IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. 14 of 2015
FAM 123 of 2014

BEFORE

The Right Hon Sir John Chadwick, President
The Right Hon Sir Bernard Rix, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
Justice Mangatal

BETWEEN

KN

Appellant

and

MN

Respondent

Ms. Denise Owen of TraversThorpAlberga appeared for the Appellant
Ms Karen Thompson appeared for the Respondent

Hearing: 20 November 2015
Ruling: 20 November 2015

RULING

Revised from transcript and Approved

Released to counsel 9 December 2015

This Ruling is not to be published in a form which identifies the child.

Sir John Chadwick, President:

1 This appeal involves the future welfare of a young child, a girl now aged about three years old, whose parents' marriage has broken up. The position at the moment is that the

child is in the care of her mother, living on the island; with an order for supervised access by the father, who is also on the island.

2 In the course of deciding what long-term order to make - and in the circumstances that allegations of physical abuse of the child by the father had been made by the mother - Justice Williams ordered a fact-finding hearing to determine the truth or falsehood of those allegations. That hearing came before Justice Mangatal in April of this year. She gave her judgment on 16 June 2015. She found that two of the allegations that had been made - one relating to lower body injury to the child, said to have been caused by the father, and the other relating to abusive behaviour by the father whilst the child was being bathed - were proven. She did not find proven a number of other allegations which were made by the mother.

3 The father obtained the leave of the judge to appeal to this Court. He filed a notice of appeal on 29 June 2015; and that was followed shortly thereafter, on 7 July 2015, by the filing of a memorandum and grounds for appeal relating to those allegations.

4 From that date at the beginning of July until the end of October there appears to have been little or no communication with this Court by those representing the father. This Court began its autumn session on 2 November 2015. Shortly before that date, on 28 October 2015, counsel for the father wrote to the Registrar of the Court of Appeal asking if the appeal could be listed for this session; it not having appeared in the published list of appeal listed for hearing. The Registrar's response was to the effect that the appeal could be listed for hearing on 13 November 2015: but that, in order to enable the appeal to be heard on that date, it would be necessary to file, by 10 November 2015, the documents which the Court would need for the appeal.

5 That did not happen. Those documents were not filed until yesterday afternoon, that is to say, on 19 November 2015. They comprised a very substantial bundle of the material that had been before the judge, together with a full and comprehensive skeleton argument and the judgment which Justice Mangatal had delivered in June 2015. At the same time as those documents were filed with the Court they were delivered to counsel for the mother; although, in so far as they comprised documents which had been used at the trial, Ms

Thompson accepts that she would already have had them in her possession. But she was unaware that she was going to need to re-read and digest them for a hearing in this session. In those circumstances the Court directed that the matter should come before it today for a mention so that we could take a view whether there was anything useful that could be done.

6 The practical problem is that the husband's work permit is expected to expire at the beginning of February 2016. There will then be a period of some ten months, between beginning of February and the end of November 2016, when the child will be on the island with her mother - who has the right to remain until the end of November 2016 – during which the opportunity for the father to have contact with his daughter will depend on his ability to travel to the island from time to time for that purpose.

7 That, plainly, is a change in circumstances which needs consideration by the Family Court. It will be for that court to decide what contact regime should be put in place during that ten-month period so as to enable meaningful contact to be maintained between the child and her father. In making that decision the judge will need to consider whether such contact as he thinks appropriate should be supervised - as it has been so far - or unsupervised; and, in reaching a conclusion on that issue, he will need to take account of the facts (i) that findings of fact have been made by Justice Mangatal accepting two of the allegations made against the father, (ii) that Justice Mangatal has given leave to appeal to this court against those findings of fact, and (iii) that the circumstances which I have described have made it impossible for this Court to hear and determine the appeal against those findings of fact in the course of the current session. It is obviously less than satisfactory that the truth or falsehood of the allegations which have been made against the father will not have been finally determined until after the Family Court has had to decide what contact regime should be appropriate from the beginning of February.

8 In those circumstances, we direct that the matter be listed before the Family Court for a mention at an early opportunity; so that that court can decide how best to deal with the situation that I have described before the husband leaves the island at the beginning of February 2016.

9 I should add this. One of the problems that will face the Court of Appeal when this appeal is heard in April 2016 is that there is no transcript of the evidence which was given before Justice Mangatal in April 2015. Counsel for the father tells us that she has a comprehensive note; but that note has not yet been agreed with counsel for the mother and there is an obvious risk that memories are fading. If appeals from judges in the Family Court conducting fact-finding hearings were to become commonplace, it would be necessary for Family Court to give serious consideration to the need for a transcript of evidence to be taken by a stenographer and transcribed - as would be the case in a criminal trial – because, without a transcript of evidence, the Court of Appeal will be at a serious disadvantage in determining these matters.

10 With that in mind, it is I think, desirable that judges sitting in the Family Court in this type of case should be slow to give leave to appeal against their own findings of fact. If there is a point of principle which needs to be determined by the Court of Appeal, then that would be a reason for leave to appeal to be given. But, if on analysis it can be seen that the challenge to the judge's findings of fact is that the judge weighed the evidence wrongly, then the administration of justice may be better served if judge has confidence in his or her own judgment and leaves it to the Court of Appeal to decide whether to entertain an appeal against those findings of fact.

11 In that context, I draw attention to the observations made in this Court in the appeal *of B v B* (2014) 2 CILR, 234 at paragraph [66]. The issue in that case was whether a child should be relocated out of the jurisdiction. At the end of its judgment this Court observed:

> "This appeal was brought with the leave of the judge. I should not be taken to criticize the judge for his decision to grant leave; it may be that he thought there was a perceived tension between observations in *Payne* - which had been consistently applied by the courts in this jurisdiction - and the more recent guidance given by the Court of Appeal in *Re F* which required consideration or resolution by this court. But if there were a need for this court to address a point of principle, it was unfortunate that that need arose in a case where litigation costs - which the parties could ill-afford - had already had an effect on the father's ability to meet maintenance orders which had been made against him. In my view, judges should be slow to grant leave to appeal in cases of this nature."

I take this opportunity of reminding the profession and the Family Courts of those observations. Fact-finding hearings are intended to achieve finality in relation to the facts

on which decisions as to the child's welfare should be based. That objective is going to be seriously undermined if leave is given to appeal against findings of fact as a matter of course; particularly in circumstances where there is, under the present practice, no transcript of the evidence which was before the judge. If there is a point of principle, then the position may be different. But again judges should have in mind that litigating points of principle is an expensive exercise; and that that expense should not lightly be thrown on parties whose means are better expended in providing for the welfare of the child in circumstances where the marriage has come to an end or broken up. There needs to be finality in these matters without undue expense and without undue delay. Granting leave to appeal in this sort of case is not easily reconciled with that need.

Chadwick P

Rix JA

Field JA