IN THE GRAND COURT OF THE
CAYMAN ISLANDS
FAMILY DIVISION

Cause No: 122 of 2007

BEFORE RICHARD WILLIAMS J

BETWEEN

SHERVIN IRA WOOD

Petitioner

-AND-

GRACE MARGARET WOOD

Respondent

Heard: 14th September 2011
Circulated: 21st September 2011

For the Petitioner: Miss Nicola Moore
For the Respondent: Mr Delroy Murray

Family law - Ancillary Relief - Final division of assets following submission of report by trustee in execution – Section 23 Matrimonial Causes Law - Variation of final division ancillary relief orders made by Grand Court as varied by the Court of Appeal - Costs of trustee – Legal Costs

JUDGMENT of Williams, J

Introduction

1. Shervin Ira Wood, the Petitioner, ("husband") made an application for ancillary relief. The Application was heard on 14th and 16th July 2008. Judgment was handed down on 19th August 2008 and the final order "in full and final settlement of all claims under Matrimonial Causes Law (2005 Revision) and the Married Women's Property Law (1997 Revision)" made by Levers, J was dated 27th October 2008.

2. The part of the order relevant to the issues requiring present determination dealt with the parties' assets. Levers, J determined that the matrimonial assets were:

- 4 Bergman Lane, Block 27C, Parcel 10;
- 12 Bergman Lane, Block 27C, Parcel 472;
- Land on Patrick's Island, Block 24C, Parcel 14;
- Land on the canal front in Spotts, Block 24E, Parcel 341;
- Two apartments in Spotts, Block 25B, Parcel 240;
- Waterfront property in Florida;
- Honda, Mitsubishi and Volvo Motor vehicles; and
- Bayliner boat.

Levers, J ordered that all of these assets were to be valued, then sold with an equal distribution of the proceeds to the parties.

3. Levers, J determined that business carried on through a company known as NWF Ltd, was not a matrimonial asset and that as a consequence the Respondent ("wife") was not entitled to a part of it.

4. The wife appealed contending that the judge erred when finding that the business was not matrimonial property and as a consequence deciding to leave that interest out of account in the property adjustment order made in relation to other assets. The appeal was heard by the Court of Appeal on 2nd and 3rd April 2009. The Court of Appeal's judgment was handed down on 8th April 2009. The Court of Appeal varied the order of Levers, J by deleting paragraph 10 therein which dealt with the business and substituting the following paragraphs set out at in the Judgment of Sir John Chadwick, P[1]:

"8A On the distribution of the proceeds of sale of the properties directed to be sold under para.8,[2] the husband is to bring into account, prior to equal division of those properties, the sum of CI$300,000.

....

10A On the husband bringing into account the sum of CI$300,000 as directed in para. 8A, no order is made in respect of the husband's interest in, or assets held by or on behalf of, NWF Ltd."

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[1] W v W [2009 CILR 255] paragraph 33

[2] The same assets as set out in paragraph 2 herein

5. Sir John Chadwick, P then ensured that there could be no confusion as to the consequence of the Court's decision by stating, "….. I intend the effect of the order as varied to be that the wife receives from the husband the sum of CI$150,000 (being one- half of the sum of CI$300,000 to be brought into account) in addition to her one half share of the proceeds of sale of the properties listed at para.7 of the order of October 27th, 2008."[3]

6. Miss Moore confirmed to me that the Court of Appeal considered affidavits filed by the parties and the opportunity given by the Court to both counsel to make submissions about the variation and the quantum of the company as an asset was taken up at the appeal hearing. Therefore, the decision was reached based upon information and submissions placed by the parties before the Court.

Background

7. The background leading up to the Court of Appeal hearing can be gleaned from the numerous affidavits upon which the parties have relied and is comprehensively summarised in the aforementioned written judgments. For the purpose of this ruling, I have regard to that background but do not intend to again fully rehearse the same herein.

8. I recognise that this was a long marriage. The parties were married in Grand Cayman on 23rd December 1986. The Petitioner filed his amended petition for dissolution of marriage on 30th May 2008 and the final decree was pronounced on 7th November 2008. There are two children of the marriage, a daughter born in December 1991 and Julian, a son born in July 1997.

