IN THE PROVIDENCIALES MAGISTRATES COURT
PROVIDENCIALES
THE TURKS AND CAICOS ISLANDS **NO: 408/02 & 583/02**

IN THE MATTER OF SECTIONS 3(a) and 3(b) OF THE DOMESTIC PROCEEDINGS ORDINANCE, CHAPTER 89 OF THE LAWS OF THE TURKS ANC CAICOS ISLANDS 1998 REVISED EDITION

BETWEEN:-

ELIZABETH KOHLI **Applicant**

-AND-

STEPHEN BRETT KOHLI **Respondent**

MR JONATHAN KATAN appeared for THE APPLICANT

MR CONRAD GRIFFITHS appeared for THE RESPONDENT

JUDGMENT

Handed down 30th day of July 2002

Background & Preliminary Issues

This matter concerns applications made by the British Applicant Mother, Elizabeth Kohli (aged 34) for maintenance for herself and the children of the family from the Canadian Respondent father, Mr Stephen Kohli (aged 41). The parties were married in September 1991 in Bermuda and separated at the end of December 2001/early January 2002. The family still resides in the Turks and Caicos Islands. There are no pending divorce proceedings before the Courts.

The Applicant filed an application for maintenance pursuant to *Section 3(b) of the Domestic Proceedings Ordinance* in relation to the four children of the family namely, Thomas aged 9, Joanna aged 6, Jack aged 5 and Samantha aged 3. This application was filed on 28th February 2002 and served on Mr Kohli on 8th April 2002. The Mother contends that the Father has failed to provide, or to make a proper contribution towards reasonable maintenance for any of the children. The matter came before the Court on 12th April and was adjourned to 3rd May 2002 for hearing. Mrs Kohli subsequently issued a summons seeking maintenance for herself pursuant to *Section 3(a) of the Domestic Proceedings Ordinance.* This summons was issued on 22nd April 2002 and although service of the same is accepted the actual date of service is not clear from the Court papers or oral evidence given. On 3rd May 2002 both summonses came before the Court when the hearing was adjourned to 30th May to enable the mother to obtain legal representation. Mrs Kohli contends that Mr Kohli has failed to provide reasonable maintenance for her. Mrs Kohli, as confirmed in the written submissions of Mr Katan, is seeking a global figure of $1,700 per month maintenance. Mr Kohli argues that no orders for maintenance should be made as the grounds for making orders pursuant to the above sections of the Ordinance have not been made out. If required to pay maintenance, Mr Kohli indicated in oral evidence that a monthly 'global figure' he would feel 'comfortable paying' under the circumstances set out in document Schedule 2 *(p58 bundle)* would be $1,015.50. Mr Griffiths' written submissions do not disclose a figure save to state that the current voluntary monthly sum of $600 is reasonable.

The hearing commenced on 30th May 2002 when the Court received the oral evidence of Mrs Kohli. On 13th June Mr Adrian Corr and Miss Avril Whittingham gave evidence on behalf of the Mother and Mr George Headlam and Mr Martin Reagan gave evidence on behalf of the Father. The matter was further adjourned to 2nd July 2002 when the Court heard Mr Kohli's evidence in chief. Mr Kohli completed his evidence on 3rd July 2002 and thereafter Counsel presented their closing oral and written submissions.

Unfortunately, this relatively straight forward maintenance hearing has appeared to have taken a path of its own, resulting in the Court hearing rather more detailed evidence than would be the norm for this type of application within this jurisdiction. Additionally, the Court has received evidence from four expert witnesses who are in some way connected to the insurance industry on the Turks and Caicos Islands. Although a helpful non-agreed

bundle was filed on the first morning of the hearing, further documentation has been produced in a disorganised manner throughout the trial. This Court is concerned about the unstructured way in which this hearing has developed and the resultant cost to these litigants especially when one considers the issues and the quantum of maintenance involved. In future, as a matter of good practice, serious thought should be given by Counsel to following the relevant requirements of the *Practice Direction (Family Proceedings: Court Bundles) (2000) 1FLR 536* in relation to the preparation of court bundles for hearings with a time estimate of half a day or more. Consideration may now need to be given by the Court to passing rules to adopt the forms and procedure relating to applications brought under the mirror legislation in England and Wales, namely the *Domestic Proceedings and Magistrate's Court Act 1978.* For the record I indicate that all future domestic proceedings shall be heard in Chambers pursuant to *Section 48(1) and (2) of the Domestic Proceedings Ordinance* and during this matter no members of the public were noted as being present during the hearing.

However, I do note paragraph 2 of the written submissions submitted by Mr Griffiths and agree that any potential orders have 'far wider implications' and may have 'dramatic consequences.' This has no doubt resulted in the hearing taking on the complexion of a fully contested ancillary relief case although here without consideration of capital assets. With this in mind I view it as necessary to prepare and hand down this full and rather lengthy written judgment in which I will adjudicate on issues to date, which I hope will act as a guide to any future tribunal and which will assist Mr and Mrs Kohli to comprehend the law and reasoning behind this Court's decision.

I feel it right to comment on a further issue which has also occupied a great deal of the Court's time in this matter and which has resulted directly from the rather haphazard manner in which expert witnesses and documentary evidence have been produced before the Court. Both Counsel have quite rightly referred me, on more than one occasion, to *Section 16 of the Evidence Ordinance 2001* either to support or oppose the introduction of certain documents. The Court, in cases where the welfare of the child is the first consideration, should take a flexible and generous approach when dealing with the admissibility of and weight to be placed upon this type of hearsay evidence. The Court is mindful of the reasons why the eminently sensible *Children (Admissibility of Hearsay Evidence) Order 1993* was introduced in England and Wales.

The Applicant's Evidence

The Applicant indicates that as the parties' relationship came to an end that she was involved in a number of discussions with Mr Kohli concerning future arrangements. Mrs Kohli accepts that she vacated the former matrimonial home but was not in desertion as it was by consent. The Applicant contends that the children have enjoyed equal staying access with the parents. A great deal of evidence was given concerning child guidance discussions with Dr Slattery. With respect to Dr Slattery, I pay little regard to the content of those discussions and note that he appears to have no relevant qualification in either child psychiatry or child psychology. *Pages 1 to 17 of the bundle* include copies of emails

and letters from Mr Kohli to Mrs Kohli. The Applicant does not accept that they are an accurate reflection of any agreement but are more a record of what the Respondent wanted. Mr Katan contended that the Respondent was compared to his client in a position of strength due to his many years in the accountancy profession and because he was the paramount salary earner for the family.

