1977/A

IN THE COURT OF APPEAL OF JERSEY

20th September, 1977

BEFORE: FRANK WHITWORTH, ESQUIRE, Q.C., PRESIDENT
JOHN GODFRAY LE QUESNE, ESQUIRE, Q.C.,
SIR HERBERT FRANK COBBOLD BREAUT, KNIGHT,

JUDGMENT

BETWEEN A APPELLANT

AND

B RESPONDENT

PRESIDENT Frank Whitworth Q.C.

In this case the marriage of the parties appears unfortunately to have broken down. The parties were married in 1968 and they have two children, who was born in 1968, and another boy, , who was born five years later. Both parties consider the other has treated them with cruelty and the wife initiated proceedings by filing a petition for divorce in November, 1976.

The answer and cross-petition was not filed until April of this year, but we are told that there were certain discussions between the parties in the intervening period which may well have caused that delay.

The parties share a flat which consists of two bedrooms and a living room and a hall, and the usual offices, and there are four people for two bedrooms. It is adequate accommodation for a happy family but not very convenient when you have parties at arms' length.

The situation between the parties deteriorated from its already unhappy state, as is perhaps only to be expected when divorce proceedings are pending and the parties continue to live under the same roof.

On the 20th July this year an application was heard which had been initiated by A to exclude her husband from the matrimonial home. The basis of this was that there had been physical acts of violence by the husband (although let it be said nothing like so serious a nature as we sometimes have to deal with in this Court), that the tension between them was intolerable and that it was having its effect upon the wife's health and also upon the well-being of the two children. On these grounds the wife sought the relief, which is always a drastic step to take, of having the husband excluded from the matrimonial home in advance of the determination of the matrimonial proceedings between them and of

course in advance of any of the ancillary matters that would be decided consequent upon a decree of divorce being granted to either or both of them.

At the hearing, no medical evidence was called on behalf of the wife. The reason for that, we are told, was that the application was launched fairly speedily as being a matter of some urgency. As such it was dealt with by the Court speedily and when it was sought to obtain the corroborative evidence of the doctor it was found that he was out of the Island for a month, and his evidence was not available. For myself, I am not particularly worried about that, because we have the evidence of the wife recorded before us and she had told the Royal Court that she was taking Valium and Mogadon and some anti-depressant tablets called Surmontil and that was not challenged. The medical evidence that one gets in these cases must always to a large extent be dependent upon the facts as related by the patient to the doctor coupled with the fact that the patient has recited these matters; but this is no proof that the alleged facts ever occurred or were in truth having the effect related about them. So I am not particularly worried at the absence of medical evidence in view of the established fact that she was receiving treatment of sedation and anti-depressant tablets.

A more cogent criticism by the husband, who is appealing against the Order which the Royal Court made excluding him from the home, is that there was no report by a Child Welfare Officer. The Court of its own motion after the hearing remedied that and we have had the advantage of seeing and considering the report of Mrs. Bird, the Child Care Officer, which is dated the 12th September, 1977. That, perhaps not unnaturally, contains a certain amount of matter which we ought not to consider, it being introduced after the hearing and not supported by evidence. Counsel

for the husband however agreed that we should look at this report, to the extent therefore that we have it before us it did cure the defect, if defect it was, of the absence of any such report before the Royal Court. I do not need to recite the whole of that report now, but what it did seem to corroborate was that the children are suffering as a result of the home situation. Let it be said at once that both husband and wife are devoted to their children and in their respective ways are doing the best they can to assist them; and the children seem to be devoted to both their parents. This tension that exists between the parties and the disputes which have occurred (in one case admitted to have occurred and in other cases alleged by the wife to have occurred) in physical terms as well as in quarrels, apparently are causing the children, in the words of the Child Care Officer, to suffer as a result of the home situation; and she goes on to say that both parties, that means to say both parties now living at home, could more effectively fulfil their role as parents if the tension was removed. This is not merely a question of the welfare of the children; the primary concern in an application of this sort is for the state of affairs as between the two parties. It has been urged upon us on behalf of the husband, relying upon the case of HALL -v- HALL (1971)1AER 762, that this is a most serious step for any Court to adopt, and Counsel for the husband quoted the words of Lord Denning at p. 764 "I would like to say an order to exclude one spouse or the other from the matrimonial home is a drastic order. It ought not to be made unless it is proved to be impossible for them to live together in the same house"; and later "Such an order ought not to be made unless the situation is impossible. I would add,"said the Master of the Rolls", that it is important as well to have regard to the interests of the children."

