

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FAMILY DIVISION**

3
4 **CAUSE NO: FAM 60 OF 2016**

5 **BETWEEN:**

6 **TARA FAULKNER**

Petitioner

8 **AND**

9 **STUART DAMER**

10 **Respondent**

11
12
13 **Appearances:**

Mr. David McGrath of Samson & McGrath for the
14 **Petitioner**

15 **Ms. Lynne McDonagh of Ritch & Conolly for the**
16 **Respondent**

17
18 **Before:**

Hon. Mr. Justice Richard Williams

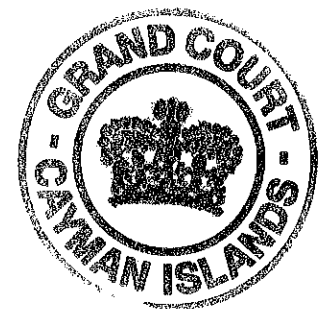
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20 **Heard:**

1 June 2016

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22 **Date of Judgment:**

1 June 2016

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24 **Circulation of Judgment: 2 June 2016**



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26
27 **HEADNOTE**

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29 *Family Law – Financial relief – Jurisdiction – Interim provision – Interim lump sum orders –*
30 *No statutory power to make such provision – Inherent jurisdiction not justified – costs*

31
32
33 **RULING**

34 1. This is an Ex Tempore Ruling. A transcript of the same will be provided to the
35 parties.

36
37 **Application**

38 2. I have before me the Respondent husband, Stuart Damer's, Summons dated 26
39 May 2016. The Summons seeks an order for the Petitioner wife, Tara Faulkner,

1 to transfer to him the sum of US\$62,500, being half of the sum US\$125,000
2 allegedly withdrawn by her from their joint bank account without his consent.
3 The order sought is appropriately labelled at paragraph 9 in the husband's
4 position statement as being "*an interim lump sum payment*". I have acceded to
5 Mr. Damer's application made in paragraph 2 of the Summons, namely to
6 abridge time for service.

7
8 3. I hope that the parties do not feel me discourteous but, for convenience reasons,
9 I will hereafter refer to them hereafter as the husband and the wife.

10
11 **Background**

12 4. This Ruling concerns the preliminary issue which is whether the Court has
13 jurisdiction to make interim lump sum payments in proceedings governed by the
14 Matrimonial Causes Law (2005 Revision) ("the Law"). With this in mind, I do
15 not intend to set out the detailed background of the proceedings contained in the
16 pleadings filed in support of and in opposition to the current application.

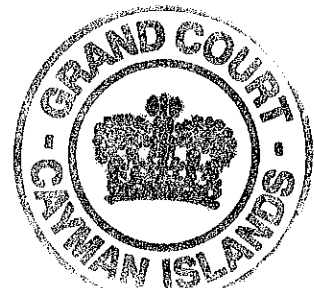
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18 5. The parties were married on 1 February 2012 in England. There are two children
19 of the marriage, ED aged 10 and AD aged 5. The husband has moved to
20 England and he is applying for an order granting him leave to permanently
21 remove the children to that jurisdiction. The removal application is opposed by
22 the wife. In the interim the parties agree that the children, who currently reside



1 in the Cayman Islands, will have extensive periods of contact with the husband,
2 including a period of around six weeks during their upcoming summer vacation.
3

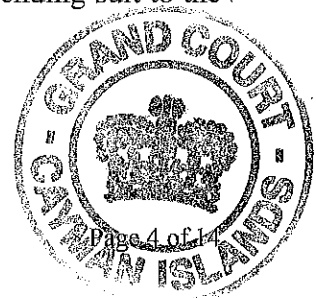
4 6. On 29 March 2016 the wife filed her Petition for Divorce, which was not
5 contested, and the Petition was proved on 19 April 2016. The First Appointment
6 Hearing was conducted by me on 12 May 2016. At that hearing the Court was
7 aware of the husband's Summonses which were awaiting issue. On 12 May
8 2016 the husband filed an Amended Summons in which he seeks an order for
9 the wife to pay US\$8,000 per month maintenance pending suit, apparently for
10 spousal and child maintenance. In the Amended Summons the husband seeks a
11 US\$30,000 lump sum for his interim legal costs, however it is accepted that
12 despite the terminology used it is a costs allowance application, which is a type
13 of periodical payments order. In the Summons an unspecified interim lump sum
14 order is sought to meet the husband's relocation costs. Finally, at paragraph 5 of
15 the Summons, an order is sought requiring the wife to pay or transfer to the
16 parties' joint bank account the sum of \$62,500. That Summons is still to be
17 issued.

