

COURT OF APPEAL

77.

22nd April, 1994.

Before: R.D. Harman, Esq., Q.C., President
A.C. Hamilton, Esq., Q.C., and
Miss E. Gloster, Q.C.

Between:

GM

Appellant

And:

LM

Respondent

Appeal by the Appellant from the Order of the Royal Court (Matrimonial Causes Division) of 30th October, 1992, that:

- (1) the Respondent should have care and control and the Appellant and the Respondent should have joint custody of the children of the marriage; and
- (2) the Appellant should pay the taxed costs of the Respondent of and incidental to the hearing in the court below.

The Appellant on his own behalf.
Advocate N.F. Journeaux for the Respondent.

JUDGMENT

HAMILTON, J.A.: This is an appeal by GM against a decision of the Matrimonial Causes Division of the Royal Court dated 30th October, 1992. I shall refer for convenience to GM as "the husband". The Respondent, whom I shall again for convenience refer to as "the wife", was formerly known as LM.

On 30th June, 1992, the marriage of the husband and the wife was dissolved nisi and subsequently made absolute. Since the Order appealed against the wife has remarried; she is now known as LC.

The husband and the wife were married on 9th May, 1987. Two children, both girls, were born of the marriage, namely C born in January 1988, and D born

in July 1989. The husband is now about 41 years of age and the wife about 34. The Order appealed from awarded care and control of these children to the wife with joint custody to the husband and the wife.

Prior to the hearing of the substantive appeal the husband, who although legally represented in the Royal Court has appeared in this Court on his own behalf, presented an application under Rule 12(1) of the Court of Appeal (Jersey) Rules to adduce additional evidence. This Court allowed that application but only to a limited extent. Its reasons for doing so may now be shortly stated.

Three items of additional evidence were sought to be introduced. The first was an affidavit from E who had given evidence as a witness in the custody proceedings below.

The second was certain items of correspondence passing between the husband and the Chef de Police of the Parish of St. Peter which recorded that the wife's present husband, F had, after enquiry, been found to have committed an assault upon the husband. The date of that assault, although not specified in the correspondence, appears to have been in or about December, 1993.

The third was a number of passages selected by the husband and apparently transcribed by him from evidence given in other proceedings between the husband and the wife. The trial in those other proceedings, which related to a certain injunction sought by the husband against the wife, was heard by a differently constituted Royal Court from that which heard the matter presently under appeal. These other proceedings took place some months before the trial in the present matter. I shall refer to the earlier proceedings as the injunction proceedings and the present proceedings as the custody proceedings although the only substantive issue between the parties in the custody proceedings is the matter of care and control of the children.

In considering the application this Court took into account the principles formulated in Ladd -v- Marshall (1954) 1 WLR 1489 as read with the observations of Lord Fraser of Tullybelton in G -v- G (1985) 2 All ER 225. Lord Fraser observed in the course of his speech in that case:

"The Court of Appeal must be entitled to decide in the exercise of its discretion whether to look at additional evidence or not. Additional evidence dealing with events that have occurred since the hearing in the Court below is readily admitted especially in custody cases where the relevant circumstances may change dramatically in a short period of time. But it must be a matter for the discretion of the Court in each case to decide whether the

additional evidence which it is asked to look at is likely to be useful or not and to reject it if it considers it unlikely to be so.

Only the second item - the correspondence relating to the assault upon the husband - properly deals with any event which has occurred since the hearing in the Court below. It is potentially pertinent to the current relationship between the husband and the wife's present husband in whose home the children now stay. Their long term welfare may well be affected by the quality of the relationship and dealings between the children's father and their mother's present husband. Although not formally proving the assault referred to in the correspondence it appears to the Court to be material which ought to be before it when adjudicating upon the best interests of the children as matters now stand. We were unimpressed by the statement on the wife's behalf that instructions had not been taken as to whether or not it was accepted that such an assault had in fact taken place.

We refused leave to the wife to adduce oral testimony about this matter. The matter of the parents' attitudes towards each other in the context of arrangements relative to the children is dealt with in the report from the Children's Service dated 14th April, 1994, provided for the purposes of this appeal. For these reasons we admitted the correspondence referred to.

The affidavit evidence tendered from E is not evidence which this Court regards as likely to be useful in determination of the appeal. While E was an important witness, the matters referred to in the affidavit were purely peripheral to the issues in the substantive appeal. While an important issue is the comparative credibility of the wife and E introduction of the proffered material would not be likely materially to effect that issue.