Mrs Kohli stated that she received no maintenance in January 2002, February 2002, and March 2002 and thereafter has benefited from a global monthly sum of $600 per month. The Applicant accepts that she received $950, being one half of the returned damage deposit from Bimini House, the former rented matrimonial home. In December 2001 and January 2002 Mrs Kohli collapsed the CMARSP pension apparently valued at Can$44,222.28 (US$28,638.29 (but she stated received US$22,000, Mr Kohli estimates US$20,000 –*page 2 bundle*)) taken out in her sole name but solely contributed to by Mr Kohli. She says that this was not in lieu of maintenance payments and that she had no choice but to reluctantly collapse the fund as there was no satisfactory arrangement for maintenance with Mr Kohli and that she did not receive her first salary payment until the end of March 2002. When cross-examined she stated, "fact that I could live off the $22,000 from the pension was discussed by Mr Kohli, he told me what to do and I accept it. It is in his nature to command." The Applicant stated that apart from using the money for living expenses in January to March 2002 that the initial expense of setting up her new home was $4,660 with an additional $460 for a bunk bed and that by the end July and after the deduction of most legal expenses only $2,600 will be left.

On the issue of accommodation, Mrs Kohli stated that she had looked at different properties charging less than her current monthly rent of $1,400. Her evidence is that she felt unable to accept ground floor accommodation such as Mr Kohli's Richmond Hill home for security reasons and that she did not wish to live in Long Bay which she perceived as an isolated area. Her current view, even during cross-examination when she was shown the property particulars *from page 27 to 34 of the bundle,* is that the average rent for a two-bedroom apartment is "$1,550 plus change."

I was referred to the Applicant's curriculum vitae which was prepared 'to target ' her current employer *(page 38 bundle).* It appears from the face of that document that, prior to undertaking some voluntary work and taking up her current position, that Mrs Kohli had not worked since 1993. Her previous expertise is in the captive insurance sector and that she worked as an account handler for R K Clarvill & Co. Ltd in London from 1987-1991 (not from 1989 as written) and thereafter as an underwriter in Bermuda, a jurisdiction with traditionally high salaries, where she was earning $40,000 (tax free) per annum. She left employment, with the consent of Mr Kohli, when she was aged 25 in 1993 following the birth of their eldest child. It is clear that she is computer literate and from the manner that she gave her evidence that she is an intelligent lady with a great deal to offer in the workplace. The Applicant contends that the captive insurance market in the jurisdiction is too small and that there are no current or foreseeable vacancies for her. The Applicant highlighted that she does not have any internationally recognized paper qualifications and that she would have a problem with obtaining a work permit for any employment in the insurance market. In cross-examination Mrs Kohli conceded that

she had not made any formal job applications or circulated her curriculum vitae to anybody in the insurance industry since receipt of the letter from Misick and Stanbrook dated April 24, 2002 *(pages 39-42 bundle).* The Applicant stressed that her current position as Football Administrator for the Turks & Caicos Islands Football Association, which she accepted in December 2001, is not just a hobby and that she fitted the criteria set out in the related job advertisement (which she helped prepare) which appeared in the Weekly News *(page 26 bundle*). Mrs Kohli's income is $24,000 per annum tax-free. No evidence was put before the Court about her National Insurance contributions. Mrs Kohli contends that Mr Kohli had initially supported her wishes to take up this employment as evidenced by his comments in the third paragraph of his email dated December 28th on *page 3 of the bundle.* The Applicant stated that her employers are very flexible and permit her to work shorter hours during the time that the children are residing with her as long as she makes the time up the following week.

Mrs Kohli referred to the schedule on *page 55 of the bundle* as an accurate record of her income and outgoings. She highlighted that she is unable to contribute towards a pension or car replacement fund. The Applicant indicated that she felt her reasonable monthly outgoings to total $3,570.50 leaving a shortfall after her salary of $1,570.50. Her itemized outgoings, save for house rent are the same or less than those being claimed by the Respondent. Mr Kohli indicated that she wished to be financially independent from the Respondent. The applicant stated in cross-examination that she had no complaint with the budget presented by Mr Kohli *(page 36 of bundle*) save for car replacement, medical emergency fund, loan principal, KPMG pension, occasional expense fund and the level of child support. Although there is a need in the future to replace one of the vehicle's which is unsuitable for four children, Mrs Kohli felt that this should not be provided for at this stage. In relation to the medical fund she felt it would be acceptable if it meant that the parents could travel with the child but that she would prefer to be able to set up her own fund from any maintenance she received.

The Respondent's Evidence

Mr Kohli is an employee of KPMG with a current salary of $90,000 tax free raised from an initial level of $75,000. Under his employment contract, which expires in 2004, it was agreed that this annual salary would rise to $105,000 in January 2003 and to $120,000 in January 2004. Bonuses were also written into his contract and they can range from 0% to 20%. A copy of the contract was not placed before the Court. Mr Kohli stated that his employer has expressed concern about the detrimental effect of his marital breakdown on his work performance and in particular his unavailability when he has responsibility for the children and as a consequence KPMG may not increase his salary as contractually bound. In addition Mr Kohli indicated that the level of his bonus, if any, for the year ending 2001 is still to be determined. He stated that his employer would not be making a decision about his bonus rather surprisingly until the conclusion of these proceedings. It is a great pity that there was no evidence from Mr Kohli's employer before the court on the issue of the variation of the contractual agreement as to future salary increases, the

level of his 2001 bonus and the reasons for what appears to be an unreasonable seven month delay in determining the size of his bonus for last year. I have to say that I did find that KPMG'S indication made to Mr Kohli and then expressed in writing to Mrs Kohli that they felt that it was inappropriate for a senior accounting professional to be before the Court on matrimonial matters to be inexcusable, as it was not only unhelpful to the Court but also places uncalled for pressures on Mr Kohli in what are already very trying circumstances for him. The regrettable attitude taken by the management at KPMG towards the Court, it's functions and the services it offers to all members of the community clearly may not have helped Mr Kohli in preparing his case appropriately.

Mr Kohli indicated that in Bermuda, before Thomas was born, that the initial intention had been for Mrs Kohli to remain at work. There were difficulties obtaining a babysitter and Mrs Kohli told Mr Kohli that she wanted to stay at home and look after Thomas. Mr Kohli conceded that there was a joint decision that Mrs Kohli would leave work to raise the family.