9. As a consequence of the wife being in contempt of the order of Levers, J dated 27th October prohibiting the removal without consent of Julian from the jurisdiction, the father filed an ex parte summons on 28th May 2009. Henderson J, upon hearing

[3] W v W paragraph 34

the summons, granted custody and control of the children of the marriage to the husband. He ordered that the mother return Julian to the jurisdiction forthwith.

10. On 18th June 2009 both parties were represented by Counsel before Henderson, J. It was ordered that care and control revert to the wife and that there be a social enquiry report into the issue of access between Julian and the husband. The wife was ordered to swear an affidavit explaining the circumstances of the alleged breach of Levers, J's order within seven days.

11. Regretfully, the wife remained in contempt of the said order resulting in a further ex parte summons emanating from the husband, this time dated 6th June 2010. Various orders were sought including:

- the return of Julian to the jurisdiction within seven days of the order;
- that there be a custody and control order in relation to Julian in favour of the husband;
- that the wife be held to be in contempt of court due to her removing Julian out of the jurisdiction without consent and also due to her failure to permit the ordered social enquiry report to be prepared; and
- that there be an warrant for committal issued.

12. On 1st July 2010 Foster J considered the ex parte summons and upon finding the wife to be in contempt of the orders of 27th October 2008 and 18th June 2008 ordered:

- that she return Julian to the Cayman Islands within seven days;
- that, as per the order of 9th June 2009, there be a custody and control order in favour of the father in relation to Julian; and
- that a warrant for the wife's arrest be issued.

13. On 14th July 2010 the husband issued a summons seeking a variation of the ancillary relief orders made on 28th October 2008 by Levers, J. The summons also sought an order that, due to the wife's lack of co-operation, a trustee in execution be appointed in place of the Respondent to enable enforcement of the said ancillary relief orders. The Summons was supported by a detailed affidavit sworn by the husband on

10th August 2010 in which he set out the problems faced when trying to carry out the terms of the ancillary relief order and also the reasons why that order should be varied. It was and is still contended that the Court of Appeal were inadvertently in error when the Court calculated the value of the certificates of deposit by overlooking the fact that the CI$100,000 loan from the business to the husband had been used to pay spousal maintenance and child support up to the date of appeal. The husband contends that this meant that spousal maintenance was credited twice to the Respondent and this, coupled with the wife's conduct which includes the aforementioned contempt of Court orders, should lead this Court to vary the order. It is accepted by Miss Moore that the matter was not referred back to the Court of Appeal, the reason cited being lack of funding for the husband.

14. Henderson, J set the summons down for a hearing after granting leave for overseas service of the summons on the wife. Noticeably following service of the order the wife, Joel Brax (her new husband) and the Petitioner each swore and filed an affidavit.

15. On 11th November 2010 the summons came before Quin, J who, after denying the wife a right to be heard after he had found her in contempt of the orders of 27th October 2008, 18th June 2008 and 1st July 2010, made various orders including:

- the appointment of Peter Anderson as a trustee in execution to give effect to the order of Levers, J of 27th October 2008 as modified by the Court of Appeal on 8 April 2009;
- that the trustee was to give account of the estate to the attorneys of the parties including all sums expended since 27th October 2008;
- that the costs of the trustee in execution to be paid by the estate subject to the said order of Levers, J. It is significant that this was not only set out in the relevant order but also in the brief Ruling specifically dealing with the wife's contempt and therefore it is evident that her conduct and the reasons why the appointments was necessary were fully in his mind when he was considering who should pay the costs of the trustee;
- the variation of the child support orders made on 27th October 2008. In light of the fact that the father has indicated at the hearing before me that he does not

seek to apply to further vary the same, I need not comment further on these payments, save to say that to his credit it appears that he has adhered to the terms of the order despite the wife's failure to comply with the order to return Julian to his custody in this jurisdiction; and

- that there be liberty to apply in respect of the order of Levers, J of 27th October 2010 upon the account being received from the trustee in bankruptcy. I note that the order of Quin J did not provide for a variation of the order of Levers, J as modified by the Court of Appeal.

16. Mr Peter Anderson submitted his report as an exhibit attached to an affidavit sworn by him on 1st August 2011. Mr Anderson states at paragraph 5 of his affidavit that in the report he has "accurately represented the values and various accounting adjustments that may be applicable to the estate to achieve an equal contribution."

