

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

CAUSE NO: FAM 39/2015

BETWEEN:

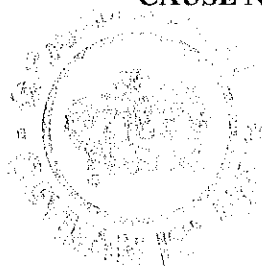
AK

Petitioner

AND:

TK

Respondent



Appearances: **The Petitioner in person**
 Mr. David McGrath from McGrath Tonner for the Respondent

Before: **Hon. Mr. Justice Richard Williams**

Heard: **3 May 2017**

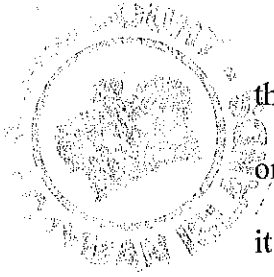
Perfected copy of
Judgment circulated: 4 May 2017

HEADNOTE

Financial Provision - Ancillary relief – Perfecting Court order following delivery of Judgment – Court order in relation to the implementation of final ancillary relief order – Application to adjourn stay of execution Summons.

JUDGMENT

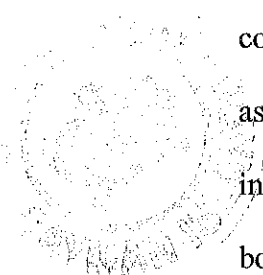
1. Following an ancillary relief hearing that was spread over seven days, commencing in June 2016 and concluding on 17 January 2017, my detailed Judgment was handed down on 7 February 2017.
2. Due to the nature of my decisions made in relation to the former matrimonial home, namely that the husband should have an opportunity to see if it was feasible for him to retain the property, I felt unable to deal in the Judgment with



the implementation in relation to retention, any sale of the property or the ordered division of the capital. As I made clear at paragraph 66 in my Judgment it was patently clear that the husband could not countenance or come to terms with the possibility that the matrimonial home may have to be sold. His attorney was offered the opportunity to outline the type of alternative property he would require, but she did not do so as she said she was without instructions and it was evident that he did not want to take up the opportunity still being afforded at the time for him to address this. Although in my Judgment I expressed reservations about whether the husband had the financial means to remain in the property, especially as to do so would require further borrowing and having regard to what he was saying was the level of his outgoings, I still felt that, due to his strong desire to remain, it would be just and fair to give him a reasonable period of time to consider whether, in light of my decision about the capital division and maintenance payments and after considering his financial position, he still wished to retain the property or if he concluded that it had to be sold as it was not feasible. I accepted that he would need a reasonable period of time to consider the financial consequences of my ruling to see if it was possible for him to arrange his affairs in such a way that he could retain the property.

3. Having regard to the long followed practice in the Cayman Islands, I had expected the parties to submit an order which reflected the decisions made in my Judgment. I also expected them to have discussions and then hopefully reach an agreement about the implementation and timeframes.

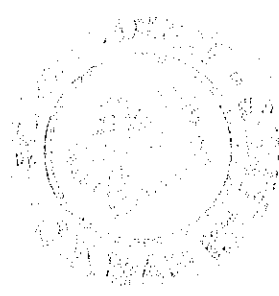
4. Over two months ago, on 21 February 2017, the wife's attorneys wrote to the husband's attorneys and attached a copy of a draft order. In the letter they stated that the terms of the draft order reflected the decisions contained in my Judgment. In the letter they expressed a desire to reach agreement in relation to the issues concerning the matrimonial home and suggested that the husband have thirty days to decide whether he wished to retain the home. They suggested that, if he wanted to retain the property, the capital payment for the wife should be paid within sixty days of the order. However, if the husband decided not to retain the home, they suggested that its sale be by agreement and be subject to the supervisory direction of the Grand Court. The attorneys suggested that these implementation provisions could be placed in a Court order, but if the parties were unable to agree the matter it would have to come back before the Court. In the letter a suggestion was also made in relation to the chattels and that the commencement date for child and spousal maintenance be 1 March 2017.
5. As no reply had been received, the wife's attorneys followed up with a letter on 14 March 2017 again seeking comments on the draft order. By that time the wife was on notice that, although no order had been perfected, the husband intended to appeal and make an application for stay of execution of my "orders."
6. On Friday 31 March 2017 a copy of the draft order was submitted to the Court by the wife's attorneys and they invited the Court to approve the same. In the email they indicated that although the above-mentioned communications (21 February 2017 and 14 March 2017) had been sent to the husband's attorneys no



