IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM. 53 OF 2014

BETWEEN

ANM

Petitioner/Respondent

AND

ALM

Respondent/Applicant

IN CHAMBERS

Appearances: **Petitioner represented by David McGrath instructed by McGrath & Tonner.**

Respondent represented by David Holland instructed by KSG Attorneys-at-Law

Before: **Hon. Justice Nova Hall (Actg.)**

Date of Hearing: **26 September 2018**

Date Ruling Delivered: **3 October 2018**

RULING

1. The divorce between the parties hereto was finalized on 9th February 2016. Prior to that, on September 21st, 2015, after trial, the following Decision was issued as to ancillary matters:

1) A Residence Order is granted to the Respondent/Wife with respect to R, A and I, the children of the marriage;

2) The Petitioner/Husband shall have liberal contact with the children of the marriage at such times as agreed between the Petitioner/Husband and the Respondent/Wife. Failing agreement either party shall be at liberty to return the matter to the Grand Court for determination;

3) The Petitioner/Husband shall pay child maintenance of CI $1,500.00 per month per child until the child ceases full-time education or reaches the age of 21 years whichever is the later;

4) The Petitioner/Husband shall pay the school fees and agreed extra- curricular activities of each child until the child ceases full-time education or reaches the age of 21 years whichever is the later;

5) The Petitioner/Husband shall pay the health insurance and additional medical/dental/article expenses for each child until the child ceases full-time education or reaches the age of 21 years whichever is the later;

6) The Petitioner/Husband shall contribute an additional sum of CI $3,500.00 per month towards the housing needs of the children of the marriage. Such payments to continue until the last child

ceases to reside with the Respondent/Wife, ceases full-time education or attains the age of 21 years whichever is the earlier;

7) The Petitioner/Husband shall pay spousal support to the Respondent/Wife in the sum of CI $3,000.00 per month for a period of three (3) years commencing 1st October 2015;

8) The previous 50/50 division of the proceeds of sale of the real estate owned by the parties to the marriage is noted and approved;

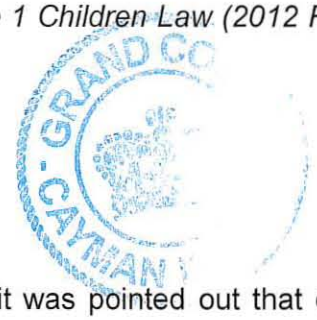
9) The Respondent/Wife shall retain ownership of the Mazda motor vehicle and the Petitioner/Husband shall retain ownership of the Porsche and Toyota motor vehicles outright.

2. The eldest child of the marriage, R is now 18 years of age and about to start University in Australia, the birthplace of the Respondent/Applicant, the former wife. Both R and her mother are currently in Australia. The two younger children are residing with their father.

3. The Respondent/Applicant has filed an application to relocate to Australia with the two younger children of the marriage, A and I. The matter is listed for a contested 4 day trial along with an application filed by the Petitioner/Respondent (the former husband), for consequential variations to the Order for Ancillaries.

4. The current application is brought by the Respondent/Applicant for a legal costs allowance to be paid by the Petitioner/Respondent "*for the benefit of*

the subject children pursuant to Schedule 1 Children Law (2012 Revision)". This application is opposed.



The Plaintiff

5. On behalf of the Respondent/Applicant, it was pointed out that during the divorce proceedings the future uncertainty of her post-divorce immigration status in the Cayman Islands had been raised. It was submitted that although it had not been a part of those proceedings, there had always been a real prospect that she may wish or need to relocate with the children to her native Australia at some point in the future.

6. It was submitted that the need for relocation has now arisen because of the desire of the eldest child to pursue further education and university in Australia. It was submitted that this child has had struggles with anxiety and mental health issues for some time and it was the belief of her mother that it was in the child's best interests that her mother remain close to her to provide ongoing emotional and parental support. This would also necessitate the proximity of her siblings.

