Henderson

25/5/10

IN THE GRAND COURT OF THE CAYMAN ISLANDS

D129 /2005

BETWEEN:	**MARIA-COSTANZA LINDSAY FEAR (nee GIGLIOLI)**	**Petitioner**
AND:	**RICHARD DAVID FEAR**	**Respondent**
AND:	**SHARON HOLLOWELL**	**Co-Respondent**
Coram:	The Hon. Mr. Justice Henderson	
Appearances:	Mr. Nigel Meeson Q.C. appeared for the Applicant Richard Fear Mr. David McGrath appeared for the Respondent Maria-Costanza Fear	
Heard:	24th May 2010	

RULING ON APPLICATION FOR LEAVE TO APPEAL

1. On March 30th, 2007 I made an order disposing of the remaining ancillary issues in this matrimonial cause and gave my reasons. I determined that Mr. Fear should pay spousal support to Mrs. Fear, that it should be payable for an indefinite period of time, and that payments should be in the amount of $2,350 per month. A significant element in my decision on the question of spousal support was the obligation undertaken by Mr. Fear to pay all of the educational expense, in the amount of $8,500 per month, of Elena, a child of the marriage. When assessing his income for the purposes of my spousal support award, I deducted the entire amount of his payment and treated his income as if it were $11,500 per month (all

figures are in US dollars). My decree of dissolution was granted May 1st, 2007. He did not appeal.

2. In the event, Elena set aside her pursuit of higher education and obtained employment. Mrs. Fear applied for a variation upward in the spousal support award on the ground that there was a material change in circumstances. Mr. Fear immediately filed a cross summons seeking a termination of spousal support payments.

3. Prior to the original ancillaries hearing, Mr. Fear had been paying the sum of $5,000 per month in spousal support. Mrs. Fear argued that, since the expense of paying for Elena's education was no longer a burden for Mr. Fear, he should be ordered to pay the original sum of $5,000 per month going forward. Mr. Fear filed a skeleton argument in which he sought a termination of maintenance payments on the principle that a clean break was appropriate in his case. The submissions presented and the cases cited were directed solely to the clean break principle. For the most part, Mr. Fear's oral argument at the hearing was to the same effect.

4. In my Ruling of February 18th, 2010 I increased the spousal maintenance award to $4,500 per month. I also held that there was no justification for a termination of spousal support and that the clean break argument had been advanced and rejected in 2007.

5. The present application by Mr. Fear is for leave to appeal my orders of March 30th, 2007 and February 18th, 2010 pursuant to s. 5 of the Court of Appeal Law (2006 Revision), and for a stay with respect to the maintenance increase.

6. An appeal in a matrimonial cause from a decree or from any order disposing of an ancillary issue as a precursor to granting a decree may be brought as of right but must be brought within 21 days. That is the effect of section 24 of the Matrimonial Causes Law ("the Law") and, in particular, the construction put upon it by our Court of Appeal in ***Wight v Wight*** (unreported) CICA No. 6 of 2006 (December 8th, 2008). Section 24 of the Law reads:

> *24. Either party to a suit brought under this Law may appeal to the Court of Appeal against any decree or order pronounced or made by the Court in such suit in respect of any matter of law or of mixed fact and law, provided that written notice of appeal is lodged within twenty-one days of the pronouncement of the decree or such notice is given orally in open court at the time of the pronouncement of the decree.*

7. In ***Wight v Wight***, Mrs. Wight sought to appeal against an ancillary order concerning the division of assets. Section 5 of the Court of Appeal Law (2006 Revision) provides that the Court of Appeal has jurisdiction to hear and determine an appeal from any judgment of the Grand Court. That power is modified by section 6 (f) (ii) which provides that no appeal shall lie from an interlocutory judgment or from "a decree nisi in a matrimonial cause" except with leave. Rule 12 (6) (y) of the Court of Appeal Rules (2004 Revision) provides that any order "for or relating to ancillary relief in matrimonial proceedings, including a matrimonial property adjustment order" shall be treated as interlocutory and can

be appealed only with leave. Mrs. Wight sought and received a ruling of the Court of Appeal that she did not need leave because the Matrimonial Causes Law contained the governing provision. The Court set out its reasoning in this way:

"Section 3 of the Matrimonial Causes Law (2005 Revision) authorizes the Grand Court to pronounce and enforce "decrees" not only of dissolution of marriage but also under (f) of "matters ancillary thereto" – disposition normally made by order, rather than by decree. But section 21 requires the Court to make "orders" for a variety of purposes including under (b) "the disposition of matrimonial property" and under (e) "making financial provision from the property of either spouse". Sections 24 and 25 grant a specific right of appeal to either party to any suit under the statute against "any decree or order pronounced or made" in "such suit". They provide:

> *24. Either party to a suit brought under this Law may appeal to the Court of Appeal against any decree or order pronounced or made by the Court in such suit in respect of any matter of law or of mixed fact and law, provided that written notice of appeal is lodged within twenty-one days of the pronouncement of the decree or such notice is given orally in open court at the time of the pronouncement of the decree.*
>
> *25. The Court of Appeal may, after hearing and considering any appeal against any decree pronounced under this Law-*
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> > *(a) rescind the decree; or*
> > *(b) confirm the decree with or without variation of any order made therein.*

Section 26 provides that the parties become free to remarry if time for appeal has expired without notice of appeal having been given. No provision is made for any extension of time to appeal. It is apparent that the "decree" referred to in ss. 24 and 25 is a decree relating to the dissolution of marriage.

We were of the view that the expression in section 24, "any decree or order pronounced or made by the Court in such suit", must be taken to extend to an order for ancillary relief relating to division of assets granted in association with the decree of divorce, and that the time for giving notice of appeal against any such order must be taken to run from the date of the granting of the decree of divorce.

