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ROYAL COURT
(Matrimonial Causes Division)

5th April, 1989

Before: The Deputy Bailiff and
Jurats Blampied & Le Boutillier

Between

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Petitioner

And

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Respondent

Matrimonial dispute - application to vary the terms of a previous Royal Court Order dated the 17th October, 1985, in the above action - matters left over from cross summonses dated the 24th September, 1987 - see previous judgments of the Royal Court (as yet unreported) dated the 13th October, 1987 (interim order re. sale of property) and the 4th April, 1989 (judgment on preliminary matters raised by the summonses).

Advocate Mrs. S.A. Pearmain for the Petitioner
Advocate G.R. Boxall for the Respondent.

JUDGMENT

DEPUTY BAILIFF: As we said in our Judgment delivered yesterday on the two preliminary points taken on behalf of the petitioner, we cannot regard the Order of the 17th October, 1985, as a final one; it was a contingent Order. The Order directed that "... the petitioner should receive all the net proceeds of the sale of the former matrimonial home, in St. Peter, in the event that such sale becomes necessary as a result of the failure of the respondent to pay all the mortgage instalments due on it"

Thus, there were two events that had to occur before the petitioner became entitled to the proceeds of sale. The first was that the respondent should default in the mortgage payments and the second was that as a result of that default, a sale should become necessary.

It appears that the petitioner acted on the assumption that as soon as the respondent defaulted she had an automatic and absolute right to the proceeds of sale; however that was not so, because a sale had to become necessary.

One alternative would have been the re-mortgaging of the property on an 'interest only' mortgage with no capital repayments until either the financial situation and/or the health of the respondent had substantially improved, or permanently, with a sale of the property deferred until the younger of the children had reached the age of sixteen years or completed full-time education. However, by the time the matter came before the Court on the 13th October, 1987, the summonses of both parties sought a sale and both counsel informed us that the house had to be sold. No doubt this was so because nothing had been paid on the mortgage since the 29th May, 1987. Thus, the Court was deprived by the parties of the opportunity to consider the question of necessity.

It is unfortunate that Commissioner Mr. Dorey did not give reasons for his decision of the 17th October, 1985. Whilst the delivery of written judgments does involve delays, it assists the administration of justice if decisions are "reasoned". The summons before Commissioner Mr. Dorey sought as its first prayer an order that the respondent should transfer to the petitioner his interest in the former matrimonial home, on such terms as might be just. The Commissioner neither made that order, nor dismissed it

nor adjourned it. Likewise the application for a lump sum payment. He adjourned sine die only the applications relating to a reduction of maintenance and the costs of the action. The other matters were left, so to speak, 'in limbo'. We suspect that the Commissioner was intending to coerce the respondent into maintaining the mortgage payments as a first priority out of his income but, in default of reasons, we cannot speculate. We do not, however, accept the submission of Mrs. Pearmain that there is a difference in principle between a variation of an order relating to *periodical* payments and one relating to real property. The legislature enacted Article 32 of the Matrimonial Causes (Jersey) Law, 1949, to enable the Court to discharge or vary any order made, inter alia, under Article 28 (transfer or settlement of property, real or personal). When the legislature enacted Article 29A (power to order sale of property) by the Matrimonial Causes (Amendment No. 7) (Jersey) Law, 1986, it amended Article 32 to add Article 29A orders to it.

Mrs. Pearmain said that there was no precedent for a variation of an order relating to real property. Two such cases are Chamberlain -v- Chamberlain (1974) 1 All E.R. 33 C.A. where an order for the settlement of the matrimonial home was varied, and Mesher -v- Mesher (1980) 1 All E.R. 126 C.A. where an order for the transfer of the property to the wife was set aside; both cases are referred to in the case of O'Connell -v- O'Connell which was cited in the judgment delivered yesterday. We fail to see any difference between a variation on appeal and a variation on subsequent application specifically provided for by statute. Finality in matrimonial causes is, of course, desirable, but finality is achieved only when an order has been fully implemented.

