ROYAL COURT
(Family Division)

24th October, 1997

Sir Peter Crill, K.B.E., Commissioner, and
Jurats Herbert and Jones

Between: **Judith Hope Richardson** **Petitioner**

And: **Charles Robin Denton** **Respondent**

Appeal by the Respondent, under Rule55A of the Matrimonial Causes (General)(Jersey) Rules, 1979, as amended, against so much of the Order of the Greffier Substitute (Family Division) of 16th December, 1996, as ordered that within 6 weeks of 16th December, 1996, and subject to the consent of the mortgagee (TSB Bank (Cl) Ltd), the Respondent shall transfer to the Petitioner all his interest in the former matrimonial home at the cost of the Respondent, on condition that the Petitioner shall take over responsibility of the mortgage secured on the property.

Advocate D.F. Le Quesne for the Petitioner.
Advocate J.G.P. Wheeler for the Respondent.

JUDGMENT

THE COMMISSIONER: This is an appeal from the Order of the Greffier Substitute of the 16th December, 1969, in which he ordered, *inter alia "that within 6 weeks of the date hereof, and subject to the consent of the mortgagee, the TSB Bank (Cl) Limited, the respondent shall transfer to the petitioner all his interest In the former matrimonial home, namely, "The Barn", Le Coin Court, St. Lawrence,* ("the property"), *the said transfer at the cost of the respondent.* He added that *"the said transfer shall be on the condition that the petitioner shall take over the responsibility of the mortgage secured on the property in favour of the TSB Bank (Cl) Limited".*

Whilst it is true that the appeal is confined to the Order made by the Greffier Substitute on that day, it is necessary to go back a little way to look at the background to this case.

The first thing to note is that the parties were divorced and the petition by the petitioner ("the respondent", whom I shall now refer to as the wife for convenience sake) was based on the grounds of adultery with a Sandra Ridings, the co-respondent in that case and was dated 31st July, 1995. It is not necessary to go into the details of that petition.

Subsequently, certain orders were made on the eighteenth day of October, in relation to custody and maintenance and the application was made, in a summons for a hearing on that date by the wife that the husband should be ordered to transfer his

share in the property, "The Barn", Le Coin Court. I should add here that that property is the only asset of any substance owned by the parties and is in their joint names.

The Greffier, on 23rd November, did not in fact make the order asked for, but postponed the matter. In his judgment he made a number of observations concerning the request for the transfer. He reached the conclusion, at p.7 of his judgment. that a "Mesher" type order would not be appropriate. But he made certain interim orders and he made a general observation in his conclusion which is as true today as it was then and I quote from p.11:

> ***Everything in this case depends upon the wife's ability and inclination to find herself a job. It would therefore be right In my opinion to adjourn both the matter of transfer of property, and the matter of future maintenance until a date to be fixed not before one year from the date hereof".***

There were a number of affidavits in fact sworn before the Greffier, or produced before the Greffier at that hearing, one of which was by the wife, and the relevant one is in fact sworn on twenty-third, itself, of November. In that affidavit the wife set out what she considered a proper order which would be fair. There are a number of matters referred to in the affidavit but the principal one is to be found in paragraph 6(a) is that: *"each party to have a 50% interest in the property and consequential orders".*

There was another hearing in 1996 before the Greffier and the last affidavit of the wife was dated twelfth day of September,1996, in which she refers to her job with the Post Office which she had previously owned and she has occasional employment at ITEX (Jersey) Limited which doesn't produce much money. There are a number of other observations there about her general impecuniosity and the problems she faces which need not detain us long.

At the adjourned hearing on 16th December, the Greffier, in addition to ordering the transfer of the property which is now appealed from - or a share of the husband in the property to the wife - made a number of other orders. Firstly, he increased the rate of maintenance by about 50%, so that it was ordered then to be paid at the rate of £160 net of tax, £200 per week gross. And, secondly, that the husband would continue to pay the premiums due in respect of the Norwich Union Insurance Policy No. A39800733 until maturity, which we were told today is the year 2012 *"and that both parties, being beneficiaries under the policy, will be entitled to such benefits as are contained in the said policy".*

In her evidence before the Greffier the wife claimed the whole of the property. On the face of it, having regard to the passage I have just read in her affidavit of 23rd November of that year that would seem inconsistent. Having regard to the explanation given to us by her counsel and having regard also to the possibility that there was an irregularity in the order of the Greffier requiring such matters to be laid before him by one party but not the other, we are satisfied that nothing can attach to that apparent discrepancy which would in any way affect this appeal.

