In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2010: No. 222

BETWEEN:

F

Petitioner

-v-

F

Respondent

(Re: Maintenance Pending Suit)

RULING
(in Chambers)

Date of Hearing: July 5-6, 2011
Date of Ruling: July 22, 2011

Mrs. Georgia Marshall, Marshall Diel & Myers, for the Petitioner
Mr. David Kessaram, Cox Hallett Wilkinson, for the Respondent

Introductory

1. The present vigorously contested application brought by the Petitioner/Wife for maintenance pending suit against the Respondent/Husband takes place against a background in which (a) the Husband, who made his fortune after marrying the "stay at home" Wife, has formed a new relationship with a woman half his age, and (b) both his liquidity and the value of the family assets have been compromised by litigation pending in Canada.

2. The Petition was presented on November 22, 2010. The Notice of Application for Interim Ancillary relief was filed on April 5, 2011. It was supported by the Wife's First Affidavit sworn on March 11, 2011 but filed on April 5, 2011 when the Registrar gave directions for the filing of evidence in response. On May 3, 2011, the Husband issued an application for an extension of time for filing his evidence, which application was listed for hearing on May 10, 2011. At the May 10, 2011 hearing before the Registrar, the Wife sought and obtained an order that the Husband pay $60,000 per month by way of interim maintenance. He had been paying $20,000 on a voluntary basis until then. On May 17, 2011, Wade-Miller J heard an appeal against this interim order and on June 17, 2011 she set it aside on natural justice grounds. The Registrar quite properly decided to set down the *inter partes* hearing of the Wife's interim ancillary relief application before a judge.

3. The evidence was supplemented by the First Affidavit of the Husband dated May 13, 2011, the First Ziehl Affidavit (sworn on the same date by an accountant employed by the group companies which is owned by various trusts of which the parties are both beneficiaries) and by the Fourth Affidavit of the Wife sworn on June 22, 2011. The Wife's First Affidavit was 22 pages with 69 pages of exhibits. The Husband's First Affidavit ran to 90 pages. The Wife's Fourth Affidavit ran to 135 pages with 145 pages of exhibits. Beyond the perimeters of the battlefield on which the ancillary relief application is being fought out, legal skirmishes concerning discovery, changing the *situs* of certain trusts and the wife's unauthorised acquisition of certain documents belonging to the Husband from the former matrimonial home, have also broken out.

4. Despite having heard an application for maintenance pending suit which lasted two days, I must remind myself that this application is not the final ancillary relief application but the sort of enquiry which is ordinarily dealt with by the Registrar in a comparatively summary manner. That said, the cases cited by counsel demonstrate that such applications can occasionally be fully argued and raise points of general principle.

Applicable legal principles

5. The Court's jurisdiction to grant interim ancillary relief arises under the following provisions of the Matrimonial Causes Act 1974:

> "***Maintenance pending suit***
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> *26 On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.*"

6. Mrs. Marshall for the Wife referred the Court to authorities in respect of the following key three principles upon which she relied. Firstly, since section 26 of our Act is derived from section 22 of the Matrimonial Causes Act 1973 (England & Wales), counsel emphasised the breadth of the Court's discretion as explained by French J in *Offord-v-Offord* (1982) 3 FLR 309 (transcript, page 4):

> "*Maintenance pending suit…is governed by s.22 of the 1973 Act which gives the court as wide and unfettered discretion as can well be imagined. It provides that the court may order such periodical payments until the hearing as 'the court thinks reasonable', reasonable, that is to say, in the light of the means and needs of the parties and any other relevant circumstances.*"

7. Mr. Kessaram did not challenge this proposition which I accept governs the present application.

8. The second principle relied upon by Mrs. Marshall was that articulated by Charles J in *Murray-v-Murray* [2002] EWHC 317 (Fam) at paragraph 57 where he held: "*Here the husband relies on changes of circumstances and in my judgment before he can assert with force that I have to accept that change he must in performance of his duty to give full and frank disclosure of them and thus a clear and full explanation…*" While this approach may be justified in many cases, in the instant case the key facts upon which the Husband relies are not really in dispute and are matters of record in related proceedings brought by the trustees of certain trusts. That said, of greater relevance is the following passage at paragraph 110 of Charles J's judgment in the same case, to which Mrs. Marshall also referred, in which the following observations of Waite LJ[1] were approved:

> "*…But certain principles emerge from the authorities. One is that the court is not obliged to limit its orders exclusively to resources of capital or income which are shown actually to exist. The availability of unidentified resources may, for example, be inferred from a spouse's expenditure or style of living, or from his inability or unwillingness to allow the complexity of his affairs to be penetrated with the precision necessary to ascertain his actual wealth or the degree of liquidity of his assets…*"[2]

9. The third principle which Mrs. Marshall relied upon, which appears not to have been expressly considered by a Bermudian court, is the proposition that an order awarding maintenance pending suit may include an award in respect of the legal costs of the

[1] Thomas-v-Thomas [1995] 2 FLR 668 at 690-691.

