

**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

**SCT-CIV-2022-0046**

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**STEPHEN EVANS-FREKE**

**Appellant/Petitioner,**

**v.**

**VALERIE EVANS-FREKE,**

**Appellee/Respondent.**

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**On Appeal from the Superior Court  
for the District of St. Thomas & St. John**

**Case No. ST 2016 D1 00166**

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**BRIEF OF APPELLEE**

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## **STATEMENT OF SUBJECT MATTER JURISDICTION**

This appeal involves a review of a *Pendente Lite* support order arising from a divorce action and equitable distribution of marital assets that was filed in the Superior Court in the Division of St. Thomas and St. John. A decree of divorce was issued on February 14, 2022. The equitable distribution claim is unresolved, and discovery has not commenced, as Appellee does not have the resources to pay counsel and her expert. The Superior Court of the Virgin Islands has subject matter jurisdiction, over all divorce, annulment, and separation proceedings, pursuant to 4 V.I.C. § 76(a), 16 V.I.C. § 106(a), and 16 V.I.C. § 108.

## **STATEMENT OF SUPREME COURT JURISDICTION**

Appellee maintains that this Court is without jurisdiction to hear the instant interlocutory appeal. As discussed below, the order from which the Appellant seeks review is interim in nature and not ripe for appellate review. A Motion to Dismiss for lack of jurisdiction was filed and denied.

## **SUPPLEMENTAL STATEMENT OF FACTS**

Several assertions of facts by the Appellant are correct. The couple was married in 1990. In 2008 Appellant moved to St. Thomas to participate in the Economic Development Authority program, and to save the family money in taxes. A divorce action was filed in the Virgin Islands. The parties appeared for a two-day hearing on Appellee's Emergency Motion for *Pendente Lite* Support, Expert

Forensic Accounting Fees, Costs, and Attorney's Fees on June 2, 2022, and June 3, 2022. As represented in the Record of Proceedings located on pages 1-2 of the Appellee's Appendix (hereinafter cited as "AA"), the first day of hearing lasted 10 hours and 58 minutes with 27 minutes of recess, with the second day's hearing lasting a total of 5 hours and 51 minutes with 28 minutes of recess. (AA 001-002). Clearly, all parties were given the opportunity to present relevant evidence, although discovery has not been propounded.

On August 31, 2022, Appellant filed a Motion for Limited Stay of Execution Pending an Interlocutory Appeal. The motion was denied on November 10, 2022. This appeal followed.

Of importance to the Appellee's position is the fundamental fact that she has never been in control of the couple's finances. Appellee has always had severely limited access to and knowledge of the couple's finances during the marriage and since the parties' separation. Appellant is currently providing minimal support to Appellee.

The marital assets discussed at the *Pendente Lite* hearing included the following:

1. The parties' New York Marital Homestead located in Tuxedo Park, New York, where Appellee currently resides, and where the parties resided together with their children from 1999 until Appellant moved to the Virgin

Islands in 2008 for tax reasons. It was testified to at the hearing that the Tuxedo Park estate has fallen into disrepair. (AA 139).

2. Crow's Nest, Inc. is a company owned by the parties in Portland, Maine, holding more than 100 acres of undeveloped land. (AA 068 and AA 102).
3. Auvén Therapeutics Management Company is part of the Economic Development Authority program in the U.S. Virgin Islands. (AA 041). Appellant is a managing partner in Auvén Therapeutics, a Virgin Islands company founded in 2008, which develops pharmaceutical products. (AA 045). At the time of the hearing, Appellant was receiving compensation of \$70,000.00 per month from Auvén. (AA 043).
4. ADC Therapeutics is a Swiss pharmaceutical company in which Auvén Therapeutics holds a 26% interest. (AA 079). Appellant, a stockholder and director with the company, received \$60,000.00 a year in director's fees. At the date of the hearing, Auvén's stock was valued at \$70,000.00. (AA 047).
5. AeroMD is a Virgin Islands air ambulance company that owns a fleet of aircraft for medical transport. Appellant is a founder and has a 12% stake. (AA 047-048).
6. Water Island Development Company is a Virgin Islands company formed by Appellant to develop a luxury hotel and marina on and around Water Island. (AA 100).