The husband swore an affidavit, he swore a number of them but therelevant one to which I wish to refer is that of the 4th December, 1996, where he refers to a French property. In the judgment of the Greffier of 16th December, 1996, is to be found the following passage in relation to a French property. That reference is to be found at the bottom of p.4 of his reasons for the judgment, for his judgment in relation to that matter:

> ***"Although the value is indeterminate, the husband owns a quarter share in a French property in which his parents live".***

That is obviously a matter which was taken into account by the Greffier in arriving at his decision to make the Order which is appealed. However, in the affidavit to which I have just referred and to which 1 now refer in more detail of the husband of 4th December, 1996, he sets out very clearly the position regarding that property. In the course of the appeal hearing he had in fact admitted, on oath, before the Greffier, the first appeal hearing, appeal, rather, there was an appeal hearing, I understand, from the original order we are not concerned with, that he was the legal owner of a 25% interest in the French property. This is what he says in paragraph 2, no, 3 (c) of his affidavit of 4th December, 1996:

> *'When questioned on this matter at the original hearing before the Greffier Substitute I stated in evidence that the reason I was the legal owner was something to do with French tax. I wish to emphasise that I have no beneficial interest in the property, the legal ownership of which is registered in the names of my parents and my sister as well as myself. The property is beneficially owned by my parents and my interest is incapable of being realised in any event. The only reason for the property being registered in the way described above is to avoid the stringent French inheritance taxes which would otherwise arise on the death of my parents. The petitioner is fully aware of this fact and the reason that the arrangements were entered into In the manner described. I am therefore amazed that she has now sought to suggest that I have a beneficial interest in the property when she knows full well that this is not the case".*

The real objection raised by the husband to the Greffier's Order is not that he increased the maintenance, which he did and which is not appealed, but that he coupled that increase with the transfer order and also maintained that the husband should continue to pay the premiums on the insurance policy which the plaintiff - which the husband contends is in fact a policy known as a mortgage payment policy which is really attached to and should really form part of the real property and should not be considered in isolation. We do not think it is necessary for us to decide that point because we are going to make an order in a moment which reflects the decision of the Court.

Now, in dealing with an appeal of this nature this Court has to be guided by a number of observations of earlier decisions, particularly a fairly recent one in the case of Richomme -v- Le Gros unreported, I think, Matrimonial Causes Division of 27th

June, 1994. And in that case the learned Deputy Bailiff, as he then was, was dealing with the question of what a Court of Appeal should do in cases of this nature and I read from three quarters of the way down p.5:

> *"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 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 matter is of some importance, we think that it is desirable to repeat the passage from Lord Fraser's judgment M9851 2 All ER at 228 - 230) which we set out below* (and I am now quoting from that judgment):
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> > *"1 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 P.L.R. 482 at 488, where he said:*
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> > > *'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 1 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 Imight not, but I was never in that situation. 1 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, to 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 Bellanden (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:

> *'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'."*

Now, that - those are the principles which this Court is to observe in dealing with appeals from orders of the Judicial Greffier. It is true that it is not to do with strict maintenance nor with custody, but they are matters concerning matrimonial affairs and we see no reason to differ in this particular appeal, this instant appeal, from those principles. However, in dealing with what should be done, over all that lies the basic concept of the attempt to do justice to both parties. that their learned Lordships are saying is a matter of practice in the Appeal Courts in England and in our Appeal Court here and this Court sitting on an appeal from a decision of the Judicial Greffier. But if, in the course of the hearing, this appellate Court comes to the conclusion that we ought to interfere in order to do justice to both parties, then we conceive it to be our duty to do so.