[2] Even this principle is somewhat diluted at the interim stage in the particular circumstances of the present case as the time for the Husband to give disclosure for the purposes of the main application had not expired at the date of the hearing of the present application.

applicant. This principle has seemingly only recently been clearly established in England. In *Moses-Taiga-v-Taiga*[2005] EWCA Civ 1013, Thorpe LJ opined as follows:

> "*25. In construing section 22 as embracing the applicant's need for cash to finance the continuing litigation, and at least implicitly approving that practice, Mr Aderemi has quite rightly said that my observations in McFarlane were, strictly speaking, obiter. I accept that that is the correct classification. Nonetheless, the passage is a pretty clear indication of where I stand on this issue. In short, it seems to me that the progressive construction that the judges have adopted in the Family Division is both pragmatic and sensible. I accept that at the date of the advent of the Matrimonial Proceedings and Property Act 1970 (1 January 1971) no judge of the Division would have so construed section 22, particularly because one of the provisions of the 1970 Act was to remove the wife's agency of necessity and with it her opportunity to seek security for the costs of future litigation. But times have moved on. In the 1970s a petitioner who had no assets and whose only prospect of affluence lay in the outcome of her application for ancillary relief could easily find specialist solicitors who would pursue her claim on legal aid. That world has long since gone. In those days a number of the leading specialist ancillary relief firms could, as a matter of public duty, take on an admittedly small number of legally-aided cases. Leading firms that would not take legally-aided clients invariably had an arrangement to pass such cases to highly competent firms that would do legal aid. All those support systems have disappeared. The modern reality is that the highly specialist solicitors and counsel necessary for the conduct of big money cases will no longer do publicly-funded work. So if the applicant has no assets, can give no security for borrowings, cannot guarantee an outcome that would enable her to enter into an arrangement such as that which was upheld in Sears Tooth v Payne Hicks Beach, then there is no source of funding of the litigation other than the approach to the court for a maintenance pending suit that will include a substantial element to fund the cost of the litigation. Obviously in all these cases the dominant safeguard against injustice is the discretion of the trial judge, and it will only be in cases that are demonstrated to be exceptional that the court will consider exercising the jurisdiction. But I am in no doubt that in such exceptional cases section 22 can in modern times be construed to extend that far.*" [emphasis added]

10. Mr. Kessaram, relying on the last sentence of the quoted *dictum* of Thorpe LJ, sought to emphasise the "exceptional" nature the jurisdiction to award a legal costs element of a maintenance pending suit order. However, in a subsequent unanimous decision of the English court of Appeal which I find to be persuasive and upon which Mrs. Marshall forcefully relied, it was made clear that the jurisdiction to award legal costs as an incident

of a maintenance pending suit award is a more flexible discretionary power. As Wilson LJ stated in *Currey-v-Currey* [2006]EWCA Civ 1338:

> "*17.The repeated use by Thorpe L.J. of the word "exceptional" has become controversial. Did he mean that, apart from establishing that she (or, as here but less typically, he) had no facility to fund the litigation in any of the three specified respects, an applicant for a costs allowance needed to show that the case was exceptional? In TL, cited above, Mr Mostyn thought not. At [128] he said:*
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> > *'Thorpe L.J. speaks of the power only being exercised in 'exceptional cases'. I would be surprised if he intended by that remark to impose the need to demonstrate anything beyond the requirements that he had previously mentioned, namely, that the applicant: (1) had no assets; and (2) could not raise a litigation loan; and (3) could not persuade her solicitors to enter into a Sears Tooth ... charge. The combination of those three factors would, to my mind, make the case exceptional.'*
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> *18. I should also refer to the decision of Hedley J. in C v. C (Maintenance Pending Suit: Legal Costs), as yet noted only in [2006] Family Law 739. The judge so varied an order for a wife's maintenance pending suit as to include a costs allowance of £10,000 per month for ten months until the hearing of her claims for ancillary relief. The primary focus of the argument was upon the suggestion of Thorpe L.J. that an applicant needed to demonstrate that "she has no assets [and] can give no security for borrowings". For the wife had an unencumbered half share, worth in excess of £500,000, in the matrimonial home in which she continued to live with the children; and so it was the husband's simple assertion that she did have assets and could give security for borrowings. Hedley J. held that it would be "wholly unfair" to expect her to jeopardise the family's occupation of the home by raising a loan on the security of her share. He accepted the submission on behalf of the wife that the reference by Thorpe L.J. to having no assets and being unable to raise a loan was illustrative of one "exceptional scenario" rather than definitive. And he suggested that in one sense all "big money" cases were exceptional but that the need in the case before him for an investigation into the scale and liquidity of substantial assets under the husband's control certainly made it exceptional.*
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> *19. I consider that the word 'exceptional' is obstructing the proper exercise of the jurisdiction to include a costs allowance; and I am convinced that Thorpe L.J. never intended that it should do so. To*