comments or responses had been received about the terms of the draft order and, as such, the Court should go on and perfect the order. Upon reading that email, in a bid to be fair to the husband, I instructed my personal assistant to write to both parties to give the husband's attorney a further opportunity to provide any comments that her client may have about the draft by noon on Monday, 2 April 2017. On the same day she replied stating that she was not able to reply as she was 'off-island' until Monday. She added that she felt that the draft order included matters which were not covered in the judgment and that each party should be afforded the opportunity to make submissions on the same.

7. On 21 April 2017 the wife's attorneys again wrote to the husband's attorneys, this time in regard to the upcoming hearing scheduled for 26 April 2017 at which the Court would be asked to perfect orders arising out of the judgment and to consider an application made by the husband for a stay of execution. In the communication the wife's attorneys reiterated that they had provided a draft order and sought feedback in relation to the timing for payment and clarification about whether the husband wished to retain the matrimonial home. They sensibly suggested that the husband provide a draft order which he felt reflected the decisions made, which could then be placed before the Court to enable it to make a balanced and informed determination about the terms of the order. Regrettably no such draft order was received.

8. When the matter came on before me on 26 April 2017, I was aware that the husband had indicated an intention to appeal, and I provided the parties with a copy of all of my typed notes from the evidential stage of the ancillary relief hearing. Unfortunately, the husband was unable to attend the hearing as he was at home caring for the children who were not feeling well. His attorney was content to proceed with the hearing and she again submitted that the draft order did not accurately reflect the content of the Judgment.
9. At the hearing I stated to the parties that I *“deliberately did not deal with issues concerning dates in relation to capital maintenance orders in the judgment as I had received no submissions on the points from the parties and I had hoped that the parties would resolve that between themselves and failing that I expected that they may apply concerning the mechanisms, when a decision could (then) be made after hearing from both of them.”*
10. On 26 April 2017 an exercise was conducted whereby the attorneys went through the terms of the draft order. I stopped the hearing as I felt that the parties should be given the opportunity to review the notes from the ancillary relief hearing which I had given to them as this may be relevant to the stay application and in particular to the required consideration about the prospect of the success of the grounds of appeal as set out in the husband’s Notice of Appeal apparently filed on 16 February 2017. I also wished the husband to have an opportunity to attend Court before I made my decision, in particular about the provisions



relating to implementation of the order. The latter consideration arose because the husband's attorney, despite the above-mentioned February 2017, March 2017 and April 2017 correspondence from the wife's attorney in which clarification had been repeatedly sought about the husband's position in relation to the issues currently before the Court, indicated that she was without instructions about the same.

11. At the 26 April 2017 hearing I indicated to the parties that the matter would be adjourned part heard to today's date and that it might be sensible if the hearing was approached in three stages. The first stage would be to consider the terms of an order which simply reflected the decisions contained in the Judgment. The second stage would be to consider an order which dealt with the implementation and timeframes for the order, the very same type of issues raised in the February to April 2017 correspondence sent by the wife's attorney to which no meaningful response had been received from the husband's attorney. The third stage would be to consider the husband's application for a stay of execution.
12. Prior to the 26 April 2017 hearing and prior to today's hearing no bundle was filed or served by the husband in support of his summons for a stay of execution. The wife's attorney provided a bundle for the 26 April 2017 hearing and an updated bundle for today's hearing. I have been told that they attempted to serve today's bundle on the husband's attorneys' office around noon yesterday, but the

office was closed. It appears that the courier served it at around 4:20 pm and that the bundle was only shown to the husband by his attorney at Court this morning.

