

ROYAL COURT
(Matrimonial Causes Division)

27th June, 1994

128

**Before: The Deputy Bailiff, and
Jurats Vint and Gruchy**

Between:

A

Petitioner

And:

B

Respondent

Appeal by the Respondent under Rule 55(A) of the Matrimonial Causes (General) (Jersey) Rules, 1979, as amended from the Order of the Deputy Judicial Greffier (Matrimonial Causes Division) of 22nd March, 1994, granting care and control of the children to the Petitioner.

**Advocate R.G.Morris for the Petitioner.
Advocate S.E.Fitz for the Respondent.**

JUDGMENT

THE DEPUTY BAILIFF: At the beginning of the hearing, counsel indicated to us that it was intended that there should be a de novo hearing with all or most of the witnesses being heard afresh, notwithstanding that this was an appeal from a decision of the Deputy Judicial Greffier. We expressed some doubt as to whether that was the proper procedure and we accordingly heard argument on this point.

The facts are that the petitioner obtained a decree nisi of divorce on the 18th November, 1993 on the ground of the respondent's adultery with G. In the prayer of the petition the petitioner sought to be granted sole custody, care and control of the children. There are four young children, now aged between seven and nineteen months. Accordingly, on the 15th October 1993, he had filed a summons in the following form:-

"Let the respondent or her advocate attend the Judicial Greffier to show cause why:-

5 (a) care and control of the said four minor children of the marriage should not be vested in the petitioner;

(b) the respondent should not be ordered to pay the costs of and incidental to this application."

10 The summons was heard before the Deputy Judicial Greffier over a number of days. He heard a number of witnesses for both the petitioner and the respondent, some of whom had travelled to the island from the United Kingdom, and on the 22nd March, 1994 awarded care and control of the children to the petitioner.

15 It is against that decision that the respondent appeals by notice dated 23rd March, 1994. The general grounds of appeal are:-

20 "That the learned Greffier placed too much emphasis on a Children's Report and the recommendations contained therein and failed to have due regard to the law relating to awards of custody, care and control of young children to a particular parent."

25 The procedure governing appeals to the Court from orders and decisions of the Judicial Greffier is set out in Rule 55A of the Matrimonial Causes (General) (Jersey) Rules, 1979, as amended. That Rule provides:-

30 "55A.-(1) An appeal shall lie to the Court from any order or decision of the Greffier.

35 (2) The appeal shall be brought by serving on every other party to the proceedings before the Greffier a Notice in Forms 15 and 16, a copy whereof shall also be delivered to the Greffier.

40 (3) The Notice shall be served within ten days after the order or decision appealed against was given or made or, having regard to the nature of the order or decision, within such delay as the Greffier may allow.

45 (4) Upon receipt of the Notice the Greffier shall deliver to the appellant and to any other party to the proceedings before the Greffier a statement setting out the reasons for the order or decision.

50 (5) Within fourteen days of service of the Notice of Appeal, every other party to the proceedings before the Greffier shall deliver to the Greffier and to the appellant a statement of submissions to be made on the hearing of the appeal.

5 (6) The Greffier shall, after the expiration of the fourteen day period referred to in paragraph (5) of this Rule and after consultation with the Bailiff, fix the day for the hearing of the appeal, notification of which shall be sent by the Greffier to each of the parties to the proceedings at their respective addresses for service.

10 (7) Not later than five clear days before the date fixed for the hearing of the appeal, each party to the proceedings shall lodge with the Greffier the affidavits (with any exhibits thereto) or other pleadings which that party proposes to use.

15 (8) Within forty-eight hours of receiving the affidavits and other pleadings from the parties, the Greffier shall deliver to the Bailiff a copy of the statement setting out the reasons for the order or decision together with copies of the affidavits, pleadings and submissions lodged by the parties.

20 (9) Save with the leave of the Court, no document may be adduced in evidence or relied on unless it has been lodged in accordance with paragraph (7) of this Rule and no submissions may be made unless they conform to the statement of submissions delivered in accordance with paragraph (5) of this Rule.

25 (10) Except so far as the Court may otherwise direct an appeal under this Rule shall not operate as a stay of the order or decision appealed against."