7. At the time of the *Pendente Lite* hearing, Appellant and his present wife rented a villa at 16 Estate Nazareth in Cabrita Point, St. Thomas, where the rent, electrical, and water total a little less than \$20,000.00 per month. (AA 028-030 and AA 122-123).
8. Personal property and vehicles worth \$220,000.00 are located in St. Thomas, Virgin Islands, including but not limited to a 38-foot powerboat named Celtic Fire. (AA 071 and AA 124-135). Appellant had the boat listed for sale at \$279,000.00, which calls into credibility the testimony that all the Virgin Islands personal property and vehicles totals only \$220,000.00. (AA 175).
9. Cabrita Point beachfront Lot 6D-1 was purchased by Appellant during his marriage to Appellee, through a trust created in the Virgin Islands in or about 2014, which trust transferred the property to Appellant's girlfriend. Appellant purchased the lot for \$200,000.00 cash and it is presently worth \$350,000.00. (AA 075-076, AA 101, and AA 115-116).
10. Castle Freke is an 80-acre property, located in Rathbarry, Ireland. The castle was purchased in 1999 for approximately \$250,000.00. (AA 053). At the time of purchase, Castle Freke had no windows or doors, no roof, no plumbing, no electrical, no appliances, was missing interior and exterior walls, and it had trees growing through the middle of its decaying stonework. (AA 005-006). The castle appraised for approximately \$1.5

million at the time of the *Pendente Lite* hearing. (AA 044-046). Appellant testified that although he initially had no intention of renovating the property, he has since spent “millions of euros” in renovation costs. (AA 066). Photos of Castle Freke were admitted into evidence. (AA 061-063 and AA 183).

11. Appellant’s CPA testified that in 2020, there was an average of fifteen employees in Ireland being paid approximately \$15,000.00 per week with money generated partly from Castle Freke Distillery and the majority of funds coming directly from Appellant. (AA 116-120).
12. Appellant owns a Porsche Cayenne in Ireland. (AA 067).
13. Castle Freke Distillery is a gin distillery located in Ireland (AA 049-050), which Appellant established to help with the costs of Castle Freke. Each bottle of gin sells for \$175.00 USD. (AA 051-052).
14. Rathbarry Castle was purchased by the parties in 2004 and is approximately forty acres, and contains five bedrooms, a stable, and a small house or “gate lodge.” (AA 005-008). The purchase price for Rathbarry Castle was approximately 1.25 million euros. (AA 055-056).
15. Appellant purchased numerous expensive animals on the Ireland properties including a herd of exotic cattle, an apiary, chickens, five horses, one pony,



and three donkeys. (AA 054-056). Payments made to and for Castle Freke Farms from 2019 to 2021 totaled \$4,105,508.00. (AA 121-122).

16. Appellant repurchased Castle Freke through The Castle Freke Trust, which Appellant created to buy out his mortgages which were sold by the original bank to Cerberus. (AA 136-137). Appellant did not advise Appellee at the time that he created a trust to purchase the outstanding mortgages from a third party. (AA 072-074).

17. Appellant had antique art, antique furniture, antique silver, and other marital assets removed from the marital home in New York to avoid seizure by U.S. Marshals. (AA 025). Appellant later shipped this property to London, England, without notifying Appellee, and there has been no accounting of these items, nor is there an appraisal on their value. (AA 120).

Appellant testified to providing financial support to his former mistress and their son who reside in Paris, France, by paying \$5,000.000 per month for the rent, \$2,400.00 per month for a private school tuition, and \$5,000.00 per month in support. Appellant pays for a car and driver for the former mistress and child. (AA 034-040). In 2019 alone, Appellant spent a total of \$147,602.49 to support his former mistress and biological child. (AA 112). There is no court order requiring Appellant to support the former mistress. (AA 113-114).