7. It was stated that the expiration of the Respondent/Applicant's lease at the end of July 2018 coincided with the period in which the eldest child had to leave in order to settle in Australia and her mother accompanied her. The Respondent/Applicant finds herself in the unenviable position of having to pursue legal action in a heavily contested matter without the requisite funds to ensure that there is equality of arms during such proceedings. It is submitted that due to all the circumstances of the case it is appropriate, fair and reasonable for the Court to make an order requiring the Petitioner/Respondent to make payments towards the legal costs of the Respondent/Applicant.

The Law

8. Both sides agreed that the leading authority on costs allowances in this jurisdiction is the decision of Williams, J in **B v B [2012 (2) CILR 124]**. That case cited with approval the approach of Wilson LJ and the English Court of Appeal in **Currey v Currey (No. 2) [2007] 1 FLR 946**.

9. At paragraph "52" of his Judgment, Williams, J expressed the following.

> "Wilson LJ at paragraph 20 went on to say that the *"initial over arching inquiry"* should be whether an applicant for a costs allowance order can demonstrate that she could not reasonably procure legal advice and representation by any other means. So in a case where an applicant has assets she needs to demonstrate that they could not reasonably be deployed either directly or by raising a loan to fund legal services. It was held that an applicant should also have to demonstrate that she had not reasonably procure legal services by the offer of a charge upon the ultimate capital recovery. Wilson LJ added an additional criterion, namely the need to satisfy the courts that no legal aid was available to the applicant to enable her to obtain legal advice and representation at the level of expertise commensurate with the complexity and nature of the proceedings. In other words, if an applicant did not wish to take an offer of legal aid because of the operation of the statutory charge she should not be able to seek to persuade the Court to make a costs allowance order."

10. Williams, J continued as follows at paragraphs 53 and 54 of *B v B*.

> "Wilson LJ outlined a different approach to that commended by Mr. Mostyn QC in ***Moses-Taiga v Taiga*** when at paragraph 21 he stated that even if an applicant satisfied the Court concerning the criteria, which she would have to do to establish that there was a lack of alternative funding, that may not be a sufficient condition for a costs allowance order to be made. Wilson LJ felt that other factors may need to be considered, such as the subject matter of the

proceedings, and the reasonableness of the applicant's stance in the proceedings. A variety of other features may be relevant, including an ongoing liability as to costs owned by the applicant to the other party. The list is not limited to those specifically mentioned by Wilson LJ. He added that the Court should proceed with a *"judicious mixture of realism and caution as to both the amount and duration of any order."*

The approach outlined by Wilson LJ and the Court of Appeal in ***Currey v Currey*** is the one which I endorse and adopt. I must determine whether the wife can be reasonably procure legal advice and representation at the level of expertise apt to these proceedings otherwise that by a costs allowance order. If I find that she cannot, I must then go on to consider the other factors raised by Mr. McCann when exercising my discretion as to whether, on the facts, an order should be made."

Jurisdiction

11. Counsel for the Petitioner/Respondent submitted that the Court lacks jurisdiction to make the order which was sought.

12. Counsel argued that the children of the marriage are the subjects of and subject to orders made pursuant to the Matrimonial Causes Law (2005 Revision). It was argued that any variations should be subject to that law. The Petitioner/Respondent has sought variations under that law. In contrast, the Respondent/Applicant brought applications pursuant to Schedule 1 of the Children Law (2012 Revision).

13. Counsel for the Petitioner/Respondent submitted that it would be illogical and unlawful for some aspects of orders made under the Matrimonial Causes Law

to remain in force and be varied; while other aspects of the children arrangements to be made pursuant to the Children Law. Counsel argued that the reason that the Respondent/Applicant's purported to use the Children Law was because she was seeking to have her former husband pay the legal costs of her application.

