**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. 0612 of 2016**

**BETWEEN:**

**DS** **APPLICANT/HUSBAND**

**AND**

**CW-S** **RESPONDENT/WIFE**

***Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court***

**Date of Decision: 28 November 2017**

**Mr. Alphonza McD. Carew for the Husband.**

**Mr. Andrew C. S. Clarke for the Wife.**

## DECISION

## BACKGROUND

[1] This Court is required to determine two questions in relation to a child of the Wife of whom the Husband is not the father. These are (1) whether the child is a child of the marriage for the purposes of ***section 42*** of the ***Family Law Act, Cap 214 ("the FLA")***; and (2) whether that child can be the

subject of an order for maintenance, care and control and access on an application by the Wife against the Husband under ***the FLA***. I will indicate how these issues have arisen before providing some illumination on ***section 42***.

[2] The parties were married on 12 June 2010. On 21 November 2016, the Husband instituted divorce proceedings. At paragraph 8 of the related application ("the divorce application"), he asserted that the parties separated in or around January 2015. The Wife filed no answer and on 21 March 2017, this Court granted a decree nisi pursuant to ***section 27*** of the ***FLA***.

[3] The Husband deposed at paragraph 12 of the divorce application, that there are two children of the marriage under the age of 18 years. I shall refer to them as "the boys". They are children of the parties who were born before the marriage. The Wife is also the mother of a female child. She was born before the parties met. I shall refer to her as "NW".

[4] On 6 February 2017, the Wife filed an application for orders in respect of maintenance, custody, care and control and access in relation to the boys and NW. In that application, she described them all as "children of the

marriage". The Husband challenges the appropriateness of this designation in relation to NW and contends that he is not liable to maintain her.

## THE STATUTORY CONTEXT

[5] I come now to ***section 42*** of ***the FLA***. I will also set out, or refer to, other provisions of ***the FLA*** which demonstrate the centrality of the concept of "a child of the marriage" to a determination of the rights and duties of parties to a marriage in relation to children.

### *Section 42*

[6] I will limit my reference to section 42 to what is relevant for the purpose of these proceedings. S***ection 42(1)(a)*** stipulates that a decree ***nisi*** does not become absolute unless the court declares (i) that there are no "children of the marriage" who have not attained the age of 18 years; or (ii) that the only such children under that age are those specified in the order and; subject to ***subsection (3)***, that proper arrangements have been made for their welfare.

[7] ***Section 42(3)*** provides for the disapplication of the requirement for the declaration as to proper arrangements. This obtains where a court determines that there are circumstances by which the decree nisi may become absolute, notwithstanding that it is not satisfied that such arrangements were made.

***The jurisdictional provisions***

[8] I turn next to ***sections 19*** and ***20*** of ***the FLA*** and ***paragraph (d)(ii)*** of the definition of "matrimonial cause" contained in **section 2(1)**. I will refer to these as the jurisdictional provisions. ***Section 19*** reads:

> **19**. (1) The High Court has jurisdiction in
>
> (a) matrimonial causes instituted or continued under this Act;
>
> (b) matters concerning
>
> (i) the adoption of children, or
>
> (ii) the guardianship, custody or maintenance of children and
>
> (c) matters in respect of which jurisdiction is conferred on it by any other enactment.
>
> …

[9] In so far as it is relevant section 20 provides:

> **20**. (1) Subject to this Part, a person may institute
>
> (a) a matrimonial cause under this Act in the High Court
>
> …

[10] ***Paragraph (d)(ii)*** of the definition of "matrimonial cause" as set out in section 2(1) reads:

> **"matrimonial cause" means**

(d) proceedings between the parties to a marriage in respect of

(i) …

(ii) the custody, guardianship or maintenance of, or access to, a child of the marriage.

…

***The substantive provisions***

[11] I turn now to the provisions of ***the FLA*** which set out the powers and duties of the court and the rights and duties of parties to a marriage in relation to the custody, guardianship and maintenance of, and access to, children. I refer to these as the substantive provisions.