30 We also observe that Rule 60 of the Rules provides that: "unless the Court otherwise directs, a shorthand note (which includes a recording by mechanical means) of the hearing of any matrimonial cause shall be taken".

35 Regrettably, the relevant Rules appear to have been substantially ignored by both parties to this appeal.

40 A Notice of Appeal in proper form was delivered to the Greffier in accordance with paragraph (2) but we were told that Counsel for the appellant did not wish to be constrained by the grounds of appeal attached to the Notice.

45 Paragraph (5) obliged Counsel for the respondent to deliver a statement of submissions to be made on the hearing of the appeal. No such statement was delivered.

50 Paragraph (7) obliged both parties to lodge with the Greffier any affidavits (with any exhibits thereto) or other pleadings

which they proposed to use at the hearing of the appeal. No such documents were lodged.

5 To add to the litany of non-compliance with the Rules, no recording of the evidence before the Deputy Judicial Greffier was made so that no transcripts of the evidence are available.

10 In mitigation, it was put to us by both Counsel that on the basis of precedent they expected the appeal to be treated as a de novo hearing. They had accordingly treated the proceedings before the Deputy Judicial Greffier as being of peripheral importance. It does seem that the Court has not been entirely consistent in enforcing observance of the Rules of Court.

15 In Ozouf v. Salmon (16th September, 1993) Jersey Unreported, Commissioner Le Cras stated in the course of his judgment on an appeal from an order of the Deputy Judicial Greffier dealing with the disposition of matrimonial assets:-

20 *"Before dealing with the facts, we should say that both Counsel asked the Court to deal with the application as a re-hearing, and not simply as an appeal.*

25 *There seems, curiously, to have been no consistent approach by the Court on this point. On occasion, (for example in Richecoeur v. Godfrey (7th September, 1987) Jersey Unreported, the Court dealt with the appeal on the transcript and it may well have done so in Fagan v. Le Marchand (22nd January, 1988) Jersey Unreported. However,*
30 *in Kay v. Murphy (24th June, 1991) Jersey Unreported, the Court appears to have heard the evidence de novo, although there the hearing would appear to have been wider than it was before the Greffier. The question does not appear to have been argued.*

35 *In this case, there is no transcript of the evidence which was before the Greffier and given the circumstances, we have formed the view that, in the instant case, it is right and proper and justice requires that we should hear*
40 *the evidence placed before us by Counsel".*

45 It was for the same reason that we decided to treat the appeal as a re-hearing, to hear witnesses already heard before the Deputy Judicial Greffier afresh, and indeed to receive any relevant evidence which Counsel wished to place before us. We desire to place on record, however, that this is not the appropriate way to proceed. The Judicial Greffier, in hearing an application in a custody or maintenance matter, is exercising the jurisdiction conferred by Article 3(3) of the Matrimonial Causes
50 (Jersey) Law, 1949, as amended. That paragraph provides:

5 **"The Court may delegate the hearing of applications, and the exercise of its powers to make orders and give directions [inter alia] ... in relation to children under Article 25 of this Law to the Judicial Greffier or to any officer of the Judicial Greffe appointed by the Superior Number of the Royal Court for that purpose."**

Article 3(4) of the Law provides:

10 **"Any order made or direction given by the Judicial Greffier or any appointed officer in pursuance of paragraph (3) of this Article shall be subject to appeal in the first instance to the Court:**

15 **Provided that any order so made for the maintenance or custody of a child or children shall continue to have effect pending such appeal."**

20 First and foremost, therefore, appropriate administrative arrangements must be made by the Judicial Greffier to ensure that proceedings at a hearing of any matrimonial cause before him or one of his deputies are properly recorded in accordance with the provisions of Rule 60 so that, in the event of an appeal, a transcript of the evidence is available to this Court. With the benefit of transcripts and of the other documents referred to in 25 Rule 55A, the Court should then be able to hear any appeal expeditiously and without requiring the repetition of all the evidence heard before the Greffier. We do not of course exclude the possibility of additional evidence being heard; but a lengthy re-hearing *viva voce* of all the witnesses heard before the 30 Greffier does not, in our judgement, accord either with the Rules or with common sense. The function of this Court on appeal is to review the decision of the Judicial Greffier.