Appellant testified his net worth was approximately \$25 million as recently as March 31, 2022. (AA 069-070 and AA 078-081). As of March 31, 2022, Appellant had \$44 million in assets. (AA 099). The testimony of Appellant's CPA included the following:

1. Appellant's 2020 tax return is accurate (AA 104);
2. Appellant's 2020 tax return reported all of Appellant's income and tax liabilities for 2020 (AA 105);
3. Appellant's total income for 2020 was \$6,843,039.00 (AA 106);
4. Appellant paid \$183,791.00 in taxes on the \$6,843,039.00 income, leaving an after-tax income of \$6,659,248.00 (AA 106-108);
5. Dividing the 2020 after-tax income of \$6,659,248.00 by twelve months in a year, equals \$554,937.00 in cash that Appellant had available to him every month of 2020 to spend on whatever he chose (AA 106-109);
6. Appellant also had a JP Morgan Chase American Express Card with a \$103,000.00 credit limit which he paid off every month (AA 109-110);

Appellee's forensic expert Mr. Cowhey testified that he prepared an "Itemized Inventory of Records" pursuant to documents that had been produced to him. (AA 089-090). Mr. Cowhey's curriculum vitae, expert testimony disclosure, verification, analysis of change in net income, summary of Appellant's total income, and certification were admitted as exhibits. (AA 185). There are multiple

businesses and companies belonging to Appellant, which Mr. Cowhey found per his research, and are set forth in Mr. Cowhey's certification; however, Appellant has provided no information as to many of these assets which Appellant did not voluntarily disclose in his sworn personal financial statement. (AA 197).

At the Court's request, Appellee submitted in Ex Parte Affidavit of Attorney's Fees and Costs dated June 8, 2022, in support of her claim for interim attorney fees incurred to date in the amount of \$86,630.00. (AA 138). The affidavit also contained Appellee's counsels' anticipated work product to navigate the case to mediation and trial.

Mr. Cowhey testified that he works as a forensic accountant. At the time of the hearing, he was a partner at the firm RSM US LLP, located at 30 South 17th Street, Philadelphia, Pennsylvania. He has a master's degree in accounting and worked at Arthur Anderson for seven years in corporate finance. He has worked in forensic accounting, business valuation, economic damages, litigation consulting, and expert witness services. Mr. Cowhey was a partner in a firm called Financial Research, Inc., which provided forensic accounting, business valuation, economic damages, litigation consulting, and expert witness services. He sold the firm in 1999 and rejoined Arthur Anderson as a partner. (AA 082-084). In 2002, Mr. Cowhey started his own firm providing the same services. In 2009, he sold his firm

to HSBC Bank and continued as a member to the board of the North American Operations for HSBC. (AA 084).

Mr. Cowhey has testified as an expert in more than 500 contested family matters in state courts in Colorado, Delaware, Florida, Illinois, Maryland, Massachusetts, Missouri, North Carolina, New Jersey, New York, Pennsylvania, Tennessee, Texas, Virginia and in federal courts in Pennsylvania, New Jersey, New York, Massachusetts, Florida, North Carolina, Texas, Illinois as well as courts in Guam and Ontario, Canada.

As pertaining to the matter before the court, Mr. Cowhey testified that he has worked as an expert in matrimonial matters for more than 30 years and he has worked on approximately 5,000 to 6,000 divorce cases in the United States and internationally. Forensic accounting in matrimonial cases is a catch-all phrase for analyzing historical information to the extent there may be adjustments to follow the flow of funds or assets. In short, he follows the money. Mr. Cowhey's work includes preparing income available for support calculations for either temporary alimony during the pendency of an action or post action alimony. (AA 082-084). When offering testimony as to the necessity of an expert witness at this stage of the litigation, Mr. Cowhey states, "I do have some concerns about fraud and hidden assets because there's certain assets that dropped off the balance sheet with no reporting of income." (AA 097).

A CPA does not calculate the value of businesses, investigate marital estates, identify existing assets, or identify issues impacting the distribution of those assets. (AA 094). Appellant provided no supporting documents or schedules to support the testimony regarding his assets, debts, and net worth. While the Court admitted the financial statements, it indicated that it would give them appropriate weight since none of the statements have backup. The Court further stated that the admission of those statements does not mean the court will accept everything or anything that's in it. (AA 098).

Appellee sought *Pendente Lite* support to be awarded in the amount of \$10,000.00 per month, and the Superior Court awarded her \$7,500.00. Also sought was the payment for interim attorneys' fees of \$25,000.00 per month, while the court awarded \$350,000.00 for fees and costs. (AA 231). Other miscellaneous living expenses such as club memberships and vehicle repairs were resolved by the parties during the hearing, as well as access to the multiple marital properties.