18
19 7. At the First Appointment Hearing I was also aware of the Summons awaiting
20 issue in which the husband is applying for leave to permanently remove the
21 aforesaid children to the United Kingdom and for residence orders to be made in
22 his favour. That Summons is also still awaiting issue.
23



1 8. At the First Appointment Hearing I carried out a case management exercise and
2 gave directions for the filing of evidence in relation to the husband's
3 maintenance pending suit application. I directed that the hearing be listed on the
4 first open date after 10 June 2016 with a half day time estimate. No date has yet
5 been obtained for that hearing by the parties. I also ordered a Court Welfare
6 Officer's Report and gave directions in relation to the child arrangement
7 applications. Both the children and ancillary relief proceedings were adjourned
8 to a mention hearing to be held on 18 August 2016, as the Welfare Report is to
9 be filed by 4 August 2016.

10
11 9. At the First Appointment Hearing I was informed by Mr. McGrath that the wife
12 was offering to make a forthwith capital payment to the husband of around
13 US\$50,000 which she believed was his interest in the matrimonial assets. It is
14 evident that the husband has pressing needs caused by his relocation to England,
15 his health and employment situation as well as the fact that the children will be
16 spending a considerable period with him during this summer. Mr. McGrath
17 indicated at the hearing that such a payment would alleviate or reduce the
18 husband's immediate needs and could also be used by him to meet his legal fees.
19 The husband does not agree to that transfer taking place and he contends that it
20 would be inappropriate for him to 'eat into' his capital to meet his current needs
21 and his legal fees. Of course, if he did receive the transfer, and if the Court
22 deemed it appropriate to backdate any order for maintenance pending suit to the



1 date of the application, he may be able to partly or fully replenish his capital
2 fund.

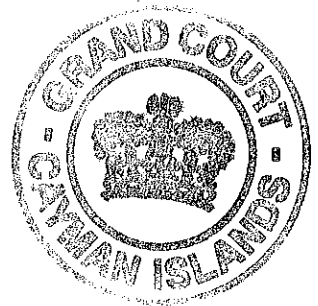
3
4 10. I believe on Thursday last week, the husband's Summons, which I am
5 considering today, was placed before me and I was asked whether it could be
6 listed on an urgent basis. As I was then aware that Court time had become
7 available today, I agreed that service could be abridged and that the Court would
8 consider paragraph 1 of the Summons. It is an unattractive submission made by
9 the husband's Counsel this morning that under paragraph 3 of the Summons I
10 should also go on to consider making orders for maintenance pending suit
11 contained in the still to be issued Amended Summons filed on 12 May 2016.

12
13 **Preliminary Issue**

14 11. The application before me today requires consideration of a preliminary issue,
15 namely whether the Court has jurisdiction to make interim lump sum orders.
16 The orders that I can make at the stage of the proceedings are set out at s.20 of
17 the Law which provides:

18 *"The Court may make orders pending the outcome of any suit in*
19 *respect of which a petition has been presented providing for –*

- 20 (a) *the care and control of the children of a marriage;*
21 (b) *the use of a matrimonial home;*
22 (c) *periodic payments to be made by one party to another*
23 *pending suit;*
24 (d) *an injunction for the protection of settled and other*
25 *property in which either spouse claims an interest;*
26 (e) *the protection of one spouse from interference by the*
27 *other; and*
28 (f) *security for costs."*



1 12. Section 20 of the Law contains no provision for the making of a lump sum
2 order. For the avoidance of doubt, interim orders made in relation to school fees
3 and costs allowance orders are not lump sum orders but are periodical payment
4 orders.

5
6 13. At the outset of the hearing I provided the parties with the leading decision made
7 by the Court of Appeal in England and Wales in *Wicks v Wicks* [1998] 1 FLR
8 470. Although that is a non-binding English decision dealing with the
9 Matrimonial Causes Act 1973 ("the Act"), it is helpful as the Act similarly does
10 not contain a provision for the making of interim lump sum orders.¹ As the
11 authors in Duckworth Matrimonial Property and Finance note at para. B123,
12 prior to the decision in *Wicks* it was assumed in cases like *Barry v Barry* [1992]
13 2 FLR 233 that the Court had power to appropriate capital of the parties to one
14 or other of them on an interim basis, on the understanding that the asset thereby
15 required would be brought into account on the eventual distribution of assets at
16 the final hearing, but the Court of Appeal in *Wicks* ruled this out, which means
17 there is no way which the Court may order an interim lump sum.