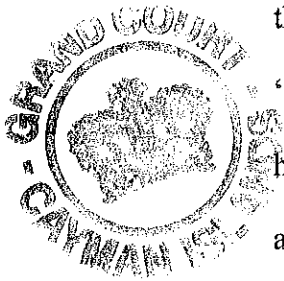
13. This morning, just before today's hearing, I considered an Ex-Parte Summons filed by the husband's attorney seeking an order for her to come off the record. The husband did not oppose this application or an order for the abridgement of the time for service of the Summons and supporting affidavit. An order was made for the attorneys to come off the record. A copy of that order is still to be served on the wife, but no issue has been taken by the wife's attorney arising from the husband now appearing in person at this hearing.

14. This morning, at the outset of this hearing, the husband made an oral application to adjourn not only his Summons for a stay of execution but also the hearing regarding the perfecting of the order arising out of the Judgment and regarding the making of any implementation order. The grounds of his application are that he needs time to instruct a new attorney as he does not understand the proceedings. The husband also said that he had not had sufficient time to read the wife's bundle. I therefore put the matter back affording him a sufficient opportunity this morning to go through the bundle. I indicated to the parties, before they left the courtroom, that I was not minded to deal with the stay of execution application as that involved issues of law and, as a consequence, I felt it fair and just to adjourn that Summons for a reasonable period of time to enable the husband to obtain legal representation. I also indicated that any new attorney



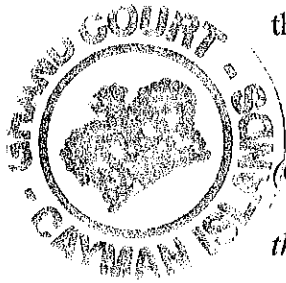
may be better placed to determine the merits of bringing an appeal and pursuing a stay of execution application if an order had been perfected. It is clear that to enable him to address any issues about the orders the husband did not need to digest all in the bundle, as only some parts were relevant to them. The helpful documents therein appear to be two pages of the Position Statement drafted by the wife's attorney, two draft orders which run to five pages in total and ten pages of *inter partes* correspondence. The husband has now taken up the opportunity to go through the bundle and the parties have just returned to Chambers, the husband having indicated that he had reviewed the bundle and was ready to come back into court.

15. I have explained to the parties that it is a matter for the Judge to perfect his order and that when doing so he would specify the terms which he felt reflected the terms of his Judgment. I made clear that it is not for the parties to dictate to the Judge what the Judge ordered or intended, the Judge is best placed to make that decision as it is his Judgment and his order. I am therefore minded not to adjourn and will go on to deal with the first stage, which is the perfecting of an order which reflects my decisions contained in my Judgment.
16. I have regard to the Overriding Objective and my duty to bring closure to this long drawn out ancillary relief matter. A final order arising out of my decision is required and then, armed with that, both parties will be better placed to decide whether they wish my decisions to be reviewed by the Court of Appeal. I am



satisfied that the husband has had ample opportunity to prepare for a review of the terms for a 'stage 1 order', as well as to make representations about the 'stage 2 order' concerning timeframes and implementation. Since February 2017 he has been aware of the terms suggested by the wife, but he has failed to adequately respond. This may be because he believed from the date his attorney on his instructions filed a Notice of Appeal on 16 February 2017 that, as he is applying for a stay of execution, the Court should not consider perfecting a final order, which I suggest would be the wrong approach as it is a bit like putting the cart before the horse.

17. The husband is a highly experienced and qualified professional, holding a very senior position dealing with high level finances. I am satisfied that he has the intelligence, ability and background knowledge, which he so ably exhibited in his affidavits, in the schedules he produced during the ancillary relief hearing and by the quality and content of his oral evidence given at that hearing, to today be able to adequately address the issues arising concerning the terms of both orders. He, better than anyone else, knows what the financial consequences of the Judgment might be for him and what timeframe he might require to rearrange his financial affairs. He has had ample time since February 2017 to consult with his former attorney and reach a decision in relation as to how my decision may affect his wish to retain the property and to make proposals about the orders flowing from my Judgment.

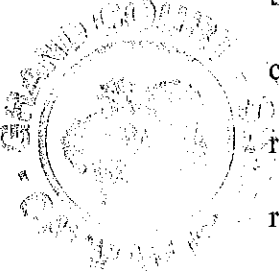


18. I am therefore going to proceed and carry out my required function to determine the provisions of my ancillary relief order and how that should be implemented.