14. In submitting that there was no Children Law jurisdiction to make a legal costs allowance order Counsel for the Petitioner/Respondent made further reference to the decision of Williams, J in B v B. Therein he stated *obiter* at paragraphs 61 and 62:

"As the relevant applications before me are brought within pending proceedings, and as a consequence the Children Law does not apply, I need not carry out a review of that case law.

62. A significant part of the costs in the matter before me are related to the wife's temporary and permanent applications to remove the children from the jurisdiction and private law custody access applications. If these were not pending proceedings, the wife might arguably have been in a position to contend that cost allowance orders could be made under Schedule 1 of the Children Law. I have little doubt that in future cases before this Court parties will recognize the important extension to the Court's jurisdiction exercisable pursuant to Section 17 and Schedule 1 of the law when dealing with applications relating to children."

15. In response Counsel for the Respondent/Applicant submitted that the Court had jurisdiction to make costs allowance awards under Schedule 1 of the Children Law or under the Matrimonial Causes Law. With reference to the *dicta* from Williams, J in B v B, Counsel was of the opinion that the term "*pending proceedings*" were a reference to the removal applications which

were a part of the matrimonial proceedings before the Judge. Thereafter the Judge made reference to applications brought outside of those matrimonial proceedings. Counsel further submitted that when the instant applications were brought, there were no other pending proceedings under the Matrimonial Causes Law.

16. It was submitted that the test to be applied was the same whether the order was being made pursuant to the Children Law or the Matrimonial Causes Law. The only additional test was that in applying the provisions of the Children Law the Court had to consider whether this was for the benefit of the children.

17. My interpretation of the obiter comments in *B v B* is that I have jurisdiction to make an Order under Schedule 1 of the Children Law.

The Benefit of the Children

18. Both Counsel agreed that the Court had to consider whether the Orders sought under the Children Law (2012 Revision) were for the benefit of the children.

19. Counsel for the Petitioner/Respondent submitted that the term was originally given a restrictive interpretation. In **W v J (Child: Variation of Financial Provision) [2004] 2 FLR 300** it was decided that the term did not empower the Court to grant a legal costs allowance. He conceded however that in **Re S (Child Financial Provision) [2005] 2 FLR 94** a more expansive interpretation of the term was taken. The Court of Appeal distinguished *W v J* and stated that the term should be given a wider construction. Counsel pointed out that this more expansive view was recognized by Williams, J in *B*

v B. Not surprisingly, Counsel for the Respondent/Applicant agreed that a more expansive construction to the term should be taken.

20. Having found that I had jurisdiction in this matter, I now find that it would be for the benefit of the children for this Court to consider making the orders sought.

The Overarching Enquiry

21. It was agreed that in order to satisfy the Court that she is unable to secure legal representation by any means other than a Legal Costs Allowance Order, pursuant to *B v B*, the Applicant must satisfy the Court of the following:

(1) That she had no assets which could reasonably be deployed either directly; or indirectly such as raising a loan to fund legal services;

(2) That she cannot reasonably enter into any Sears Tooth agreement with a charge to her attorneys;

(3) That no legal aid was available to enable her to fund her legal representation.

Thereafter the Court should consider other factors in determining whether it is appropriate to exercise its discretion in favour of the Applicant.

22. Counsel for the Petitioner/Respondent submitted that the Applicant had to satisfy each element of the test before the Court could consider whether its discretion should be exercised. It was only at that point argued Counsel that the issue of the equality of arms arose. Conversely, Counsel for the Respondent/Applicant argued that at each stage the Court had to bear in mind the test of the equality of arms.

Assets

23. Counsel for the Respondent/Applicant explained that his client has no assets which could reasonably be deployed and she had no ability to raise a litigation loan because she was unemployed. Further, such assets as she did have, were minimal and largely accounted for already by other expenses. It was noted that her spousal maintenance ceased at the end of September 2018.

