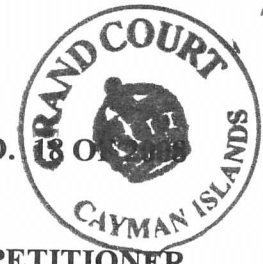


Foster
15/7/10



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE FAM NO. 1309/09

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4
5 BETWEEN: R V

PETITIONER

6
7
8 AND: M V

RESPONDENT

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13 Coram: The Hon. Mr. Justice Foster

14 Appearances: Mr. David McGrath of Samson & McGrath for the Petitioner

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16
17 Mr. Shaun McCann of Campbells for the Respondent

18
19 Heard: 23rd November 2009

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22
23 REASONS FOR INTERIM ORDER DATED 23RD NOVEMBER 2009

24
25
26 1. By summons dated 30th October 2009 the Petitioner ("the Husband") applied for
27 an order varying the interim maintenance order dated 11th March 2008 made by
28 Sanderson J. (Actg). By order dated 23rd November 2009 I varied that interim
29 order, also on an interim basis, to the extent that spousal maintenance should no
30 longer be paid but not in respect of the maintenance payable in respect of the 3
31 children of the marriage.

32
33 2. Before setting out the background to this matter and my reasons for my interim
34 order on 23rd November 2009, I should explain briefly why these Reasons have
35 been produced so relatively late. The Husband's Notice of Appeal, it appears,
36 was filed on 22nd December 2009. At that time I was not sitting and was abroad;

1 accordingly I was not aware that Notice of Appeal had been filed until after I
2 resumed sitting again on Tuesday 26th January 2010. At that time the next
3 session of the Court of Appeal was scheduled to commence on 1st March and end
4 on 19th March 2010.

5
6 3. On 29th January 2010 the Registrar informed me that I should defer preparing
7 Reasons until it was known whether the Husband's proposed appeal of my
8 interim order was in fact proceeding since the final hearing of ancillaries had
9 apparently been listed to take place on 24th March 2010, less than a week after
10 the end of the Court of Appeal March session. On 1st February 2010 the
11 Registrar emailed to me a copy of a letter to her from counsel for the Husband
12 dated 29th January 2010 in which it was said that the parties had agreed that an
13 appeal against my interim order would be futile given that the final hearing of
14 ancillaries was to take place shortly after the end of the Court of Appeal session.
15 The letter confirmed that in the circumstances there was no need for me to
16 produce Reasons for my interim order because the appeal and the Reasons would
17 be otiose. Counsel for the Husband requested that the appeal should be
18 adjourned *sine die*. At the request of the Registrar, I returned the Court file
19 which she had given to me to enable me to draft my Reasons, the same day (1st
20 February 2010).

21
22 4. 3 months later, on 5th May 2010, I was informed by the Registrar that the
23 Husband wished after all to proceed with the proposed appeal as apparently, for
24 reasons not known to me, the hearing of the final ancillaries had not in fact taken

1 place on 24th March 2010. It apparently took some 6 weeks for counsel to the
2 Husband to notify the Registrar that he now wished to proceed with the appeal.
3 Unfortunately, some 7 court days thereafter, on 14th May 2010, I stopped sitting
4 and then went abroad. Having other judgments in the course of preparation and
5 a full list there was insufficient time for me to prepare Reasons for my interim
6 order before I left.

7
8 5. I resumed sitting again on 21st June 2010 and I then recommended strongly that
9 the most sensible way to proceed was for the final hearing of ancillaries to take
10 place as soon as possible and I asked the Registrar to pass that recommendation
11 on to counsel for the Husband. At that time the next session of the Court of
12 Appeal was scheduled to commence on 9th August and to finish on 27th August
13 2010. I was then informed by the Grand Court Registry that the final hearing of
14 ancillaries had been re-listed for 21st September 2010, less than a month after the
15 end of the next Court of Appeal session. In the circumstances I sought further
16 clarification from the Registrar as to whether in the circumstances the appeal was
17 to proceed and was informed that the appeal had been listed for hearing on 17th
18 November 2010, which would obviously be after the hearing of the final
19 ancillaries and therefore pointless.

20
21 6. However, subsequently, on 8th July 2010, I was informed by the Registrar that,
22 notwithstanding the listing of the final hearing of ancillaries for 21st September
23 2010, counsel for the Husband was nonetheless pressing for the hearing of an
24 appeal of my interim order during the forthcoming session of the Court of

1 Appeal in August and that my Reasons were therefore now required urgently. It
2 is accordingly only since 8th July that it has been made clear to me that Reasons
3 for my interim order of 23rd November 2009 are definitely required.