## **ARGUMENT**

### **I. This Court lacks jurisdiction to hear an interim appeal on an emergency *Pendente Lite* order of support.**

Appellant is seeking review of the *Pendente Lite* order. He cites 4 V.I.C. § 33(b)(1) and Rules 4(a) and 5(a)(2) as the basis for the jurisdiction of this Court. Other than listing the statutory claim for appellate jurisdiction, the Appellant has not discussed the application of the statutes to the issue raised on appeal.

“The right of appeal is a statutory right, not a common law right... [and] legislatures can set conditions and impose limitations on how and when an appeal is taken.” *Xavier*, 67 V.I. at 264 (internal citations omitted). But appeal is not the same as reconsideration, trial *de novo*, or review.

*Valerino v. Manning*, 68 V.I. 276, 301 (Super. Ct. 2018).

4 V.I.C. § 33(b)(l) extends interlocutory jurisdiction of this Court to reviews of orders granting injunctive relief.

(b) Interlocutory review-civil. The Supreme Court of the Virgin Islands has jurisdiction of appeals from:

(1) Interlocutory orders of the Superior Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions;

4 V.I.C. § 33(b)(l).

Appellee did not seek injunctive relief in the Emergency Motion, and more importantly, the court did not address, modify, dissolve, or refuse to dissolve any existing injunction. “Since the Superior Court neither granted nor denied” [motions for injunctive relief], ‘there is nothing for this Court to review’ on appeal.” *Arellano v. Rich*, 2013 V.I. Supreme LEXIS 70, at \*5 (V.I. Oct. 7, 2013) (quoting *Caribbean Healthways, Inc. v. James*, 59 V.I. 805, 812 n.2 (2013) (collecting cases)). Research has failed to locate any decision in which a *Pendente Lite* order of support was deemed injunctive in nature. Thus, the statute does not support the exercise of appellate jurisdiction by the Court.

Rule 5(a)(2), the third purported basis for jurisdiction of the court, addresses an appeal as of right. This rule specifically limits an appeal as of right to either a final order, or an order for which interlocutory appeal has been specifically granted under 4 V.I.C. § 33(b) or (c).

(2) To be appealable as of right, an order of the Superior Court must either be a final order, or must fall within one or more of the categories of interlocutory orders for which a right of appeal is specified in 4 V.I.C. Sections 33(b) and (c).

V.I. R. App. P. 5(a)(2).

“The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court.” *Slack v. Slack*, 69 V.I. 567, 570 (2018); 4 V.I.C. § 32(a). “A final judgment ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *Riley v. Kennedy*, 553 U.S. 406, 419 (2008) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); see also *V.I. Gov’t Hosps. & Health Facilities Corp. v. Gov’t of the V.I.*, 50 V.I. 276, 279 (2008). *Hard Rock Café v. Lee*, 54 V.I. 622, 638 (2011). There is no dispute that the *Pendente Lite* order for support did not end the litigation between the parties which has been ongoing for years and would not extend traditional appellate jurisdiction to the Court under 4 V.I.C. § 32.

The procedural posture of this litigation must be distinguished from the litigation in *Slack*, in which the court undertook a review of an award of *Pendente Lite* support. There, the initial request for *Pendente Lite* support was denied.

Critical for purposes of establishing appellate jurisdiction was the fact that the divorce action in *Slack* proceeded to a final order in which the court amended its previous order and granted the wife \$12,000.00 in *Pendente Lite* support. The court did not grant the wife payment of her credit card debt or attorneys' fees. An appeal of the final order included a review of the *Pendente Lite* support.

The *Slack* court specifically recognized and stated that the order before “it constitutes a final order and this Court has jurisdiction over the appeal.” 69 V.I. at 570. Thus, while the court did review the *Pendente Lite* support order, the parties were obligated to wait to appeal any disputes concerning the *Pendente Lite* support until the final order resolving all issues in their property division was entered by the court. Furthermore, the *Slack* court recognized that the *Pendente Lite* support order was subject to review and revision in the final property distribution. *See Smith v. Henley*, 67 V.I. 965, 970 (2017) (court had jurisdiction to review a final property division arising from a divorce action).

In *Hard Rock Café*, the court considered whether an order remanding a dispute for unemployment benefits was an order entitled to appellate review. The court was called upon to determine if it had appellate jurisdiction and concluded that it did not.