24. Counsel for the Petitioner/Respondent submitted that the Applicant did not put forward sufficient evidence to satisfy the Court about her lack of assets. Counsel submitted that the Respondent/Applicant voluntarily gave up her employment as a Montessori teacher in or around June 2018 after 10 months of working in that position at a salary of CI $23,000 per annum. It was argued that this income as a teacher had been in addition to her spousal maintenance of $3000 per month. At the same time she benefited from the order for child maintenance of $4,500 per month and the housing allowance of $3,500 per month provided by the Petitioner/Respondent. Other expenses for the children such as school fees, extracurricular activities, health insurance and medical expenses were borne by the Petitioner/Respondent.

25. Counsel for the Petitioner/Respondent argued that no valid reason had been given for the move to Australia at the end of July 2018 except to settle the eldest child before university. However, R will not start University until February 2019. It was submitted that the Respondent/Applicant by resigning from employment in the Cayman Islands made herself voluntarily unemployed in Australia and there was no good or valid reason for this action. Further, it was argued, she had provided no evidence about what efforts she had undertaken to gain employment in Australia and she had not indicated whether or not there was any state support or benefits payable to her in Australia.

26. Counsel for the Petitioner/Respondent referred to the Applicant's statement that she had savings of $20,000. The level of evidence provided for this assertion was challenged as well as her statements that much of this money had been earmarked for travel and storage of her furniture and other expenses. Counsel also referred to the Mazda motor vehicle owned by the Applicant and left in the Cayman Islands. The market value of same was argued by both sides but it is accepted that the vehicle has a value of between $18,000 and $20,000. Counsel for the Petitioner/Respondent submitted that the vehicle could be sold and the money put towards legal costs.

27. Counsel for the Petitioner/Respondent also raised the issue of the manner in which the Respondent/Applicant had disposed of her 50% share of the matrimonial real estate. It was argued that it is not clear what these funds had been spent on.

28. Counsel for the Petitioner/Respondent submitted further that the Respondent/Applicant had put forward insufficient evidence to establish that she was unable to obtain a loan. The evidence of loan applications before the Court were over three years old. It was further submitted that there was no evidence of what assistance if any could be obtained from credit cards or any other form of borrowing facility. Further there was no evidence of what assistance could be obtained from friends or family. This was particularly relevant since apparently the Respondent/Applicant was living in Australia with the assistance of family.

29. Counsel for the Respondent/Applicant took the position that the limited funds and the motor vehicle could not properly be used to fund her legal costs which greatly exceeded any such funds. He also argued that funds provided for child maintenance and school fees could not properly be viewed as funds available to the children's mother for her own use. He pointed out that having failed in

her earlier attempts to get loans, it was hardly likely that she could obtain one while unemployed.

Sears Tooth Agreement

30. Counsel for the Respondent/Applicant stated that her lawyers were not prepared to enter into a Sears Tooth Agreement. Counsel for the Petitioner/Respondent submitted that this bare statement did not amount to evidence. He contrasted the level of evidence that was provided on this point in *B v B*. In response Counsel for the Respondent/Applicant submitted that that these agreements were relevant in ancillary applications where there was capital to be distributed. This was not the case in this application and as such a lack of formal evidence under this heading was not fatal to the Applicant's case.

Legal Aid

31. Counsel for the Respondent/Applicant pointed out that a previous application for legal aid had been made on March 6, 2016 to appeal the final ancillary order and for permanent removal of the children from the jurisdiction. The application which was made post-divorce was refused by the Honourable Chief Justice who gave the following reasons for refusal:

"Legal Aid refused: the parties to this marriage have more than sufficient assets to allow the applicant to afford her own attorney. She should ask her lawyers to apply to the Court of Appeal or the Grand Court to order that the Respondent husband provides the resources which will enable her to pay for her own appeal. She does not qualify for legal aid."

32. Counsel submitted that at the time of the application, the Respondent/Applicant had been unemployed and she remains unemployed today. It was conceded that a new application had not been made, however it was submitted that since the Respondent/Applicant did not qualify for legal aid previously, obviously she would not qualify now. Additionally she was specifically directed to make a costs allowance application against her husband.