(Oral submissions received from both parties in relation to the order to reflect the content of the Judgment)

19. Using the draft order prepared by Mr. McGrath as the working document and having just heard from the parties about what provisions which should be in the order to best reflect the decisions I made in my Judgment, I will go through each paragraph separately. I will invite Mr. McGrath to draft the terms of the order which I now set out.

20. In relation to the last paragraph of the preamble - this should be slightly amended to reflect what I said at paragraph 122 in my Judgment (where I incorrectly refer in the footnote to paragraphs 89-91, and it should have read 91-93). At paragraph 122 in the Judgment I made it clear that when determining the appropriate level of child maintenance I had "*regard to the fact that the husband will voluntarily be making considerable payments.*" I was aware, as indicated at paragraph 91 in the Judgment, that the husband was contending that he should not pay any additional child maintenance as he was willing to be responsible for meeting all of the major expenses for the children. The schedule attached to the draft order reflects the headings of expenditure which the husband said he agreed to make which I had in mind when reaching my decision about the level



of child maintenance in the Judgment. The schedule rightly does not contain the dollar amounts to be paid, as in my Judgment I did not necessarily accept that the expenditure that the husband stated that he had to make for the children's needs to be met under those heads was reasonable or could not be reduced. With this in mind, the final part of the preamble in the order should read "**AND UPON** the Petitioner indicating that he will voluntarily pay directly the children related costs set out in the schedule annexed hereto." Schedule 1 attached to the draft order should now be attached to the final order.

21. Paragraph 1 of the draft order accurately reflects the decision made by me in my Judgment and should appear as paragraph 1 in the final order. It corrects the slight mathematical error made by me at paragraph 120 in the Judgment. The husband has queried whether in the Judgment I intended to give him the alternative means of paying the total amount of the capital payment to the wife suggested in the draft. I can confirm that my intention was that he have both options, as at paragraph 120 by my use of the word "*acceptable*" I was introducing the option of part payment by pension sharing from his pension.
22. There is no issue between the parties that paragraph 2 in the draft order accurately reflects the content of my Judgment and therefore it should appear as paragraph 2 in the final order. During his submissions this morning the husband insightfully asked about the timeframe for such a transfer. This was a further indicator of his understanding of the issues concerning the order and it fortified

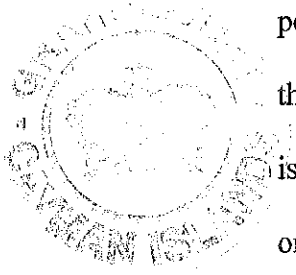


my view that he was able to deal with the issues. I informed him that the issues of timeframes would be dealt with when we moved on to consider the second order, the implementation order.

23. In relation to paragraph 3 of the draft order the parties agree that there should be a slight amendment. Paragraph 3 should be inserted into the final order, but on the final line the words "*property is sold for..*" should be removed and replaced with "*net proceeds of sale are ..*"

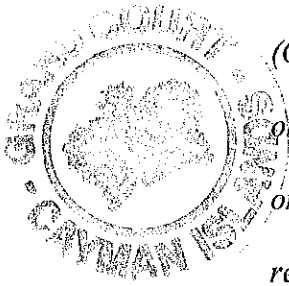
24. In relation to paragraph 4 of the draft order, in principle both parties agreed that this reflects my decision in the Judgment. The husband invited the Court to be a bit more specific about the assets and use the terminology contained in paragraph 119 of the Judgment. The wife did not object and therefore paragraph 4 of the final order should read: "*All assets owned by or held in the name of each party which will include motor vehicles, their pensions and the contents of their bank accounts shall remain the asset or liability of the party in whose name they are held at the date of this order. This is subject to any pay out the husband may have to make from the pension if the matrimonial home is transferred to him.*"

25. In relation to paragraph 5 of the draft order there is no issue that the first sentence reflects my decision at paragraph 123 of the Judgment. The husband questions the need for the duration provision contained in the second sentence,



as that was not mentioned in the Judgment and he feels it would not reflect the position that would exist when any of the children is attending university and therefore not residing full time at home. I have explained to the husband that this is a standard duration provision which appears in almost every ancillary relief order made in the Cayman Islands, as it reflects the governing statutory position at s.22(1) of the Matrimonial Causes Law, under the heading "Duration of periodical payments." I am satisfied that paragraph 5 of the draft order should be replicated as paragraph 5 in the final order.

