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In the Royal Court of Jersey
(Matrimonial Causes Division)

Before: Mr. V.A. Tomes, Deputy Bailiff,
Jurat P.G. Blampied
Jurat G.H. Hamon

Between: F , **Petitioner**

and

W , **Respondent,**

and

H **Co-Respondent**

Advocate J.C.K.H. Valpy for the petitioner
Advocate R.A. Falle for the respondent

On the 8th July, 1971, the petitioner and the respondent were married. There is one son of the marriage, T , who was born in April, 1975. On the 1st May, 1985, the Court, having exercised its discretion in favour of the petitioner, pronounced a decree nisi of divorce on the ground of the respondent's adultery with the co-respondent. The Court postponed the further consideration of all ancillary matters.

This suit comes before us on a Notice, dated 9th July, 1986, served on the petitioner at the instance of the respondent, seeking:-

(1) That the petitioner and the respondent jointly have custody of the child of the marriage with care and control of the child vested in the respondent;

(2) That the former matrimonial home, in St. Helier, be sold and that the proceeds therefrom be divided equally between the petitioner and the respondent;

(3) That the respondent be allowed to remove from the former matrimonial home such items as are her property including a 1.57 carat solitaire diamond ring, a white fox fur jacket and a water colour of Southern France.

(4) That an equal division of the contents of the former matrimonial home as are jointly owned by the petitioner and the respondent take place;

(5) That one-half of the stocks and shares in the name of the petitioner and the respondent jointly shall be transferred into the sole name of the respondent;

(6) That the petitioner pay such maintenance in respect of the child of the marriage as the Court shall consider just;

(7) That the petitioner pay such maintenance to the respondent as the Court shall consider just;

(8) That the Court make such other order as it may deem just for the proper and equitable distribution of the matrimonial home; and

(9) That the petitioner pay the respondent's costs of and ancillary to the Notice.

In the event, the majority of the heads of claim were either not proceeded with or presented no difficulty and we dispose of those as follows:-

(1) We are satisfied that there has been no difficulty in practice with regard to the care and control of the child, who shares his time between both parents.

Accordingly, we order only that the child of the marriage, namely T, shall remain in the joint legal custody, of the petitioner and the respondent.

(3) and (4) The respondent withdrew her claim to the 1.57 carat solitaire diamond ring. The parties were agreed that each should retain such items in the former matrimonial home as are his or her exclusive property and that there should be an equal division of such of the contents of the former matrimonial home as are jointly owned.

Accordingly, we place on record the agreement of the parties whereunder the petitioner shall make, or cause to be made, an inventory of the contents of the former matrimonial home showing whether such contents are claimed to be the property of the petitioner, or jointly owned, or the property of the respondent; the respondent shall be allowed access to the former matrimonial home for the purpose of checking the said inventory; the respondent shall be permitted to remove such items as are agreed to be her property; there will be an equal division of those items that are jointly owned; to assist such division the parties shall, if necessary, obtain a professional valuation of disputed items; and in the event only of a continuing disagreement with regard to any items shall there be a further reference to this Court.

(5) The petitioner and the respondent hold in joint names £2,000 Icelandic Government Stock and 200 Jaguar shares. We order that there shall be an equal division between them of the stock and shares.

(6) Both parties already contribute to the maintenance of the child of the marriage in that they each maintain him, the petitioner when the child is living within the former matrimonial home and the respondent during periods of staying access. We were invited to face up to the reality of the situation; as the child grows older it will be substantially a matter for his election with which parent he spends his time. The degree to which each of the parties was in fact maintaining the child was in dispute but it was not disputed that each was making a contribution. We believe the present arrangement and the de facto joint

care and control to be in the best interest of the child. We propose, therefore, to make a nominal order only so that the matter may be reviewed in the future should circumstances alter.

Accordingly, we order that the petitioner shall pay to the respondent the sum of One Pound per annum by way of maintenance in respect of the child of the marriage.

(7) The claim of the respondent that the petitioner be ordered to pay maintenance to the respondent was formally withdrawn during the hearing.

(8) Neither counsel addressed us on the question of costs; accordingly this head of claim is left over for further decision, if necessary, after both parties have been heard.