The Respondent reminded the Court that Mrs Kohli had an R K Carvill and Co. employee pension plan with Equitable Life with a fund value of UK£12,968.00 (US$20,345.65) as of 1 January 1998 *(page 20 bundle).* No further contributions have been made to that fund and the current value will be slightly but not dramatically more. Mrs Kohli should still have attempted to obtain a more up to date statement. Mr Kohli had a pension plan in his sole name with CMARSP which had a value of Can$19,115.77 (US$12,380.10) as of 28th March 2002 *(pages 24-25 bundle*). Unlike Mrs Kohli's larger CMARSP pension valued at Can$44,222.28 (US$28,638.29) this plan is locked in until retirement age and cannot be collapsed. The pension plans were set up as an income splitting strategy with Mr Kohli making all payments. The Respondent contends that the parties looked at their assets and liabilities and agreed that the only possible way forward was to collapse her fund to enable her to meet her daily expenses. Mr Kohli indicated that he felt that Mrs Kohli might also be entitled to aUS£1,000 tax refund. The Respondent has just started payments into a potentially valuable KPMG pension, which to this date may only have a small value. There is no pension policy statement before the Court in relation to this plan. What is clear is that he is currently paying $312.50 into the pension which is being matched by his employer.

Mr Kohli emphasized that there is a further joint asset, namely land, currently held in a corporation owned by KPMG nominees called 'Seahorse Holidays.' The land was purchased in June 2001with a view to later building on it. Both parties agree that a joint loan not gift was obtained from Mr Kohli's parents to enable them to purchase the land. Mr Kohli drew the Court's attention to the Powerline Account Statement *(page 18 bundle).* This document shows a debit for the purchase of Can$61,586 (US$39,879.48) on 22nd June 2001. The Powerline Account, which is in his parents' name, is also used by his parents for meeting his credit card liabilities. The balance owed on the account on18th April 2002 was Can$77,080.96 (US$49,917). It should be noted that the account also has a credit entry of Can$19,596 (US$12,960.48) on 27th June 2002 which Mr Kohli received from an investment property purchased before the marriage in 1986. Both parties accept that this Powerline Account should be cleared from the sale of the land. The total capital

and interest minimum monthly payments which have to be made to this account amount to around Can$478 (US$309.55) (see entry 18-Apr-02) and Mr Kohli wishes to pay US$500 per month. Mr Kohli wishes the property to be resold, equity to be first used to clear the Powerline account and then split the balance equally with Mrs Kohli, even if Mrs Kohli fails to assist with the ongoing monthly repayments. There is no valuation of the land before the Court but one can determine that if the equity were used to clear the Powerline debt which stood at US$ 49,917 that the balance for division would not be considerable (Mr Kohli estimated it at $6,000 each- *page 2 bundle*).

Mr Kohli introduced the emails and a number of schedules contained in the bundle into evidence. I do not intend to reproduce the contents in detail herein but have carefully scrutinized them all. The email of 21 December 2001 *(page1 bundle)* was drafted after separation had been agreed upon and refers to some previously provided preliminary figures. These figures are contained in the projected budget *(page 65 bundle)* and estimated monthly maintenance of $1,600. At that stage Mrs Kohli was not working and had no income and Mr Kohli contends that the document was presented as support for twelve months. In his later email of 28th December 2001 (pages 2-3 bundle) an indication is given that the earlier figures may have to be revised and that she would receive $20,000 from collapsing her RRSP in Canada. Mr Kohli further contends that the emails on *page 11 bundle* and the receipt on *page 16 bundle* show that Mrs Kohli agreed to the 'scenario' put forward by him on February 27th 2002, namely that he would pay $600 monthly maintenance and inferred that she accepted that the Canadian RRSP should be regarded as capitalized maintenance. It does appear that Mrs Kohli contends in her evidence that there was not an agreement but a forced 'acceptance' of Mr Kohli's proposals and also it seems that both parties may have left the discussions with a differing view of their outcome as they did not have a mutual understanding about the term of the $600 payment (*Paragraph 2 page 16 bundle*). I note that Mr Kohli says that the curtailed February meeting did not go well and that the three proposals 'on the table' for discussion were his proposals. He added that at the meeting Mrs Kohli said that none of the scenarios were good enough and that she mentioned using the Court to resolve the matter.

Mr Kohli resides in a two-bedroom ground floor apartment in Richmond Hills which he rents for $1,000 per month. In fact Mrs Kohli had viewed the same property but rejected it as she had concerns about security. Mr Kohli stated in evidence that Mrs Kohli could find suitable two-bedroom accommodation for between $1,000 to $1,200. He also criticized Mrs Kohli for vacating the matrimonial home although he refused to vacate it himself and for not consenting to what he termed the 'revolving parent option' using the former matrimonial home as the base.

It is clear that Mr Kohli has commendably taken over the responsibility for meeting the large school bill for the children who attend the Ashcroft School. The annual school fees will rise to $20,225 and he will probably have to pay an additional 5% for payment by installments (total around $1,769/ month or $21,236/annum). Both of the parties wish the children to remain at the Ashcroft School despite the fact that the fees are high relative to other private schools on Providenciales. It appears that the Respondent has also been

paying the school holiday child-care but he agrees that the Applicant should now take responsibility for day care when the children are with her.

Mr Kohli submits that he needs to place $300 per month into a car replacement fund to enable him to purchase a second-hand larger vehicle which is suitable to carry four children. At present the parties exchange the larger family car dependent on who the children reside with as it is agreed that the second car is not suitable for carrying the children.

The Applicant argues that he needs to pay $200 per month into an emergency medical fund. This will enable the parents to be able to travel 'off-island' with an ill child if the need arises.

Mr Kohli also referred the court to a number of budget schedules which he prepared using his skills as an experienced accountant prior to and during the course of this hearing. I have studied *pages 57-60 of the bundle* which he prepared in response to Mrs Kohli's submitted budget on *page 55 of the bundle*. I have also had regard to Mr Kohli's budget dated 4/1/02 *(page 36 bundle)* which he drafted after receipt of the Applicant's budget *(page 35 bundle)*. In cross-examination Mr Kohli indicated that he would feel comfortable paying a "global maintenance" figure of $1,015.30 in the circumstances set out in his budget *Schedule 2 (page 58 bundle)*.

Under cross examination Mr Kohli admitted that he could have reviewed his bank statements at the end of February to see if he had funds available out of his salary to pay maintenance. However, he did not do this as he was waiting for a meeting with Mrs Kohli to review the position. He then stated that he had a balance of $1,420.66 showing on his statement on 30th January and that 'perhaps' he could have paid that to Mrs Kohli but added that one should also look at the loan and credit card activity. He conceded that at the end of February there was a bank balance of $930.05 and that he could have written a maintenance cheque for $930. At the end of March he further conceded that there was a balance of £3,940. What is clear from the account Transactions CIBC Chequing, at *pages 68 to 70 of the bundle,* that significant payments were being made into a car replacement fund and the medical emergency fund. At the end of April the credit balance in the account had reduced to $19.92 as he paid $2,000 into the loan at the request of his parents. It appears from the account transaction statement submitted by Mr Kohli *(page 69 bundle)* that the $2,000 cheque cleared on 15th April 2002 but that interestingly the request for the payment from his parent's was not made until their email of 19th April 2002 *(page 17 bundle)*. Mr Kohli was served with the summons for the proceedings in relation to child maintenance on 8th April and also he indicated in his email dated March 27th *(page 10 bundle)* that he thought that the matter would be going to court for resolution.