33. In his submissions, Counsel referred to the fact that in *B v B* legal aid had been granted but with a cap of $3500. Counsel submitted that the reality of legal aid in this jurisdiction is that caps are routinely imposed even where there is a grant. He argued that even if it was granted, legal aid with a cap would be insufficient to fund the relocation application. He pointed out that significant costs had already been incurred since the application had been filed. It was submitted that the Respondent/Applicant had satisfied the Court that she could not secure public funding for her application.

34. In response, Counsel for the Respondent/Applicant pointed out that it could not be assumed that legal aid would be denied if an application was made or that a cap would be imposed which would be insufficient to fund the litigation. He argued that at the time of the last application, the Respondent/Applicant had received capital of $362,000 and as such it was not surprising that her application for legal aid to appeal the Order of the Grand Court was denied.

35. Counsel submitted that in order to satisfy the Court of the unavailability of public funds to pursue this application the Applicant should have made a fresh application asserting different proceedings and a financial change of circumstances. In the absence of this, the Applicant had not discharged her burden.

Discretionary Factors

36. Counsel for the Petitioner/Respondent took the position that the Respondent/Applicant did not satisfy any of the threshold criteria. As such it was submitted, the Court ought not to consider exercising its discretion to grant the application. However several factors were still itemized which it was argued militated against the favourable exercise of discretion. The most salient arguments for both sides on this point are stated below.

37. Counsel for the Petitioner/Respondent argued that the Respondent/Applicant's decision to remove the children from the Cayman Islands was entirely voluntary. While it was correct that the uncertainty of her immigration status had been raised during the trial, her situation had been sorted out when she obtained a work permit to teach at a Montessori school. Thus there was no issue that she was unable to remain in the Cayman Islands legally. While it was her right to relocate, she was seeking to take the children to live in a jurisdiction in which they had not previously resided and where their father did not reside. This action was unfair and it was unfair for their father to have to pay the legal costs of the relocation application.

38. It was further argued that this is not a case where the Petitioner/Respondent would ever be able to recoup any of the money spent on a legal costs allowance in respect of costs. This was particularly unfair since the Respondent/Applicant already owed costs on a previous application.

39. Further, it was submitted that the Petitioner/Respondent has already incurred substantial legal costs of his own in defending applications brought by the Respondent/Applicant including this one. She does not appear to have given thought to how he will pay these costs as well as pay for all the expenses

related to the children. Currently, he is no longer a partner in a prominent legal firm but he is on "*gardening leave*".

40. The Respondent/Applicant stated that she had set aside money to pay for travel to and from the Cayman Islands to Australia. It was argued that it was unfair to compel the Petitioner/Respondent to pay for her legal fees while she made other decisions for the use of her funds.

41. It was submitted that despite his lack of employment, the Petitioner/Respondent continued to make arrangements to meet his old expenses and that of the children of the marriage yet the Respondent/Applicant remained voluntarily unemployed and seeks more money from him. She had also spent a great deal of money from her marriage settlements with apparently nothing to show for it.

42. Counsel for the Respondent/Applicant countered that his client was not unreasonable in seeking to relocate to her homeland of Australia which had always been a real prospect after the divorce. With the consent of her former husband, she has been the primary caregiver for the children for all of their lives and it is reasonable for her to continue to fill that role.

43. It was submitted that it was unfair for the Petitioner/Respondent to raise the issue of the costs owed to him when he had not pursued his claim for it and any such claim was now time barred. It was also unfair of him to withhold the court ordered housing allowance for the past two months which totalled $7000. It was argued that despite the fact that the allowance is for the benefit of the children and the fact that the two youngest children currently reside with their father, the Respondent/Applicant will need appropriate

accommodation in Australia to house all of the children regardless of the Court's decision in relation to her substantive application. She has been presented from searching for suitable properties in Australia because she requires one month's deposit and one month rent payable upfront.