35 The principles to be exercised in hearing appeals relating to custody and maintenance from decisions of this Court were settled by the Court of Appeal in Laugee v. Laugee (1990) JLR 236. The Court of Appeal cited a lengthy passage from the speech of Lord Fraser of Tullybelton in G. v. G. (minors) [1985] 2 All ER 225 40 which, the Court decided, laid down principles which were applicable in this jurisdiction to appeals from this Court to the Court of Appeal. In our judgement, the principles are equally applicable to appeals from the Judicial Greffier to this Court. Because Laugee v. Laugee was not cited to us, and because the 45 matter is of some importance, we think that it is desirable to repeat the passage from Lord Fraser's judgment ([1985] 2 All ER at 228 - 230) which we set out below:

50 **"I entirely reject the contention that appeals in custody cases, or in other cases concerning the welfare of children, are subject to special rules of their own. The jurisdiction in such cases is one of great difficulty, as**

every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so it will leave his decision undisturbed. The limited role of the Court of Appeal in such cases was explained by Cumming-Bruce, L.J. in *Clarke-Hunt v. Newcombe* (1982) 4 F.L.R. 482 at 488, where he said:

'There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the matter. Whether I would have decided it the same way if I had been in the position of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation. I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer? I emphasise the word "plainly". In spite of the efforts of [counsel] the answer to that question clearly must be that the judge has not been shown plainly to have got it wrong'

That passage, with which I respectfully agree, seems to me exactly in line with the conclusion of Sir John Arnold, P. in the present case, which I have already quoted. The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion and they are cases to which the observations of Asquith, L.J. in *Bellenden (formerly Satterthwaite) v. Satterthwaite* [1948] 1 All E.R. 343 at 345 apply. My attention was called to that case by my noble and learned friend Lord Bridge after the hearing in this appeal. That was an appeal against an order for maintenance payable to a divorced wife. Asquith, L.J. said:

5
10
'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere'.

15
I would only add that, in cases dealing with the custody of children, the desirability of putting an end to litigation, which applies to all classes of cases, is particularly strong because the longer legal proceedings last, the more are the children, whose welfare is at stake, likely to be disturbed by the uncertainty.

20
25
30
35
40
45
50
*Nevertheless, there will be some cases in which the Court of Appeal decides that the judge of first instance has come to the wrong conclusion. In such cases it is the duty of the Court of Appeal to substitute its own decision for that of the judge. The circumstances in which the Court of Appeal should substitute its own decision have been described in a number of reported cases, to some of which our attention was drawn. We were told by counsel that practitioners are finding difficulty in ascertaining the correct principles to apply because of the various ways in which judges have expressed themselves in these cases. I do not think it would be useful for me to go through the cases and to analyse the various expressions used by different judges and attempt to reconcile them exactly. Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as "blatant error" used by Sir John Arnold, P. in the present case, and words such as "clearly wrong" or simply "wrong" used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. The principle was stated in this House by Lord Scarman in *B v. W* (wardship: appeal) [1979] 3 All E.R. 83 at 96; [1979] 1 W.L.R. 1041 at 1055, where, after mentioning the course open to the Court of Appeal if it was minded to reverse or vary a custody order, he said:*

5 'But at the end of the day the court may not intervene unless it is satisfied either that the judge exercised his discretion on a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly.'

10 The same principle was expressed in other words, and at slightly greater length, in the Court of Appeal (Stamp, Browne and Bridge, L.JJ.) in *Re F* (a minor) (wardship: appeal) [1976] 1 All E.R. 417, [1976] Fam. 238, where the majority (Browne and Bridge, L.JJ.) held that the court had jurisdiction to reverse or vary a decision concerning a child made by a judge in the exercise of his discretion if it considered that he had given insufficient weight or too much weight to certain factors. Browne, L.J. said ([1976]) 1 All E.R. 417 at 432; [1976] Fam. 238 at 257):

15
20 'Apart from the effect of seeing and hearing witnesses, I cannot see why the general principle applicable to the exercise of the discretion in respect of infants should be any different from the general principle applicable to any other form of discretion'