18
19 14. The Headnote in *Wicks* records that it was held that:

20 *"- although there was undoubtedly a need in some cases to make*
21 *interim capital provision, the court had no jurisdiction to do so:*
22 *..... The inherent jurisdiction of the court did not confer a general*

¹ Save that s.23(3)(a) of the Act provides that the Court has the power to order an interim lump sum for meeting expenses for maintaining the applicant or the child before applying for a lump sum order under section s.23(1)(c) of the Act.



1 *residual discretion to make any order necessary to ensure that*
2 *justice be done between the parties. The reality was that the wife*
3 *was seeking the enforcement of rights which the Matrimonial*
4 *Causes Act 1973 did not grant her."*
5

6 15. The Headnote in *Wicks* also recorded that:

7 *"Per Ward J (obiter): there will be other cases where*
8 *unfortunately no relief will be available to the wife in distress, but*
9 *the court has no inherent jurisdiction to do that which Parliament*
10 *has not granted it power to do."*
11

12 16. I note that the prevailing view in England and Wales is that claims arising from
13 the breakdown of a marriage should only be brought in context of the
14 Matrimonial Causes Act 1973.² This is equally applicable to the Cayman
15 Islands.

16
17 17. It is clear, and I accordingly find, that the Grand Court has no power to make
18 interim orders of a capital nature, including lump sums, under the Law, even in
19 what are argued by the husband to be exceptional circumstances. I dismiss the
20 husband's application.

21
22 **Observations**

23 18. These ancillary relief and children proceedings are at an early stage. I am not
24 sure if I gave a costs statement direction at the First Appointment Hearing but,
25 just in case I did not, I now direct that hereon at each hearing the attorneys are to

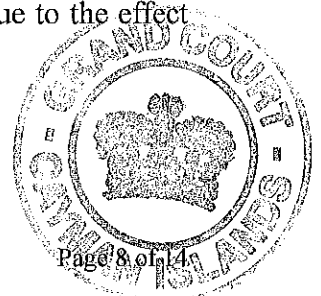
² *Tee v Tee and Hillman* [1999] 2 FLR 613.



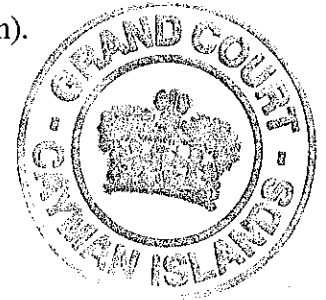
1 provide the Court with an up to date costs statement. I order this as I am
2 concerned, from the course the litigation has taken so far, that costs will escalate
3 in a concerning and disproportionate manner in this case.
4

5 19. I take this opportunity to remind parties that not every point has to be litigated.
6 If the husband has had to relocate to England and is currently unable to work
7 partly due to poor health, the parties should be using their best endeavours to
8 negotiate a realistic holding level of interim maintenance and do so having
9 regard to each parties' circumstances and financial position and applying the
10 factors in s.19. The parties will be aware of my duty to have regard first of all to
11 the best interests of their two children.
12

13 20. It was raised during this hearing, although not applied for in the husband's
14 Summons, that the Court could make an order for a lump sum pursuant to s.20
15 (d) of the Law, which is the asset protection provision. That subsection of the
16 Law does not give the power to the Court to make an interim lump sum order to
17 a spouse; it is aimed at preserving the asset and preventing dissipation. I note for
18 completeness sake that, in England and Wales RSC O.29, r.2 gives the Court
19 power to grant various interim remedies, including an order for the detention,
20 custody, or preservation of "relevant property." This means that arguably an
21 order that money be paid into Court, or into a designated account pending trial,
22 can be made under this rule. However, in the Cayman Islands, due to the effect



1 of GCR O.1, r.2, the mirror provision at GCR O.29, r.2 does not apply to
2 proceedings governed by the Matrimonial Causes Rules (2005 Revision).



3
4 *(Submissions in relation to costs made by both Counsel)*

5 **Costs**

6 21. Having regard to the fact that Grand Court reported or unreported Judgments are
7 now promptly placed on the Judicial website which all attorneys have access to,
8 the Court is entitled to expect that all attorneys will make themselves aware of
9 local decisions that may be relevant to the application currently before the
10 Court.

