Judgment 25/2008 D v D – Court of Appeal (Civil Appeal 394) – 15July 08

Matrimonial Causes Law (Guernsey), 1939 (Part VIII) – husband's appeal from terms of vesting order and order for maintenance – circumstances in which it is appropriate to interfere with exercise of judicial discretion – facts in Martin v Martin distinguished from the present case – charge in favour of the husband to be redeemed not later than three years after the original order – payment to the husband increased from £90,000 to £130,000 – no order as to costs before the Court of Appeal

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

CIVIL DIVISION – APPEAL NO 394

Hearing date - Tuesday 14 July 2008
Judgment date – Wednesday 15 July 2008

Before: **Jonathan Philip Chadwick Sumption OBE QC, President**
Sir de Vic Carey
Nigel Peter Pleming QC

Between: **D** **(Appellant)**
v
D **(Respondent)**

Advocate F J Haskins appeared for the Appellant
Advocate A N Brown appeared for the Respondent

Cases, texts and statutes:

Rayden and Jackson 18th Edition
G v G [1985] 2 All ER. 225 HL
Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 CA
Martin v Martin [1977] 3 All ER 762 CA
Chadwick v Chadwick [1985] 1 FLR 606
Sawden v Sawden [2004] 1 FCR 776 CA
S 25 of the Matrimonial Causes Act 1973
Browne (formerly Pritchard) v Pritchard 1975 3All ER 721
White v White [2000] 2 FLR 981
Elliot v Elliot [2001] 1 FCR 477
E v E [2007-08] GLR 133

JUDGMENT

CAREY JA

This is the judgment of the Court

1. This is an Appeal brought as of right by the Husband against an Order which Lieutenant Bailiff Finch made in the Matrimonial Causes Division of the Royal Court on 15th November 2007 in the following terms:-

   1. *That the matrimonial home:*[……..]

      shall henceforth vest solely and absolutely in the Petitioner for herself and her heirs.

   2. *That the Petitioner shall consent to a First Charge over the property in favour of the Respondent in the sum of £90,000. The capital sum to carry interest at the base rate. The said sum shall be paid to the Respondent on the first of the following events:*

      (a) The Petitioner's death.

      (b) The Petitioner's re-marriage.

      (c) The Petitioner's cohabitation for a continuous period in excess of six months.

      (d) The Petitioner's voluntary sale of the property.

   3. *That the Petitioner shall retain the contents of the property.*

   4. *That the Respondent shall pay to the Petitioner maintenance at the rate of £750 per calendar month payable in advance by standing order on the first working day of each month into such bank account as shall be nominated by the Petitioner. The said maintenance is to be increased annually by any increase in the Guernsey Official Index of Retail Prices (or successor index) during the preceding year.*

   5. *That the Respondent shall pay to the Petitioner maintenance for [the* younger *child] until the said child shall attain the age of 18 years or completes full time education or training, whichever shall be the later, at the rate of £300 per calendar month payable in advance by standing order into such bank account as shall be nominated by the Petitioner on the first working day of each month. The said sum is to be increased annually by any increase in the Guernsey Official Index of Retail Prices (or successor index) during the preceding year.*

   6. *That save as aforesaid, each party shall retain all other assets currently held in their respective sole names.*

   7. *That the parties shall forthwith do all acts and things as are necessary to comply with the terms and conditions of this agreement and to give it full force and effect.*

   8. *That there be no order for costs.*

9. *That, by consent, paragraphs 1 and 2 of this Order shall be stayed, pending the hearing of the Respondent's appeal.*

2. The Order followed a one day hearing on 15th October 2007 at which both parties were represented. There was wide agreement on factual issues and the only witnesses were the Husband and the Wife. The Lieutenant Bailiff handed down a reasoned judgment on 29th October 2007.

3. *[The history of the marriage and the composition of the family were summarised]* The Husband was, at the time of the hearing, 54 and the Wife 59. *[The wife suffered from a serious medical condition]* to an extent that the Lieutenant Bailiff was persuaded that an indeterminate Maintenance Order was appropriate. He also vested the former matrimonial home in the Wife on terms that a secured sum was to be payable to the Husband on the happening of certain events but with no provision for actual payment at a fixed date in the future.