As to the selected items of transcript the purpose of their introduction was apparently to support the husband's contention that the wife was an habitual liar and so ought not to have been believed by the Court below adjudicating on the custody issue. The essential question, however, is whether the Court below was entitled to accept the wife's testimony on such matters as it did in those proceedings. Insofar as the evidence given by her there was inconsistent with that earlier given in the injunction proceedings it was open to the husband's advocate to challenge her evidence on specific matters on the ground that it was so inconsistent. The husband was represented by the same advocate in both proceedings and we understand that he made use of his knowledge to make effective challenges.

Indeed the Royal Court in the custody proceedings was well aware that the wife had not been regarded as truthful, at least in some respects, in the injunction proceedings. She made admissions

to that effect in the custody proceedings. The Royal Court in those proceedings expressly took this into account. We cannot see that in these circumstances the introduction of selected passages from the earlier proceedings would be useful for the purposes of this appeal. The case is quite different from that of Golder -v- Dodd & Anor. (1982) JJ 23 (C.of.A.), in which after the conclusion of civil proceedings at first instance, a witness was convicted of perjury in relation to evidence given in those civil proceedings. We accordingly refused to allow this additional evidence to be introduced.

The burden of the appeal as presented by the husband was that the wife had persistently lied in relation to matters pertinent to the welfare and interests of the children. She had done so, it was alleged, not only in evidence in the custody proceedings, but in evidence in the injunction proceedings where the position of the children had also been traversed and also to a Mrs. Hart of the Children's Service who had prepared a report for the Royal Court relative to the custody proceedings and indeed had given evidence in those proceedings relative to that and other matters. She had, it was contended, also lied elsewhere in relation to the same matters. In support of his primary contention the husband took this Court through a detailed set of contentions running to 32 pages and containing cross references to passages in the evidence. The nature of his case can conveniently be identified by the summary at the end of that document. It is in the following terms:

"SUMMARY

The evidence clearly shows that LM is a notorious liar, and the only reason for lying is to conceal the truth.

She had lied not only to the Courts but also the paid and honorary police, the children's service, her own lawyer and even her immediate family in an attempt to evade the truth, and resist GM's attempts to bring her to justice over the abuse of their two children, C and D.

GM believes it has been clearly proven that LM:

- (1) Lacks good judgment and self discipline.
- (2) Lacks maturity and a basic goodness.
- (3) Only has a primitive and instinctive love for her children.
- (4) Is a compulsive liar with extremely low morals and is generally dishonest.

- (5) Has little regard for the law and comes from a flawed and poor family background.
- (6) Is financially irresponsible.
- (7) Is happy to use violence to achieve her aims or as a release for her emotions.
- (8) Resorts to foul and disgusting language when under pressure and also swears in general conversation to express herself.

It is also proven that LM has acted extremely poorly in relation to the children, having:

- (1) Subjected them to witness the many assaults by herself and her family upon GM.
- (2) Actively trying and succeeding in removing the children from GM's presence.
- (3) Actively undermining the children's relationship with

GM's allegation that LM abused the children is also constructively proven by the corroborating evidence of E which is much more reliable and preferred to the evidence of LM.

It is plainly obvious that the wrong decision was reached at the lower Court hearing, due to the Court being grossly misled by LM and in the absence of any constraints on the suitability and capability of to care for the children the appeal should be granted in full with the further costs of this appeal being awarded against the Defendant."

The Royal Court heard evidence in the custody proceedings over some 15 days. The evidence ranged widely over the whole relationship of the husband and the wife as well as the situation relative to the children. It is clear that for a substantial period, at least from the birth of the younger child in July, 1989, the relationship between the parents was strained. Their relationship further deteriorated as time passed.

In October 1991, the husband took legal proceedings to exclude the wife from the matrimonial home. She remained excluded from that home and from the primary care of the children until early in 1992, when on the conclusion of the injunction proceedings she was able to return to live there. The situation in which the parties then found themselves was fraught with

potential difficulties. It would not be surprising that in such a situation there arose behaviour which did not demonstrate the better qualities of the individuals involved.

The main burden of the husband's case in the Royal Court was to seek to demonstrate that the wife's character was so flawed as to make her an unsuitable person to have care and control of the children. The Royal Court accepted that the wife's conduct was open to serious criticism in important respects. She lied in other judicial proceedings; she had shown deplorably little respect for the Orders of the Court. Much of this she had herself admitted when giving evidence in the custody proceedings.

The critical question, however, for the Court below was: whether it was in the best interests of the children that they be in the care and control of their mother. They reached the conclusion without hesitation that the wife should have such care and control, both parties being entitled to custody. The question for this Court is whether the Court below was plainly wrong to reach that conclusion. A further question arises in light of events which have occurred since that decision.