11
12 22. In **CMS v RGS** Fam 177/2013 a written ruling on the issue of costs and the
13 principles to be applied was delivered on 4 November 2015. There is nothing of
14 a contentious nature in that judgment on the issue of costs. In **CMS** under the
15 heading "*the law and principles to be applied*" I stated the following:

16 *"4. The Grand Court has a wide discretion concerning the making*
17 *of costs orders in matrimonial proceedings. GCR Order 62.4(1)*
18 *provides that the rule "shall have effect unless otherwise provided*
19 *by any law."*
20

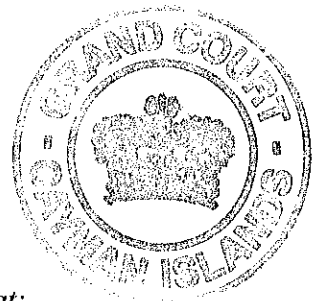
21 23. In the **CMS** ruling I then went on to highlight parts of the reported Court of
22 Appeal decision in **Rory Michael McTaggart v Mary Elizabeth McTaggart**
23 CICA 14 of 2010, which all parties should be aware of as it is the leading
24 Cayman Islands case on the approach to costs in matrimonial proceedings. In the

1 *CMS* ruling I highlighted the important guidance given by the then President,
2 Sir John Chadwick, in *McTaggart* when I stated:

3 *"6. At paragraph 5 of the judgment the President set out*
4 *paragraphs 106-107 of the Court of Appeal's earlier judgment on*
5 *the appeal of the ancillary relief decision which had been handed*
6 *down on 29 November 2011, where he stated:*

7 *"106. Put shortly, the position, here, is that costs in*
8 *matrimonial proceedings – as in other proceedings – are*
9 *governed by the Grand Court Rules; and, in particular by*
10 *GCR Order 62, rule 4, which requires (at sub-rule (3))*
11 *that:*

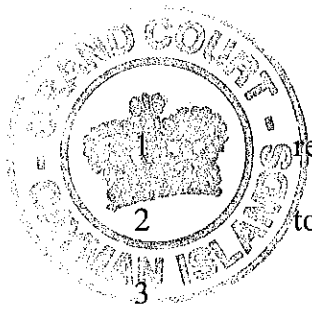
12 *'If the court in the exercise of its discretion sees fit*
13 *to make any order as to the costs of any*
14 *proceedings, the court shall order the costs to*
15 *follow the event, except where it appears to the*
16 *court that in the circumstances of the case some*
17 *other order should be made as to the whole or any*
18 *part of the costs.*



19
20 7. *At paragraph 23 of his ruling the President clearly stated that:*

21 *"... Unless and until there is a change to the relevant rule*
22 *in this jurisdiction, in awarding costs in ancillary relief*
23 *proceedings courts here should give effect to the provisions*
24 *of GCR 62.4 – that, generally, a successful party to any*
25 *proceeding should recover from the opposing party the*
26 *reasonable costs incurred by him in conducting that*
27 *proceeding and in an economical, expeditious and proper*
28 *manner"*
29

30 24. For completeness sake, although not raised by either party today as a reason for
31 not making a costs order, in the case of *DJ v BJ & RK* Fam 66 of 2014, in a
32 judgment handed down on 30 October 2015, I considered the jurisdiction of the
33 Court to make costs orders at this stage of matrimonial proceedings. The
34 judgment dealt with an application for leave to appeal an order made for costs
35 made in proceedings pending decree. In the judgement, leave to appeal was



refused on detailed reasons given for my decision that the Court had jurisdiction to make costs orders pending decree.

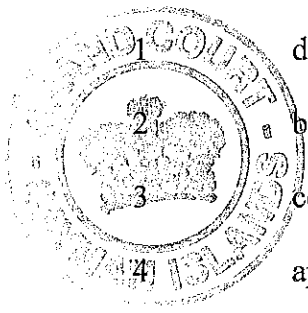
4 25. The submissions as to costs made by Mr. McGrath on behalf of the wife are
5 consistent with the guidance given by the Court of Appeal in *McTaggart* as
6 adopted by me in *CMS*. He rightly submits that costs should follow the event
7 unless there is good reason for a departure. It is contended that this is a case in
8 which the husband, from the outset, should have realised that the application
9 was flawed as the Court does not have jurisdiction to make interim lump sum
10 orders in matrimonial proceedings brought under the Law.

11

12 26. In support of his application for an order for the husband to pay the wife's costs
13 of today's hearing, Mr. McGrath has referred to letters sent by him to the
14 husband's attorneys dated 26 May 2016 and 30 May 2016. In the letters he
15 highlighted the lack of jurisdiction of the Court to make interim lump sum
16 orders. He further indicated that the letters would be placed before the Court
17 when it was considering the issue of costs if the application in the Summons was
18 pursued with.