25 Bridge, L.J. agreed with Browne, L.J. and I quote a passage from his speech where, after stating that his view was different from that of the judge, he went on to say ([1976]) 1 All E.R. 417 at 439-440; [1976] Fam. 238 at 266):

30
35 'Can this conclusion prevail or is there some rule of law which bars it? The learned judge was exercising a discretion. He saw and heard the witnesses. It is impossible to say that he considered any irrelevant matter, left out of account any relevant matter, erred in law, or applied any wrong principle. On the view I take, his error was in the balancing exercise. He either gave too little weight to the factors favourable, or too much weight to the factors adverse, to the father's claim that he should retain care and control of the child. The general principle is clear. If this were a discretion not depending on the judge having seen and heard the witnesses, an error in the balancing exercise, if I may adopt that phrase for short, would entitle the appellate court to reverse his decision [and Bridge, L.J. then cited authorities]. The reason for a practical limitation on the scope of that principle where the discretion exercised depends on seeing and hearing witnesses is obvious. The

40
45
50

5 appellate court cannot interfere if it lacks the
essential material on which the balancing exercise
depended. But the importance of seeing and hearing
witnesses may vary very greatly according to the
circumstances of individual cases. If in any
discretion case concerning children the appellate
court can clearly detect that a conclusion, which
is neither dependent on nor justified by the trial
judge's advantage in seeing and hearing witnesses,
10 is vitiated by an error in the balancing exercise,
I should be very reluctant to hold that it is
powerless to interfere'.

15 The decision in *Re F* is also important because the
majority rejected, rightly in my view, the dissenting
opinion of Stamp, L.J. (see [1976] 1 All E.R. 417 at 429-
430; [1976] Fam. 238 at 254), who would have limited the
right of the Court of Appeal to interfere with the judge's
decision in custody cases to cases 'where it concludes
20 that the course followed by the judge is one that no
reasonable judge having taken into account all the
relevant circumstances could have adopted' That is
the test which the court applies in deciding whether it is
entitled to exercise judicial control over the decision of
an administrative body: see the well-known case of
25 *Associated Provincial [Picture] Houses Ltd. v. Wednesbury
Corp.* [1947] 1 All E.R. 680; [1948] 1 K.B. 223. It is not
the appropriate test for deciding whether the Court of
Appeal is entitled to interfere with the decision made by
30 a judge in the exercise of his discretion."

Returning to this appeal, we are, however, for the reasons
which we have stated, in the position of a judge at first
instance, examining the matter *de novo*.

35 It is now necessary for us to sketch in the relevant
background. The parties were married on 21st May, 1988 and there
are four children of the marriage, namely C, born
in 1987 (and subsequently legitimated), D, born in
40 1988, E, born in 1990 and F,
born in 1992. The petitioner is employed by the
parish of St. Helier and works
between the hours of 6.00 a.m. and 1.0 p.m. The respondent is a
housewife. On 1st October, 1993, the respondent left the
45 matrimonial home, a house rented from the Housing Committee, and
went to the Women's Refuge. She remained there for about a week,
leaving the children in the care of the petitioner. On 7th
October, the respondent obtained *ex parte* an ouster injunction.
She returned from the Refuge with a Viscount's officer and the
50 petitioner was obliged summarily to pack his bags and go. He moved
to the house next door as a guest of his neighbour, where he has
since been staying, sleeping at night on the settee. For some

reason which has not been explained, the action arising from the Order of Justice containing the ouster injunction was never tabled; on the other hand, no complaint has been made of this failure by the petitioner.

5 In passing, it is worthy of note, however, that in the Order of Justice containing the ouster injunction no complaint was made of violence towards the respondent. The only complaint of violence
10 involved allegations of his having punched the child C two or three years before and of having flung the same child across a room, causing a bruise some three or four months before. It must be added that these allegations are denied. In essence, the respondent claimed that the petitioner had been abusive towards
15 her and that she did not wish to return to the matrimonial home while he was there. In support of her application for an injunction, the respondent swore an affidavit asserting that she was "in fear for the immediate welfare of the children". In evidence before us, she had no substantial complaint of the manner
20 in which the children were cared for whilst she was at the Women's Refuge. If the authorities cited to us had been cited to the judge in chambers, we have little doubt that an ouster injunction would not have been granted.