The Royal Court had the benefit of seeing and hearing the witnesses, including the wife and the husband. In a case of this kind that is a very important advantage. It is an advantage which an appeal court, having before it only the printed evidence, does not enjoy. It is possible to show, as the husband in his measured submission to us showed, that in any number of respects there were inconsistencies in the testimony of the wife which the Royal Court had not expressly dealt with in its judgment. But that is not sufficient to warrant the conclusion that the Royal Court plainly erred in its evaluation of the critical evidence and thus made the wrong decision when awarding care and control to the wife. Their judgment, which ran to some 43 pages, evaluated the evidence on the critical issues in a way which cannot properly be said to be fundamentally flawed.

There was no doubt, as the Royal Court found, that the wife is highly strung and excitable. That characteristic no doubt played its part in her performance as a witness as well as in her conduct generally. But a Court which sees and hears the witness is best placed to judge whether on matters critical to the question at issue, namely the welfare of the children, the wife gave evidence which could be relied on. We are unable to say that on such matters they were plainly wrong. For example, one important issue was the allegation that the wife had made a regular practice of physically mistreating the elder child, C. The wife denied that allegation. The only witness to speak to it was E. Her evidence was contradicted not only by the wife but by the daughter of E, namely G. The latter witness was regarded by the Royal Court as a person who "seemed natural and

without guile". She, in contrast to her mother, had no reason to have feelings of animosity towards the wife, nor it appears did she have any reason to favour the wife. This evaluation of demeanour by the Royal Court is an important consideration in the assessment of the evidence.

The husband referred us to Yuill -v- Yuill (1945) P.15 for the proposition that an evaluation of demeanour by a Court of Trial is not necessarily conclusive. It is to be noted, however, that Lord Greene, M.R. observed at p.19 that: "**It can of course only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion**" (on the matter of demeanour). Here, by contrast, there were no circumstances to justify such a finding.

G's evidence was consistent with the evidence in the case, including that of the husband, that C was not a difficult child and thus any occasion for the kind of mistreatment spoken to by E did not arise. E's evidence was otherwise subject to a number of valid criticisms.

The Royal Court was in these circumstances well entitled to conclude that the wife's denials on this matter were true. It does not follow of course that in all respects she told the truth to the Royal Court in the custody proceedings, but that Court was well aware that serious questions arose about her veracity on oath and it is evident that it addressed the question of her truthfulness on the important matters in the custody proceedings. This Court is unable to hold that it was plainly wrong to prefer the wife's evidence on important issues where it was in conflict with other evidence such as that of the husband. In any event, even if there were grounds for disbelieving the wife on important matters there were strong reasons for awarding care and control to her.

The Royal Court held that she was a loving and devoted mother who had made a home for the children and brought her own life under control. They were entitled to take the view that whatever her shortcomings in other respects she was more suitable than the husband as the primary carer of these two small girls. The Royal Court had been much impressed by evidence given by Mrs. Hart, a Child Care Officer, who had prepared a report on the children which she spoke to in evidence. She was of the opinion that even if the husband's allegations against the wife were fully proved the latter was, in this instance, the best person to have care and control. This view, expressed by a professional person qualified in the field, while not binding on the Royal Court, was rightly of persuasive value. Even if the husband's evidence had been preferred to that of the wife there remained a valid basis for awarding care and control of the children to her.

The husband challenged a number of inferences and conclusions drawn by the Royal Court adverse to him. Some of these challenges may well have substance, but it does not follow that the Royal Court's decision to award care and control to the wife was plainly wrong. His ability to provide the immediate requirements of care and control of two small girls, must, given his professional and other commitments, necessarily have been in doubt.

In the whole circumstances on the basis of the material before it the Royal Court did not go plainly wrong in making the award which it did.

It is now eighteen months since that decision was made. The girls have continued to live with their mother. She has now remarried and has very recently given birth to a boy. As Advocate Journeaux pointed out the proposal that at this stage the two girls be removed from their mother would give rise to a serious risk that they would regard themselves as having been rejected by reason of the birth of their step-brother. This Court has had the benefit of a report recently prepared by other Officers of the Children's Service. That report contains both reassuring and disturbing information. Its summary and conclusions are in the following terms:

- "a) It is our assessment that C and D are happy and settled living with their mother and F. There is nothing which leads us to believe that they have been subjected to physical abuse.
- b) GM is obviously a loving father who is committed to his daughters. C and D are happy in their father's company. We feel it is important that they should be able to grow up knowing their biological father and to have him continue to play a part in their lives.
- c) It is our submission that these parents have lost sight of what the issues are about. They each have their own problems and agendas which they try to address using the Court system.
- d) Whatever the outcome of the Court proceedings unless the parental psychology is addressed and dealt with these adults will not be able to move forward and this would be to the detriment of their children's emotional well being.