This leaves only the two heads of claim with respect to the former matrimonial home. These are (2) that the property be sold and the proceeds therefrom be divided equally between the petitioner and the respondent and (8) that the court make such other order as it may deem just for the proper and equitable distribution of the matrimonial home.

We understand the financial background to the ownership of the home to be as follows:- before their marriage the parties bought, in their joint names, a bungalow residence in St. Helier, for £7,500. The petitioner contributed £1,500 and the respondent contributed £1,000, the balance of £5,000 being raised by means of a mortgage. The parties pooled their income and the mortgage interest was paid jointly. In 1972, the petitioner's father died and this yielded some inherited capital. Subsequently, the mortgage was repaid, the bungalow was sold for £21,000 and a house was purchased for £26,000. The parties moved into a house in July 1975. The shortfall in the price was met by the petitioner

out of his inheritance. So that, at the date of purchase of the house the petitioner had contributed £11,500 and the respondent £1,000, the balance representing the jointly owned profit from the sale of the bungalow. The house had been improved and had been worked on extensively by both parties. There was some dispute as to the degree that each had contributed in labour on the property. It is probable that the petitioner contributed more in labour but the respondent, who was earning more, probably contributed more in money. In default of evidence, we proceed on the basis that there was an equal contribution to the maintenance, upkeep and improvement of the property.

The next problem is that of valuation. In her pleadings the respondent put the market value of the property at not less than £140,000 whereas the petitioner's estimate, in the absence of a professional valuation was £110,000. The respondent based her valuation upon the fact that the property had been on offer for sale for over a year at the asking price of £140,000 and we were provided with a copy of the estate agent's particulars of the property, described as an impressive house, commanding fine views and providing an excellent home with an income, two integral flats being let on a self-catering basis providing £150 per week each during high season and £50 per week each in winter. It was the respondent's contention that the petitioner had made little or no effort to sell the property; that he had deliberately neglected the exterior of the property to deter prospective purchasers at that price; that whilst the respondent used to maintain the gardens the petitioner had not; and that the house was last painted in its entirety by the respondent, but that no decorations had been carried out since. The petitioner's explanation was that his idea in putting the house on the market was to avoid a professional valuation and to test the market. Only two people had shown any interest. He did not want to sell the property and wanted to retain it as his home and that of the child of the marriage.

However the petitioner had very recently obtained a professional valuation - it was dated the day before the hearing - from Messrs. Knatchbull

and Taunton; in the sum of £120,000. Although Mr. Falle suggested that the picture given by the valuation is a pessimistic one, when compared with the property particulars prepared a year ago at £140,000, we are of the opinion that the professional valuation is the more reliable and, for our purposes, we accept the figure of £120.000 as the value of the property.

We must now consider the law to be applied to the division of this asset of the parties. The relevant parts of Articles 28, 29 and 29A of the Matrimonial Causes (Jersey) Law, 1949, are as follows:-

"Article 28

(1) Where a decree of divorce....has been made, the court may, having regard to all the circumstances of the case including the conduct of the parties to the marriage and to their actual and potential financial circumstances....order:-

(a) that one party to the marriage transfer to the other party to the marriage....any property whether real or personal to which the first mentioned party is entitled;....

Article 29

(1) Where a decree of divorce....has been made, the court may, having regard to all the circumstances of the case, including the conduct of the parties to the marriage and to their actual and potential financial circumstances, order:-

.....

(b) that one party to the marriage shall pay to the other party to the marriage such lump sum or sums as the court may think reasonable....

(c) that security be given for the payment of any sum or sums ordered to be paid under sub-paragraph....(b) of this paragraph;

Article 29A

(1) ....where the court makes an order under Article..28 or 29 of this Law, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest,....

(2) Any order made under paragraph (1) of this Article may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality of the foregoing provision, may include -

(a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates;...."

Thus the court is required, when deciding whether the former matrimonial home should be transferred to one of the parties, to have regard to all the circumstances of the case including the conduct of the parties. We mention this because counsel for the respondent, very properly, drew our attention to the English case of Wachtel v. Wachtel (1973) 1 All ER 133, and, on appeal at (1973) 1 All ER 829, which has been considered in several Jersey cases, particularly in Urquhart v Wallace (1974) 2 J.J. 119. The decision in Wachtel v Wachtel was made against the background that the law of England permits divorce on the ground of irretrievable breakdown of the marriage, and the Court held there that the conduct of the parties should not be taken into account in determining the apportionment of the assets, except where the conduct of one party had been obvious and gross.