4
5 7. The original interim order dated 11th March 2008, which the Husband applied to
6 me to vary, provided, as far as maintenance was concerned, as follows:

- 7
8 (1) *The Petitioner shall continue to pay the mortgage, utilities, strata fees,*
9 *maintenance for Mystic Retreat and the car loan of C1\$741.00.*
10
11 (2) *Commencing on 1st April 2008, the Petitioner shall pay to the Respondent*
12 *the sum of C1\$4,681.00 toward the monthly expenses of the children and*
13 *the Respondent will be responsible for the cost of the children's school*
14 *fees and extra curricula activities.*
15
16 (3) *The Petitioner shall pay to the Respondent C1\$3,000.00 per month*
17 *(C1\$1,500.00 in spousal support and C1\$500.00 per child per month)*
18 *commencing the 1st April 2008.*
19
20 (4) *No order as to costs.*
21
22

23 As I have already mentioned, there followed an interim consent order relating to
24 care and control of and access to the 3 children of the marriage. That included
25 agreed provision that the Husband would vacate the matrimonial property at
26 Mystic Retreat and reside at property located at Hope Springs within 72 hours
27 and agreed provision that the Wife should reside with the children in the Mystic
28 Retreat property.

29
30 8. At the time of my interim order in November 2009 the 3 children of the marriage
31 (a boy and 2 girls) were aged 13, 10 and 7 respectively.

32

1 9. At the time of the original interim order dated 11th March 2008 the Husband was
2 a self-employed dentist with his own practice in Grand Cayman and the Wife
3 was not in employment. By the time of the Husband's application to me for
4 variation of that order in November 2009 the Wife had obtained employment.
5 She accepted that in those circumstances the spousal maintenance of
6 CI\$1,500.00 per month should no longer be paid and accordingly I varied the
7 interim order dated 11th March 2008 to that extent. The issue between the parties
8 before me concerned the orders at paragraphs 1 and 2 of the original interim
9 order and the order at paragraph 3 insofar as requiring payment by the Husband
10 of maintenance of CI\$1,500.00 per month in respect of the children of the
11 marriage (CI\$500.00 per child per month).

12
13 10. The basis for the Husband's contention that the interim order dated 11th March
14 2008 should be so varied was that the circumstances had changed inasmuch as he
15 had moved to live in England a month previously and his income there was very
16 significantly less than his income from his dental practice in Cayman. At the
17 time of the interim order dated 11th March 2008 the Husband's earnings from his
18 Cayman practice were of the order of CI\$21,300.00 per month. According to
19 him, now that he was working as a self employed dentist in England with only
20 National Health patients he estimated his net disposable income to be in the
21 region of the equivalent of about CI\$2,000.00 to CI\$2,500.00 per month. He
22 said that he had also incurred expenses in England, such as having to purchase a
23 car. He argued that he was now in no position to comply with the interim order

1 dated 11th March 2008 and that if required to do so he would inevitably fall into
2 arrears and consequently be subject to enforcement proceedings.

3
4 11. It was submitted on behalf of the Husband that the Court required to be satisfied
5 that an order for interim maintenance was affordable by the party liable to pay
6 and that it would be wrong in principle for the Court to order the Husband to
7 make maintenance payments which he could no longer afford. It was contended
8 that there had been a clear and obvious change in circumstances as a result of the
9 Husband's recent move to England, where he was subject to income tax, and the
10 very significant reduction in his earnings. The Husband said that he was seeking
11 alternative, more highly paid, jobs in England but that there was no private, and
12 therefore more lucrative, dental work available to him there. At the time of the
13 hearing before me the Husband had only been in England for approximately 4
14 weeks.

15
16 12. As I have said, the Husband was seeking to vary paragraphs 1, 2 and 3 of the
17 interim order dated 11th March 2008. However my note of the hearing does not
18 disclose what, if any, alternative proposal he was making in relation to financial
19 support of his 3 children and it is not my recollection that he made any such
20 proposal.

21
22 13. The Husband's application was strongly opposed by the Wife. In particular it
23 was argued on her behalf that the onus was on the Husband to satisfy the Court
24 of 5 matters in particular, namely (1) that the Husband had left Cayman

1 permanently; (2) what his actual earnings were in England. In this regard the
2 Wife stated that before the parties came to the Cayman Islands from England
3 some 12 years ago the Husband was earning in the region of GBP 5,000.00
4 (CI\$6,103.00) per month there, significantly more than he now claims to be
5 earning; (3) clear evidence of the Husband's current financial resources. In this
6 respect the Wife pointed out that he had purchased a Saab motor car since being
7 in England, that he was flying to Cayman the following week and that he also
8 wanted to fly the 3 children to England at Christmas, all of which suggested that
9 he had the financial resources to meet such significant expenditure; (4) that he
10 had in fact severed all ties with his Cayman Islands dental practice; and (5) the
11 welfare of the children being paramount, the Husband required to justify
12 variation of the order for their maintenance and to make appropriate proposals.

13
14 14. The Husband accepted in his evidence that in September 2008 he had been
15 granted permanent residence in the Cayman Islands and an employment rights
16 certificate giving him the right to work here, although he did not disclose this to
17 the Wife, who did not become aware of the fact until much later. The Wife
18 alleged that the Husband had failed to make full and frank disclosure in relation
19 to his income from and the financial position of his dental practice in Cayman.