26. Both parties agree that paragraphs 6 and 7 of the draft order accurately reflect the content of the Judgment. Paragraphs 6 and 7 should therefore be replicated as paragraphs 6 and 7 in the final order.
27. This order is not a consent order and therefore it does not need to be signed by either of the parties. I invite Mr. McGrath to prepare the final draft and to send a copy of that to the husband and/or any new attorney and he in turn should then provide any comment upon the accuracy of the content of the final draft within two days. The order may then be submitted to me for my approval.
28. I now move on to deal with the second order which is the order dealing with implementation.



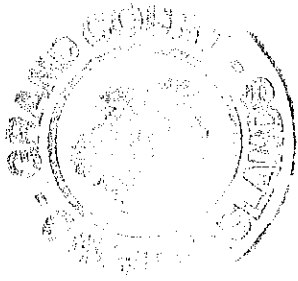
(Oral submissions received from both parties in relation to the implementation order) - (The parties concluded making their submissions in relation to this order, but the Court was not in a position to give an Ex Tempore Ruling in relation to this order because immediately upon the conclusion of his submissions the husband had to leave the Court to collect the children from their school. The following part of this Judgment was drafted in the absence of the parties).

29. Having regard to the manner in which the husband addressed the issues concerning the provisions which should be placed in both of the orders, I am fortified in my initial view that he has the required understanding to properly address the Court about the issues relating to the implementation provisions. Some of the provisions in the draft orders prepared by Mr. McGrath have varied due to the helpful and insightful contributions made by the husband. I have carefully considered the submissions made by the parties concerning the implementation provisions.
30. In relation to paragraph 1 of the draft order, the husband has contended that he should be given additional time to make the transfer and that the current effective date of Friday, 2 June 2017 should be removed and replaced with Friday, 30 June 2017. The wife agrees with this variation and therefore paragraph 1 be amended accordingly.

31. The husband objects to paragraph 2 of the draft order. This was not something that I considered in my Judgment. As I am not satisfied about the effect of this provision and not sufficiently clear about what liabilities it may effect, this paragraph should not appear in the order.

32. There has been a great deal of discussion in relation to paragraph 3 of the draft order. The husband is concerned that this provision should reflect that the property should not be marketed for sale at a price which would result in there being net proceeds of sale of under US\$1,950,000. The wife contends that the words "*but not less than US\$1,950,000*" could be removed from the final sentence which would then read that the property "*shall be marketed for sale for the best price reasonably obtainable.*" I am satisfied that the final part of the sentence should read that the property "*shall, be marketed for sale for the best price reasonably obtainable and that when fixing that price regard should be had to the advice given by their jointly instructed realtor in light of the parties' hope that the net proceeds of sale will amount to no less than US\$1,950,000.*"

33. The husband expressed a concern as he said he heard the wife indicating to her attorney during the hearing that she could "handle the sale." Of course, if the parties wanted to save realtor fees that is something they could consider, but that is a matter for both of them to agree upon. Paragraph 4 of the draft order is designed to meet each party's concerns about sales process. The effect of this paragraph is to ensure that both parties have an equal input in relation to the sale



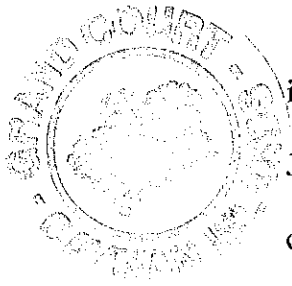
and that neither of them can act unilaterally. If the parties cannot agree about issues that may arise relating to the sales process then they may at that time return to the Court for directions in relation to the sale. This paragraph clearly protects both parties' interests and should be incorporated in the order.