that extent I agree with Mr Mostyn. There is a recognised syndrome in which, in order to illumine his exposition of the proper approach, a judge uses a word; and then, to his astonishment, finds that the word of intended illumination is mistaken for the proper approach itself. But I would go further than Mr Mostyn, just as Hedley J. has gone in C. For it is clear that the reference by Thorpe L.J. to an applicant's need to demonstrate that she "has no assets [and] can give no security for borrowings" should not be taken literally. Mrs C did have assets and could give security for borrowings; the point was, however, that it was unreasonable to expect her to do so.

20. In my view the initial, overarching enquiry is into whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services. Furthermore, not to forget the third of Thorpe L.J.'s three features, she has also to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery. I would add, fourthly, that the court needs also to be satisfied that there is no such public funding available to the applicant as would furnish her with legal advice and representation at a level of expertise apt to the proceedings, i.e. that the applicant does indeed in that regard fall within the unserved constituency referred to by Thorpe L.J. in the statement quoted at [1] above."

Findings: is the Petitioner entitled to a legal costs order?

11. It is not disputed that the Wife lacks resources of her own and as a person residing in Florida is ineligible for legal aid. Her counsel indicated that her firm is unwilling to act on the basis of obtaining fees out of whatever recovery the Wife may make at the end of the day. Such a position might seem churlish in a more straightforward case; in the present circumstances it is reasonable.

12. The Husband's main argument in opposition to his being required to contribute to the Wife's legal costs at this stage is that she ought reasonably to be required to look first to the trustees of the discretionary trusts of which she is a beneficiary for support. I reject this submission, which is contradicted by the Husband's own evidence. In his First Affidavit, he deposes: "*To the best of my knowledge, the Trusts would not be in a position to make any kind of future distributions to any discretionary beneficiaries due to the ongoing commitment under the Royalty Agreements. The Trusts have not made any distributions to any beneficiary since 2005. Those distributions which occurred prior to 2005…were not used for personal or family purposes.*" (paragraph 144). This assertion cannot be accepted at face value however; it is common ground that at some juncture one of the trusts acquired the Florida property in which the Wife and children now live. There

is no basis for expecting, and every reason for doubting (based on the Husband's own evidence), that the trustees will promptly and positively respond to any request by the Wife for a financial distribution at the present time.

13. Mrs. Marshall sought $20,000 per month, back-dated to the date of the Petition, as a reasonable costs order. This was based on her client's evidence that her legal costs to date, (and which I accept likely include costs incurred in relation to the satellite applications), are in the order of $120,000 or $17,224 per month. The claim also takes into account an estimate that an increase in these expenses will be required in the run-up to the effective hearing of the present application to $30,000 monthly. It is not presently obvious that the Husband will or should be liable for all of these costs (i.e. the costs of the satellite applications). Nor should the level of support the Husband is required to provide at the interim stage be pitched at such a level that the Wife has no incentive to conduct the proceedings going forward in a rational manner.

14. Accordingly, I award the Wife $20,000 per month from the date of the present application until the present interim award (4 x $20,000 = $80,000) as a lump sum in respect of legal expenses incurred to date. However, I would reduce this monthly allowance to $10,000 per month for the period between now (i.e. the month of August onwards) and the final ancillary relief hearing. In my judgment it is the more usual course to back-date maintenance pending suit awards to the date of the application rather than the date of the Petition, as illustrated by the case of *Re G (Maintenance Pending Suit)* [2007] 1 FLR 1674 (upon which the Husband's counsel relied).