Mr Kohli believes that Mrs Kohli could obtain alternative better-paid employment. He accepts that she left her previous employment by consent and that during the past eight years and prior to her present job that there had been no discussions, save for a foray into the Tupperware market, about her going back to work. To his credit, Mr Kohli readily

accepts that her contribution as a homemaker over the last eight years is an equal family contribution to his financial contribution.

The Experts' Evidence

Both parties introduced evidence from two witnesses with connections to the insurance industry in the Turks and Caicos Islands. The purpose of the evidence was to assist the Court with determining the likelihood of Mrs Kohli finding employment within the jurisdiction in the captive or domestic insurance industries within the foreseeable future. Although I found the evidence of the four witnesses interesting it was inconclusive and in the end of little value and I do not intend to outline it in any detail herein. I cannot say whether I preferred the evidence of one witness over the other, save that the presentation by Mrs Whittingham of her evidence was a little brittle and defensive but I gained the impression that that might be her natural demeanor in the pressurized court setting. The conclusion I was left with was that there may be employment opportunities for a non-Belonger over the next twelve months but on the other-hand that there may not! It does not appear that the captive market is likely to offer up much hope of employment in the foreseeable future and that if there were to be vacancies it would be in sales or administration in the domestic market. I could also not ascertain with any degree of certainty what salary a person with Mrs Kohli's experience would be likely to receive. Mr Headlam did say that a person of her experience might receive $36,000 and that in Brittam a person with similar experience had been earning $30,000 as an administrator but that a less experienced administrator was earning only $20,000. Mr Reagan stated that his new employee is paid $25,000 but after eighteen months, with good performance, a bonus could take that up to $35,000. Mrs Whittingham stated that in domestic insurance a salary of $20,000 to $24,000 might be expected and that $36,000 was unlikely. I am afraid this expert evidence did not particularly assist me with my deliberations and that not one of the experts' evidence stood out above the others.

The Law

Both Counsel strove to define what the meaning of maintenance is. *Scott L.J. in Acworth v Acworth (1943) p.21, C.A, at p.22* stated, "Maintenance is a very wide word, and, in my view, it should be read as covering everything which a wife may in reason want to do with the income which she enjoys. It includes much more than food, lodging, clothes, traveling, and so on. It includes, for instance, charity and making arrangements for the future, thus incurring various liabilities in her discretion, and it is wrong to limit it to any particular expenditure." *Harman J. in Re Borthwick, Borthwick v Beauvais (1949) 1 All ER 472 at pp 475, 476* stated, " maintenance does not only mean the food a wife puts in her mouth. It also means her clothes, the house in which she lives, and the money which she is to have in her pocket, all of which vary according to the means of her husband. Maintenance cannot mean only mere subsistence." In this case the Court must have regard, when considering what maintenance can cover, to the resources and needs of both

parents, who over the last couple of months have established a pattern of shared care for the children.

It is evident that, even post *Child Support Act 1991*, the equivalent legislation in England and Wales is the *Domestic Proceedings and Magistrate's Court Act 1978 (hereinafter DPMCA).* Thus, this Court when considering the *Domestic Proceedings Ordinance* may have regard to and seek guidance from the application and interpretation of the *DPMCA.* The Court will have initially to determine whether the grounds of the application are established. If the ground(s) is (are) made out then the law to be applied under the *DPMCA* with regard to the financial provision which the Court is empowered to make is, within the limits of the Court's jurisdiction, very similar to that applied by courts in relation to financial provision under the *Matrimonial Causes Act 1973 (as amended)(hereinafter MCA).* Within the limits of the jurisdiction the principles to be applied are the same and one is entitled to have regard to the application of the *Matrimonial Causes Act 1973 (Macey v Macey (1982) 3 FLR 7).* Of course, the Court does not have the power to make unrestricted lump sums and to make property adjustment orders. Therefore, it is accepted as a general rule, as endorsed in *Binder 4A Section 562 of 'Butterworths Family Law Service'*, that the amount of provision by way of periodical payments which is made by a spouse should be the same whether the proceedings are brought under the *DPMCA* or by way of ancillary relief application in proceedings for divorce nullity or judicial separation. Provided that such considerations are kept in mind it is perfectly proper to cite in the Magistrate's Court decisions which have been made in ancillary relief proceedings in the divorce court. Orders for periodical payments for children should also in general be in the same amounts irrespective of whether the application is made to the Magistrate under the *DPMCA* or to the divorce court under *Section 23 MCA* because, once again, the relevant provisions are the same. With the above in mind, I respectfully reject Mr Griffiths' submission that maintenance differs from periodical payments despite *Section 4(1) of the Ordinance* making specific provision for payment of periodical payments

What constitutes reasonable maintenance for the Applicant or the children or a proper contribution towards reasonable maintenance for the children of the family must be matters of fact to be decided by reference to the circumstances of each case. In deciding these questions the Court must make reference to precisely the same matters as those to which, by *Sections 5(2) and 5(3) Domestic Proceedings Ordinance*, it is directed to have regard in deciding whether, and if so how, to exercise its powers under *Section 3.* In other words, if the Respondent is paying an amount which at least corresponds with the amount the court would be inclined to order in the proper exercise of its powers, then he is making reasonable provision. If the amount he is paying is materially less than the Court would properly order, the Respondent is failing to provide reasonable maintenance or a proper contribution towards maintenance or a proper contribution towards reasonable maintenance, as the case may be, and, prima facie, an order should be made. These are continuing 'offences' and so the cause of action must be in existence, not only when the complaint is made, but also when it is heard.

When carrying out the *Section 5* exercise, the Court must do the best it can to see that no stone is left unturned insofar as it is financially relevant to the family. A valid way of performing this duty is to go through each of the statutory considerations seriatim, then to stand back and look at the composite picture in the light of 'all the circumstances' to decide what would be the right order *(Ormrod LJ in P v P (1978) 1 WLR 438 at 487-488)* I have considered each of the relevant considerations. It clearly would be highly inappropriate for the Court to adopt a practice of setting a rigid level of maintenance at $50 or any other amount for each child in this type of proceedings. If this practice has been viewed as a benchmark for the Court's approach in the past, I respectfully contend that the Court has been failing to carry out its required statutory duties and emphasize that I will not be adopting it. Under *Section 5 (1) of the Ordinance* the children's welfare is the 'first' consideration. But this does not mean that it must prevail over all the other considerations.