Mr. Valpy also invited us to consider Harnett v. Harnett (1973) 2 All ER 593. In that case the husband had discovered the wife committing adultery with a youth half her age. The husband reacted violently, ordering the wife out of the home; she left with the children. Her association with the youth did not survive. The husband thereafter treated the marriage as at an end because of the wife's disloyalty. He obtained a decree nisi on the ground of the wife's adultery, the wife not proceeding with a cross-petition alleging cruelty.

At page 601, Bagnall J., having reviewed a number of cases, including Wachtel v. Wachtel, extracted certain principles from the decisions and, on the subject of conduct said:-

"It will not be just to have regard to conduct unless there is a very substantial disparity between the parties on that score. Ormrod J. and the Court of Appeal in Wachtel v. Wachtel used the phrase "obvious and gross". In this phrase I think that 'gross' describes the conduct; 'obvious' describes the clarity or certainty with which it is seen to be gross. But the conduct of both parties must be considered. If the conduct of one is substantially as bad as that of the other then it matters not how gross that conduct is; they will weigh equally in the balance. In my view to satisfy the test the conduct must be obvious and gross in the sense that the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless. I think that there will be very few cases in which these conditions will be satisfied".

In Cuzner v. Underdown (1974) 2 All ER 351 the Court of Appeal found, (at page 357) that -

"The conduct of the wife in taking a half share of the house while she was committing adultery with the co-respondent was "obvious and gross" misconduct and, even allowing for the fact that she had brought up the children

and that a portion of her earnings had been used in the home, it would not be just that she should have a share in it, particularly (per Walton J.) in view of the finding that she was entirely to blame for the breakdown of the marriage".

The ratio decidendi of Urquhart v. Wallace 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 that case the Court found that the wife was solely to blame for the ending of the marriage. Nevertheless, at page 145, the court said "We have accepted that there are exceptional circumstances, such as existed in Cuzner v. Underwood, where it would be repugnant to justice to order the husband to make any payment. Although we have been obliged to hold the wife solely reponsible for the ending of the marriage we do not place this case in the same exceptional category as the Cuzner case. The parties continued to live together for some years after the property was bought jointly. Had it been possible for us to find that both parties had contributed equally to the breakdown of the marriage, we would probably have ordered the husband to pay to the wife half the agreed value of the property if the wife were making no further claim on the husband. Her conduct disentitles her in justice to such a proportion. Nevertheless we think that she is entitled to some payment in recognition of the fact that she has given the husband eleven years of good companionship,. She has not contributed to the purchase price of the property, but she has contributed indirectly to the financial position of the husband by looking after the home and bringing up the child. That form of contribution merits, as we have seen, as much consideration as a financial contribution of a more direct nature".

In Urquhart V. Wallace the Royal Court approved the matters to which the courts shall have regard in exercising their powers. These were as set out in section 5(1) of the Matrimonial Proceedings and Property Act 1970, as follows:-

"It shall be the duty of the court....to have regard to all the circumstances of the case including the following matters, that is to say:-

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, 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 underlining is ours).

The principles laid down in Urquhart v. Wallace were followed and applied in Elwell v. Knight (1976) 2 J.J. 383 and in James v. Patterson (1980) J.J. 125. Reference to Urquhartr v. Wallace was also made in Billot v. Perchard (1977) J.J. 33 although in that case both counsel had agreed that "in this respect our discretion is unfettered, whether we proceed under Article 27 or Article 28 of the Matrimonial Causes (Jersey) Law, 1949 (as amended)."

The same principles were applied in the recent case of Hickman v. Norton (as yet unreported). In that case the Court found that in all the circumstances of the case, and having regard to the conduct of the parties, it would be repugnant to justice to allow the wife any share in the husband's assets and to make an award to her. But that case turned on its particular, and unusual, facts.

The overriding principle, in all these cases is that set out by Lord Denning M.R. in Wachtel v. Wachtel, at page 842:-

"In all these cases it is necessary at the end to view the situation broadly and see if the proposals meet the justice of the case".