Now, the principles dealing with matters of this nature are set out at p.28 of the judgment of this Court in the Matrimonial Causes Division in the case of Carol O'Connell, née Huish -v- Patrick Maurice O'Connell & Lesley Cochran and the learned Court said this:

> *'We summarise the principles to be applied:- We must have regard to all the circumstances of the case, both financial and personal, and including conduct, viewing the situation broadly, in the exercise of our discretion, and attempt to do justice to both parties".* I interpolate here to say that conduct is not in issue and it is not something to which we have had regard. *"We must have regard to financial resources and needs, obligations and responsibilities which each of the parties is likely to have in the foreseeable future. Thus we must take the*

prospect of inheritance into account. A very large emphasis must be placed on the provision of homes, but the paramount consideration is the requirements of the dependent children. The Court has very flexible and wide-ranging powers. If it is guesswork whether the petitioner will or will not remarry, prospective remarriage should be ignored". And, indeed, that is what we have done ourselves. "It is generally better to allocate shares in the matrimonial home rather than to give a spouse a fixed amount which might be eroded by inflation when it comes to be realised. In appropriate cases the whole of one spouse's interest in the matrimonial home should be transferred to the other spouse. A 'clean break' whilst attractive and to be encouraged, is not appropriate in all circumstances, especially where the interests of the children may be paramount. Decisions of the courts can never be better than guidelines. They are not precedents in the strict sense of the word; there are no rigid categories, and the aim must always be to meet the justice of the particular case".

With those words this Court respectfully agrees.

There is one further case to which I wish to refer and that is the case of Gallichan -v- Gallichan, again in the Matrimonial Causes Division, it is reported - and the judgment of 12th September, 1991, and at p.120 the Court in that judgment says this:

"As in the case of O'Brien, née du Val -v- O' Brien, the respondent should not be completely deprived of any share in the capital asset. In the present case there is no exceptional circumstances which would make it repugnant to justice for the respondent to receive anything. As the Court of Appeal said in O'Conner -v- O'Conner this is not a penal jurisdiction; our discretion is to achieve the best possible result in equity".

Further, in O'Conner -v- O'Conner, although that matter was touched on briefly in the part passage I have just read in Gallichan -v-Gallichan, on p.2 of the judgment in Conner -v- O'Conner, the Court of Appeal actually said this:

".... we are not happy that a more equitable means of achieving that result was not considered by the learned Bailiff, and we have it in mind that this is not a penal jurisdiction but a discretion to achieve the best possible result in equity".

These are the exact words which were paraphrased in Gallichan -v-Gallichan. But the learned Court of Appeal then goes on as follows:

'We have thought therefore that it was a Draconian measure to deprive the husband of all interest in the property, and, indeed, when he is excluded from his residence there, not to determine his liability for maintenance".

Well, that is not entirely the position here because it was the husband who, in fact, walked out.

We were referred by Mr. Le Quesne to the case of Smith -v- Smith. Mr. Le Quesne, I'm sorry, could you give it to me, because I've left it in the room. As I was saying, we were referred to the case - Mr. Le Quesne referred us to the case of Smith-v- Smith, reported (1975) 2 All ER at p.19. There's a particular passage which has influenced this Court in coming to the decision it did and I refer to the last two sentences on p.22:

> ***"This wife like so many wives when there are children has come off worse as the result of the breakdown of the marriage. It is a sad fact of life that, where there are children, both husband and wife suffer on marriage breakdown, but it is the wife who usually suffers more. The husband continues with his career, goes on establishing himself, increasing his experience and qualifications for employment - in a word, his security. With children to care for a wife usually cannot do this. She has not usually embarked on a continuous and progressing career while living with her husband, caring for their children and running the home. If the marriage breaks down she can only start in any useful way after the children are off her hands and then she starts from scratch in middle life while the husband has started in youth".***

I don't think it's necessary to read much more than that, but that is the kind of background which this Court, and no doubt the Greffier had in mind.