Sections 5(2) (a), 5(3)(b) and 5(3)(f) Domestic Proceedings Ordinance

This Section demands a review of the parties' incomes and earning capacity and what steps a party should reasonably be taking to increase their capacity. I find that the Respondent, a hard working individual, is currently in suitable employment and that the Court cannot reasonably expect him to seek additional or alternative work. However, the Court is aware that apart from his current income of $90,000 (Mr Katan in his submissions states $86,669), which had increased from $75,000, there is still the issue of his annual bonus for 2001 to be resolved. The matrimonial difficulties resulting in child care problems commenced towards the end 2001/early 2002 and thus there has been no good reason why Mr Kohli's bonus position has not been resolved to date. In addition the Court is aware that his income should increase next January to $105,000 and in January 2004 to $120,000. The Court notes and accepts Mr Kohli's undertaking to the Court to promptly give full details to Mrs Kohli of any bonus and/or salary increase when received. I do not accept, in the absence of any supporting evidence from his employer, that he will not receive a bonus for last year when he took on further duties such as financial administration and that his salary will not be raised in 2003 pursuant to his contract of employment. I am rather surprised that Mr Kohli, who on a number of occasions stressed to the Court his dire financial circumstances, has not pushed for a speedy resolution of the payment of his outstanding bonus seven months on. I do not accept, on the evidence before me, that KPMG for some illogical reason are waiting until the end of these unrelated domestic proceedings to decide what bonus (between 0-20%) he will receive. The impression is given that Mr Kohli may have been delaying clarification of these issues until after the Court hearing which unfortunately has hindered the Court's consideration of *Section 5(1)(a).*

Mrs Kohli is currently earning only $24,000 with the Football Federation. I do not criticize her for applying for and accepting that post in December 2001/January 2002 at a time when the marriage was encountering difficulties. It was reasonable for her to take up that post at that time and the income from that employment has no doubt proved invaluable during the seven month transitional period of setting up two households. The impression given to the Court was that she greatly enjoys her job which overlaps with her

main hobby. However, the Court must consider whether it is reasonable to expect her now to seek alternative better paid employment. The Court is aware, from the manner in which she gave her evidence, that she is a presentable and intelligent lady with communication skills which would be of great use to any potential employer. It is clear that she has, until recently, been out of the employment market for some eight years whilst 'working' as a full-time mother. She is not old and therefore her position can be distinguished from the wife in *Smith v Smith (1976) Fam Law 245, CA* where an earning capacity was not attached to the wife by the Court. The Court should give due weight to the fact that Mrs Kohli has had a reduction in her career prospects as a result of motherhood *(Barrett v Barrett (1988) 2 FLR 516, CA,* whilst Mr Kohli has progressed in his chosen profession of accountancy. Both parties are, save for their responsibilities for the children seeking a clean break. Of course this Court cannot deal with their capital assets but can seek to address the question of maintenance long-term in such away to give them financial independence. However, this means that both parties must find employment to their full capacity, which does not necessarily mean the type of employment with which they are particularly enamored. I did not find it appropriate for Counsel to disclose his client's apparent 'hatred' of the insurance industry to expert witnesses in the trial who may be considered as potential employers of his client. I disregard the effect that the questioning may have had on those employers and trust that Mrs Kohli will endeavor to apply to them if suitable vacancies arise. I also find that any inferences given by Mrs Kohli during her examination in chief concerning Mr Headlam's alleged conduct towards her to be without merit and any apparent foundation. This line of questioning was highly inappropriate and regrettable, as Counsel never put the 'allegations' to Mr Headlam during cross-examination. It appears that there is uncertainty about foreseeable prospects in the captive insurance market but that forthcoming vacancies may surface in the domestic insurance market. Mrs Kohli has the capability to work outside the insurance industry as shown by her current appointment. I was rather dissatisfied by Mrs Kohli's lack of desire to attempt to find alternative work as shown by the manner of the delivery her evidence and also her complete failure to research the employment market. Mrs Kohli it seems has not considered nor put any evidence before the Court about possible alternative employment and she cannot simply hide behind the understandable concern about work permits in a bid to retain her current enjoyable employment. I do find that the onus should now be on Mrs Kohli to constructively seek other better-paid employment and that a salary of $ 30,000 per annum would be feasible. A six-month period to February would seem reasonable. The applications for alternative employment should of course be done as far as possible in confidence, for if the Applicant were to lose her current employment the current family arrangements could well become untenable.

In relation to the parties property and resources. I note that the Applicant retains a United Kingdom 'frozen' employment pension which in 1998 had a value of around $20,345. I also note that she has had the benefit of a collapsed pension with CMARSP which Mr Kohli contends released @US$20,000. I have not seen a surrender statement to confirm the figure accurately as that figure appears less than that contained within the statement on *pages 22-23 of the bundle.* Mrs Kohli, through Counsel, contends that after the costs the balance remaining will be reduced from the current value of US$8,300 to US$2,600.

Mr Kohli has a non-collapsible CMARSP pension in his sole name with a value of around US$12,380. The Respondent also has a KPMG pension, with an undisclosed value, to which his contribution of $312.50/month is being met by a like contribution from his employer. Mr Kohli has pre-assessed legal costs of around $7,000. Mr Kohli also indicates that the parties have a joint interest in land which after repayment of the Powerline Account will leave an equity in the region of $12,000.

Mr Kohli contends that at the time of separation the parties agreed that the applicant would collapse the CMARSP pension held in her sole name, as evidenced by his emails of 21st and 28th December and his projected budget on *page 65 of the bundle*. I note that all of the said documents were prepared by Mr Kohli around December 2001 when Mrs Kohli had no salary. Mr Kohli contends that this pension, apparently unlike his own, should be considered as a joint asset and as capitalized maintenance as this is what he believed was agreed with Mrs Kohli at arms length. This Court, in the current proceedings, must be very careful not to encroach into the jurisdiction of the divorce court and deal with capital assets which it has no power to do (save for pursuant to *Section 4(1) (d) Ordinance*). The use by Mrs Kohli of that capital asset may well be of significance when the divorce court considers the division of the matrimonial capital assets in any future ancillary relief proceedings. I find it wrong to seek to deal with those capital assets 'through the back door' at these maintenance proceedings. I also find that Mrs Kohli was given little option but to utilize some of that capital asset to support her and the children and that to contend that she agreed to it being viewed as maintenance in these circumstances to be wrong. I do feel that Mr Kohli, who was clearly administering the family's finances, gave Mrs Kohli little option but to 'agree' to his suggestion that she draw on this asset, especially as he had not paid maintenance in January, February and March 2002. Mrs Kohli was entitled, if she had not been placed under financial duress, to insist that the pension be left in place until the hearing of the ancillary relief proceedings and remain intact like the capital pension provision of Mr Kohli. If these were ancillary relief proceedings, in this non-pension splitting or 'earmarking' jurisdiction, that Court would no doubt look at the collapsed and frozen pensions in Mrs Kohli's name and balance or off-set that against the non-collapsible and potentially lucrative KPMG pension for Mr Kohli and the equity from the sale from the land and consider how to balance the value of these assets with all other available capital. Mr Kohli did not disclose whether he believed Mrs Kohli's English pension and the pensions held in his sole name should be considered as joint assets. I do not view the use of this collapsed asset as 'capitalized maintenance' but re-iterate it may well draw the attention of the ancillary relief tribunal who will determine how to deal with arguments about the off-setting of a pension in a non-pension splitting or 'earmarking' jurisdiction. The position concerning a possible tax rebate of $1,000 related to the collapsed pension was too unclear on the evidence and is not accepted as a foreseeable source of income.