Irrefutably, the Superior Court's Remand Order of May 5, 2008, remanding the case to the Department of Labor for further proceedings, including the opportunity to “confront and rebut evidence presented against her[,]” does not constitute an appealable



interlocutory order because the Order is not an injunction, nor is it an order pertaining to receivers or receivership, nor does the Superior Court's Remand Order fall within the statutory purview of title 4, section 33(c) of the Virgin Islands Code. Therefore, the Government's basis for seeking an appeal to this Court from the Superior Court's Remand Order fails to comply with the prerequisites for an appeal under title 4, sections 32 and 33 of the Virgin Islands Code.

*Hard Rock Café*, 54 V.I. at 639–40.

A similar attempt to obtain review of a *Pendente Lite* order of support in a divorce action has been considered by this Court. In *Malpere v. Malpere*, Civ. App. No. 1999-122, 2001 WL 1735082, at \*1 (D.V.I. App. Div. Sept. 10, 2001), the husband in a divorce action was ordered to tender a lump sum of \$10,000 *Pendente Lite* support to help the wife cover her attorneys' fees necessary for defending the divorce action. The husband asserted that since the *Pendente Lite* order was enforceable by contempt pursuant to 16 V.I.C. § 352(a), the order had the requisite characteristics of a final order to extend the court interlocutory appellate jurisdiction. The court did not agree.

While section 352(a) addresses the mechanisms available for enforcing an order for support, it does not establish an exception to the general rule that interlocutory orders are not generally appealable, nor can it be read to establish such an exception. Notably, the appellant makes no effort whatsoever to support with any legal authority this rather strained reading of section 352(a). Aside from his unsupported conclusion that this Court has jurisdiction pursuant to section 352(a), the appellant provides no other ground for jurisdiction. Moreover, the appellant provides no argument for this Court to broaden its general rule limiting the application of 4 V.I.C. § 33 to final orders. (See Appellant's Reply Br. at 2.) An order granting alimony *Pendente Lite* is at its very essence interlocutory in nature and not appealable except by permission.

*Malpere*, 2001 WL 1735082, at \*1.

Here, Appellant sought a stay of enforcement of the interlocutory order but did not seek permission to file an immediate appeal, pursuant to V.I. R. App. P. 6. Given that the interim order is unquestionably interlocutory in nature, no basis for appellate jurisdiction exists. Consequently, Appellee requests that this Court deny the appellate review of this interim order for lack of jurisdiction.

## **II. The Superior Court properly awarded temporary support.**

An appellate court reviews the trial court's rulings with respect to support for abuse of discretion. *Slack v. Slack*, 71 V.I. 1139, 1140 (2019).

Here, the wife sought temporary support and attorneys' fees. This recovery is permitted under Virgin Islands' law. The Superior Court is guided by Virgin Islands statute 16 V.I.C. § 345(a) when making any support award.

The amount provided for support, except for the support due to or on behalf of a child or children, shall be proportioned to the resources of the person giving such support and to the necessities of the party receiving it, and shall be reduced or increased in proportion to the resources or the necessities of the latter.

16 V.I.C. § 345(a).

As the party seeking *Pendente Lite* support, the wife bears the “burden of substantiating her claim that she has the need for alimony and that [the husband] has the financial ability to pay for her purported living expenses.” *Fabien v. Fabien*, 69 V.I. 809, 815 (2018). The trial court properly held that this burden was

met. In making its determination, the trial court set forth the appropriate factors for awarding *Pendente Lite* support, noting that it must “determine whether interim support is appropriate, the Court must weigh the Respondent’s needs and capacity for gainful employment and the Petitioner’s ability to pay.” (Joint Appendix, hereinafter “JA”, at SEF23)

The trial court properly took note of Appellee’s advanced age, lack of college education, and the fact that she has been out of the workforce since 1992. (AA 004). Consequently, ample evidence supported the Court’s determination that Appellee lacked the capacity for gainful employment. At the time of the hearing, Appellee had approximately \$176,300.00 in four separate accounts. (AA 012). Her only source of income was the \$5,000.00 “allowance” by Appellant and permission to use \$5,000.00 per month on Appellant’s American Express Credit Account (AMEX), which she would lose if she did not use it. (AA 009).

Appellee resides in the former marital home located in New York. (AA 018). The residence is in need of significant repair and Appellee testified that she was afraid to use her limited funds to complete the repair work because she was concerned that the property would be taken away from her, due to a pending legal action against Appellant. (AA 027).