34. The husband objects to paragraph 5 of the draft order as he has concerns about the language used in the provision. He has concerns about the meaning of and use of the words "*pro tanto*." I explained to him that the section meant that if the property was sold and if the net proceeds of sale were less or more than US\$1,950,000 then the capital amount that he would have to pay would be decreased or increased proportionally. I am satisfied that this is an appropriate provision and again it protects each party's interests. It promotes finality as it may prevent the need for further hearings, as it is almost inevitable that the proceeds of sale will not amount to exactly US\$1,950,000.

35. There appears to be no issue in relation to paragraph 6 of the draft order. The husband did mention that he is concerned that clarification is given in relation to what amounts to net proceeds of sale. Having regard to his submissions I see merit that, in addition to paragraph 6 of the draft being incorporated into the implementation order, there also be a definition paragraph in the order which may read: "*the term "net proceeds of sale" in paragraph { } of this order and in paragraph { } of the order dated [] shall mean the gross sale price of the property less the amount outstanding in respect of the mortgages secure thereon*

in favour of [] and attorneys conveyancing costs and disbursements and realtors charges.”

36. In relation to paragraph 7 of the draft order the husband objects to a commencement date being placed in the order as he feels that this would be a retrospective order and that it was too technical a provision for him to address today without legal representation. In my Judgment I did not enter a date for the commencement, as I had no information about when the wife would be vacating the matrimonial home. I had expected the parties to agree outside of Court that the commencement date for maintenance orders would coincide with her leaving the property. The decision in the Judgment about the level of child maintenance was made on the basis of the arrangements contained in the orders of McMillan J. who, on 15 December 2015, made a shared residence order with the children spending alternate weeks with the parents. If McMillan J. changed the arrangements under the order by a new order subsequent to my judgment then that may be a ground for a variation of the level of payments ordered in the judgement. If in such circumstances such an application was formally made and granted then that would be in a separate new order and not in an order relating to my Judgment. There has been no such application issued and, even if it had been, a judge would note that, although children applications have come one before McMillan J. over the past 12 months, his residence order of 15 December 2015 remains in force. It is conceded by the husband that the wife vacated the property on or around 1 March 2017 and therefore paragraph 7 in the draft



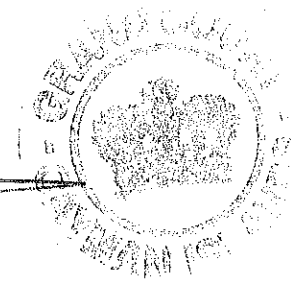
implementation order accurately reflects my intention at the time of the Judgment, namely that the commencement date should be 1 March 2017. For completeness sake, I note that, as no date was specified in the Judgment, it is arguable that the commencement date could be the date of the Judgment in February 2017. Mr. McGrath has sensibly not sought to try to persuade the Court that the earlier date should be the date placed in the order.

37. The wife makes an oral application at the hearing for a forthwith order for the payment of unpaid child maintenance from 1 March 2017 to date as the husband has failed to make any child maintenance payments. I understand that the husband wishes to raise submissions which would basically amount to an application to remit some or all of the arrears on the basis of extra expenditure he says he has had to make for the children as the shared residence arrangements of McMillan J. have regrettably not been implemented. Non-compliance with a s.10 Children Law court order would not amount to a ground for remitting, but today's hearing with the unrepresented husband is not the time to deal with enforcement and the application for a forthwith order. If the wife seeks to enforce any arrears that have accrued under the orders she may issue an application and a Court could consider increasing the capital sum to be paid to the wife from the matrimonial assets in the amount of the arrears.

38. In relation to spousal maintenance, for the reasons outlined in the preceding paragraph I am satisfied that paragraph 8 of the draft order accurately reflects

my intention at the time of the Judgment and it should be included in the order. I have been informed that the husband has been making this payment since 7 March 2017. This is consistent with the approach that payments commence when the wife vacates the matrimonial home.

39. As I indicated earlier, the Summons for a stay of execution which would now relate to these two orders is adjourned to enable the husband to obtain legal representation. I informed the parties that I would speak to the Listing Officer to obtain a date to hear that Summons before 30 June 2017. I have obtained that date and the Summons for a stay of execution will be heard by me on 29 May 2017 at 9:30 a.m.



HONOURABLE MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT

The judgment was delivered in private, but the Judge hereby gives leave for it to be published.

The judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgement itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.