4. The relevant financial information concerning the parties' capital assets can be briefly stated (I omit reference to motor vehicles) :-

   - Former matrimonial home jointly owned £420,000 agreed value.
   - Husband pensions – capital value £130,745
   - Wife pension - capital value £7,289
   - Wife National Savings - £2,343
   - Wife's debts (non family) - £5,340
   - Wife's debts (family) - £4,280
   - Husband's debts (non family) - £5,840
   - Husband's debts (family) - £1,100

   The Husband earned approximately £47,000 p.a. gross and the Wife £500 p.a. *[…….]*

5. The Appellant's case runs to some 28 pages and the frequent references to "*undue weight"* being given to certain matters by the Lieutenant Bailiff gives the impression that the complaint relates to the way in which the Lieutenant Bailiff exercised his discretion rather than that what he has decided is wrong. We will revert to this when considering what the Respondent is saying in her case and to the law that this Court must apply.

6. The Appellant is asking for the Order of the Matrimonial Causes Division to be varied in the terms under which the house is vested in the Wife and also that the maintenance to be paid to the Appellant by the Respondent be reduced and for the Order to cease on the Appellant reaching 65 or his earlier retirement. So far as the vesting of the house is concerned, the Appellant wants either £100,000 now or the amount secured in his favour to be increased from £90,000 to £145,000 and for a cut off date to be included, namely when [*the younger child]* reaches 21 or ceases to be in full time secondary education or training.

7. Mr Brown for the Respondent supports the decision of the Lieutenant Bailiff and calls in aid the authorities that have evolved over the years in England to the effect that the Court of Appeal should be reluctant to interfere with the exercise of a Judge's discretion. He submits that the decision is properly reasoned and is supported on the evidence. He quotes from Rayden and Jackson at paragraph 51.66 and the House of Lords Decision in *G v G* [1985] 2 All ER. 225. [The changes made under the CPR

have no equivalent here but for practical purposes we do not consider that they make any difference to the approach to be adopted here from the new regime in England]

8. In the first paragraph of his carefully reasoned judgment the Lieutenant Bailiff acknowledged that the case had "caused him considerable concern in seeking to produce a just determination". He returned to this theme in paragraph 15 when he described this "as not one of the easier cases". In our view, this is just the sort of case where this Court should be taking careful note of the oft quoted words of Lord Fraser in *G v G* 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".*

9. 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".*

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".*

10. There are a number of matters that the Lieutenant Bailiff has determined which we consider this Court is not entitled on the basis of the authority that we have quoted to interfere, even if we thought we would have decided matters differently, which we would not necessarily have done. They are:

    a. The decision as to maintenance for the Wife both in amount and duration. The Wife is ill and the Lieutenant Bailiff was entitled to take the view that she was of limited earning potential and will need ongoing financial support from the Husband. *[paragraph 16 of his judgment]* . The amount is claimed to be high when added to the maintenance for *[the younger child]*, but it is not so high as to fall outside the range of the reasonable and fair choice that the Lieutenant Bailiff could have made. In any event maintenance can be revisited by the Royal Court in the event of a change of circumstances

b. The decision to prefer the case made on behalf of the Wife against immediate sale of *[the Matrimonial Home]* and downsizing to that put forward on behalf of the Husband. Linked into this is the view that the Wife should have the Matrimonial Home vested in her alone. Indeed there was no suggestion from either side that there should be a revesting as tenants in common.

c. The acceptance of the problems over *[the children's]* relationship with their father, the impracticalities of their living with him and that to the extent that their interests were to be taken into account, these lay with being able to be accommodated by the Wife.

d. The complaints about the weight given to the Husband's contribution to the financing of the matrimonial home from his inheritances and the inheritance prospects of the Wife,

11. The Lieutenant Bailiff was persuaded to go down the road of a *Martin* Order when deciding on how to deal with the issue of the former matrimonial home. This was on the invitation of Mr Brown who does not appear to have formally cited or dealt with the facts of *Martin v Martin* [1977] 3 All ER 762 CA. Instead he drew the Lieutenant Bailiff's attention to *Chadwick v Chadwick* [1985] 1 FLR 606 a case which looks similar to the facts of this one but is decided on a totally different point and is therefore seen by the Lieutenant Bailiff as "*not offering much assistance*".

