

Judgment 12/2010

R v R – Court of Appeal (Civil Appeal 409) - 17 March 2010

Matrimonial Causes (Guernsey) Law, 1939 – wife’s appeal from finding of the Royal Court as to ancillary relief – circumstances in which an appellate court can interfere with the exercise of judicial discretion in the Court below – appeal dismissed.

**IN THE COURT OF APPEAL OF GUERNSEY
(CIVIL DIVISION)**

No. 409

The 17th day of March, 2010 before: Dame Heather Steel, DBE, presiding, Sir de Vic Carey and Michael Cameron St John Birt, Bailiff of Jersey

R

(Wife/Appellant)

-v-

R

(Husband/Respondent)

IN THE MATTER OF the appeal by the Appellant from the decision of the Royal Court on 23rd July 2009;

THE COURT, having on 16th March 2010 heard Advocates Pauline Allen and Alan Merrien for the respective parties thereon, this day GAVE JUDGMENT in the attached terms and DISMISSED the appeal;

AND THE COURT AWARDED COSTS to the Respondent on the standard recoverable basis, provided however that they shall not be enforced without the leave of this Court.

K H TOUGH
Registrar of the Court of Appeal

THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

Between

R

(Appellant)

-V-

R

(Respondent)

Before: Dame Heather Steel DBE
Sir de Vic Carey
Michael Cameron St John Birt, Bailiff of Jersey

JUDGES OF APPEAL

Hearing date: 16th March 2010
Judgment delivered: 17th March 2010

Advocate for the Appellant: P A Allen
Advocate for the Respondent: A M Merrien

Cases, texts and statutes:

G v G [1985] 2 All ER. 225 HL

Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 CA

Section 25 of the Matrimonial Causes Act 1973

White v White [2000] 2 FLR 981

Burton v Burton [1986] 2 FLR 419

C v C [2005-06 GLR Note 17] Royal Court

CAREY JA

Introduction

1. This is the judgment of the Court. This is an appeal brought as of right by the Appellant whom we will refer to as “the wife” against an Order which the Deputy Bailiff made in the Matrimonial Causes Division of the Royal Court on 21st July 2009 following hearings before him on the 1st, 2nd and 7th July. The Deputy Bailiff handed down a detailed judgment dealing with the matters before him on the application for ancillary relief of the Respondent whom we will refer to as “the husband”. The Deputy Bailiff dealt with the former matrimonial home in the following terms:

“1. That the former matrimonial home comprising [.....]

Shall, with effect from Friday the 30th October 2009, vest solely and absolutely in the Petitioner for himself and his heirs in consideration of the

Petitioner paying to the Respondent the sum of £95,000, the said sum to be paid on the 30th October 2009 (“the Capital Payment”)

2. *The Capital Payment shall not act as a charge on the Property.*
3. *In the event that the Respondent locates a property that she wishes to purchase prior to the 31st October 2009 and wishes to sign conditions of sale in respect thereof to secure the same, the Petitioner hereby undertakes to pay the deposit required in respect of the purchase directly to the stakeholder as part payment of the Capital Payment due to the Respondent, such sum to be paid no earlier than the 30th August 2009.*
4. *The parties can, by agreement, bring forward the date of the 30th October 2009 for the simultaneous re-vesting of the property and payment of the Capital Payment to any earlier date (“the agreed earlier date”)*
5. *In the event that the Petitioner defaults on the payment of the Capital Payment due to the Respondent such that it puts her in breach of the conditions of sale that she has signed and is liable to pay a penalty as a direct result thereof, such penalty shall be payable by the Petitioner.*
6. *That the Respondent shall be entitled to remain in sole occupation of the Property until noon on Friday 30th October 2009 (“the period”) or the agreed earlier date whichever shall first occur, save that the Petitioner shall be permitted to attend at the Property during the period:*
 - a) *For the purpose of picking up and dropping off [their child] in the driveway of the said property; and*
 - b) *On each Tuesday and Thursday between 12.30 pm and 2.30 pm to have access solely to the garage for the purpose of delivering and/or storing and/or collecting items relating to his business or the Petitioner’s possessions.*
7. *That with effect from noon on Friday 30th October 2009 or the agreed earlier date or whichever shall first occur the Petitioner shall enter into exclusive possession and occupation of the Property.”*

(The Court Order continued to deal with a number of other matters which are not in issue, for the parties to retain their own personal items (including motor cars), bank accounts and assume responsibility for their individual debts).