This view as to the drastic nature of the step expounded in HALL -v- HALL appears to have been somewhat modified in the passage

of years when we come to consider the case BASSET -v- BASSET (1975) 1. AER 513. There, after an analysis of the various cases, Mr. Justice Cuming-Bruce, sitting in the Court of Appeal said at p. 521 "I extract from the cases the principle that the Court will consider with care the accommodation available to both spouses, and the hardship to which each will be exposed if an Order is granted or refused, and then consider whether it is really sensible to expect a wife and child to endure the pressures which the continued presence of the other spouse will place on them. Obviously inconvenience is not enough. Equally obviously, the Court must be alive to the risk that a spouse may be using the instrument of injunction as a tactical weapon in the matrimonial conflict."

In this case, when it is heard, the petition and the cross-petition are likely to employ some three days or so of the Court's time. We are told that it is unlikely therefore that a hearing date for such a petition will be much before five or six months from today.

If either spouse succeeds on his or her petition or if they both succeed, the parties will then have to cease living together. As the necessarily long waiting time for the hearing date to come up passes, the tension between the parties can only get more acute.

The wife had already given evidence that it is at present, according to her words, intolerable; and while it is true that it take two people to make a quarrel, it probably also need two people to make a situation intolerable. And that is the almost inevitable concommitant of a situation when two people reside in the same premises when divorce proceedings are pending. It must be inconvenient.

But that, as we have been told by the cases, is not enough; there has to be some real anticipation of serious trouble between the parties, and that is what the wife said she thought would happen. That was clearly accepted by the Deputy Bailiff, who had had the

advantage of hearing both the parties, and for myself, I see no reason to go against his assessment of the situation and of the witnesses. I think the situation is that it is certainly intolerable and virtually approaching, if it had not approached, the impossible, for these two parties to continue to live in the same house. The situation in my opinion can only get worse and considering the balance of hardship pending the hearing of the petition it will obviously be easier for the husband to find some other accommodation for himself, rather than for the wife and the children to find such alternative accommodation. Indeed of course, even if we were to leave the husband in the house, he would have to pay for the time being for the accommodation to be found elsewhere for the wife and children; and it is obviously more reasonable for him to provide for himself than to have to find accommodation for a woman and two children.

In all the circumstances I am of opinion that, hard as it is upon the husband who is devoted to the children, this appeal must be dismissed; that there were proper grounds in my opinion for the Deputy Bailiff to have reached the Order that he did; and that on weighing the comparative hardships it is obviously much easier for the husband to leave the matrimonial home than it is for the wife and children.

There has already been expressed the view that the husband is devoted to his children and therefore be given generous access to them. That in my opinion clearly ought to be the case; we ought to allow access every day. It is possible that it can be arranged between the respective Advocates for the parties as to what this should mean, and inasmuch as the husband's place of business is very close to what has been the matrimonial home, that may be the most convenient place for him to have access. For that there will have to be discussions between the parties, and if they cannot agree they will

have to come back to the Royal Court for a ruling upon it. But so far as our views are of any assistance to their cause, I think I am speaking for my colleagues when I say that we all feel that this access should be daily and substantial and, preferably, not access with the wife standing over him, that is it should be sole access, at least for the time being. If that is done the husband's influence over the children and his companionship with them ought to be capable of being maintained over this period, possibly even better than if it was exercised in an air of tension in the house itself. For myself, I have every sympathy with the husband but nevertheless I feel the only solution to this problem is for the parties to separate.

It is unfortunate your client is no longer here to hear what has just been said Mr. Troy, but of course this order cannot take effect at once; he obviously must be given a reasonable time. Would one month be sufficient for your client to make suitable arrangements?

(After Discussion)

We suggest that a month would be the appropriate period and that will stand as the Order of this Court. In view of the circumstances as the appeal has not succeeded, the wife should have her costs in any event, not to be paid immediately.

B , during your temporary absence, we did say that you should have sufficient time to make other arrangements and therefore the Order will not be taking place before one month from today; and if you consult with your counsel I am sure that arrangements will be made for you to have the fullest possible access to your children to the benefit both of them and of yourself.

J. G. LE QUESNE, ESQ., Q.C. I agree.

SIR FRANK EREAUT, BAILIFF: I agree.