[12] Custody, guardianship and access are regulated by ***sections 43*** and ***44***, and maintenance by ***sections 51*** to ***55***. It is a feature of these provisions that they are expressed to apply in respect of "children of a marriage", "the children of the marriage", or "a child of a marriage".

**THE DEEMING PROVISIONS**

[13] ***Section 3*** of ***the FLA*** aids with the question as to who is to be considered as a child of the marriage. It reads:

> 3(1) For the purposes of the application of this Act in relation to a marriage
>
> (a) a child adopted since the marriage by the husband and wife; or

(b) a child of the husband and wife born before the marriage.

is deemed to be a child of the marriage, and a child of the husband and wife (including a child born before the marriage) who has been adopted by another person or other persons is deemed not to be a child of the marriage.

(2) For the purposes of the application of section 42 in relation to a marriage

(a) a child adopted since the marriage by the husband or wife with the consent of the other; or
(b) a child of either the husband or wife (including an ex nuptial child of either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife,

is deemed to be a child of the marriage.

(3) Relevant time means for the purposes of paragraph (b) of subsection (2),

(a) the time immediately preceding the time when the husband and wife separated; or

(b) if they have separated on more than 1 occasion, the time immediately preceding the time when they last separated before the institution of the proceedings for dissolution of the marriage.

**LIABILITY TO MAINTAIN**

[14] The question as to whether the Husband can be ordered to maintain NW or indeed whether the court can make the other ancillary orders sought in relation to her is at its core a jurisdictional inquiry. It requires consideration

as to whether this Court has jurisdiction under ***the FLA*** to make maintenance and related orders in relation to a child that is of one party to a marriage but not the other.

***The submissions***

[15] Counsel for the Wife, Mr. Alphonso Carew, submitted that NW is a child of the marriage whom the Husband can be ordered to maintain. He sought to rely on ***section 3(2)(b)*** of the ***FLA*** and ***Craig v Craig***, ***High Court Suit no. 342 of 1987 (date of decision, 14 July 1989) (Craig)***.

[16] Mr. Andrew Clarke who appeared for the Husband submitted that section ***3(2)(b)*** is only applicable for the purposes of ***section 42*** and that the latter provision gives the court no jurisdiction to make an order for maintenance. Counsel cited ***In the Marriage of R and G Perkins (1987) 12 Fam LR 25*** (***Perkins***) and ***Kirton v Mohammed High Court Suit no 376 of 2014 date of decision, 3 November 2014*** (***Kirton***) to support this submission. I will comment on these cases.

***Perkins***

[17] ***Perkins*** is unhelpful. It is a decision of the Family Court of Australia in which Mullane J determined that he had jurisdiction to grant the husband's application for custody of two children of the wife born of a previous

marriage. He was concerned with a definition of "matrimonial cause" contained in ***sections 4(1)***, ***paragraph (ce)*** of the ***Family Law Act 1975*** (***AFLA***) and ***section 5(1)(e)(i)*** of that legislation.

[18] The latter provision deemed an ex-nuptial child of either party who satisfied a prescribed household membership requirement to be a "child of the marriage". It is much unlike ***section 3(1)*** of ***the FLA*** which does not embrace such children. No more needs to be said to demonstrate that ***Perkins*** may be distinguished.

***Kirton***

[19] In ***Kirton***, the Wife sought an order for maintenance in respect of a child of the parties and her adult child from a previous relationship who was pursuing tertiary education. Provision is made for the maintenance of adult children in the special circumstances set out in ***section 54(3)(b)*** of ***the FLA***. Having considered ***sections 19***, ***20*** and ***paragraph (d)(ii)*** of the definition of "matrimonial cause" contained in **section 2(1)** and ***sections 51*** **to** ***55***, the court concluded that to be the subject of a maintenance order a child had to be "a child of the marriage". It went on to consider ***section 3*** and noted that while ***section 3(2)*** deemed a step-child to be a child of the marriage, that was for the purpose of ***section 42*** only. ***Section 3(1)*** which applied

generally made no such accommodation. Hence, the court held that it had no jurisdiction under ***the FLA*** to make a maintenance order with respect to such children.