20
21 15. However, the Wife's principal contention was that the Husband's relocation to
22 England in October 2009 was not *bona fide* and was a sham or device, adopted
23 by the Husband in an attempt to force her and the children to return to live in
24 England, where maintenance of them would be much less expensive, before

1 returning himself to resume his dental practice in Grand Cayman. The Wife had
2 no desire to return to live in England after more than 12 years in Cayman. She
3 had since acquired permanent residence in Cayman with the right to work in her
4 own right and had obtained employment here which she would probably have
5 considerable difficulty obtaining, certainly at that level of remuneration, in
6 England. More importantly, the children have lived in Cayman to all intents and
7 purposes for all their lives and are well settled, happy and established here in all
8 respects. Cayman is their home and it would not be in the best interests of their
9 welfare to now uproot and take them to live in what to them is effectively a
10 foreign country. She argued that there is no good reason why that should be
11 done.

12
13 16. The Wife argued strongly that the Husband has anyway not left or does not really
14 intend to leave Cayman and his dental practice permanently. She drew attention
15 to an email widely circulated by the Husband to the patients and clients of his
16 dental practice shortly before he left Cayman in which he said he was taking
17 "*leave of absence*" and referring to the appointment of another dentist "*while I*
18 *am away*". She submitted that this strongly indicated that the Husband was
19 leaving his practice only temporarily. She also referred to an advertisement
20 placed in the Yellow Pages by the Husband only 3 months before he left to go
21 England advertising his practice in Grand Cayman in his own name, obviously in
22 order to retain his existing patients and to encourage new patients to his practice
23 here. The Wife also referred to the Husband's website as at June 2009 listing his
24 practice address in Grand Cayman and showing him as the only dentist there. It

1 was submitted on behalf of the Wife that it was incomprehensible that the
2 Husband would deliberately choose to reduce his income of approximately
3 CUS\$21,300.00 per month in Cayman only a month ago by almost 90%.

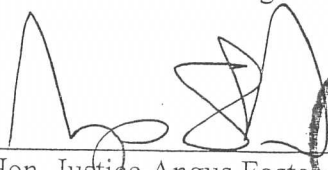
4
5 17. In my view in order to justify a variation of the interim order dated 11th March
6 2008 it was for the Husband to satisfy me that there was a genuine and
7 unavoidable change in his circumstances such that in my discretion, particularly
8 having regard to the best interests of the children, I should reduce the
9 maintenance which he had been ordered to pay some 20 months previously. On
10 the evidence before me I was not so satisfied. In particular I was not satisfied
11 that the Husband had established a genuine and *bona fide* change in
12 circumstances which was unavoidable. He gave no reason, still less any
13 justification, for his leaving his dental practice in Cayman. He had unilaterally,
14 deliberately and entirely his own choice put himself in a position where his
15 earnings had reduced very considerably. He was not the victim of some
16 unavoidable situation or change in circumstances; it was his own decision and of
17 his own making. He had by his own voluntary act reduced his income by almost
18 90%. He put forward no explanation for doing so and he acted entirely without
19 regard to his responsibilities and his legal obligations towards his three children
20 and his need to comply with the previous interim order. His decision had the
21 effect of jeopardizing his ability and his legal requirement to maintain his
22 children, whose interests are not only the first consideration for the Court but
23 should be for him also. The Husband has, as I have said, permanent residence in
24 the Cayman Islands with the right to work here and no reason or argument was

1 put forward as to why he could and should not return to Cayman and resume his
2 dental practice so as to be able to meet his obligations to his children as before.
3 Indeed, the main thrust of the evidence, which I accepted, was that he did not
4 anyway intend to leave Cayman permanently but that, to put it at its lowest, he
5 had deliberately left open the possibility of his return to his dental practice here.
6 There is certainly no legal reason why he may not resume his practice here and,
7 as I have said, I was not presented with any reason why he could or should not
8 do so.

9
10 18. It was submitted on behalf of the Husband that I should not decline to vary an
11 order which the party concerned was not able to meet and in general terms I
12 accept that as a matter of principle. However, that is not the case here. The
13 Husband is, in my view, well able to meet and comply with the order dated 11th
14 March 2008 if he returns to Cayman, as he is able and entitled to do, and resumes
15 his dental practice here as before.

16
17 19. In all the circumstances I was not satisfied that the Husband had established a
18 genuine bona fide change in circumstances such that I should exercise my
19 discretion to vary paragraphs 1, 2 and 3 of the order dated 11th March 2008 as he
20 sought. Accordingly I refused the Husband's application in that respect and
21 ordered him to pay the Wife's costs of and incidental to the hearing before me.

22
23 Dated 15th July 2010

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25
26

Hon. Justice Angus Foster
Judge of the Grand Court