15. Whilst I accept that the Husband's financial position is more constrained than it was during the marriage, it is not realistic to assess his income solely based on the formal salary he receives from private companies which he himself set up (and may fairly be viewed for present purposes as commercially controlling in a non-legal sense). Nor is it permissible to disregard the evidence of his general lifestyle. It seems clear at the present stage at least that the Husband is in matrimonial law terms a man of means more ample than the assets strictly owned by him would suggest. On the facts of the present case, the primary obligation to discharge the Wife's reasonable expenses rests with the Husband. This Court cannot aid and abet any attempt by the Husband to impair the ability of the Wife to contest the present litigation on a level playing field.

16. I am satisfied that he can (not perhaps without some difficulty) comply with such legal costs order, in addition to meeting the payment obligations imposed below in respect of the Wife's reasonable living expenses.

Findings: what are the Wife's reasonable living expenses?

17. The Husband contends that $20,000 per month is sufficient to cover the Wife's reasonable living expenses. He admits that under pressure from her, he paid certain household bills in addition to wiring this amount to her. She sought to challenge the adequacy of this $20,000 estimate in two ways. Firstly, she estimated those expenses, without producing the back-up documentation typically supplied. Secondly, her counsel

relied on an analysis of expenditure based on bank and credit card statements during the marriage. After an incisive analysis by Mr. Kessaram of both the estimates and the tables prepared by Mrs. Marshall, it was clear that there were good grounds for approaching the Wife's claim with care.

18. It was, understandably, of great concern to the Wife that the Husband had purchased numerous air tickets for his new romantic interest, Ms. C, between January 2010 and March 2011, using the same corporate credit card that was once available to her. However, when the relevant charges were analysed, it was clear that they were generally very modest, seemingly discounted because Ms. C is an employee of an airline.

19. Although it is somewhat unclear which expenses charged to the Husband's corporate credit card were truly business expenses and which were personal (and liable to be reimbursed by him), I consider it more likely than not (for present interlocutory purposes only) that a substantial portion of travel and other items charged to the relevant card at all material times were genuine corporate expenses, so the Wife's assessment of how much the Husband spends on himself now and spent on her travel during the marriage is materially inflated.

20. Having regard to bills which the Wife sent to the Husband to pay, I find that his assessment of what the Wife's reasonable living (including household) expenses are is, on balance, not wholly unrealistic. His estimate (First Affidavit, paragraph 47) was that her necessary expenses excluding spending money for entertainment and travel was just under $13,000 per month. However, rightly or wrongly, she has admittedly become dependent to some extent on the Husband paying certain household bills in addition to receiving $20,000 per month. It is entirely plausible that these sums have been paid under protest, as the Husband contends, because of his devotion for the parties' children and in response to threats that she has made. On the other hand, it seems obvious that he is scrutinizing the Wife's expenditure far more closely than he would have done during the marriage and not wholly because of a decline in his financial liquidity. Whether consciously or unconsciously, he is undoubtedly assessing her interim needs at a level below what she enjoyed during the marriage.

21. In my judgment it would impose an unfair administrative burden on the Husband to require him to pay various household expenses directly, as Mrs. Marshall invited the Court to consider. She should be paid a monthly sum out of which she pays all household expenses, leaving him to make the direct payments which he customarily has voluntarily made on behalf of the children[3]. A reasonable amount, which cannot be calculated with mathematical precision, should be more than the $20,000 he has been paying but only so much more as to ensure that the Husband continues to pay the Florida household basic maintenance costs which he reluctantly assumed responsibility for prior to the present application.

[3] If these items cannot be agreed, I will hear from counsel as to the terms of the Oder to be drawn up to give effect to this Ruling as this issue was not addressed in argument.

22. On balance, I would award the wife $22,000 per month for living expenses with effect from the date of the present order, to avoid any possibility of requiring the Husband to pay twice in respect of any additional monthly amounts he may have paid towards the Florida home since the date of the filing of the present application, which I estimate at $2000 per month based on the Husband's own figures (excluding the costs of the nanny). If he has made no such additional payments since the date of the application, I would consider that he deserves credit for the additional payments made by him prior to the application date (over and above the voluntary $20,000 periodic payments) in any event.

Summary

23. The Father is ordered to pay $20,000 per month towards legal costs incurred since the date of the present application (4 months @ $20,000= $80,000). In terms of monthly maintenance from the date of the present decision, he is ordered to pay $22,000 per month for living expenses + $10,000 per month for legal expenses= $32,000 per month.

24. Unless either party applies within 21 days to be heard as to the costs of the present application, I would reserve the costs to be assessed after the conclusion of the main ancillary relief application.

Dated this 22nd day of July, 2011 _____

KAWALEY J