Appellee submitted a financial affidavit, dated March 11, 2022, at the hearing that her monthly expenses were \$26,217.00 and that her current

“allowance” was not sufficient to meet her needs. (AA 013). She indicated that Appellant pays her \$500.00 for household supplies. (AA 014). Appellee testified that those household expenses have increased an additional \$200.00 per month since the date of the affidavit. (AA 016). The couple regularly entertained during the marriage and the monthly cost of her entertaining expenses has increased. (AA 016). She testified that she has a 2004 Land Rover that is currently in need of an estimated \$33,000.00 in repairs, some involving safety issues. (AA 010-011). The cost of monthly groceries at home has gone up since the date of the affidavit due to the rising cost of food. Additionally, the cost of eating outside the home has increased an approximate \$500.00. (AA 017). Appellee’s monthly costs for sports and hobbies have increased by \$500.00. (AA 019-020).

During the hearing, the parties informed the Court that Appellant agreed to pay for the necessary repairs to Appellee’s vehicle and agreed to reimburse Appellee for the Tuxedo Club fees, amounting to \$15,000.00 per year after proper documentation was received. (AA 021-022).

Appellee requested access to the couple’s Rathbarry Castle property in Ireland. She testified that in 2008, she was informed by Appellant that if she returned to the property, she would be locked out and possibly arrested. She has witnessed on social media Appellant’s present wife’s daughter and others at the property and wearing her clothing. She requested that she be permitted to return to

the property. (AA 026). The Ireland property is one of four parcels of real estate owned by the parties.

Appellee testified that she was financially naïve and needed an expert to help her identify and value the assets and holding of the couple. She has paid her forensic accountant \$25,000.00 as a retainer. (AA 023).

While Appellant focuses on Appellee's lack of documentation for any increase in monthly expenses, he does not refute the fact that Appellee's residence is in need of repair, that she owns an 18-year-old vehicle that is in significant need of repair, and that the cost of living has increased for herself and others. The Court's modest award for monthly expenses was clearly supported by the evidence presented.

### **III. The Court's award of Appellee's attorney and expert witness fees were reasonable and supported by competent evidence.**

The Superior Court's rulings with respect to attorney's fees and costs, are reviewed for abuse of discretion. *In re Guardianship of Smith*, 58 V.I. 446, 449 (2013).

The Superior Court considered the claim for interim fees under the standard noted in *Kaloo v. Estate of Small*, 62 V.I. 571, 584 n.11 (2015):

attorney's fees awards should represent "a fair and reasonable portion of ... [the] attorney's fees incurred in the prosecution or defense of the action, and not [necessarily] the whole amount charged by the attorney."

The Superior Court then considered the various factors that are considered by the reviewing court to determine if an award of attorneys' fees is reasonable as previously recognized by the Virgin Island Supreme Court.

Specifically, we examine:

the time and labor required, the novelty and difficulty of the issues involved, the level of skill needed to properly conduct the case, the customary charges of the bar for similar services, the amount involved in the controversy, the benefits resulting to the client from the services, and the contingency or certainty of compensation.

[*Jones v. Sanders*,] [2007 U.S. Dist. LEXIS 388,] at \*1 [E.D. Mich. Jan. 5, 2007] (citing *Lindy Bros. Builders, Inc. of Phila., et al. v. American Radiator & Standard Sanitary Corp., et al.*, 487 F.2d 161 (3d Cir. 1973); *Lucerne Inv. Co. v. Estate Belvedere, Inc.*, 411 F.2d 1205, 1207, 7 V.I. 242 (3d Cir. 1969)).

*Judi's of St. Croix Car Rental v. Weston*, S. Ct. Civ. No. 2007-050, 2008 V.I. Supreme LEXIS 21, at \*3 (V.I. May 19, 2008).

The Superior Court then separately considered each of these factors and supported its conclusions. Under the reasonableness of the time claimed by Appellee's attorneys to date, the court noted that the matter before it was a high conflict matrimonial action in which Virgin Islands counsel had already expended more than 200 hours. The matrimonial action was a complex asset dispute with holdings in multiple countries which would support extensive evaluations, thereby supporting the second factor. Appellee testified that she was unaware of the extent

of the marital assets or their value and testified that Appellant has never shared the information with her. (AA 024).

Because of the high conflict and complex nature of the couple's marital estate, resolution of the conflict will require attorneys and experts of superior skill, thereby supporting the third *Judi*'s factor.