17. Mr Anderson provides two 'Division of Assets Breakdown' forms. The first relates to a breakdown if there is no variation of the order of Levers, J as modified by the Court of Appeal and the second if the Court makes the variation sought by the husband. The first shows a total gross asset value per party of CI$913,493 and the latter a value of CI$863,493.

18. Mr Anderson goes on to set out his proposals for an in-specie distribution of the assets as well as a proposal for the sale of the two apartments in Spotts. Both attorneys at the hearing stated that they had instructions to accept these proposals. They seem eminently sensible and I am content to vary the order to reflect the recommendations rather than a simple sale of assets and division.

19. Mr Anderson also made a recommendation concerning the trustee's fees and legal fees. I am not convinced that this was within his remit. Mr Anderson proposed that the fees standing at CI$29,714 be assessed against Mrs Wood. In addition, he proposed that the legal fees in connection with trustee services for the period 2009 to July 2010 (US$11,985) and for the period July 2010 to the date of the report (US$23,157) be assessed against Mrs Wood. Mr Anderson also recommends that Government stamp duty fees on the proposed transfers of the 4 Bergman Lane property, 12 Bergman Lane property and the Spotts apartments be assessed against

Mrs Wood if they are applicable. The husband adopts all of the recommendations and seeks an order in the proposed terms. The wife objects, contending that Quin, J has already clearly provided on 11th November 2010 that the costs be paid by the estate.

20. On 3rd June 2011 the husband filed the Summons which is before me asking:

- the Court to receive the report of the trustee pursuant to the Order of Quin, J of 11 November 2010. I am content to do so subject to my comments herein concerning parts of the content;
- for orders relating to the final property transfer and/or adjustment of the matrimonial asset in the case. Again this is something that is required and overdue in this matter. I am content to adopt the proposals for in-specie distribution of assets and the sale of apartments but will need to consider which figures they can be based on;
- for costs of the appointment of a trustee in execution to be born by the wife; and
- for costs in relation to the Summons and the summons heard on 11 September 2011 when Quin, J adjourned costs of that application generally.

21. The Summons was heard by me on 14th September at which time I indicated that I would reserve my decision and ruling. At the hearing Mrs Moore attended with the husband. Mr Murray appeared for the wife, who did not attend. Mr Murray indicated that he had minimal instructions and intimated that he might like to come off the record. The Court indicated that to do so he would need to make a formal application which must be served on his client and requested that he remain in court and contribute when he felt able. No application to adjourn was made on the wife's behalf and Mr Murray took the opportunity given by making submissions on issues upon which he was satisfied he had sufficient instructions.

The present application

22. The husband seeks a variation of the order of Levers, J dated 28th October 2008 as modified by the Court of Appeal. In her skeleton argument Miss Moore phrases the application as being:

"made pursuant to summons of July of last year under the liberty to apply of the order of Quin, J of 16 November 20011for

a. .....

b. variation of the final division of the assets to take into account the fact that the certificate of deposit as valued by the Court of Appeal was made fundamentally based on a mistaken valuation."

23. In fact, the order of Quin, J did not give expressed liberty to apply in the terms expressed by Miss Moore, as he made no mention of the Court of Appeal or the certificate of deposit as valued by the Court of Appeal. In that order Quin, J simply gave liberty to apply in respect of the order of Levers, J of 27 October 2008.

24. I accept Miss Moore's uncontroverted submission that the Grand Court does have the jurisdiction to vary ancillary orders. Section 23 Matrimonial Causes law provides:

"Either spouse or the personal representatives of either spouse may make an application for variation of any order made under section 21, and the court, after hearing the parties, may make such variation."

25. Miss Moore relies upon the judgment of Zacca, P in *Range v Range (1988-89 CILR 437)* in support of her proposition concerning the Court's jurisdiction. I accept that this case is good law for the submission that the Court has such a jurisdiction. However, Zacca, P understandably states at paragraph 15 on page 4 of his judgment that it was a jurisdiction that should be used sparingly where the order itself appears to contemplate finality. In the matter before me it is clear that the order, save for the issue of quantifying the value of the assets, was designed to bring all ancillary matters to a close. Additionally and importantly, Zacca, P when reviewing the case law stated that the matter before the Court of Appeal in *Range* concerned the powers of the court which made the order (my emphasis) to vary it.