[20] I find that reasoning to be compelling**.** I might add that ***sections 43*** and ***44*** of ***the FLA*** which relate to custody, guardianship and access, equally reflect the jurisdictional dictate that limits children-related orders under ***the FLA*** to "children of the marriage". ***Section 3(1)*** of ***the FLA*** contains no provision which deems a child of one party to a marriage only as a child of the marriage for purposes of the general application of the legislation.

[21] ***Section 3(2)*** includes such a child within the ambit of the term if, at the relevant time, the child was "ordinarily a member of the household of the husband and wife". As prescribed in section 3(3), the relevant time is "the time immediately preceding the time when the husband and wife separated"; or, if they separated on more than one occasion the last time they did so prior to the institution of divorce proceedings. However, this is for the purpose of ***section 42*** only.

[22] It follows that NW is not a child of the marriage for the purposes of proceedings related to maintenance, custody, care and control and access. However, she may be a child of the marriage for the purposes of divorce

proceedings, provided the court is satisfied that she was ordinarily a member of the household of the parties at the time prescribed in ***section 3(3)***.

[23] This brings me to ***Craig***, a decision on which Mr. Carew placed great store. In that case, the wife made an application for maintenance in respect of her two infant children, one of whom was not her husband's. She also sought an order under ***section 42*** of the ***FLA***. The decree *nisi* had been granted previously. Williams CJ was satisfied that the latter child was ordinarily a member of the parties' household at the time that the parties separated. He reasoned, therefore, that proper arrangements had to be made for her welfare before the decree *nisi* of dissolution of marriage could become absolute. He then went on to make an order for the maintenance of both children.

***Does section 42 give jurisdiction?***

[24] In ***Craig***, neither Counsel nor the court made any reference to ***section 3(1)*** of ***the FLA***. The court's jurisdiction to make the maintenance order in respect of the child that was not the husband's was not put in issue. Seemingly, it was assumed to exist once the child was considered a child of

the marriage for the purposes of ***section 42***. That assumption is now being challenged.

[25] Mr. Carew considers that ***Craig*** should be followed and an order made in relation to NW's maintenance once it is accepted that she was ordinarily a member of the parties' household at the relevant time. However, Mr. Clarke contends that despite ***section 42***, this Court has no jurisdiction to grant a maintenance order for NW's benefit.

[26] I side with Mr. Clarke on this issue. There are two points to be made in respect of ***section 42***. The first is that it does not require that the court make orders as to maintenance, access, care and control or custody. It requires simply that the court declares that it is satisfied that proper arrangements in all the circumstances have been made for the affected children's welfare. This echoes the comment of the majority in ***In the Marriage of Opperman (1978) 33 F.L.R. 248*** with respect to **section 63** of the ***AFLA***, a like provision.

[27] The second point is more fundamental. It was acknowledged over fifty years ago by Crawford J in ***Whatley v Whatley (1966) 9 FLR 173*** in relation to ***section 71*** of the ***Matrimonial Causes Act 1959-1965*** (***AMCA***), the first ***section 42***-type provision enacted in Australia. More recently, it was

repeated by Strauss J in ***Opperman*** in reference to section 63 of the ***AFLA***. It is that ***section 42 (1)(a)*** of ***the FLA*** does not vest a court with jurisdiction to grant orders relating to the maintenance, custody, access and guardianship of children.

[28] In summary, a step-child is not a child of the marriage for purposes of ***the FLA*** other than ***section 42***. That provision neither requires nor empowers a court to make welfare-related orders in relation to such a child. It would be a striking anomaly if ***section 42*** could be used to impose post-marital obligations on a party in respect of a child with respect to whom no obligations could be imposed during the currency of the marriage.