The court accepted the skill level and hourly rate of Appellee's counsel as reasonable for a case of this nature, supporting the fourth factor. Given the extensive holdings of the couple, and Appellee's lack of financial experience or expertise, the Superior Court concluded that she would benefit from the retention of the attorneys and experts. (JA at SEF24-SEF28). Given that Appellee has no income source other than Appellant, the Superior Court's ruling was an attempt to put the parties on an equal financial footing in terms of prosecuting this matter.

Appellant objects to the portion of the *Pendente Lite* award for the cost of Appellee's expert witness and attorneys' fees. His primary objection to the award for Appellee's expert witness was that he was not a licensed CPA in the Virgin Islands.

16 V.I.C. § 108(1) provides for the interim award of funds to the "party in need... as may be necessary to enable the party in need to prosecute or defend the action." Appellant categorized the anticipated time needed by Appellee's expert to identify and value Appellant's expansive assets as "untenable." Yet, Appellant

admitted that he retained a full time CPA, a tax expert, and the services of Ernst & Young to aid in the management of his business interests and assets. He further suggests that both parties could rely on the accounting services of Auvén Therapeutics, one of the companies in which he is a partner and director, to determine the value and ownership of assets. Appellee asserts that this suggestion is untenable and clearly contrary to established law. She is clearly permitted to retain her own experts to verify or refute the conclusions of Appellant's accountants.

Appellant then argues that law governing the award of costs in non-divorce actions to prevailing parties under 5 V.I.C. § 541 should be applicable while mis-citing *Mahabir v. Heirs of George*, 75 V.I. 369, 370 (2021), in support of a limitation on the court's discretion in awarding costs and attorneys' fees in divorce actions. *Mahabir* involves an estate dispute and an award to a prevailing party. The principles and factors considered by that court are inapplicable to a determination under 16 V.I.C. § 108(1), which provides for the interim award of funds to the "party in need... as may be necessary to enable the party in need to prosecute or defend the action." Thus, when making an interim award of attorneys' fees and costs, the trial court must consider not only the anticipated complexity of the pending litigation but also the respective needs of the parties and the obligor's



ability to pay. The Superior Court followed these principles when making its determination.

Appellant takes particular issue with Mr. Cowhey's \$600.00 per hour billing rate, ignoring the expert's testimony that the blended hourly rate of his team amounts to \$300.00 per hour. (AA 088). The use of Mr. Cowhey's firm would entitle Appellee to appraising services in the United States, England, Ireland, Switzerland, and France.

The expert witness was offered at the *Pendente Lite* hearing to counter Appellant's testimony concerning his ability to pay the interim fees as well as the need for extensive review of the financial holdings of Appellant. Appellant testified that his limited income was being used to support his adult children and the support of Appellee. Further, his CPA testified that Appellant claims as dependents and supports Appellee, the parties' adult sons, his present wife, his former mistress, and his minor son. (AA 103).

Mr. Cowhey asserts that Appellant's tax returns from 2020 show an income of millions of dollars and that over the last five years, Appellant's after-tax annual income was approximately \$5.75 million. (AA 092). Mr. Cowhey further questioned the figures included in Appellant's financial affidavit for the last five years. While it indicated amounts paid to Appellant as director for his various companies, the supporting documentation from those companies were not included

that would indicate amounts as cash payments from the various companies. (AA 093). Mr. Cowhey also noted the apparent discrepancy in the valuation of the Castle Freke property in Ireland that has had a consistent valuation for years, even after Appellant spent millions of euros in renovation work. (AA 091). Water Island Development, a holding company in the Virgin Islands, showed a decrease on Appellant's financial statement from from \$7.2 million to \$1 million in the 90-day period after the divorce decree was entered, without any supporting documentation to support why there was such a rapid drop in value. (AA 091). Mr. Cowhey testified that the sudden drop in valuation of certain assets on Appellant's financial statements raises questions of fraud and hidden assets that are yet to be determined. (AA 097).

Mr. Cowhey also testified to the need for a forensic accountant rather than a CPA in this case. He testified that a CPA would help with matters such as tax planning but would lack the skill or expertise to help in the valuation of the numerous assets in dispute in this case. (AA 094-095).