2. The circumstances of the parties can be briefly stated. [.....]
3. The Deputy Bailiff’s findings that the current earning capacity of the wife and the husband were respectively £35,000 per annum gross and £19,000 per annum gross, are not challenged. The wife without making any concrete suggestions as to how he would achieve so doing considered the husband could earn more and the husband suggested the wife could seek promotion to a more senior post a suggestion that the wife did not want to pursue. [.....]. The husband runs his own business from his house [.....]. The wife is in good health, the husband has had a [serious] operation, which does not seem to impede his lifestyle.
4. There had been controversy over what would happen to their child. Through the good offices of the Safeguarder Service an understanding was reached shortly before the financial hearing, that the child would be principally cared for by the wife, but that the husband would be involved in collecting the child from school and there would be regular weekend staying access with the husband and the holiday periods would be shared. From the information that

was supplied to the Court, it is clear that it was in the child's interests, that both parents should have sufficient accommodation to receive the child to stay overnight.

5. So far as the assets of the parties are concerned, there is precious little apart from the former matrimonial home and the wife's pension with the States. This at the time of the hearing before the Deputy Bailiff was valued at £93,265.21. This is not money that the wife can realise tomorrow, but quite properly it was taken into account as an asset from which she will benefit in the future and was correctly included in the calculations of the Deputy Bailiff.
6. The main asset therefore is the former matrimonial home, [.....] and there were two further issues in connection with the property which were slightly unusual. The first was that the husband was saying that his father had provided a sizable part of the money required in connection with property.
7. The further complication with [the former matrimonial home], is a longstanding insurance claim in respect of subsidence. This has been the subject of long and protracted negotiation with the insurance company who, as is not unusual in cases such as this, have raised the issue of under insurance. The husband has been unable to indicate when the works will be commenced. The property would have to be vacated during such time as the contractors were on site. All this had an effect on the valuation of the property. The agreed valuation, if the property is in good order is £372,500, but that if it was sold before the works had been done, the value would be £285,000 with no credit for any insurance claim.
8. The husband petitioned for divorce in October 2008 alleging unreasonable behaviour and the final Order was made on 19th January 2009. There was an issue of alleged domestic violence on the part of the husband, shortly after the Final Order. Conduct is not an issue, so this Court does not have to investigate it.

The Position Statements of the Parties at the Final Hearing as amplified in recorded evidence and Oral Argument

9. The husband claimed that in total, his father had contributed £95,312 towards the cost of [the former matrimonial home] in the form of loans. This comprised firstly £30,576 in respect of various payments before 2000, and secondly £30,000 originally advanced to pay for improvements - a project which was thwarted by planning permission being refused, which the father agreed to applying to reducing the mortgage. Thirdly £34,736 was advanced in 2006 to pay off the rest of the mortgage. The Husband disclosed additional liabilities amounting to approximately £45,000 in respect of his business overdraft and legal fees. He offered a lump sum of £75,000 which on his calculations would enable the wife to buy a house for £250,000 (ignoring fees) as she could borrow £175,000. On his figures this would achieve almost an equal split, if the court treated the money due to the father as a debt.
10. The wife in her Position Statement, proposed a lump sum of £130,000 to buy an alternative property with a maximum mortgage that she could obtain (£175,000). This depended on the husband being able to buy her out. Alternatively, she proposed that the property [.....] should, after the works to repair the subsidence have been carried out, be sold, and she should have 35% of the proceeds of sale, or "*the renovated value if the petitioner secures funding to keep the property*". She also sought £39,000 in respect of capitalised maintenance, but at the hearing she did not proceed with any claim for maintenance of the child, that being reserved for another day. In her final submissions to the Deputy Bailiff, Mrs Allen stayed with this proposal, save that she firmed up on the proposed lump sum payment of £130,000, suggesting that it should be payable in eight weeks time.

The Findings of the Deputy Bailiff

11. There was clear conflict in the evidence of the husband and the wife and we remind ourselves that the Deputy Bailiff had the advantage of being able to observe their demeanour in the witness box. He assessed issues of credibility in paragraphs 4 – 9 of his judgment.
12. Turning to the monies provided by the husband's father, there was documentary evidence of this money being advanced and a low rate of interest being charged, but it appeared that the loan would not be repaid unless the house was sold without purchasing another. The Deputy Bailiff concluded that the husband's parents wanted to treat all [their children] equally, and in his opinion, this suggested that any money advanced on the house was a loan, to be taken into account on the death of the parents, if not, repaid sooner. The important conclusion of the Deputy Bailiff however was that so long as the husband retained ownership of the present house, the parents would not call in the money they had advanced, although again, had they required funds to finance their old age, the position might become less clear. The Deputy Bailiff was at a disadvantage because he had this conflicting evidence between the husband and the wife and he did not have any evidence from the father. He said this in paragraph 24 of his judgment:

“The precise terms on which the money was provided are not clear and, probably, could only be determined if the father was a party to the proceedings. It is sufficient for me to say that on the evidence I have heard I am satisfied that the money was not an outright gift; it is an advance of some sort. It is not likely to be repayable during the lifetime of the husband's father and/or mother but until then he will have the use of the money, or at least he will have the use of it whilst he continues to own his present house. The husband may also be able to retain it if he purchases another property but I cannot say that with absolute certainty.”
13. As will be apparent from the Vesting Order, which we have cited, the property was originally acquired in 1994 by the husband and his then partner. When that relationship foundered, he bought his partner out. After marriage, he transferred an undivided quarter share of this property, into the name of the wife for nominal consideration. Again in paragraphs 25 – 27 of his judgment, the Deputy Bailiff endeavoured to assess what the significance of the transaction was, acknowledging that even if the wife was, at that time, having her interest limited to one quarter share, that would not be binding on him and he would be free to make such Order in respect of the property as he considered it appropriate. He did however go on to say that he felt that the 75:25 split was probably a fair assessment of the spouses' relative contributions at the time, albeit that since that time and up to the date of separation, the wife had made at least an equal contribution, if not more.
14. The Deputy Bailiff then dealt with the insurance claim, acknowledging that until such time as the remedial works are carried out, the agreed value of £372,500 for the matrimonial home would not be attained on sale. The Deputy Bailiff recorded that the parties agreed that each of them needed a two-bedroomed property so that they could share the care of the child. This is not wholly accepted by Mrs Allen. There was a further difficulty for the Deputy Bailiff in that the wife failed to produce any firm particulars of the kind of property she needed and its likely cost. She explained why she had chosen not to look at what was on offer. Mrs Allen acknowledged this gap in her closing remarks and answered it with the suggestion that the Judge take judicial notice of what was on the market and its cost. Quite rightly, the Deputy Bailiff declined to be drawn into such an exercise.
15. In paragraphs 39 – 44 of his judgment, the Deputy Bailiff dealt succinctly with the law and the overriding principle established in cases such as *White v White* of equality tempered by fairness. Like the Deputy Bailiff, we find no assistance to be gleaned from *Burton v Burton* [1986] 2 FLR 419 or *C v C* [2005-06 GLR Note 17] Royal Court. The Deputy Bailiff admitted that no authority had been quoted as to how he was to deal with money provided by the father which he dealt with in the paragraph we have already quoted, of his judgment.

16. The Deputy Bailiff's conclusions were, putting the matter simply, that the husband should keep [the former matrimonial home]. This had been a marriage that had lasted for less than six years and his overall contribution was accepted as having been substantially greater than the wife's. He then went on to deal with the really difficult issue in this case, as to what money should be paid by the husband to the wife. He concluded that £95,000 was the appropriate figure, being a sum which the husband's bank was prepared to offer him by way of mortgage, albeit it that it was proposing that £20,000 of that be allocated to his presently unsecured business overdraft, resulting in his original offer to the wife having been only £75,000.

The Law relating to Appeals in this type of Case

17. It is now necessary to consider in detail, Mrs Allen's attack on this judgment and before doing so, it is right that we should record what we see as the duty of an Appellate Court in a case such as this, involving as it does an invitation to interfere with the exercise of the Deputy Bailiff's discretion.
18. This in our view is a case where the Court should be taking careful note of the oft quoted words of Lord Fraser in G v G 1985 2 All ER 225 at page 228:

"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".

19. We acknowledge that this case was one relating to custody but in our view the principle applies to ancillary relief applications as well as other cases involving the exercise of judicial discretion. Lord Fraser goes on to quote from Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER at page 345:

"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."

20. Again on page 229 Lord Fraser restates the principle:

"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 Appellant's Case

21. Now we have to look individually to Mrs Allen's complaints against the judgment of the Deputy Bailiff, as recorded in her case and amplified in argument before us.
22. Mrs Allen started her written case by some paragraphs headed "*background*". She endeavours to resurrect the alleged domestic violence incident, for reasons that are not clear. She then goes on to give evidence of what has happened in connection with the wife's purchase of a property from the States [.....]. It is now accepted that none of this could

have been before the Deputy Bailiff. Mr Merrien quite properly raised the point of obtaining leave to introduce fresh evidence. Our view was that rather than get involved with legal argument on the issue, we would take a note of what had happened since the hearing before the Deputy Bailiff on the basis that it was not going to be prejudicial to the husband to do so. The wife duly purchased a house for £250,000, but being an ex States house it was not in perfect order. It needs further renovation and she has not got the funds to carry this out. It cannot be right for the appellate court to accept that her experience in rehousing herself in one particular property since the hearing should be admitted as evidence in support of the contention that the decision of the Court below was wrong