Pursuant to *Section 5 (3) (b) of the Ordinance* I find that the children do not have an income, earning capacity nor any relevant property and financial resources.

Section 5(2) (b) and 5(3)(f) of the Domestic Proceedings Ordinance

When considering the financial needs, obligations and responsibilities of the families now and in the foreseeable future I treat the parent's as equally sharing the physical care of the four children of the family. I also have regard to the schedules of outgoings contained in the bundle along with both parties' desire to try to separate their respective finances. It does appear that there are on the whole only minor issues between the parties about their disclosed outgoings (*page 36 for the Respondent, page 55 for the Applicant*). It is the duty of the Court to also consider the reasonableness of those figures.

Mr Kohli's income is agreed currently to be $90,000/annum ($7,500/month).
It is clear that the school fees have now gone up to around $1,769 per month with a one off $600 text book fee but that there would then be no additional cost for Samantha's childcare which was declared at $1,950 per annum (*see 58 and 36 bundle*). The childcare costs for all the children would reduce from $3,000 to $1,120 with Mrs Kohli assuming responsibility for a like sum. It does seem reasonable to expect both parents to take their vacations during the school holidays.

I find that the husband has found reasonable accommodation for himself and the children. Although I do not criticize Mrs Kohli for trying to locate comfortable accommodation for her and the children, I do find that Mrs Kohli could find cheaper two-bedroom accommodation. I do not accept her arguments about security within this jurisdiction and have regard to the fact that the apartment turned down by her and now occupied by Mr Kohli had been previously occupied by a single lady. Having studied the rental property particulars on *pages 27 to 34 of the bundle,* having regard to the cost of any move and having considered the unfortunately unsettling affects on the children of a further move, I still accept Mr Kohli's evidence that an alternative suitable monthly rental property should be found for $1,000 to $1,200.

The Court has heard a great deal in relation to the debts to Mr Kohli's parents as a consequence of the purchase of the Leeward property and credit card repayments. In considering *Section 5(1) (b)* the Court does not exercise a quasi bankruptcy jurisdiction and it would be wrong to prefer the claims of creditors over those of Mrs Kohli and the children (*Mullard v Mullard (1982) 3 FLR 330,CA* – a case in ancillary relief proceedings). It follows that the there is no power to order one party to pay the unsecured debts (*Burton v Burton (1986) 2 FLR 419, CA*). Debts will of course be a part of the needs of a party but the court differentiates between a hard debts which have to be repaid on commercial terms and soft family debts, when approaching such needs (*M V B (Ancillary Proceedings: Lump Sum) (1998) 1 FCR 213).* However, I note the acceptance of Mrs Kohli that this is a joint debt that must be paid off. The proposal is that as soon as the land in Leeward is sold that the equity will be used to clear the Powerline liability. Meanwhile Mr Kohli must be permitted to pay a reasonable sum to his parents to ensure that at least they can make the monthly minimum payments. I do not accept that a monthly sum of US$500 per month is required but set the figure to match that of 18 Apr 02 *(page 18 bundle)* namely, US$310 (Can$478). This will enable payment of the interest and a part of the capital. Despite what Mr Kohli has said to the Court about his intention

to divide the equity of the property equally after the Powerline debt has been repaid, he would be entitled to invite a later tribunal which was considering the division of matrimonial capital assets to take into account all payments made by him towards discharging that debt. I feel that whilst the loan is protected by the equity in the property that repayment of the loan over and above the amount outlined enough is not a priority at this trying time.

I accept that the concept of setting up a car replacement fund is a commendable one. I also have regard to the fact that one of the two family vehicles is too small for its intended use and that both parties seek to have motoring independence. If one looks beyond the immediate replacement vehicle, it would be ideal if both parties could establish similar funds. I do not believe that this fund is of the utmost urgency and have regard to the fact that Mr Kohli, should in the view of the Court and for the reasons expressed hereinbefore, be able to draw on a bonus payable for last year and can expect an increase in salary in January. This type of fund may more appropriately commence for both parties in the new-year after a salary increase for Mr Kohli and following my finding that Mrs Kohli must find better rewarded employment with an immediate replacement vehicle coming from any bonus payment received. I should add that I make the same findings and comments in relation to the parties setting up their own medical emergency funds. I note that Mr Kohli has to his credit ensured that the children and Mrs Kohli are still covered by his employer's group medical insurance.

I find that at 41 years of age that Mr Kohli is entitled to invest in his KPMG pension fund. This is also relevant when I considered how the collapsed pension in Mrs Kohli's sole name should be considered in these proceedings.

I have carefully considered the budget filed by Mr Kohli which can be found on *page 36 of the bundle*, which he, in cross-examination, said, was a 'fair reflection' of his expenses. I find that the childcare figure for Samantha can be deleted (*note 1 page 58 bundle*), that the childcare figure for the children can be reduced by $1880 to $1,200 *(note 2 page 58 bundle)*, that the loan interest and loan principal should be reduced from a global sum of $500/month to $310 per month ($6,000 to $3,720), the vague entry for 'miscellaneous other' of $1,100 should be suspended until February 2003. I find that the car replacement fund should not be given priority until February 2003 and the same should apply for the emergency healthcare fund which should be reduced to $1,200 bringing it into line with the figure deemed appropriate for Mrs Kohli (*page 58 bundle*). In addition the car insurance figure should be reduced by $400 to $500 and petrol should be reduced by $540 to $960 in line with the figures deemed suitable by Mr Kohli for Mrs Kohli and as both parties will soon have sole responsibility for their respective vehicle. I find that a one off figure of $600 should be added for schoolbooks and that the figure for school fees should be increased by $2,214 to $21,228. The current outgoing figure should be amended to $73,050.24, leaving disposable annual income prior to 'maintenance' deductions of $16,849.76. ($1,404.15 per month). On the current income that figure will reduce in February to $11,149.76 ($945.81/month) but when the contractual salary increase is forthcoming it should rise to $26,349.76 ($2,195.81).