**IS NW A CHILD OF THE MARRIAGE FOR PURPOSES OF SECTION 42?**

[29] I will now consider whether NW is a child of the marriage for the purposes of ***section 42*** of the ***FLA***. For this label to attach to her, ***section 3(2)(b)*** requires that she must have been "ordinarily a member" of the parties' "household" at the relevant time. As defined in ***section 3(3)***, the relevant time is "the time immediately preceding the time when the parties separated", or if they separated more than once, the last time they did so.

[30] The parties do not agree that NW was ever ordinarily a member of their household; and the Husband contends that even if she held that status at

some point, she did not when the parties separated. To resolve these issues, I will consider the meaning of various words and phrases contained in ***section 3(2)*** and review the evidence to see if the membership test is established. If I so find, I will go on to consider whether it can be said that it existed at the material time.

***Did the parties have a "household"?***

[31] The statutory provision requires the parties themselves must have belonged to a "household". ***The New Shorter Oxford English Dictionary, Vol. 1*** indicates that the word "household" is a collective noun which refers to "[t]he people living in a house, esp a family in a house; a domestic establishment".

[32] Whether or not a household existed is one of fact. The parties do not dispute that one existed. They lived together prior to and after their marriage giving rise to a domestic establishment that could have been accurately described as the Seales' household.

***Was NW ordinarily a member of the household?***

[33] I will now consider whether NW was ordinarily a member of that household. Much of the relevant evidence is undisputed. NW lived with the parties and the boys before and after the marriage. The Wife usually

looked after NW's financial needs with the Husband supplementing her efforts where necessary. He assumed full responsibility when the Wife was not working. He maintained the boys, paid the rent and the utility bills and bought food for the household. He asserts that he was prevented from exercising discipline and control over NW but the Wife denies this. I have not found it necessary to resolve that issue. In response to Mr. Carew, he stated in his oral evidence that he "would say that [NW] was part of the household … and part of the family by extension".

[34] Mr. Carew submitted that based on the evidence the Court should find that NW was ordinarily a member of the household. Despite the Husband's concession to that effect, Mr. Clarke contended that she could not be so regarded. He highlighted as important the fact that the Wife was largely responsible for NW's expenses, and the Husband's evidence that he exercised little authority over the child. Citing ***Adams v Adams Suit No. D-2056 of 2003, Supreme Court of Jamaica (date of decision, 2 July 2008)***, Mr. Clarke submitted further that the Court had to consider whether NW's presence in the household was the result of a mutual agreement between the parties, or out of the Husband's kindness.

[35] In particular, Mr. Clarke referred me to two passages found at paragraph 10 in ***Adams***. In the first, Campbell J cited ***Dixon v Dixon [1967] 3 All E.R. 659*** and noted that, in that case, it was held that there could not be acceptance of a child into a family without some mutual arrangement between the spouses that the child should be treated by both spouses as the child of both. In the second passage, he opined that "[c]ourtesy, care and kindness extended to a child under one's roof do not … demonstrate an assumption of responsibility for the child's maintenance".

[36] These passages must be properly contextualised. Adams involved certain provisions of the ***Maintenance Act*** of Jamaica. Campbell J highlighted those provisions at paragraph 6 where he stated:

> The Act defines a parent as a person who is a party to a marriage or co-habitation and **accepts as one of the family**, a child of the other party to the marriage or cohabitation. [Emphasis mine]
>
> Section (9)(4) of the Act provides that in considering the circumstances of a dependent who is a child, the court should have regard to several matters including;
>
> a) The extent if any to which that party has on or after such acceptance of the child **assumed responsibility for the child's maintenance**. [Emphasis mine].
>
> …

[37] It is evident that Campbell J was concerned with legislative concepts of "acceptance as one of the family" and "assumption of responsibility". These

concepts are not expressed in ***section 3(2)*** of ***the FLA***. That provision requires that the child was "ordinarily a member" of the household.