23. Mrs Allen then dealt with the law. There is no issue about obtaining leave to appeal; this is an appeal as of right as we have said.
24. Mrs Allen makes a number of discrete points in her written case, where she says the Deputy Bailiff got his judgment wrong. Inevitably these overlap, but it is perhaps helpful to take them in turn.
 1. **The Deputy Bailiff was in error in limiting the capital sum to be paid to the wife to the amount of funds which the husband stated he was able to borrow**
 2. **The Deputy Bailiff erred in not taking into sufficient account the availability of the matrimonial home as a realisable asset available for the provision of a greater capital sum to the wife to provide for her needs**
25. These two points cover the same complaint although expressed in different ways. The complaint is that £95,000 was not sufficient for the wife's housing needs to be met and accordingly it was wrong to reach a conclusion that [the property] could be retained by the husband for his use rather than being forcibly sold as a result of the capital sum to be paid to the wife exceeding what the husband could borrow. Mrs Allen emphasised the heavy burden that would fall on the wife in paying a mortgage and working full time. However it was clear from the evidence that the wife had received advice as to the maximum mortgage sum she could service and that was the sum contemplated by the Deputy Bailiff in his order.
26. It is true that the Deputy Bailiff referred to the home being available for the Husband's business use but there were other factors which could properly persuade him to endorse a position where the husband could retain [the property]. There was the subsidence problem militating against early sale at full price, the long connection the husband had had with the property and the greater contribution he had made. Further the Deputy Bailiff felt, in our view with justification, that so long as the husband remained in ownership his parents would not call in the advance made to him. The Deputy Bailiff also referred to the length of the marriage – 6 years.
 3. **The Deputy Bailiff erred in that he gave insufficient weight to the present needs of the wife as primary carer of the minor child**
27. The Deputy Bailiff had the Safeguarder's report and we have noted how the case proceeded on the premise that [the child] would be regularly staying with both parents who should own their own accommodation with 2 bedrooms. One of the problems facing the Deputy Bailiff was that the wife had not looked at properties that were available to see if they met with her needs – all that the judge had was print outs from the internet . We see no reason to expect the husband to comment on these when he too had not seen them.
 4. **The Deputy Bailiff erred in giving too great a weight to the wife's pension fund when considering her entitlement or her needs at the present time**
28. Mrs Allen suggested that the norm was for the CETV to be discounted by as much as 50% but this had not been argued below and no authority was produced in support. It is true that in

Guernsey there is no power in matrimonial cases to make orders relating to pension entitlements and we accept that a future pension entitlement cannot be used to provide security for loans and the like. There is no indication that the Deputy Bailiff misdirected himself in this regard.

5. The Deputy Bailiff erred in accepting the husband's evidence relating to the 'loans' without requiring further evidence thereof from the husband who was relying on the statement

29. There are two points here. Firstly, Mrs Allen argues that the Deputy Bailiff was wrong to treat the money advanced by the father as a loan which had to be taken into account, or repaid at some later stage. He should have treated this as a gift, particularly as the husband had failed to produce the father as a witness. The second point was that these were in any event "soft" loans which were highly unlikely to be required to be repaid during the lifetime of the lender, if at all, and should therefore not have been considered as a liability in the same way as a loan from a bank or other institution.

30. The Deputy Bailiff dealt with this issue fully in paragraphs 18-24 of his judgment to which we have already referred. He reached conclusions after hearing the oral evidence of the parties and this court should be loathe to interfere with findings based on that testimony, which the Court has not received.

6. The learned Deputy Bailiff erred in giving insufficient weight to the Appellant's evidence concerning the Respondent's control over the family money

31. This point appeared to be an allegation of conduct. Mrs Allen accepted this and did not pursue it.

Conclusions of this Court

32. The Deputy Bailiff referred to the need to take account of the factors in Section 25 of The Matrimonial Causes Act 1973 and one of the most important of these is the welfare of any minor child. Mrs Allen suggests that the failure to provide for better housing for the wife, who is going to be the main carer of the child, was wrong, particularly in the circumstances that pertained over the monies advanced by the parents, which were taken account of in the calculations and the alleged over-emphasis of the wife's entitlement to a pension in due course. As always, we cannot individually say that had we been sitting we would have reached precisely the figure that the Deputy Bailiff did of £95,000. That said, in our view, he applied the principles he is required to apply by law and exercised his discretion with great care in a way that falls far short of the situation where this Court is entitled to interfere.

33. The Appeal is dismissed.