12. It is useful to start a consideration of this topic by looking at Rayden and Jackson 18th Edition para 16.151

> *"The Martin order is derived from the form of the order made by Purchas J in Martin v Martin and approved by the Court of Appeal. Purchas J decided in a 15-year marriage with no children, that the court was entitled to take into account the fact that the husband was cohabiting with a woman and had a secure home in council property. The husband earned sufficient to maintain his present domestic situation. The wife needed a roof over her head. Had the marriage not broken down, it was probable that the parties would have remained in the former matrimonial home and not realised the asset for another 20 years. The sale of the house would represent a bonus provided that the wife could find another partner able to offer her secure accommodation as the husband had been able to do. It would not be doing justice between the parties to force a sale which would mean the husband received a bonus unimpaired, but the wife was impaired by the need to find a roof. The order was that the house should be held jointly by the parties on trust for the wife's sole use during her lifetime or until her remarriage, or voluntary removal from the property whichever first occurred, provided that the wife paid the mortgage instalments; thereafter the house would be held on trust for sale and the net proceeds divided equally between the parties; the husband's interest was further protected by a charge upon the property up to half its value. On appeal by the husband, this form of order was upheld. The Court of Appeal held there was no rule of thumb that the sale of the matrimonial home would only be postponed if it was needed as a home for young children. The difference between a Mesher order and a Martin order is that with a Martin order the occupying spouse has, absent cohabitation or remarriage, the opportunity to remain in the property for her lifetime, whereas a Mesher provides for the sale to be deferred until the youngest child has reached a certain age or completed education. In Sawden v Sawden the Court of Appeal varied a Martin order by inserting a trigger*

> *for sale of the former matrimonial home in the event that both of the adult children (aged 28 and 21) left the home and settled independently in homes of their own".*

The Editors make no reference to other cases where the learning in *Martin* has been followed by the Court of Appeal save for the case of *Sawden v Sawden* [2004 1 FCR 776 CA] which we will consider shortly. The important point and one, which distinguishes the facts of *Martin* from this case is that the Husband there had no immediate housing need. He was further housed in secure council accommodation with his new partner and was said to have no immediate need for a capital sum to support his way of life. Here we have a husband exposed to the vicissitudes and the expense of the private rental market after a long marriage during which he and his former wife enjoyed the security of owning their own home. The Lieutenant Bailiff fully accepted the desirability and indeed the justice of the Husband getting back on the housing ladder. The flavour of the Court's approach in *Martin* can be gleaned from the following extract, from the judgment of Stamp LJ, (both he and Ormrod LJ fully endorsing the approach of the judge below, Purchas J)

> *"the husband is living with the party cited in a three bedroom council house. He intends to marry her, and he saw no difficulty in obtaining a transfer of the tenancy of this house to him and the party cited, who has two children of a former marriage aged 12 and 9, and recently gave birth to a child of whom the former husband is the father. So, and this is one of the important features of this case, the father has a secure roof over his head. The parties' solicitors accepted that the equity in the house belonged to them in equity in equal shares. The registrar found, if such a finding was necessary, that the wife's share of the equity of a sale would not enable her to purchase alternative accommodation.*
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> *It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head. That is perhaps the most important circumstance to be taken into account in applying s 25 of the Matrimonial Causes Act 1973 when the only available asset is the matrimonial home. It is important that each party should have a roof over his or her head whether or not there be children of the marriage.*
>
> **.....**
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> *The judge went on to consider the effect of s 25(1)(c) of the 1973 Act, pointing out that it was 'relevant to have regard to the fact that the family before the breakdown of the marriage lived in modest, comfortable circumstances in their own house on which a reasonably small mortgage was being paid off'. In this connection I would emphasise that had the marriage continued the parties would almost certainly, as the judge pointed out, have remained in the house and would not have been in a position to enjoy the equity comprised in the matrimonial home in the form of a liquid asset until they reached the age of retirement and perhaps moved into smaller or more modest accommodation. The judge added:*
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> > *'At least, therefore, it is likely that for a further 16 or 20 years until the husband retired the inchoate asset represented by the matrimonial home would have been of no practical financial value to either party. In a sense the proceeds of the sale of the matrimonial home in the immediate or not too far distant future would represent an uncovenanted bonus arising out of the breakdown of the marriage*