The right of appeal provided for in the Matrimonial Causes Law does not seem capable of application to ancillary relief orders made after the granting of the

divorce decree, such as orders varying provisions made for custody or maintenance. This anomaly could not, in our view, justify the Court in disregarding the plain words of s.24 creating an appeal as of right with respect to orders made in the divorce proceedings which take effect in association with the granting of the decree of divorce".

8. There is no provision which allows either the Grand Court or the Court of Appeal to extend the time for an appeal under section 24 of the Law. The intent of the Legislature is that such an appeal must be brought quickly or not at all, in order that divorcing parties may proceed to make life-altering decisions, including a decision to remarry, without being left in a state of uncertainty over ancillary issues.

9. Section 5 of the Court of Appeal Law (2006 Revision) is a provision of general application; it provides an avenue of appeal in all manner of civil actions. Section 24 of the Matrimonial Causes Law has application only to a narrow class of order – divorce decrees and orders ancillary to and preceding them – and constitutes a singular exception to the general right of appeal in s. 5. To permit an appeal under s. 5 in any matrimonial cause where an appeal under s. 24 is no longer possible would render the latter provision otiose. The reasoning in ***Wight v. Wight*** supports this conclusion.

10. Rule 12(6)(y) of the Court of Appeal Rules (2004 Revision) applies to "an order for or relating to ancillary relief in matrimonial proceedings". The purpose of this sub-rule is to ensure that such orders shall be treated as interlocutory and therefore requiring leave to appeal. It cannot be read as providing an appellate

jurisdiction where none would exist otherwise. For these reasons, I agree with the submission made on behalf of Mrs. Fear that any appeal from my order of March 30th, 2007 is now out of time and that time cannot be extended.

11. It follows that all but one aspect of my spousal support award is immune from appeal. The Court of Appeal cannot now be asked to find that:

(1) an award of spousal maintenance was not warranted because the circumstances show that a clean break is appropriate;

(2) the award of spousal maintenance should not have been made for an indefinite period;

(3) as at the date of the decree of dissolution, the appropriate level of spousal support (bearing in mind the very substantial obligation of Mr. Fear to pay for his daughter's education) was $2,350 per month.

12. The application for leave to appeal from my Ruling of February 18th, 2010 is relatively straightforward. In the last paragraph of the passage quoted above, the Court of Appeal has observed that section 24 of the Matrimonial Causes Law does not seem capable of application to orders made after a decree of dissolution which vary ancillary relief granted earlier. Leave to appeal such orders can therefore be applied for under section 5 of the Court of Appeal Law (2006 Revision). Rule 12 (6) (y) requires that such an order be viewed as "interlocutory" and requires leave to appeal.

13. Leave to appeal is granted where the proposed appeal has a real prospect of success: ***TeleSystem International Wireless Inc. and another v***

CDC/Opportunity Equity Partners LP & three others 2001 CILR note 21 (Grand Court). Leave may also be granted in an exceptional case because the point at issue is a question of public interest; this principle has no application in the present case.

14. Mr. Fear has filed draft grounds of appeal. Ground No. 1 asserts that my decision in 2007 to award spousal maintenance was "wrong in principle". Ground No. 2 argues that it was wrong in principle to make spousal maintenance payable for an indefinite period. The third ground says that spousal maintenance should not have been awarded because "no need had been established". The fourth ground seeks to attack the amount of spousal maintenance ($2,350 per month) awarded in March, 2007. These decisions were made over 3 years ago and cannot, for the reasons given above, be attacked now.

15. Ground No. 5 asserts that the increase in maintenance awarded in February, 2010 was wrong in principle. The final ground, No. 6, argues that there was no evidence of "present need" and a failure to take proper account of the current financial situation of Mr. Fear.

16. There was some relative brief but cogent evidence of need given by Mrs. Fear in paragraph 5 of her affidavit of February 4th, 2010. Mr. Fear's current financial circumstances were set out at some length in his affidavit of February 11th, 2010.

17. The portion of the skeleton argument (entitled "Leave and Appeal") addressed to the fifth and sixth grounds is as follows:

58. *In the alternative, if spousal maintenance was correctly ordered in March 2007 then there should have been a clean break at 18 February 2010. Please refer to arguments addressing a clean break above at paragraph nos. 27-34.*

59. *In the alternative, if spousal maintenance was appropriate as at 18 February 2010, the learned judge erred in not making the order for a finite period.*

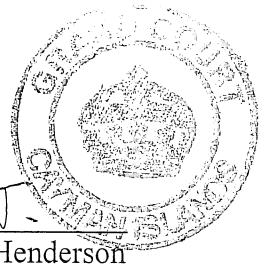
60. *It is submitted that the time of adjustment must soon be over. The Respondent (sic) has paid support for 5 years.*

61. *The parties now live two separate lives.*

18. Establishing the proper quantum of child support is an exercise which involves a relatively high measure of judicial discretion. Mr. Fear cannot succeed simply by satisfying the Court of Appeal that the award was too high. Quantum of spousal support is a question upon which "on the same evidence two different minds might reach widely different decisions without either being appealable": see ***Piglowski v Piglowski*** (1992) 2 FLR 763. The real question is whether the award of $4,500 per month in February, 2010 falls outside the spectrum of awards which may be reasonable in the circumstances, for it is only then that the proposed appeal would have a "real prospect of success". The applicant's proposed argument or, at least that portion of it which can properly be advanced on an appeal from my second order, provides inadequate reason to believe it enjoys a real prospect of success.

19. Both applications for leave to appeal are dismissed.

Dated: 25th May 2010



The Hon. Mr. Justice Alexander Henderson
Judge of the Grand Court