It is hoped that these parents would accept any form of counselling which may be offered to them as it is felt that this may well help them to resolve their difficulties."

The accommodation arrangements for the girls with their mother and stepfather are satisfactory; they are presently financially maintained by their stepfather with whom they appear to get on well. The husband has access under the present arrangements to the children on a regular basis which has been in existence since about the time of the Royal Court's decision.

The husband now lives with H who, he says, gets on well with the children during access. H, who is about 42, is employed as a personal assistant in a bank earning a good salary. There are no plans for the husband and H to marry. There is no material before this Court to indicate that she would be prepared in the present circumstances to take upon herself the responsibilities necessarily incidental to providing female care for the children on the basis of their primary residence being with her and the husband.

Subject to the comments made below, the circumstances, as they now exist, point to it being in the best interests of the children that their care and control remains with the wife.

The report also contains disturbing information. It indicates that the acrimony which followed the breakdown of this marriage continues to affect the welfare of the children born of that marriage. The husband has a fixed notion of what he perceives to be in the best interests of the children and blindly, in the view of this Court, persists in an attitude which, however honestly held, can do only damage to the interests of the children to whom he is devoted. The wife, according to the report, has conceived the notion that the ideal goal would be for the husband to play no part in the children's lives. That notion is, in the view of this Court, as well as in the view of those professionals compiling the report, wholly misconceived.

These children have been born of parents, who, each in their separate ways, has a deep love for them. The children in turn have a deep affection and need for their natural parents. To deny that need and to obstruct its fulfilment, far from advancing the interests of the children, is gravely prejudicial to those interests. If these parents truly have the welfare of these children at heart they will set aside their differences and strenuously endeavour to secure that each of them plays a full rôle in their development.

The Law is a blunt instrument in such matters. In the case of obduracy and wrong-headedness it may require to be involved but while this Court is in no position to restrain parties from exercising such legal rights as they have, further hostile litigation is more likely than not to cause further damage to these children.

This Court, concerned as it is with the interests of the children, expects of each parent that he and she will, with the help of professional assistance if necessary, address the true interests of their children. In this matter their respective partners also have responsibilities.

This court has also heard certain discussion in relation to the matter of costs. The position in the Court below was that at the end of the proceedings costs were awarded to the wife against the husband. It is not clear upon what basis the Royal Court proceeded to make that Order. However that may be, the outstanding position in relation to the potential enforcement of these costs is one which is more likely than not to give rise to further difficulties in relation to the position between the parties, ultimately to the prejudice of the children.

In these circumstances this Court proposes to make a direction in relation to the Order as to costs made in the Court below. That direction is that that Order while itself not being varied will, so far as relates to its enforcement, be enforceable only with the leave of the Royal Court. The Royal Court will be entitled to take into account all relevant circumstances but no doubt will have particular regard to the then financial position of the husband and what is in the best interests of the children when deciding whether or not the Order should be enforced and if so to what extent.

The position as stated to us on behalf of the wife relative to costs in this Court is that if she were successful she would not seek an order for costs against the husband.

In the event she has been successful in resisting this appeal. Accordingly the appeal will, subject only to the direction aforementioned, be dismissed and there will be no order for costs in relation to the appeal proceedings.

Authorities

A -v- A [1988] 1 FLR 193.

Stovold -v- Stovold [1973] Fam. Law 14.

Re S (A Minor) August [1991] Fam. Law 302.

Bowley -v- Bowley [1984] FLR 791.

Hunt -v- Hunt (née Pallister) (1987-88) JLR N.5.

Williams -v- Williams [1985] FLT 509.

Casal-Farrapeira (née Arthur) -v- Casal-Farrapeira (1985-86)
JLR N.9.

Rayden & Jackson's Law and Practice in Divorce and Family
Matters (16th Ed'n): p.1391.

G -v- G (1985) 2 All ER 225.

4 Halsbury 18: p.89; paragraph 120.

Yuill -v- Yuill [1945] P.15 C.A.

Golder -v- Dodd & Anor. (1982) JJ 23 C.of.A.

Ladd -v- Marshall (1954) 1 WLR 1489.