> *from which both parties might benefit, provided that the wife is fortunate enough to find a partner who will provide her with secure and suitable accommodation as the husband has been able to do. Such a course would clearly be just as between the parties and in accordance with the provisions of s 25 of the Matrimonial Causes Act 1973. However, such a sale giving one the bonus unimpaired but the other the bonus impaired by its immediate and necessary application to secure a roof would not, in my judgment, be doing justice between the parties. Bearing these matters in mind I am unable to say, nor indeed is there any evidence to this effect, that by deferring the realisation of the only asset, namely the matrimonial home, either party and in particular the husband will suffer any damage in relation to the financial position in which they would have been had the marriage continued and each had discharged his or her financial obligations and responsibilities to the other'*
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> .....
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> *The learned judge concluded that it would be wrong to order an immediate sale of the property. I can only say that I agree so much with the way that the matter was put by the judge that I do not think it could be put better, and I entertain no doubt that he came to the right conclusion."*

And from the judgment of Ormrod LJ

> *"The case was rightly approached by Purchas J. He adopted the Browne (formerly Pritchard) v Pritchard approach. It is clearly a case where needs far outweigh resources in importance. It is a case where both parties need a secure home at a price which each can afford, and that they have under Purchas J's order. It seems to me that is exactly right".*

13. The one further case referred to in paragraph 16.151 is *Sawden v Sawden* qualified by the remark in the footnote that it is a case which would seem to be fact specific – to the extent of the variation ordered it is fact specific but it illustrates an endorsement in the recent past of the *Martin* principle of, where appropriate, providing for a husband to be kept out of his share of the former matrimonial home indefinitely. The case is also useful for showing the flexibility that the English Court of Appeal will allow itself when it discerns an injustice. See paragraphs 9 and 10 of Ward L J's judgment:

> *"I have to remind myself that this is technically a second appeal. Consequently, to get permission to appeal Mr Sawden has to establish that there is some important point of practice or principle at stake, or some other compelling reason as to why the Court of Appeal should grant a third hearing when two judges have carefully looked at it and given judgments which are commendable.*
>
> *I fancy that Mr Sawden would struggle to point to any point of practice or principle, especially relating to the two matters at issue at the moment. But in an exercise which involves being fair as between husband and wife, and doing justice between them, if there appears to be the possibility of an unfairness or injustice then, for my part, I would strain the rules and find that correcting that injustice is a compelling reason why the Court of Appeal should interfere".*

This judgment also recognises that a restrictive approach is appropriate when it comes to deferring realisation of a charge as was shown by the fact specific addition

of another 'trigger' that the charge be realised if the adult children, who were living with the wife, left home.

14. These decisions confirm however that it is within the options open to a judge to make an order without defining a moment in time when the husband will have the certainty of knowing that he will come into his share of what was a joint asset. It might therefore be difficult to interfere with the exercise of the Lieutenant Bailiff's discretion as a matter of principle. However, it is not disputed that the facts of ***Martin*** were not drawn to the Lieutenant Bailiff's attention. No relevant extract from Rayden or copy of the report of the judgment was included, even for the purpose of this Appeal. That omission in itself opens up the issue of whether the Lieutenant Bailiff fell into error.

15. There are two further points which in our judgment were not fully explored before the Lieutenant Bailiff. The first was the proper approach to the yardstick of equality identified by the House of Lords in ***White v White [2000] 2 FLR 981*** in small money cases. Mrs Haskins has included in her skeleton the authority of ***Elliot v Elliot [2001] 1 FCR 477***, which again does not seem to have been referred to below. This decision involved a second appeal against the order of a District Judge who had directed that the matrimonial home be sold but that the proceeds be used to buy a new home for the wife and minor children and made subject to a charge in favour of the husband for 45% of the equity with the usual triggers but to be redeemed in any event on the youngest child becoming 18 or completing tertiary education, whichever was the later. On the first appeal the circuit judge had deleted this latter provision. The Court of Appeal restored the District Judge's order. Thorpe LJ said this:

> *"So I ask myself, how did the judge rationalise the deletion of a provision, the likely consequence of which would be to leave the wife with the enjoyment of almost all the capital built up during the marriage for a very long time and possibly for years beyond the husband's decease? All he said in his judgment was:*
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> > *"To put the wife in a house which she will have to sell or remortgage cannot be right. I see a strong argument for deleting that clause ..... The house is not capital but is somewhere for the wife to live".*
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> *It seems to me that is altogether too partisan a perspective. It ignores the husband's reasonable entitlement to deploy capital to house himself at the end of a long marriage during which he has worked hard, mainly in the police service, and has contributed his earnings to the building of family capital".*

16. The second point is that the judgment of the Lieutenant Bailiff in the case before us was handed down some ten days before the decision of this Court differently constituted in a case which is now reported as ***E v E [2007-08] GLR 133***. This case involved the appropriate order to be made when small children had been entrusted to the care of the wife and the only asset was the jointly owned former matrimonial home. The Royal Court had made an order vesting the property in the wife subject to a charge in favour of the husband repayable on the happening of certain events, with a long stop redemption date of when the youngest child reached full age. That Court felt that the way in which the Royal court had disposed of the matter was not fair to the absent husband.