26. This Court is not only being asked to vary parts of the order made solely by a Judge of the Grand Court but also to vary a part of the order fundamentally modified on appeal by the Court of Appeal. This Court clearly has the jurisdiction to vary that

part of the order made by Levers, J in which she expressed how the assets should be realised and distributed. As already indicated herein, both parties consent to a variation to enable division of assets to be as recommended by Mr Anderson rather than by sale of all of the assets. However, the contentious issue is whether this Court can vary that part of the order dealing with business assets which was modified by the Court of Appeal based upon affidavit evidence placed before them by the parties and upon submission they received on point from both parties' Counsel. I, sitting in the Lower Court, am being asked to correct what is being termed an error or mistaken valuation by the Higher Court. Miss Moore quite rightly conceded that she had been unable to find any authority in support of a submission that this Court could vary an order of the Court of Appeal. The 'mistaken valuation' although brought to the husband's attorneys' attention in April 2010, has at no time been referred back to the Court of Appeal by the husband, apparently due to lack of funding for such a referral. When asked by me, Miss Moore expressly stated that the husband was not at this time seeking an adjournment to make such a referral and did not seek an adjournment of the summons.

27. Miss Moore commends to the Court a wide power to vary. However, I do not accept Miss Moore's submission that the part of an order which was varied by the Court of Appeal can be regarded an order made by the Grand Court. The Court of Appeal's modification came about due to a clear finding that the Learned Judge had erred in her approach and as a consequence they replaced that part of the order with their own.

28. Accordingly, the only variation to the order of Levers, J that will be made is to replace paragraph 8 with a provision reflecting the detail of the recommended in-specie distribution of assets based on the valuation of the assets arrived at by the Court of Appeal and the sale of the Spotts apartments.

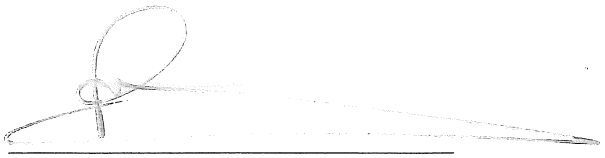
29. I am asked by the husband to disturb Quin, J's order that the estate pay the costs of the trustee. It is submitted that due to the wife's conduct that she should be required to bear those costs alone. It is patently clear that Quin, J was fully aware of the wife's conduct at the time he made the order in November 2010. Quin, J was also fully aware of the background that led to the need to appoint a trustee. I have no detail

before me to show whether or by how much the costs of the trustee have increased since the November hearing due to the more recent conduct of the wife. There is brief reference in the affidavit of Mr Anderson concerning alleged lack of co-operation from the wife's attorneys. This is refuted by Mr Murray in his affidavit of 11th August 2011. Mr Anderson was unable to attend the hearing and no finding, even if it could then be established to have resulted in increased costs for the trustee, could be made. Miss Moore decided not to take up the Court's suggestion that the Court might be invited to consider granting leave for the filing of further affidavits supported by written submissions outlining any contention that the costs of the trustee had escalated since November 2010 due to the conduct of the wife. In light of the above, there is no reason to disturb the informed order of Quin, J and his order, as it remains in force, covers the trustee's fees and legal fees in connection with trustee services.

30. Finally I must turn to the costs of today's hearing and those of the hearing of 11th November 2010. At that hearing the Court was required to deal with the conduct and contempt of the wife. I am satisfied that the wife should bear the costs of the Summons from preparation up to and including that hearing and I so order.

31. I am asked by the husband to award him costs of this hearing. The vast bulk of the time has been taken up with the husband's application to vary that part of the order modified by the Court of Appeal and the issue of the costs of the trustee. He has not been successful in either application. The variation in relation to how the assets may be realised for distribution has been dealt with by consent and hardly occupied any of the time of this Court at the hearing. Despite this Court's ruling, I am not minded to grant the wife the costs of this hearing. She has failed to personally attend the hearing, failed to give her Counsel full instructions and she is still in contempt of three court orders. It would not be appropriate for me to make an order for costs in her favour. Accordingly, the parties will bear their own costs of this hearing and I so order.

32. This Judgment will be circulated and I invite Miss Moore to kindly draft up an order reflecting the contents herein. The draft should be agreed with Mr Murray before submission to the Court.



Richard Williams
Justice of the Grand Court