Nevertheless, he did make a finding of fact that both parties had contributed to the house, "The Barn", on a 50-50 basis. That being a finding of fact is something which has not been challenged and something which this Court has had to have regard to. The Court had to ask itself whether it was fair and right, whilst recognising that the wife had a legitimate interest in having a roof over her head at least until the children were grown up and the possibility of being able to acquire another property in due course and possibly to be able to save something for her old age, nevertheless we were constrained by the finding of the Greffier and by a number of matters in his judgment which we feel entitled us to interfere. It seemed to us strange, to put it no higher, that, having decided not to make a Mesher order in October, 1995, but having canvassed the position and having decided not to transfer either the property from the husband to the wife at that hearing, he should agree, he should do so in December, 1996, when, according to the evidence we have heard, and what he heard, there was not that degree of change in the circumstances which would, in our opinion, have justified him to do so.

It is suggested that the husband had increased his means. Indeed he had; he has been paid more by the brewery where he was employed, but being paid more, as Mr. Wheeler has pointed out, is not necessarily the same as having job security. There is some possibility, as was hinted at in the husband's third affidavit, that there could be a "shake up" at the brewery.

Nevertheless, when it comes to balancing the needs of the wife and the husband, the Greffier found as a matter of fact in his judgment in December that the

needs of the wife were greater at that stage than the husband, but he then went on to link that statement with another passage which I will refer to in a moment. At the top of p.6 he says:

> *"Therefore, although the equal contribution which each party made towards the purchase of The Barn, the wife by her flair and acumen, the husband by his physical hard work and the contribution of £40,000 from his parents, I believe that the wife's need is so much greater than the husband's at this stage that the just solution would be for the husband to give her an outright transfer of the property".*

He makes a large leap from that statement that the wife's need is so much greater that the just solution would be for the husband to give her an outright transfer of the property. In our view that is not justifiable. In our view, it was too draconian to deprive the husband totally of his interest in this property. It is suggested that he is living - as indeed he is - with the co-respondent who has certain means sufficient to enable her to buy a speed boat. We think of that as *de minimis*. The speed boat is on hire purchase; we were not told the size or the price, or very little about it and we don't think that is of any importance.

It is the combination of what was effected to the husband that has led us to come to the conclusion that we should disturb the finding, exceptionally, because we have looked carefully at the Court of Appeal's remarks and this Court's remarks, remarks in relation to the duties of the Court on an appeal that we should, as I say, disturb the finding. We do so because, firstly, the Greffier placed an emphasis on the French property which, in our view, was not justified. Secondly, he increased the maintenance, which he was entitled to do and which is not appealed against, but it is appealed when it is coupled with the transfer, outright transfer of the share of the husband in the property. And, thirdly, he erred, in our view, in not considering that the policy, insurance policy was in fact not a separate matter but was attached, so to speak, to the property itself.

However, having said that, the wife should have the preponderance of the equity in that house. Mr. Le Quesne quite rightly pointed out that if we made a Mesher -v- Mesher order, for example, without qualification, for example, to be brought into effect when the eldest, youngest child had finished full-time schooling - which would be in about ten years from now - that would not give the wife sufficient money, even if it were possible to obtain something on the redemption value before it was due on the policy and we think it would be wrong to put her to too much difficulty at that time. On the other hand, as I have said, the husband is entitled to some, some, equity in the property.

Accordingly, we are going to allow the appeal. We will order a Mesher -v- Mesher order which will take effect only on the younger child ceasing full-time education, but the proportion that each is to have in the house will be three quarters for the wife and one-quarter for the husband.

Authorities

O'Connor -v- O'Conner (1974) JJ 179.

O'Connell -v- O'Connell (30th November, 1988) Jersey Unreported.

Fagan -v- Le Marchand (22nd January, 1988) Jersey Unreported.

Greenlee -v- Haines (24th February, 1989) Jersey Unreported.

Whitwham -v- Bashford (27th July, 1989) Unreported Judgment of the Greffier Substitute.

Gallichan -v- Gallichan (12th September, 1991) Jersey Unreported.

Wachtel -v- Wachtel (1973) 1 All ER 829.

Smith -v- Smith (1975)2 All ER 19.

Dunford -v- Dunford (1980) 1 All ER 122.

Mesher -v- Mesher (1980) 1 All ER 126.

Hanlon -v- Hanlon (1978) 2 All ER 889.

Richomme -v- Le Gros (27th June, 1994) Jersey Unreported.