I have carefully considered Mrs Kohli's budget (*page 55 bundle*) and the schedule 2 prepared by Mr Kohli (*page 58 bundle*). Mr Kohli in cross-examination stated that the Applicant's outgoings on *page 55 bundle* 'appear to be accurate' and that he did not have a difficulty with the figures on *page 58 of the bundle*. I find that the salary figure should be maintained at the same level until February 2003 when an increased figure of $30,000 will be appropriate. I consider the question of reasonable outgoings using the schedule on *pages 55 and 58 of the bundle* as a basis. The figure of $480 for Samantha's daycare should be deleted, the figure for all of the children's care should be reduced by $1,380 to $1,120. The rental figure should be retained at $1,400 until February 2002 when the figure of $1,200 (annual $16,800 to $14,400 would be appropriate. The paying of a sum of $1,200 for a newly set up emergency healthcare fund should be delayed until February 2003 and that a sum of $3,300 be then included for a car replacement fund. I find that Mrs Kohli should be able from February to invest in a new pension fund and having regard to her age in comparison to Mr Kohli and the amounts already received from the collapsed CMARSP pension from which she should have retained some of the proceeds to set up a new fund) a figure of $100 per month ($1,200) is appropriate. I find that her annual grocery bill should be similar to Mr Kohli's and be increased by $1,342 to $10,078 ($839.83). From February 2003 she should also have provision for miscellaneous other at $1,100 ($41.66) as set out in Mr Kohli's budget on *page 36 bundle*. The reasonable outgoing figure including the above changes will be $41,128.83 ($3,427.48/month). On Mrs Kohli's current income that will leave an annual deficit of $17,128.83 ($1,427.48/month). In February 2003, when I find that Mrs Kohli's salary should increase to $30,000 and in the light of the other adjustments outlined above, the annual outgoings will be $45,528.83 ($3,794.07/month) leaving a shortfall of $15,528.83 ($1,294.07/Month).

Sections 5 (2) (c), 5 (3) (d) and Section 5 (3) (e) Domestic Proceedings Ordinance

The Court must have regard to the standard of living enjoyed by the parties and the family before the alleged occurrence of the alleged failure to provide reasonable maintenance or make a proper contribution towards, reasonable maintenance for any child of the family. It is very difficult to adjudge what the standard of living of the family was just before the alleged conduct leading to the ground of the application as their domestic situation was in upheaval. The parties' separation had just happened and they were setting up two separate households. What seems evident was that the parties were experiencing financial difficulties when together which were accentuated by their separation but also in some ways reduced by Mrs Kohli finding employment. Although not a consideration under this Section, I note that the parties had before the relevant time enjoyed a reasonable lifestyle in the Turks and Caicos Islands where the cost of living is relatively high. The parties wish the four children of the family to remain at Ashcroft School at a cost of over $21,200 per annum. This is an understandable choice but one which will drastically affect the standard of living of the family. I have had regard to the children's past and future education pursuant to *Section 5(3) (e) of the Ordinance* .It is quite clear that the parties will be unable to enjoy their previous standard of living with the cost of running two households rather than one. In fact the parties will need to very

carefully scrutinize their expenditure if they are to remain on the Turks and Caicos Islands.

Section 5 (2) (d) Domestic Proceedings Ordinance

Mrs Kohli is aged 34 and Mr Kohli is aged 41. Neither of the parties could be regarded as 'old' but both should be investing in a retirement fund. The age differential of the parties means that Mr Kohli should now be investing to a greater extent in a current pension fund. Mrs Kohli' s age, despite her eight years out of the employment market, means that she is able to find work and using her clear talents to take a different direction in her career. I have regard to the fact that the marriage was a ten-year marriage until separation. Although not a long marriage it is a significant period of time and given a degree of permanency when there are four children. This is a case where one can expect Mrs Kohli to seek to increase her income but it is not a 'clean break situation'. During the marriage she gave up, albeit by consent, a good job with prospects to look after the household so the length of the marriage is of less significance in this case.

Section 5 (2) (e) and 5 (3) (c) Domestic Proceedings Ordinance

I have considered the health of both parties and the children. I have regard to Mrs Kohli's evidence given under cross-examination about Tom's urinary tract problem, Joanna's previous ailment with juvenile rheumatoid arthritis and Jack's ear trouble. The children's medical conditions, although of course always of concern, are not of a particularly unusual nature. I note that the family is covered under Mr Kohli's employment health insurance and I have considered provision for an emergency health fund for each parent commencing in February 2003.

Section 5(2)(f) Domestic Proceedings Ordinance

I feel that for this case when considering the issue of contributions it could not be put better that the words of *Lord Denning MR in Wachtel v Wachtel (1973) Fam 72 at 93* when he stated, ' We may take it that Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth.' The sentiments contained in that statement coincide with Mr Kohli's commendable statement made in cross-examination, ' I accept her contribution for those eight years was an equal one as a home-maker.'

Section 5 (2)(g) Domestic Proceedings Ordinance

I am unclear whether the Respondent is forcefully contending that the Applicant deserted the former matrimonial home. The impression I gained from the evidence was that the parties' relationship encountered irreconcilable problems. This resulted in a number of housing options for the family being discussed between the parties which ended with the

mother vacating the former matrimonial home and thereafter almost equally sharing the care of the children at her newly acquired property. This is not a case of desertion but even if it was, it could not prevent the mother making an application. The Ordinance does not require that willful neglect should be established, but simply that the Respondent should be shown to have failed to provide reasonable maintenance. One may fail to provide reasonable maintenance even if one is not under a duty to provide it and accordingly it has been established when considering the *DPMCA* that a wife who is in desertion may successfully establish a case based on her husband's failure to provide reasonable maintenance *(Robinson v Robinson (1983) Fam 42, (1983) 1 All ER 391, CA).*