To summarise, therefore, we have to 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.

We have to apply the law to the facts of the instant case: The parties occupied the former matrimonial home for some time before their marriage and

continuously during the marriage until the respondent left on the 2nd March, 1985 - a total of some seventeen years. The respondent made a financial contribution of £7,750 towards the purchase of the property. The respondent made a real contribution, both physically and financially, towards the maintenance, upkeep and improvement of the property. The respondent was earning more than the petitioner and claims that she was contributing more - whilst this is disputed we have no doubt that the cost of running the matrimonial home was a joint burden.

On the question of conduct we find that it was the adultery of the respondent with the co-respondent which caused the final break-down of the marriage. But we doubt that the breakdown was entirely due to the respondent's adulterous association with the co-respondent. The petitioner claims that the marriage was both stable and happy until the misconduct of the respondent. In his discretion statement the petitioner admits isolated acts of adultery between 1975 and 1981 and says that he knew the name of only one of the women involved. In her affidavit the respondent asserts that when she confessed her adultery to the petitioner he admitted that for a five year period from 1975 to 1980 he had had ten adulterous relationships. The petitioner claims that these acts of adultery had no affect whatsoever on the marriage because the respondent did not know of them and would never have known. But do they not indicate that the marriage was perhaps less happy and certainly less stable than the petitioner claims? Moreover, from the moment that the respondent admitted her adultery to the petitioner he behaved and conducted himself towards her in a manner which he accepts would be inexcusable had it not been provoked by the respondent's admitted adultery. Whilst we accept that the petitioner's conduct resulted from the respondent's adultery we are bound to say that it was hardly consistent with forgiveness and an attempt to persuade the respondent not to end the marriage. Is it not just possible that had the petitioner been able to adopt a very different attitude toward the respondent, she might have terminated her adulterous association and saved the marriage? These are imponderables which even the wisdom of Solomon could not resolve.

We find ourselves in a similar situation to that in which the court found itself in Urquhart v. Wallace when, at page 145, it said: "We have accepted that there are exceptional circumstances, such as existed in Cuzner v. Underwood, where it would be repugnant to justice to order the husband to make any payment. Although we have been obliged to hold the wife solely responsible for the ending of the marriage we do not place this case in the same exceptional category as the Cuzner case".

It would be inequitable in the circumstances of the instant case, to force a sale of the former matrimonial home. We find that, taking conduct into account, it would be repugnant to justice to divide the property equally. But we do not take the same draconian view as the court took, on different facts, in Hickman v. Norton, where it made no award at all to the wife. The remedy, in the instant case, is to award a lump sum payment to the respondent which will on the one hand reflect the responsibility of the respondent for the final breakdown of the marriage and on the other hand reflect the substantial contribution made by the respondent toward the years of happy marriage, the child of that marriage, and her financial contribution to the purchase, maintenance, upkeep and improvement of the property.

Mr. Valpy suggested, not we thought with much conviction, that we were precluded from ordering a lump sum payment. The notice served by the respondent has to be the foundation for any order. We are satisfied that paragraph (8) of the Notice, taken in conjunction with paragraph (2), enables us to make orders under Articles 28 and 29 of the Law for the payment by the petitioner to the respondent of such lum sum as the court thinks reasonable.

Taking all the matters to which we have referred fully into account, we make an order, under Article 29(1)(b) of the Law, that the petitioner shall pay to the respondent the sum of £40,000.

We are satisfied that the sum ordered to be paid is not so high as to indirectly compel the sale of the property or the raising of a mortgage that the

petitioner could not fund, having regard to the earning potential from the two flats. We believe that the respondent is entitled to money and, therefore, we do not order that the sum ordered to be paid will be secured on the property. The petitioner must take steps to raise the sum of money ordered to be paid and we make a further order under Article 28(1)(a) of the Law, that upon payment the respondent shall transfer to the petitioner the whole of her interest in the property, each of the parties to pay his or her own conveyancing costs.

If the petitioner should delay unreasonably in the implementation of the orders made then, and only then, the respondent's remedy would lie in an application to the court for an order under Article 29A of the Law for the sale of the property.