[38] The word "ordinarily" means "usually" and the word "member" means "a person … belonging to a particular group". These words are so defined in the Oxford English Living Dictionaries: https://en.oxforddictionaries.com. A synonymous term for "ordinarily" would be "as a rule". It is the opposite of extraordinarily. The child then must have usually been a member of the parties' household.

[39] There are some comments from Australia made in relation to the phrase "ordinarily a member" in the context of a similar legislative provision which I endorse as applicable to s***ection 3(2)***. These were expressed in ***Playford v Collier 9 Fam L R 634*** and ***Re Wiseman, Ex parte RAUWENDAAL 68 ALR 491***.

[40] In ***Wiseman***, Williams J underscored the need to disregard concepts that are not incorporated in the relevant statutory provision and the requirements which such concepts may import. He did so by comparative reference to ***sections 5(1)(e)*** and ***5(1)(f)*** of ***the AFLA***. The former contained a single qualifying requirement that the child be "ordinarily a member" of the requisite household at the relevant time. By contrast, the latter contained an

additional requirement that the child must "be treated by the husband and wife as the child of the family".

[41] Having noted that Holland J had to consider ***section 5(1)(f)*** in ***Playford***, Williams J continued at page 501:

> But there is a dual requirement postulated by that provision; in addition to the child being ordinarily a member of the household of the husband and wife, the child must be "treated by the husband and wife as a child of their family". In speaking of that additional consideration, Holland J said that it "does not merely contemplate the husband and wife acting towards the child with the same affection, consideration, kindness, care or control as they would show towards a child of their own. It does not seem to me that that is what the definition is getting at. In my opinion, in the context, it should be the status of parenthood towards the child, a quasi adoption of the child, as it were, or assuming to displace or act as a substitute for the natural or legal parents".

[42] Williams J went on to ponder on the facts of the case before him. He stated, at page 503:

> Such a consideration is relevant here because of the role in decision-making respecting the child which has been maintained by Susan Rauwendaal, his natural mother. How can it really be said that Adrian is ordinarily a member of the household of the Wisemans when a person, not a member of that household, has retained significant decision-making power in relation to him? If I might borrow an expression used by Wilson J in another context (*R v Lambert; Ex parte Plummer, supra* (CLR at p 491); because of the role played by Susan Rauwendaal it cannot be said that Adrian's welfare has become part of "the personal and private world" of the relationship between the Wisemans.

[43] The judge then emphasised the distinction between the two statutory tests. He stated that "the reasoning of Holland J is not applicable to section 5(1)(e) because the only criterion there is that the child was "ordinarily a member of the household of the husband and wife". He went on to hold that Adrian was ordinarily a member of the Wisemans' household.

[44] The second pronouncement which I endorse formed part of William J's reasoning in ***Wiseman***. In it, he stressed the importance of residence in a household and dispelled the notion that control and an adoption of parental responsibility by both parties is necessary. He stated at page 502:

> There is also the factual question, whether or not "at the relevant time" Adrian was "ordinarily a member of the household" of the Wisemans. ... Section 6 of the Matrimonial Causes Act 1959 deemed "a child of either the husband or wife ... if at the relevant time the child was ordinarily a member of the household of the husband and wife ... to be a child of the marriage" for certain purposes. The concept was considered in a number of reported decisions at first instance, and the general proposition established thereby was that, if a child had been living for sometime in a stable household, the factual requirements were satisfied. Sangster J in Cunnew v Cunnew (1974) 9 SASR 587 held that a child was ordinarily a member of the household even though its natural parent deprived the other spouse of control over that child. He held that it was not necessary that each party to the marriage act *in loco parentis* in respect of the child before the requirements of the section were met.