I find that the behaviour of either party in this matter is not sufficient to plead it as a conduct case. I respectfully decline Mr Griffith's written submission at paragraph six linking the Applicant's choice of accommodation and the *Section 5 (2) (g)* factor of conduct. The new test since 1984 is whether a failure of the Court to separately take account of the conduct in question would offend a reasonable person's sense of justice *(Kyte v Kyte (1988) Fam185 and K v K (1990) Fam Law 19)* and although the old test required the conduct to be *' both obvious and gross' (Wachtel v Wachtel (1973) Fam 72)* that is still held to be of some relevance. The appropriate course, if the Court finds the amount claimed for rent to be excessive, is for it to have that in mind when determining the reasonableness of claimed financial needs under *Section 5 (2) (b)* rather than the more punitive consequences stemming from a conduct finding. *Dunn LJ* succinctly described the Court's task when considering the *DPMCA* and issues of conduct in *Vasey v Vasey (1985) FLR 596,* when he stated, ' The proper approach of magistrates in considering any application under Section 2 of the Act (equivalent to Section 3 of the Ordinance) is therefore to make findings seriatim upon each of the matters set out in Section 3(1) (equivalent to Section 5 of the Ordinance) and then to balance the factors against one another, so as to arrive at an order which is just and reasonable. The weight to be attached to any particular matter is for the magistrates, but they must take account of all of them. The most important function of the magistrates is usually to balance needs and responsibilities against financial resources and if, in an exceptional case, the magistrates decide that conduct is relevant, that must be put in the balance. I say, "an exceptional case," because experience has shown that it is dangerous to make judgments about the cause of the breakdown of a marriage without full enquiry, since the conduct of one spouse alone only can be measured against the conduct of the other, and marriages seldom break down without faults on both sides.' The Court must of course when considering whether to make a *Section 4 order* have regard to all the circumstances of the case, giving first consideration to the welfare of the children.

Conclusions

I find that from 1st August 2002 until and including 1st February 2003 that a reasonable global maintenance figure for Mr Kohli to pay having regard to his disposable income and Mrs Kohli's and the children's needs is £1,400 per month and from February 2003 that figure should decrease to $1,295. I consider that a figure of $ 250 per child is

reasonable and that the initial figure of maintenance for Mrs Kohli to be $428 which would be reduced to $295 per month. **This figure is arrived at with the understanding that a number of the financial responsibilities which to date have been met solely by Mr Kohli including amongst others child-minding costs, car maintenance and running costs should now be the responsibility of both parties. It also has regard to the agreement that Mr Kohli will continue to pay the school fees, and my finding that Mrs Kohli's salary must increase by February 2003 and that Mr Kohli will receive his contractual pay-rise by February 2003. I also expect Mr Kohli to receive a bonus for 2001 which will, I conservatively quantify, be at least 10% of his old income of $75,000 enabling him to buy a replacement vehicle and pay towards his legal costs.** With the above under consideration I find that at the time of the cause of action and ongoing that Mr Kohli, by providing no maintenance in January, February and March 2002 and thereafter only $600, was and is still paying significantly less than what I view as reasonable provision and therefore the grounds under *Sections 3 (a) and (b) of the Ordinance* are made out. I do not regard Mrs Kohli's collapsed pension as capitalized maintenance but rather as a capital asset whose disposal will be relevant when considering the division of any remaining matrimonial assets in any ancillary relief proceedings. This Court has no powers to deal with capital, save for the limited provision contained in *Section 4(3).* I dislike the wording of the legislation because to a non-legally trained mind it often infers unjustified criticism of the Respondent parent or spouse. I must make it clear that I view both Mr and Mrs Kohli as goods parents who strive in difficult circumstances to do the best that they can for their children. Their commendable and co-operative attitude to each other is clearly shown by the flexible approach and efforts that they put in to ensure that the children are shielded from the inevitable trauma of their separation by the hitherto successful care-sharing arrangement.

Both parties have indicated to the Court that they are most anxious to be financially independent and that due to the length and cost of this hearing that they strongly urge the Court to make an order that will cover current and foreseeable changes in their circumstances thus hopefully preventing a need to return to Court. Having regard to this, I have considered it appropriate to steer away from an otherwise appropriate interim order under *Section 20 of the Ordinance*. An interim order may have been suitable due to the changing circumstances of the parties in the New Year. It is for this reason that the order is along the lines of a *Khan v Khan 1 All ER 497, (1980) 1 WLR 355* order where there was a varying periodical payments order to enable the wife to re-train and meet her earning capacity. The order I make is intended to be long ranging and should only be brought back to Court if there is a significant change of circumstances. Mr Kohli will have little disposable income until February but when his pay- rise comes in he will have a significant credit and will be able to commence investment into his proposed domestic and outside funds. Mr Kohli may feel it appropriate to apply for the order to be varied if he does not receive any salary up-lift at all in January 2003 but then the onus will be upon him to ensure that he gets the increase and failing that to decide whether to apply to the Court. Mrs Kohli may feel it appropriate to apply for a variation if she has not obtained employment but she will have to prove to the Court that **she has 'left no stone unturned' to find it**. The onus will be on her to show what attempts she has made and then apply to vary rather than making Mr Kohli apply (unlike *Barrett v*

Barrett (1988) 2 FLR 516, CA). I believe that an interim order would not give the parties the incentive they need to ensure that their income capacities are truly met by February 2003. The Court has had regard to the unique child care arrangements in this case and to the fact that Mr Kohli is financially responsible for the children whilst they are in his own home which is for at least fifty percent of the time. If the shared-care arrangement were to no longer to exist then there would be a significant change of circumstances possibly meriting a variation of the order.

The financial orders I make are:

1) The Respondent do pay or cause to be paid to the Applicant periodical payments at the rate of $400 per month from 1st August 2002 to 1st January 2003 inclusive and thereafter at $295 per month during joint lives or until further order.

2) The Respondent do pay or cause to be paid to the Applicant for the benefit of each child periodical payments in the sum of $250 for each child as from 1st August 2002 until the respective child shall attain the age of seventeen years or complete full time education whichever is the later or further order of the Court.

3) I will hear from the parties in relation to the issue of costs

I do not feel it appropriate in this case to backdate the payments to the date of the making of the applications.

In closing I do not accept both Counsels submissions that this is not a case where the Court has to consider the question of custody of the children. Mr Griffiths has submitted that his client would be willing to have the children reside with him on a full-time basis with reasonable access to the mother. Mr Katan has stated that this is a 'gun against the head' threat with no merit or legal foundation. *Section 10 Domestic Proceedings Ordinance* places a mandatory obligation on the Court before disposing of an application for an order under *Section 4 of the Ordinance* to consider exercising its powers to make a custody or access order with respect to any child of the family even if not invited to do so by the parties. It should also be noted that if the Court does not find the grounds set out in *Sections 3(a) and 3(b) of the Ordinance* proved it can still make a custody and/or access order under *Section 10(2)* and then order the non-custodial parent to make periodical payments for the relevant children. *Section 10 (1)* states that the Magistrate can make such order as he thinks fit as to custody and access. I should indicate that during my deliberations on the financial applications I have considered the making of *Section 10 (2)* orders but am satisfied that the current arrangement of apparently joint custody to the parents with equal access for the children to their parents is for the time being in the best interests of the children and I make no order pursuant to *Section 10 of the Ordinance*.

Richard N Williams
Resident Magistrate, Providenciales

(All currency conversions herein from live mid-market rates as of 18/7/02, 15.41 GMT)