25 As we have stated, the petitioner instituted divorce proceedings and on the 18th November, 1993 obtained a decree nisi of divorce on the ground of the respondent's adultery with G.

30 At this stage, we must again interpose to record that in her evidence before us, the respondent asserted that she had not committed adultery with G. She claimed that when she had first been served with the papers, she did not understand what "adultery" meant. She thought that the word meant that she was seeing someone. She had not realised that it implied having had sexual intercourse with him. She had first realised what the word
35 "adultery" meant when the hearing took place before the Greffier. She asserted that she had been told by her then solicitor that she had already admitted it and would have to go through with it. She did not, therefore, take the opportunity of the hearing before the Greffier to make her position clear. Indeed, she had persisted with the story and had given false evidence. She apologised for
40 her perjury. In that respect, we are directing the Greffier to send the papers to the Attorney General, so that he can consider what action is appropriate in respect of the admitted perjury.

45 Since the petitioner was evicted from the matrimonial home, he has exercised access to the children on a daily basis between 2.00 p.m. and 6.00 p.m.

50 On the principles to be applied by us in determining the question of whether the respondent should be granted care and control of the children, her Counsel referred us to a number of authorities. We need mention only four. It is common ground, of

course, that the interests of the children are the paramount consideration.

5 In Hunt v. Fallister (7th July, 1988) Jersey Unreported, the respondent mother applied for the care and control of the children of the marriage to be transferred to her. The learned Bailiff stated in the course of his judgment:

10 "I felt that the Court should first of all be guided by the principle that, all things being equal, young children should remain with their mother. I have found support for that statement (which was given to us in evidence by Mr. Thomson, when he presented his report and was examined on it) in the case of Bowley v. Bowley (1984) FLR at page 15 791. In the headnote to that case, it is said: "It could be stated that there was a basic proposition that very young children should be in the care of their mother, provided there was no overriding consideration against such a course. This was not a rule or principle, the position being that the best interests of the children 20 generally dictate that young children should be with their mother". That is the finding of the Court of Appeal on the judgment of Hollings J. He cited with approval the judgment of the case in the first instance against which there had been an appeal. On page 4 of the judge's notes, 25 the judge had recorded the following: "I propose to try and look at both alternatives with a general principle in mind" (that is to say the alternatives as to where the children should go in that case). "The basic proposition is that where one is dealing with very young children, 30 they should normally be committed to the custody, care and control of the mother. This is not an invariable rule, but quite a strong general principle. There are cases where exceptions have been made".

35 In Re S (a minor) (1991) FLR 302, the English Court of Appeal revisited the question of whether there was a presumption that one parent should be preferred to another parent for the purpose of looking after the children. Butler-Sloss L.J., allowing the 40 appeal, said that the child's welfare was the first and paramount consideration. There was no presumption that one parent should be preferred to another parent for the purpose of looking after a child at a particular age. It was likely that a young child, particularly a little girl, would be expected to be with her 45 mother, but that was subject to the overriding factor that the child's welfare was the paramount consideration. It was natural for young children to be with mothers, but, in dispute, it was a consideration rather than a presumption.

50 In Mayger v. Mayger, (12th November, 1992) Jersey Unreported, Lieutenant Bailiff Le Cras, in giving the judgment of the Court,

described the above passage from the judgment of Butler-Sloss L.J. as constituting "the most useful remarks" submitted to the Court.

5 In Moignard v. Moignard (6th January, 1993) Jersey Unreported, the same passage was again cited with approval.

10 We think that it can now be asserted that in this jurisdiction the sex of a parent is a consideration rather than a presumption in custody cases. The basic and indeed the only rule is that the Court should treat the welfare of the children as the first and paramount consideration.

We turn now to the evidence.