17. It has not been suggested by Mrs Haskins that the way in which this Court dealt with the problem in ***E v E*** is the appropriate course here but the whole thrust of that

Court's judgment lends support to the view that justice must be done to both parties in such situations, by coming back to what the House of Lords emphasised in ***White***, a principle followed and refined in the later big money decisions of ***Miller, McFarlane*** and ***Charman***, which have been cited to us but the details of which are not of primary concern on this occasion.

18. Fully conscious of the caution that is correctly urged on appellate courts in these situations, we have concluded that faced with a difficult case, where counsel were trying to present the issues with a degree of economy, the Lieutenant Bailiff did fall into error and made a *Martin* order in circumstances that were not fair to the Husband. Further we consider that the decision is flawed to the extent that notwithstanding that the Husband is to have to wait for his share the amount is considerably less than the wife or her estate will receive in respect of her share. That said we do not find the question of what adjustment is appropriate to the Lieutenant Bailiff's order an easy one, particularly having regard to the Wife's serious illness – we are led back to the risk of replacing one imperfect order with another.

19. So far as the date of redemption of the charge in favour of the Husband is concerned, we have concluded that this should be effected not later than the third anniversary of the order of 15th November 2007. By that time the interests and needs of *[the children]* will have changed – *[the younger]* may or may not be in further education but will then be almost 21 years of age. *[The older]* will either be on *[its]* own or if still with the mother should be earning and able to help with providing funds to meet the mother's continuing housing need. Downsizing, which we accept was properly rejected by the Lieutenant Bailiff, as an immediate solution, should by then be a real possibility if the younger child is the only one still around.

20. In discussion with Mr Brown one of us raised the possibility of whether if we felt that a definite redemption date should be provided in the order there should be inserted a provision giving leave to apply in the event that on the redemption date the Wife was seriously ill and pleaded for further respite. Having given the matter further thought in the light of Mrs Haskins's response to the suggestion we are not persuaded that it would be appropriate to so provide. Further argument and uncertainty must be avoided and it is difficult to see how the Court, if leave to apply was given, would not be drawn into a full blown rehearing of the matter.

21. There is the further issue of the amount of the deferred charge. The wife was suggesting £80,000. The Lieutenant Bailiff chose £90,000. The husband was seeking a payment of £100,000 following on from an immediate sale of the former matrimonial home as part of a downsizing exercise. We do not consider that with a house worth £420,000 a share of a quarter of the net proceeds of sale before debts are met unreasonable. The Husband now asks that if there is a deferred sale that figure be increased. Mrs Haskins suggests £145,000, without any definition of how long the Husband is going to have to wait. The reasoning proffered is that the nearer the Husband gets to his 65th birthday the lower the amount he can realistically expect to be able to borrow and repay before such event. Hence his need to have the capital sum quite dramatically increased. To be fair Mrs Haskins did not produce any figures in support of this contention. We accept that despite the direction from the Court of Appeal that discounting in the way adopted by the Royal Court in ***E v E*** and previous decisions was to stop, adjustments whether expressed by way of interest payments or liquidated amounts to take account of deferral of payments are still appropriate on occasion. Therefore if there is to be a deferral here the Husband should received an enhanced sum. Having concluded that £100,000 is a reasonable starting figure we consider that in the event of three years deferral that figure should be increased to

£130,000. The charge should therefore be in that amount interest free, to be paid to the Husband on or before 15th November 2010.

22. Mrs Haskins in her final submissions reverted to the issue of maintenance and said that if the Husband was able to buy a home, the mortgage payments would be more than his current rent and that would have affected his ability to pay the currently ordered level of maintenance. We can see the force of that argument but having concluded that the level of maintenance ordered was within the reasonable ambit of the Lieutenant Bailiff's discretion and that the issue can be revisited in the event of a change of circumstances it would not be appropriate to make any further adjustment in favour of the Husband.

23. Counsel are asked to liaise with the Greffier concerning the preparation of the appropriate Act of Court.