In deciding the present application we have had regard to a number of factors:-

- 1) Conduct: In F -v- W J.J. 8th June, 1987, as yet unreported, the Court said this: "The ratio decidendi of Urquhart -v- Wallace" [(1974) 2 J.J. 119] "is that as, in Jersey, divorce is still based substantially on the concept of the matrimonial offence, a stronger emphasis is placed by the Court on the conduct of the guilty party when apportioning the assets. Conduct must be taken into account, whether or not it is obvious and gross"

In the instant case, it was the conduct of the respondent that broke up the marriage. He committed adultery. We cannot apportion blame for earlier behaviour by either party on the basis of the evidence before us. It may well be that the marriage relationship was already under strain, largely due to the financial situation. We think that there was a certain lack of responsibility in money matters on the part of both spouses. As to subsequent conduct, we are in no doubt that the 'stop-start' attitude of the respondent in relation to the mortgage payments and the uncertainty of a continued home for herself and the children, did cause distress to the petitioner. Therefore, on the issue of conduct alone, the £5,000 already paid to the petitioner is insufficient to mark the conduct of the respondent in terminating the marriage and we reject the submission of Mr. Boxall that the monies presently available should be divided equally.

- 2) Provision of a home. As Commissioner Mr. Dorey said in *Clarke -v- Clarke* - J.J. 16th December, 1987, as yet unreported - the provision of a home to both parties to the marriage has now reached a stage of some considerable emphasis. In *Martin -v- Martin* (1977) 3 All E.R. 762, at p.765, Lord Justice Stamp said: "It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, have a roof over his or her head". Rakusen & Hunt, *Distribution of Matrimonial Assets on Divorce* (2nd Edition) Part 2, Chapter 4, at page 43, says this: "It will be suggested in Chapter 5 that one of the greatest factors influencing the distribution of matrimonial assets is the very large emphasis that is to be placed by the courts on the provision of homes. However, if there is one consideration which is more than emphatic and might be said to be paramount, it is the need to consider what are herein described as the 'overriding requirements of dependent children'. Accordingly, it may safely be stated that in nearly every case which comes before the courts where there are children, there is a simple and unalterable starting point. It is that the availability of the house as a home for the wife and children should ordinarily be ensured while the children are being educated. The reason for this clear policy is self-evident. But as well as the desire to protect children as much as possible from the consequences of divorce, there may also be seen to be a desire on

the part of many courts to protect and compensate the party (usually the wife) who is left with the financial, mental and physical burden of caring for the children of the family".

However, the Court has to face up to the reality of the situation. In this case, the former matrimonial home has been sold and is no longer available. There is simply not enough money available to provide a home, free of debt, until the younger child has completed her education. The petitioner is now a tenant of the States. We are sure that this is where the security of the family lies. In the public sector, rents are rebated according to means; it is only in rare cases of persistent non-payment or gross misconduct that States' tenancies are terminated. The petitioner can feel secure in debt-free, rented, States' accommodation. For his part, the respondent is housed, on very favourable terms from his point of view, by \angle the co-respondent cited in the original petition for divorce. We therefore proceed on the basis that the test of provision of homes to both parties has been satisfied already.

- 3) In *Urquhart -v- Wallace* (supra) the Court recited the whole of section 5(1) of the Matrimonial Proceedings and Property Act, 1970, including the final paragraph: "... and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just so to do, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other".

The Court said: "Both counsel urged that the Royal Court was entitled, in considering the application under Article 28 or 29, to take into account all those matters set out in section 5(1) of the Act, notwithstanding that it might have been argued, as we have already pointed out, that the Articles tend in this respect to be more restrictive. We concur with counsel, because, as we have said, we do not think that it can have been the intention of the legislature, on the one hand to increase the powers of the Court, and on the other hand to restrict those relevant matters to which the Court could have regard in

exercising those powers; furthermore, it appears to us that all the matters mentioned in section 5(1) are, or could be, in the appropriate case, relevant".