15 The respondent told us that she had been born in Jersey and was now aged twenty-eight. Her mother had been only sixteen when she was born and she had been brought up by her grandparents. She had not enjoyed a normal mother/daughter relationship with her mother, with whom she did not have daily contact and whom she knew as "Betty". The respondent had left school at fifteen and had had various employments until the birth of C in 1987. She asserted that the petitioner was not the father of C and that he, the petitioner, knew that to be the case. She recounted that before they were married, she had seen her birth certificate for the first time. She had not been amused to see that her father was not recorded on the certificate and she had not wanted C later to find himself in the same position. She and the petitioner had accordingly gone to the Registrar's office and had made a false declaration that the petitioner was the father of C.

30 We interpose here that the petitioner does not accept that he is not the father of C.

35 The respondent told us that there had been difficulties with two of the children. D had been asthmatic and had suffered also from infantile eczema. He had needed a special diet and special clothing which had eased the problem. E had needed intensive care at birth. Some months later, she had started holding her breath, but the consultant had advised her that this was merely attention seeking.

40 We heard much evidence about daily life during the years of the marriage and of minor complaints about the conduct of the petitioner. We are satisfied that nothing really turns on this and that both parties contributed to the daily chores and to the work involved in bringing up four small children.

50 The respondent attributed the breakdown of the marriage to her feelings of isolation. She said that the petitioner was more interested in the birds which he bred than in her. She said that he was often abusive towards the children and was impatient with them. He did not often take her out. She felt cooped up on the

estate. She admitted that she used to go out with her cousin. H and others, both male and female, on a Friday evening. She would spend the evening at public houses or nightclubs and she and her cousin would walk home together. She said that she had been friendly with G and that he had come to the house quite a lot. He was, however, just a friend. She denied having been caught by the petitioner on two occasions in a compromising position with another male friend late at night in the house, after having spent the evening out. She said, however, that in November, 1993, she had met and had subsequently become friendly with I. She was now pregnant by him and was expecting a baby in September, 1994. He was now living in the house with her. We shall advert to I again later, but so far as the respondent was concerned, he was a great help in the house and related well to the children. He worked as a fisherman, but had not been working, pending the outcome of this dispute. Since she had begun her relationship with I, she went out in the evenings only rarely. She thought that she should have care and control of the children, because she had been with them from the day they were born and they had a bond with her. She said that the petitioner had never had to cope with the day to day needs of the children.

The petitioner gave evidence that he was thirty-five. He worked for the parish of St. Helier earning about £227 per week. He said that the marriage had started well, but that it had began to decline when the respondent started going out on her own every Friday evening. This all began in 1990. Originally, he had been content with the arrangement, but subsequently became unhappy when she took to returning between 2.00 and 3.00 a.m. He gave evidence of having found the respondent in intimate situations in the early hours with one particular friend. He suspected that she was having affairs. For his part, he had always been faithful to the respondent. He said that his former wife was extravagant and we had some evidence of their having consulted the Citizens' Advice Bureau about their debts. The respondent admitted being primarily responsible for a telephone account of some £685. The petitioner admitted to having a record, including previous convictions for resisting arrest and for aiding and abetting a break-in. These offences were committed, however, some ten years ago. He denied being violent with the children, although he admitted chastising them from time to time. He specifically denied the accusations of violence alleged in the Order of Justice, which led to his summary eviction from the home. In relation to the alleged punching of C, he admitted hitting the child on the back of the head. There were no injuries. In relation to the second alleged incident, he said that C had been bullying another child and he had picked him up under the armpits and thrown him forward. The child had landed on his knees and had a slight red mark on the forehead. The petitioner made allegations about specific incidents of violence perpetrated by the respondent, but we do not need to descend into detail. Our

5 general conclusion is that none of the alleged incidents of
parental misconduct is serious enough to warrant particular
attention. We would, however, add that in our judgment, the
petitioner was an honest witness who did not minimise his own
10 faults. Where there was a conflict between his evidence and that
of the respondent, we found his evidence the more credible. So far
as his ability to look after his children was concerned, the
petitioner said that he could manage very well. He had been
looking after them nearly every afternoon since the respondent
15 left the home at the beginning of October. The respondent had
left, he said, without saying where she was going. The petitioner
said that he had a very good relationship with all the children.
He did not think that the respondent was really interested in
them. She was more interested in receiving the family allowance
and other benefits which went with looking after the children. He
could manage, he said, without support from his own family,
although he expected his father and sister to pop round. He was
open to suggestions and advice. He was not impressed with

20 I's contribution to the life of the family. Since
I's arrival, two panes of glass had been smashed in a back
window and there were numerous holes in the toilet door, as a
result of the use of a crossbow. If necessary, the petitioner
would give up his employment to look after the children full time.
He had discussed this with his manager, and had received support
25 from that quarter. He would instead receive income from the
Welfare Department.