19

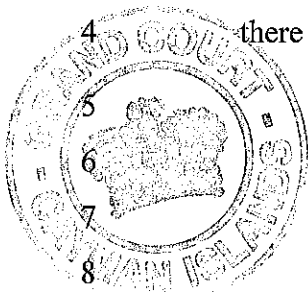
20 27. Ms. McDonagh on behalf of the husband submits that the Court should make no
21 order for costs. The primary reason appears to be grounded on the still disputed
22 factual basis of their claim, namely that the wife has dissipated funds from the
23 parties' joint bank account. No findings have been made in relation to that



disputed fact which the Court cannot determine in this lump sum application because of the jurisdictional issues. Whatever the merits of the husband's contentions in relation to those facts, they have no bearing on whether this application should have been brought as it was flawed for lack of jurisdiction reasons from the outset.

28. A further submission made is that as there are two English High Court decisions, one of which is *Barry*, in which the court ruled differently to the Court of Appeal in the non-binding decision of *Wicks* that they were entitled to bring an application, presumably as they submit that there is uncertainty on the jurisdiction point. As I said in my earlier in this Ruling, I accept that the decision in *Wicks* is not binding on the Grand Court, but reiterate my view that it is a helpful decision because the Act, although not mirroring the wider provisions contained in our Law, does not also contain a provision enabling the making of interim lump sum orders. I accept that there were earlier reported decisions in England, including in the case of *Barry*, which found that interim orders for the adjustment of capital could be made. However the decision in *Wicks* is the fundamental and guiding decision dealing with what interim capital orders a court can make in matrimonial proceedings. In *Wicks* one can see that the Court of Appeal conducted a full review of the earlier case law and considered each of the supposed bases of jurisdiction. It may be said that, to the Court's chagrin, it found each basis of jurisdiction wanting and that there was no jurisdiction to make interim lump sum orders. When reading the judgment,

1 although the Court recognised it was undesirable to entertain interim
2 applications for capital relief in most cases it felt that there was a need to do so
3 in some cases³ and as a consequence one can see them trying to explore whether
4 there was jurisdiction. Ward L.J. commented at p.436:



5 *"...all I can do is endorse the comment of Professor Stephen*
6 *Cretney in [1993] Fam Law 120 that "the legislative restrictions*
7 *on the court's powers are beginning to cause inconvenience' and*
8 *to join with him in a call for legislative reform."*

9
10 29. Although the earlier cases seemed to give courts the power to make interim
11 capital orders, there is no room for doubt that, due to the clear and thorough
12 Court of Appeal decision in *Wicks*, that if the statute does not expressly give
13 that power, no such power exists in matrimonial proceedings.

14
15 30. I have a degree of sympathy for the position that the husband's Counsel finds
16 herself in if the difficulties she has related about the husband's finances are later
17 found to exist and prevail. I understand why the husband would be trying to
18 explore all avenues, save for accepting the immediate payment of \$50,000 to
19 him from the wife, which of course he could.

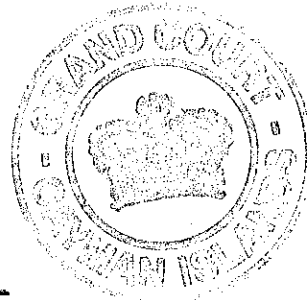
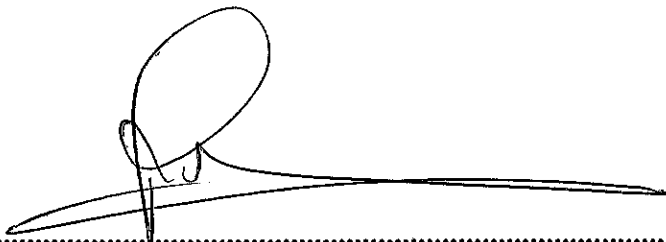
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21 31. Having considered the above-mentioned case law on the issue of facts and after
22 hearing from both counsel, there is nothing in the submissions as to costs before
23 me or from the circumstances of the case that lead me to depart from the normal
24 course, namely that costs follow the event. It should have been evident from the

³ See Ward L.J. at p. 477.

1 outset that this application would inevitably fail as the Court has no jurisdiction
2 to make the order sought. There is an absence of local reported and unreported
3 decisions on the issue of the jurisdiction of the courts to make issue of interim
4 lump sum orders, this is likely because it is trite law that the jurisdiction does
5 not exist.

6
7 32. Accordingly, having regard to GCR O.62 r.4 and the principles set out earlier in
8 this Ruling, I order the husband to pay the wife's costs incurred in preparation
9 for and for the hearing of this contested Summons. Those costs are to be taxed if
10 not agreed.

11
12
13
14



15
16 **THE HONOURABLE MR JUSTICE RICHARD WILLIAMS**
17 **JUDGE OF THE GRAND COURT**
18