[45] William J concluded at page 503:

> Given the authorities ... I have come to the conclusion that ... factors such as "control" are not relevant when it comes to determining whether a child is ordinarily a member of a household. … [T]he test to be applied is a simple one; it is one of usual residence in a "household" which has a degree of stability and permanency.

[46] I have some reservations about the references in ***Wiseman*** that suggest that the household must be a "stable" one or have "a degree of stability and permanency". I would hesitate to state these as necessary elements though they may be factors that assist a court in determining whether a household existed. That disclaimer apart, I adopt William J's statement as reflecting the law in this jurisdiction. I might emphasise though that residence in the same house as the parties is not enough. The child must be found to be a part of their household.

[47] The final statement I adopt is one uttered by Holland J in ***Playford v Collier 9 Fam L R 634*** in which he indicated that the length of the child's stay is not the determinative factor. He expressed himself thus:

> ... the existence of that criteria is not to be determined merely by the length or frequency of the child's stay rather the child must be "**ordinarily" a member** of the household as opposed to "extraordinarily" a member of the household.

[48] Reflecting on Mr. Clarke's submissions, it seems to me that in order for it to be said that a child is ordinarily a member of the household of the

Husband and Wife, there ought to be a mutual acceptance by the parties of the child as a member of the household. Ultimately, though, as described by Williams J in ***Wiseman*** at page 502, it is a question of fact whether a child was ordinarily a member of a household.

[49] So, what then is the position with NW? She lived with the parties in their household in Barbados before and during the subsistence of the marriage. At no time did the Husband protest her presence there. Undoubtedly, he accepted her in his household. He provided a roof over her head and food for her sustenance. He supplemented the Wife's efforts to otherwise provide for her. It matters not the extent to which he contributed to the child's maintenance. It matters not either whether he exercised authority and control over her, or if he did, in what degree. To adopt the language contained in ***Wiseman***, her welfare need not have become part of his personal and private world.

[50] Undoubtedly, NW was for a significant period ordinarily a member of the Seales' household. What remains though, is whether it can be said that she held that designation at the "relevant time" as defined in ***section 3(3)*** of the ***FLA***.

**WAS NW ORDINARILY A MEMBER OF THE HOUSEHOLD AT THE RELEVANT TIME?**

[51] As a final step in this status inquiry, I must now determine whether NW was ordinarily a member of the parties' household "at the time immediately preceding the time when the husband and wife separated". If they separated on more than one occasion, the crucial time is that "immediately preceding the time when they last separated." Read together, this is what sections ***3(2)(b) and 3(3)*** require.

[52] The evidence relating to separation is not uniform or clear though both Counsel submitted that the critical time is January 2015. That is the time deposed to by the Husband in the divorce application. In that document, he also deposed that the parties lived separately and apart from that date. Consistent with that, in the first of two affidavits sworn by the Wife, she deposed that the marriage "broke down on or around the year 2015" and the parties "lived separate in the same household." She repeated the assertion that the parties separated in 2015 at the commencement of oral evidence adduced at the hearing.

[53] It is common ground that in January 2015 the Wife went to the United States of America (USA) while the Husband remained in the matrimonial home. However, there is additional evidence from the Wife which casts

some doubt on whether the parties truly separated in January 2015 and suggests, that even if they did, that they resumed cohabitation in May 2015 when the returned to the matrimonial home.

[54] Before considering the Wife's further evidence in this respect, I ought to point out why I am inclined to do so despite the fact that January 2015 was accepted by the parties and Court for purposes of the divorce application. Guided by ***section 27*** of ***the FLA***, a finding as to when parties separated is necessary for a determination as to whether an application for dissolution of marriage ought to succeed. So too, is a finding that the parties have lived separate and apart since the separation date for a period of at least twelve months preceding the filing of the divorce application.

[55] It might be thought that since the decree *nisi* was granted on the basis of those unanswered assertions, the Wife would be estopped from raising afresh the question as to whether the parties separated in January 2015 or lived separate and apart since that date. This might be so on an application of ordinary principles of issue estoppel for as Dixon J explained it in ***Blair v Curran (1939) 62 CLR 464***, at 531, "[a] judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the parties".