We come now to I whose presence on the scene was
30 one of the factors influencing the recommendation of the
Children's Officer to which we shall come in due course.

I gave evidence very frankly. He is twenty-six and has had
various employments. He has a very bad record, including offences
of unlawfully discharging a shotgun, being drunk and disorderly
and committing petty theft. Three years ago, he was sentenced to
35 two years' imprisonment for attempted armed robbery. Recently, he
had been working as a fisherman, earning good wages. As soon as
this case was over, he intended to return to the sea, working on a
Channel potter. This would take him away for several weeks at a
time. He denied being a member of the British National Party,
40 although he admitted possessing some Nazi memorabilia. We
interpose here that in imitation of I the two boys
C and D received a close cropped haircut, which led to their
being teased and bullied at school.

45 We heard evidence from other witnesses, principally in
support of the respondent, but we need not recite that evidence
here. We derived little assistance from it in resolving the
difficult decision which we have to take.

50 We had the benefit of a report by Miss Richardson, a
Children's Officer, who also gave evidence. The report was
prepared for the hearing before the Deputy Judicial Greffier in

February, 1994. Miss Richardson's report expressed concern about C, who had become disruptive at school. Both he and D had told her that they blamed their mother for "kicking Dad out". Even in February, she had noticed that C was becoming noticeably more cheeky, and less amiable. Consultation with the headmaster of their Primary School had confirmed that C's behaviour had deteriorated. Miss Richardson's report stated that the two elder children had indicated through discussion and drawing that they were happier when in the care of their father. The report concluded with this recommendation:-

"It was difficult to make a recommendation in this case, as I feel that either parent is capable of caring adequately for the children. It is also further complicated by the fact that the house is very much a package with the children. However, on balance, I feel that father is perhaps more able at this time to provide the stability that the children need.

...

It is clear that the children need contact with both parents and they require support to prevent them continuing to blame either parent. It is hoped that the children are not involved in any discussion detrimental to their feelings in relation to either parent."

In her evidence, Miss Richardson said that she had monitored the situation since February, 1994. In the interim she had not changed her view and was, if anything, more convinced that the children's interests would be better served in the care of their father. Under cross-examination, however, Miss Richardson conceded that her conclusion was reached only on balance. She had felt that I was not a desirable influence in the lives of the children, but she conceded that the children were not at risk from him. She denied being biased in favour of the petitioner. She agreed that there was nothing wrong with the respondent's life style. She accepted that the two small girls needed a mother's care, but this factor had been outweighed by the desirability of giving all the children the greater stability which in her view they would be accorded by living with their father. He was a sole parent and would give them his undivided attention.

Before hearing closing speeches, we decided that we would wish to have the benefit of an additional professional view. We accordingly adjourned the hearing until today and directed the Probation Service to prepare a further report. That has been duly done and we are grateful for the assistance which we have been given. Mr. Cutland's conclusions were in the following terms:-

"CONCLUSIONS

Ms Ahier and myself were conscious that we could not devote as much time to our enquiry as the Child Care Officer but feel we allocated an even amount of time to both parties. We could find no significant differences between the way the children related to either parent and their relationship with I gave us no overt concerns from what we observed. Aware of the recommendation in the previous report we can find no reason to markedly disagree with the conclusion though we struggle to denote any marked difference between the quality of the parties' care.

We have discussed our observations together in some depth and feel it pertinent to outline the following issues:-

1. The level of parenting by each party can be described as 'good enough'. The quality of the relationship between parents and children seems to be excellent although, in the hour that we were present C did not spend as much time with his father as D and E.

2. Whilst acknowledging Mrs. Richomme's concerns about her ex-husband's level of care we were aware that she spent nearly a week at the Women's Refuge whilst the children were supervised by their father. As her residence at the Refuge appears to have followed A's over-chastisement of C we questioned her actual level of concern about the children being with him.