However, Mr. Boxall referred us to *A -v- B*

(1979) J.J. 125, a later case, where the Court dissents from the final test in *Urquhart -v- Wallace*. At page 130, the Court says this: "It is to be noted that unlike the position of the English Courts, the Royal Court is not required to exercise its powers so as to place the parties in the same financial position they would have been had the marriage not broken down. Without wishing to criticise the English legislation that requirement seems an almost impossible thing to do and has given rise to a number of conflicting decisions which happily we are not called upon to examine. Nevertheless, the Royal Court can, in our opinion, have regard to any dissipation of the family assets by either spouse whether inadvertently or deliberately; see *Martin -v- Martin* [1976] 3 All E.R. 625".

In the instant case, it is certainly quite impossible for us to place the parties in the financial position in which they would have been if the marriage had not broken down; however, the important words underlined in *F -v- W* (supra) are: "so far as it is practicable and, having regard to their conduct, just to do so" In the present case, it is simply not practicable to place the parties in the financial position in which they would have been and, as we have said already, having regard to the conduct of the respondent, an equal division would not be just.

- 4) In *Clarke -v- Clarke* (supra), Commissioner Mr. Dorey said: "The legal principles governing the division of capital assets on divorce have changed progressively in recent years. It is now rare for one party to be completely deprived of any share in the capital assets" We concur with that view. There must be exceptional circumstances which would make it repugnant to justice for one party to receive anything, before the Court will completely deprive that party of any share in the capital assets. The contribution of the respondent by his hard work over long hours and his financial contributions entitle him to some part

of the capital monies available.

- 5) Maintenance will continue to be payable to the petitioner for herself and the children. The order which we make today will be without prejudice to the right of either party to seek a variation in the maintenance-payable-depending-on-the-respective-incomes-of-the-parties from time to time. We do not propose to speculate on the outcome of any such application. The petitioner is entitled to a capital sum which she may invest to obtain an income and to fall back on if the respondent should become erratic in his payment of maintenance whether from further ill-health, loss of overtime, loss of employment, or otherwise. We must also have regard to her loss of a potential shared enjoyment of the respondent's pension and life insurances:
- 6) We cannot lose sight of the costs involved in the protracted litigation between the parties. We referred yesterday to "this sorry saga of matrimonial dispute". It is indeed sad that a substantial proportion of the monies available will be swallowed up in legal costs. We think that the proportion to be allocated to the respondent should be such that something should be left over for him after he has met his liability for legal costs. We approach the matter on the basis that each of the parties will pay his or her own costs.

Having taken all of these factors into account, as well as the other principles set out in *F -v- W* (supra) and *O'Connell -v- O'Connell* (supra), we have come to the conclusion that there should be paid to the respondent out of the capital sum available, the sum of £6,500. The balance of the capital, with all accrued interest, to be paid to the petitioner, and we so direct the Viscount. Each party shall pay his or her costs, except where there is an existing order to the contrary.

Authorities referred to:-

Chamberlain -v- Chamberlain (1974) 1 All E.R. 33 C.A.

Mesher -v- Mesher (1980) 1 All E.R. 126 C.A.

O'Connell -v- O'Connell J.J. 30th November, 1988, as yet unreported.

Faiers -v- Faiers (née Winter) J.J. 8th June, 1987, as yet unreported.

Clarke (née Mitchener) -v- Clarke et al J.J. 16th December, 1987, as yet unreported.

Rakusen and Hunt, Distribution of Matrimonial Assets on Divorce (2nd edition) Part 2, Chapter 4, at p.43.

Urquhart -v- Wallace (1974) 2 J.J. 119 at p.137.

Ostroumoff -v- Ostroumoff, née Martland et al (1979) J.J. 125, at p.130.

Martin -v- Martin (1977) 3 All E.R. 762, at p.765.