[56] For completion, I should state that ***section 29*** of ***the FLA*** allows that if there is a resumption of cohabitation for less than three months, after which the parties again separated, an applicant may aggregate the periods before and after the cohabitation as if they were one continuous period. It seems to follow then that, a party would not be estopped from asserting that co-habitation resumed but lasted less than three months unless that issue had arisen and been determined on the grant of the decree *nisi*.

[57] But the principle of issue estoppel does not apply in a strict way in proceedings where the interest and welfare of minors are involved. The reason this is so was expressed by the Family Court of Australia in In the Marriage of ***G H and M L Schorel 14 Fam LR 105***, at paragraph 29, in this way:

> … whatever might be the scope of issue estoppel in ordinary civil litigation, it has a much more limited application in matrimonial causes, and more especially in litigation which involves the welfare of children. That approach is based upon the view that the duty of courts in family law has a wider and more public element and imposes a greater responsibility to elicit the actual facts, but more particularly it is based on the obligation of such courts to have regard to the welfare and protection of children within its jurisdiction.

[58] Citing ***Re B (Minors) [1997] Fam 117***, J D Heydon in ***Cross on Evidence, 8th Australian edition*** at paragraph 5125 states:

> There is no strict rule of issue estoppel binding on any of the parties in children's cases. However, the court has a discretion to decline to allow a full hearing of the evidence in relation to matters decided in previous proceedings. … In exercising that discretion [to allow any issue of fact to be tried afresh] the court will balance the underlying considerations of public policy that there is a public interest in an end to litigation, that delay in determining a case is likely to be prejudicial to the interests of the child concerned, that the child's welfare is unlikely to be served by reliance upon determinations of fact which have turned out to be erroneous, and that the court's discretion must be applied so as to work justice.

[59] ***Section 42*** of ***the FLA*** entails consideration as to whether proper arrangements have been made for the welfare of children who previously relied on the household of the parties to the marriage. The welfare of a child who **may** be a child of the marriage for the purposes of that provision cannot be served by reliance on facts contained in the application for dissolution of marriage in relation to separation, if those facts are erroneous. It is for that reason that this Court will consider all that is before it and determine when the parties separated; or if they separated on more than one occasion the last time that they did so prior to the instituting of the divorce proceedings.

[60] In her second affidavit, in response to affidavit evidence from the Husband that she had gone to the USA in 2015 unbeknownst to him, she deposed that after the incident that caused the fractured relationship in December

2014, the parties "decided to take some time apart" and that she should travel to the USA to work. She deposed further that while she was overseas the Husband tried to convince her to remain there but she returned in May 2015. She stated that on her return their intimacy resumed and he continued to maintain the household. According to that portion of her evidence, they separated "around November of 2015".

[61] Under cross-examination by Mr. Clarke, the Wife said that she could not remember changing her status on the Facebook website in January 2015 to say that she was not married but that she might have done so. However, she maintained that the parties lived together when she came back and that they separated in November or December of 2015.

[62] In his affidavit evidence, the Husband deposed that they separated in 2015. He stated further in his affidavit that when the Wife returned to live at the matrimonial home, he accommodated "the arrangement" because the boys were happy to see her and he did not wish to upset them. He deposed also that the situation with him being unable to assert authority over NW continued and that the Wife would make decisions in relation to NW without his approval. In narrating an incident between the parties said by

him to have occurred between April and July 2016, the Husband deposed that they were then sleeping in separate bedrooms.

[63] The Husband mounted no challenge to the Wife's affidavit and oral evidence that their relationship had resumed on her return from the USA. It was not put to her by Mr. Clarke that this evidence was untrue neither did Mr. Seale seek to contradict it in his oral evidence. In light of her evidence that they eventually separated in November or December 2015, it is understandable that they might have been occupying separate bedrooms by April or July 2016.