3. In the event of A's undertaking care and control, his level of responsibility towards the children would increase and he would have to assume a more pro-active stance in relation to feeding and bathing the children etc. He is confident though that this would not be unduly problematic as he would resign from his employment and receive Parish assistance instead. Given this scenario there are a number of hypothetical questions that inevitably follow. How would the children cope with the change of a new full-time carer? The fact that A regularly sees the children and has cared for them before, albeit on a temporary basis, provides some reassurance here. How would B (and perhaps I) cope with their new access arrangements? There might be a temptation to denigrate A's efforts and if any such views were made known to the children it could have an unsettling effect. Overt confrontation between these two men being witnessed by the children is always a possibility.

4. The issue of *B*'s expected child also seems relevant. If the children were to remain with mother, there is a possibility that domestic life could be even more chaotic with the birth of the new baby and could mean a deflection of attention away from the children. Alternatively, if *A* is awarded care and control the children may feel "disowned" by their mother in favour of the new baby.

5. In the event of *B* being awarded care and control I feel that attention would have to be paid to the question of *A*'s access. *I*, whilst verbally acknowledging the importance of parental access, gives the impression of becoming disgruntled at having to vacate the premises around access time. Should the Court's decision favour his partner there is a potential risk that *I* would use this decision to assert himself in such a way as to threaten the quality of *A*'s access. In order to avoid conflict it might be preferable for *I* to vacate the premises when any access takes place in the family home.

In summary it is felt that both parents genuinely love their children and would provide adequate care for them despite there being room for improvement on both sides. They both currently play an active role in their children's lives and this would be encouraged as it seems to have a positive effect on the children. I am aware that the Court is faced with a difficult decision that must be based on marginal rather than significant grounds".

We have found this a very difficult decision. On balance, we have decided that it is in the best interests of the children that they should remain in the care of their mother. We recognise that this will be a disappointment to their father and we hope that he will be able to overcome those feelings and to continue to take the close interest which he has demonstrated, particularly in the past nine months. We think that the two boys, but especially *C* are in need of his support and attention. We have reached our conclusion having regard to the two factors relied upon by Miss Fitz. First, there is the consideration that young children, particularly young girls, might be expected to stay with their mother. Secondly, although the petitioner has been involved in the day to day care of the children to a considerable extent, the primary carer has been the respondent. To vest the care and control of the children in the petitioner would thus represent a change in the status quo.

We therefore allow the appeal and reach the following conclusion. Custody of the children will be vested jointly in the petitioner and the respondent, but care and control will be vested

5 in the respondent. The petitioner shall be entitled to exercise
regular and frequent access, the terms of which will be agreed
between the parties, or, in default of agreement, will be settled
by the Judicial Greffier. We are particularly concerned that the
petitioner's rights of access should not be adversely affected by
the respondent's new relationship with I. We think that
it is in the interests of the children that the potential for
conflict between the two men should be minimised. We therefore
10 order that I should, in default of agreement to the
contrary by the petitioner, vacate the former matrimonial home
while the petitioner is exercising access to the children within
it, as indeed has been the case within recent months.

15 Finally, in accordance with the recommendation of the
Children's Officer and the Probation Service, we further order,
pursuant to Article 54 of the Children (Jersey) Law 1969, that the
children be under the supervision of the Education Committee. We
note that both parties were agreeable to such an order being made.

Authorities

Matrimonial Causes (Jersey) Law, 1949: Article 3(3).

Matrimonial Causes (General) (Jersey) Rules, 1979: Rules 55(A),
60.

Children (Jersey) Law, 1969.

Laugee -v- Laugee (1990) JLR 236.

G -v- G (minors) [1985] 2 All ER 225.

Butterworths Family Law Service Ch. 2 A: The Welfare of the Child.

Mayger -v- Mayger (12th November, 1992) Jersey Unreported.

Re S (a minor) (1991) FLR 32.

Hunt -v- Hunt (7th July, 1988) Jersey Unreported.

Moignard -v- Moignard (6th January, 1993) Jersey Unreported.

Ozouf -v- Salmon (16th September, 1993) Jersey Unreported.