reside at premises in Old Harbour.

7. That because of my change of address my monthly expenditure has escalated enormously since March 2007. My expenditure excluding the mortgage payment for the property at Lily way is as follows:

	\$
Rent	8,000.00
Car Loan	9,135.75
Staff Loan	15,863.40
Transportation including	
Toll fees	16,000.00
Courts Ja. Ltd.	5,000.00
Credit Card	13,000.00
Laundry	4,000.00
Food and Grocery	15,000.00
Miscellaneous exp.	<u>5,000.00</u>
	\$90,999.15

37. Under section 15 of the Maintenance Act 2005, the Court has wide powers in relation to making maintenance orders, including ordering periodic and/or lump sum payments. The Court also has power to secure payment under the maintenance order, by a charge on property, an order of attachment or otherwise. The order may also be applicable in respect of any period before the date of the order.

38. In **Bromley's Family Law**, 10th Edition, pages 994-996, the learned authors have this to say about lump sum and secured payments:

Page 994(secured payments)

".....The Court may order specific property to be charged with the payment of the sum in question. When the order comes to an end, the capital must be returned to the payer(or to his estate, if he has already died) and any charge must be cancelled.

Page 995-996(lump sum payments)

"....The court may order either party to pay a lump sum or lump sums to the other...It is provided by the M.C.A. 1973 that a lump sum may be ordered to enable the payee to meet any liabilities or expenses already incurred in maintaining herself or himself or any child of the family before an application is made.

However, the most important use of this statutory power is to adjust the parties' capital assets. If, for example, the husband owns shares, the court may wish the benefit of a proportion of these to be given to the wife. It may do this by ordering them to be transferred to her, but it may alternatively order him to make a lump sum payment to her. This makes no financial difference to the wife and it will leave the husband free to sell some of his shares or to raise the money in some other way if he prefers to do so. When the matrimonial home is the only capital asset and it is sold or the wife leaves and the husband remains, the court will commonly make an order for the payment of a lump sum representing the value of that part of the assets of which the other party is to be given the benefit....Lump sums will be commonly

ordered where one party has substantial means, but such an order might also be the best solution if the husband has a little capital(for example, the proceeds of sale of the matrimonial home) but little or no income: the capital may be of real value to the wife, because it will give her some financial base, whilst the husband will be relieved of the obligation of finding continuing support for her out of meager earnings.”

39. I shall firstly have to resolve, if possible, the factual disputes mentioned in paragraphs 32 and 33 above. As regards the question referred to in paragraph 32, of whether there are reasons relating to Ryan’s welfare dictating that he should attend, or should have attended the University of Charleston as opposed to a tertiary institution here in Jamaica, I am of the view that the evidence and information placed before me do not enable me to make a firm determination in that regard. I am not in a position to say whether the course offered at the University of Charleston allows Ryan to pursue Graduate studies specializing in Artificial Intelligence and Programme Language more than the course at the University of the West Indies would have equipped him to pursue. Similarly, I cannot say whether the course in Information Technology/Research Programme at the University of Charleston better allows Ryan to fulfill the career objective which the mother claims he has, i.e. to develop and design microprocessors. I am also not in a position to confirm or deny whether as the father says a B.S.C. in Computer Science is more recognized than a B.S.C. in Information Technology. This is not therefore a factual issue that I will attempt to resolve. If I had material before me which would have enabled a resolution of this issue a related consideration would have been the relevant expectations of the parties regarding Ryan’s education whilst they both cohabited, and indeed, the history and characteristics of the parties’ own education path and that of the other children. However,

based upon my resolution of the factual issue outlined at paragraph 33 above, the fact that I am unable to say whether Ryan's welfare dictates that he should have attended the University of Charleston in the U.S.A. or a tertiary institution here in Jamaica, is not crucial to a resolution of the substantive disputes between the parties.