[64] I found no reason to reject the Wife's evidence that some degree of normalcy had returned to the marital relationship on her return in May 2015 and that the parties subsequently separated at the time she stated. That being so, I find that the material time at which I must consider whether NW was a child of the marriage is November or December 2015. In any event, though, it seems to me that even if the parties separated in January 2015 and did not resume cohabitation that the outcome in respect of NW's status would be the same.

[65] To understand why this is so, I must now come to the evidence in relation to NW. Thus far, we know that she had been ordinarily a member of the

parties' household. It is common ground between the parties that she travelled to St. Lucia in December 2014 for her vacation. The Husband took her to the airport. I do not know the exact date of her departure for St. Lucia.

[66] In response to Mr. Clarke at the hearing, the Wife stated that because of the issue between herself and her husband, she allowed NW to stay in St. Lucia for a few months. She admitted that she had not consulted the Husband about this. According to her, at that time the parties "were not in a good place in terms of communication" about NW. She stated further that NW stayed in St. Lucia until July 2015. The Husband's evidence is that she returned "around the beginning of summer 2015". I accept that she was back in the matrimonial home by August 2015.

[67] Moving from the premise that the parties separated in January 2015, Mr. Clarke submitted that NW could not be said to be ordinarily a member of the household at that time since she had "moved back" to St. Lucia in December 2014. Mr. Carew submitted that she was ordinarily a member of the household immediately before January 2015.

[68] I do not think it is an accurate reflection of the evidence to state that NW moved back to St. Lucia in December 2014. The evidence of both parties is

that she went to St. Lucia for her holiday. It would appear that things rapidly degenerated between the parties around that time resulting in the Wife's departure from the matrimonial home. She then decided that the child would stay on in St. Lucia. The evidence is that NW was away on holiday when the January 2015 break occurred between the parties. I cannot go behind the evidence and speculate as to other possibilities that were not put to the Wife.

[69] The applicable principle in these circumstances was aptly stated by Barry J in ***May v May et al [1962] VR 123***. He was commenting on ***sections 6(1)(c)*** and ***6(2)(a)*** of the ***Matrimonial Causes Act 1959*** which are replicated in ***sections 3(2)(b)*** and ***3(3)*** of the FLA. He stated at page 124:

> The mere fact that a child was not living in the household when it came to an end would in some circumstances not be sufficient to exclude the child from the definition. For example, the child might be away because of illness, or on a holiday, or on a visit to relatives or friends. If there was an intention that the child should, after the expiration of a period in hospital or as a guest in some other home, return to the household of the husband and wife, a temporary absence of the kind indicated would not affect his (or her) membership of the household. The important factor is not that the child should be physically in residence with the husband and wife up to the time when they cease to live together, but that the relationship described by the expression, "member of the household", should have been in existence at that time.

[70] It seems to me then that NW continued to be a member of the Seales's household when she left for holiday in St. Lucia and, therefore, was ordinarily a member of that household in January 2015 when the Wife left the matrimonial home. If, as both Counsel submitted, that was the time of separation for present purposes, NW was ordinarily a member of the household at that time.

[71] However, I have found that the last separation date was November or December 2015. By August of that year, NW had resumed occupancy in the matrimonial home and her living circumstances continued exactly as they were before her temporary sojourn in St. Lucia.

[72] It follows that on any view of the matter, the result is the same. NW was ordinarily a member of the Seales' household at the material time and accordingly is a child of the marriage as prescribed by ***section 3(2)(b)*** of ***the FLA.***

**DISPOSAL**

[73] In respect of the preliminary issues considered, I have determined that NW is a child of the marriage for the purposes of section 42 of ***the FLA***. However, this Court has no jurisdiction under ***the FLA*** to make an order

for maintenance, care and control, custody, or access in relation to her.

OLSON DeC. ALLEYNE

JUDGE OF THE HIGH COURT