44. In essence, it was argued that the Respondent/Applicant is in a much weaker financial position than her former husband and she is not in a position to fund her application for relocation. He is in such a position and he is represented by very capable Counsel. The principle of equality of arms requires the Court to ensure that the parties are equally represented. This can only be done if a legal costs allowance order is made in favour of the Respondent/Applicant. The sum of $50,000.00 was mooted.

Conclusion

45. If the issue to be decided herein was whether one party had more assets to deploy than the other, there would be no difficulty. Based on the evidence before me and the submissions made, it is clear that the Petitioner/Respondent (the former husband) has greater financial assets than does the Respondent/Applicant (the former wife).However, an order cannot be made based only on such facts.

46. In order to conclude that the Respondent/Applicant cannot reasonably fund her legal representation in her relocation application, it must be determined whether she has satisfied the criteria as set out in *B v B*.

47. A relevant issue is the manner in which the Respondent/Applicant has used funds granted to her during the divorce proceedings. There is a lingering question about how the funds from her half share of the realty was utilised.

Some reference is made to legal fees but it is difficult to accept that all of the funds were utilised for that. Rather than a criticism of the Respondent/Applicant's lifestyle, it is a commentary on the sparse nature of the evidence presented to convince the Court about what if any funds remain from this capital.

48. Next, there is the Mazda motor-vehicle. On the one hand, it was submitted that it had been offered to the Petitioner/Respondent for purchase to fund legal costs and on the other hand it is submitted that it would not be appropriate for the Respondent/Applicant to sell this asset and utilise the funds for her legal fees. Either the vehicle is available to be utilised for legal fees or it is not. Both situations cannot coexist.

49. Counsel for the Respondent/Applicant correctly argued that funds provided for child maintenance and school fees could not properly be viewed as funds available to the Respondent/Applicant for her own use. It must be accepted however that the housing allowance provided a benefit for her since she had a sole residence order for the children. Therefore, she would not have to spend any of her own money for accommodation. Additionally, her money whether from spousal support or earned income, was not required to be spent on the children's living, medical, educational or recreational expenses since these were all borne by their father.

50. It is noted that the spousal support for the Respondent/Applicant recently concluded. There was a real issue however, in relation to her cessation of employment. Her income as a teacher was not large but it was a source of funds. These were funds which could have been taken into account had a loan application been made. It is really the timing of her cessation of employment that is a cause for concern. Arguably, it was not necessary to

travel to Australia a full six months before her eldest child was due to start University.

51. The evidence provided by the Respondent/Applicant on the issue of institutional loans and/or financing from family is extremely lacking.

52. The Respondent/Applicant's evidence concerning assets which could reasonably be deployed falls short of that which would be expected. This criterion was not satisfied.

53. With reference to evidence concerning a Sears Tooth agreement, this Court is prepared to accept an assertion made by Counsel for the Respondent/Applicant without requiring an affidavit. This is especially so because as pointed out by that Counsel, this case does not involve any capital to be distributed. The lack of evidence on this point is not fatal to the application.

54. On the issue of public funding, the submission put forward by Counsel for the Petitioner/Respondent is accepted. Evidence of a recent application and its result is required. This Court cannot assume that the same result would have occurred had the Respondent/Applicant made a new application especially since her circumstances have changed.

55. As a result of the foregoing, this Court cannot proceed any further and utilise its discretion to make a legal costs allowance order in favour of the Respondent/Applicant. This is the case even as the Courts acknowledges the importance of the principal of equality of arms.

56. Given the missing information which has been highlighted, the Respondent/Applicant may choose to gather such evidence in the future and file a fresh application. She is at liberty to do so.

57. The application for a legal costs allowance order is denied.

58. Any order as to costs is reserved in the event that Counsel should wish to make submissions on the matter.

GRAND COURT · CAYMAN ISLANDS

Nova Hall

Acting Judge of the Grand Court

9th January 2019