40. I have had the opportunity of seeing and hearing the parties and on the issue of credibility, I find the mother more credible than the father. The mother states that she and the father discussed the issue of Ryan going abroad to study, but the father denies this. I did not find the father's demeanor credible when he denied this discussion in his Affidavit evidence and in cross-examination. On the other hand, I found the mother gave her evidence in a forthright and convincing manner, making reasonable concessions where the circumstances demanded same. Importantly, on the issue of credibility, it is obvious that in a number of his Affidavits where the father claims to have been paying the mortgage solely, indeed in the submission which the father allowed his Attorney to advance to the effect that he had been paying the mortgage alone up to the date of the hearing, the father was not being truthful with the court and sought to use the excuse of alleged payment of the mortgage by him to bolster his claim of being unable to pay more towards Ryan's maintenance. In addition, I find it difficult to accept that the father would have written the letter to the U.S. Embassy if there was no discussion with him about Ryan studying abroad. Further, although his attempt to seek a loan from his employer was unsuccessful, in paragraph 3 of his Affidavit sworn to on the 15th November 2006, the father states that he sought a loan from his employer in relation to Ryan's studies abroad. I find as a fact that the mother and father did discuss the matter of Ryan going abroad to study at the University of Charleston, the father provided documentation to the U.S. Embassy and that the father supported the decision and agreed with the mother that Ryan should pursue his studies abroad as Ryan has in fact been doing. I

accept that the father had agreed to assist in whatever way possible with Ryan's studies abroad.

41. Having made a finding of fact that the matter of Ryan studying abroad was discussed and agreed between the parties, then the applicable principle is, as discussed in the Australian text referred to at paragraph 31 above, that the father is liable to contribute to the fees involved so long as and to the extent that he has a reasonable financial capacity to do so. I accept the mother's evidence that the total reasonable costs relating to Ryan's education in the U.S. and/ or maintenance costs in respect of which the father is liable to contribute, is J\$6,004,400.00.

42. I accept Miss Jordan's submission on behalf of the mother that the father's earnings and resources are more than what he has stated in his Affidavits. However, I do accept that the father's earnings are not large, certainly not much over \$100,000.00 per month and that his necessary expenses do significantly consume his earnings. This therefore in my judgment seems to be an appropriate case in which the Court should order a lump sum payment to adjust the parties' capital assets. Payment of the lump sum would represent the value of that part of the assets of the matrimonial home belonging to the father of which the mother is to be given the benefit. This would seem to be the best solution since the husband has a little capital, but only a small income. This capital will be of real value to the mother, as it will give her a sound financial base, whilst it will relieve the father of the obligation of finding continuing support or contribution out of his insubstantial earnings.

43. In my judgment the issues involved in this case should be answered as follows:

- b. The father should be ordered to pay a lump sum payment rather than periodic maintenance.
- c. The father should be required to reimburse the mother for sums already expended by

her in relation to Ryan's education in the United States and this should be covered and included in the lump sum.

- d. The father should be required to contribute to the cost of Ryan's education in the United States.
- e. The father does appear to owe some monies to the mother based on previous orders made, after credit is given to him for mortgage payments which he has in fact made on behalf of the wife.

44. In paragraph 9 of his Affidavit sworn to on the 30th January 2008, the father refers to the fact that C.D. Alexander Realty Co. Ltd. had valued the matrimonial property at \$9.4 Million dollars. The father claims that in fact the market value of the property is closer to \$17 Million. In her Affidavit sworn to on the 28th February 2008, the mother refers to and exhibits correspondence from BNS regarding the Loan balances on the mortgage accounts. This correspondence indicates that the total loan balances on the mortgage accounts is \$4,372,271.65 together with arrears of \$410,097.73. The parties' equity in the property is therefore at least \$4.6 Million dollars collectively, and at least \$2.3 Million individually. In my judgment the father should pay to the wife a lump sum of \$2 Million dollars representing a portion of that part of the capital asset of the matrimonial home belonging to the father of which the mother is to be given the benefit. Practically, if the mother is choosing to buy the father's share in the property then she would pay him the appropriate valuation price of his 50% share less this \$2 Million. If the premises are sold on the open market, then \$2 Million of the father's portion of the proceeds of sale would belong to her. In all the circumstances it seems to me that this is the most just and fair

approach, a broad approach, to be taken to resolve this matter finally between the parties.

45. My orders are therefore as follows:

- a. On the Fixed Date Claim Form filed on behalf of the Claimant/mother, the Respondent/father is to make a lump sum payment to the Claimant in the sum of \$2 Million in respect of maintenance of Ryan, including sums already expended by the mother on Ryan's education abroad. This sum represents a part of the Respondent's 50 % share in the equity of the matrimonial home at 37 Lily Way, Mona Heights, of which the Claimant is to be given the benefit.
- b. The Defendant's Application for Court Orders filed December 1 2006 is dismissed.
- c. Liberty to Apply.