Appellant testified to having spent \$800,000.00 in legal fees so far in prosecuting this divorce. (AA 060). That figure was supported by his CPA. (AA 111). When asked to break down how that money was spent, his CPA responded, "Yes, about \$350,000 went to the New York lawyer as well as about Three Four

Hundred Thousand Dollars to the Virgin Islands lawyers as well as some unpaid bills to the V.I. lawyers.” (AA 111).

There is no factual dispute that the estimated \$800,000.00 already spent by Appellant to prosecute this marital litigation came from marital funds. Appellee is not employed, nor capable of employment at this stage of her life and is wholly dependent upon Appellant for her support.

**IV. The Superior Court properly exercised its discretion in awarding interim attorney’s fees and costs to Appellee’s counsel in the amount of \$350,000.00.**

Appellant offers the surprising assertion that Appellee’s expert may be engaged in the unauthorized practice of law and has filed a motion to that effect with “the appropriate authorities.” Consequently, Appellant maintains that the Superior Court abused its discretion by awarding Appellee \$350,000.00 in interim fees since it relied upon Appellee’s expert. Appellant’s motion was filed shortly after the two-day hearing and prior to the Superior Court’s *Pendente Lite* Order of August 22, 2022. During the hearing, the court stated that it was not considering any licensing issue, only whether Mr. Cowley was qualified to offer testimony as to Appellant’s ability to pay. (AA 003 and AA 090). Any objection as to the licensing of Appellee’s expert witness was not a matter properly before the Superior Court and is not part of the instant appeal.

On cross-examination, Mr. Cowhey testified that any determination he would make would not be subject to the standards of a licensed CPA, since he would not be performing accounting services. Rather, his work would be guided by American Institute of Certified Public Accountants, the National Association of Certified Valuators and Analysts, and the American Society of Appraisers. (AA 096). The fact that Mr. Cowhey is not a licensed accountant in the Virgin Islands is irrelevant for the purpose of the testimony he offered, nor has any bearing on his qualifications as an expert in the field of business valuation. Mr. Cowhey is an expert, and his qualifications can be questioned in a hearing at a later date. He is not practicing law, and his analysis of what marital assets exist, the value of those assets and what information or data is missing, is his role in this matter. He is retained to assist counsel in determining the marital assets and the values of each asset. While Appellee's counsel may have forwarded Mr. Cowhey's initial analysis and questions concerning assets to opposing counsel, that document was not an interrogatory or request to produce. No formal discovery has been commenced by either party.

Appellant may object to the use of Appellee's expert forensic accountant, but the *Pendente Lite* motion is not the proper avenue for objecting to a party's expert. The Superior Court limited the expert's testimony to Appellant's ability to pay. (AA 090). Appellant is free to file a motion in limine during discovery. He

may also appeal the interim award once a final judgment on the division of property and support is entered. Until such time, his objections are wholly inappropriate.

### CONCLUSION

Appellee maintains that the *Pendente Lite* order of the lower court was interlocutory in nature and not ripe for appellate review. The Appellant will have an opportunity to seek review of any award before the trial court when a final award is entered. As such, this appeal should be dismissed. Assuming arguendo, that the Court seeks to review the interim order, Appellee asserts that adequate support for the modest increase in support and the payment for attorneys' fees and expert witness has been established. The Superior Court has not abused its discretion in making this award.

Dated: April 14, 2023

Respectfully Submitted,

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## **CERTIFICATION OF BAR MEMBERSHIP**

I hereby certify that I am a member in good standing of the Bar of the Supreme Court of the Virgin Islands under Virgin Islands Bar Number 370.

/s/ Julie German Evert

## **CERTIFICATION OF COMPLIANCE WITH LENGTH LIMITATIONS**

I hereby certify that the foregoing brief complies with the limitations on the number of words as provided in the V.I. R. App. P. 22(f) in that the brief, exclusive of pages containing the table of contents and the table of authorities, contains 6,072 words.

/s/ Julie German Evert

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of April 2023 I caused a true and correct copy of the Appellee's Brief to be served via the Clerk of the Court using the Virgin Islands Supreme Court E-Filing system, which will send a notification of such filing to counsel of record via email. I certify that seven (7) hard copies of the Appellee's Brief shall be hand delivered to the Virgin Islands Supreme Court and one (1) hard copy of the Appellee's Brief shall be hand delivered to Andrew L. Capdeville, Esq. at the following:

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