

Judgment 27/2004

**C v. C – Royal Court (Divorce file 6248)
– 16 June, 2004**

Matrimonial cause – variation of maintenance – application for costs.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Before Rosalyn Le Couteur Brelsford, Lieutenant-Bailiff

On the 16th day of June, 2004.

Between

C

Petitioner

and

C

Respondent

In the matter of the applications for costs by both the Petitioner and Respondent dated 20th May, 2004 and 4th June, 2004 respectively and the Petitioner's application dated 4th June, 2004, to vary the Order of 17th March, 2004 in respect of maintenance for the elder child of the marriage;

WHEREAS on the 7th June, 2004, THE COURT having heard Advocates C. M. Fooks and P. T. R. Ferbrache for the Petitioner and Respondent respectively and the parties in person RESERVED JUDGMENT;

THE COURT THIS DAY issued Judgment in the terms attached hereto and MADE AN ORDER:-

1. THAT the Petitioner be GRANTED one-half of her recoverable costs from the date of her affidavit namely the 17th February, 2004;
2. THAT the Respondent's claim for costs is DISMISSED;
3. THAT the sum of £6,272.00, being 28 months maintenance from May 2004 until the elder child finishes its training course in September 2006, less £224.00 for the month of May 2004, if this amount has now been paid, be paid into an account in the name of Ozannes and Randell and Loveridge with a standing order payable to

the child each month for £224.00 on the understanding that if the child ceases full time education before that date any remaining monies would be released to the Respondent to whom interest should also accrue.

AND THE COURT further ORDERED that each party shall bear their own costs in respect of this application.

C. S. WEETMAN
Her Majesty's Deputy Greffier

undertaking given by the Husband in Court that in respect of another joint account held with the cohabitee (not at that stage frozen) in which the net proceeds of his house had been placed he would give an undertaking that would remain in force for a 15 day period that he would leave at least £10,270.60 therein. This period has now been extended with the agreement of the Husband and the cohabitee to 24th June, 2004. The said sum is made up of (a) £3,002.60 being the amount of costs sought by the Wife arising out the 17th March judgment, (b) £6,273.00 for two years maintenance for the child and (c) £1,000 for the cost of further proceedings.

Wife's application re. Costs of the hearing of 4th March, 2004

3. In his letter to Advocate Fooks of the 7th July, 2003, Advocate Ferbrache stated: *"It is the husband's wish that matters are dealt with amicably and, if at all possible, without recourse to the Royal Court"*. Advocate Fooks in her letter of the 29th July, 2003, replied: *"My client shares your client's wish to resolve matters amicably and without recourse to the Court"*.
4. It is a great pity, as I stated in my original judgment, that the parties in fact could not have agreed such a relatively simple matter without recourse to Court which would have saved them time, legal fees and the unfortunate exacerbation of bad feeling and mistrust between them which itself resulted in the recent proceedings before the Deputy Bailiff.
5. With regard to costs it is incumbent on both parties to negotiate if possible and at least to make an attempt to settle the case. In reaching a decision in this matter of costs I have been guided by the words of Butler-Sloss LJ in Gojkovic v. Gojkovic (No. 2) [1991] 2 FLR 233 CA as paraphrased in Rayden 17th Edition at paragraph 23.33:

“Costs are in the discretion of the Court. In the Family Division, as opposed to other Divisions of the High Court, costs do not follow the event. It has, however, been said that there remains the need for some starting point, and that starting point should be that costs *prima facie* follow the event, but that the proposition may be displaced much more easily than would be the case in other Divisions of the High Court. The court, accordingly, has a very wide discretion over the award of costs.

In determining who should pay the costs of an application for ancillary relief, the behaviour of the parties will be an important factor in the exercise of the court's discretion. Culpability in the conduct of the litigation should lead to a party being penalised in costs, for example if he or she is guilty of material non-disclosure of documents, or delay, or excessive zeal in seeking disclosure. A refusal to negotiate or to move from a particular stance may be reflected in costs, as may a refusal to make an offer or counter offer.”

6. On the 6th November, 2003, the Husband filed an application seeking a variation of some of the terms of the Judicial Separation, namely that (a) the maintenance to the child should either

be revoked or varied, (b) the maintenance for the younger child should be revoked and (c) the provision for the parties to pay one-half of any school fees, school trips and other educational expenses should also be revoked. A short affidavit was filed by the Husband who by that time was representing himself. Unfortunately no affidavit was filed by the Wife until the 17th February, 2004, in spite of her undertaking so to do. While I appreciate that during this period both sides were seeking further and better particulars, this is no reason for the Wife not to have filed her affidavit earlier which itself might have resulted in an agreed settlement.

7. The Wife's affidavit once filed proved to contain some incorrect information re. the Wife's bonuses, which unfortunately helped to increase the distrust between the parties. There would then seem to have been a flurry of activity, the Husband asking for further information by letter of the 19th February and Advocate Fooks making an offer of settlement in her letter of the 3rd March the day before the hearing which offer was in fact similar to the Order eventually made.
8. Advocate Fooks now argues that not only did the Order reflect the Wife's final offer but indeed exceeded that made by the Wife in without prejudice correspondence dated the 5th December, 2003. She also submitted that although the Wife did not file her affidavit until the 17th February, the Wife's figures and supporting documents were sent to the Husband on the 22nd of January.
9. Advocate Ferbrache, on behalf of the Husband, argued that this was not a case where indemnity costs should be considered in that the Husband had not abused the Court procedures, acted frivolously or vexatiously or otherwise unreasonably, and that the Calderbank principle should influence but not govern the court's decision. The Husband had supplied his affidavit a week before the first Court hearing on the 18th November, 2003, and had then had to wait a further 3 months before receiving the Wife's. He was, therefore, entitled to receive a sworn affidavit before considering his position. Even those details of the Wife's bank statements and receipts which the Husband had received earlier had been largely blocked out. Finally, at the hearing itself, the information contained in the Wife's affidavit had to be changed. Ancillary relief litigation was not adversarial as both parties were subject to full and frank disclosure.
10. I do not believe that the Husband was unreasonable in refusing to accept the early offers as he had not yet received any sworn statement from the Wife at the time and in any event the affidavit had to be changed slightly in Court. The Court is usually loath to apportion blame when family proceedings arise out of the breakdown of a marriage which may be seen as a

misfortune falling on both parties. The fact that the Court has to assist the parties to readjust their finances should not of itself imply blame on the part of either party.

11. It could well have been that if the Wife had produced her affidavit earlier some agreement could have been reached and it is a pity that perhaps not enough significance was given to Advocate Ferbrache's words in his letter of the 23rd October, 2003, namely "*if full and frank disclosure concerning the contribution that your client has to make and finances generally is given it might be that the husband would be convinced that his application would not succeed.*". Be that as it may I accept Advocate Fooks' submission that in view of the fact that the Order reflected the open offer made by the Wife prior to the hearing and indeed exceeded what had been offered by the Wife previously in without prejudice correspondence that she should be awarded some costs. I therefore award the Wife one-half of her recoverable costs from the date of her affidavit, namely 17th February, 2004. The Husband's claim for costs is dismissed

Application for variation of the Order of 17th March, 2004

12. Advocate Fooks submitted that the need for this application had arisen because of the way the Husband had decided to sell up in Guernsey and leave the Island without informing the Wife or their children, and that although our law did not specifically allow for secured provisions, the broad scope of Article 43 would cover any Order regarding secured provisions which the Court might wish to make.
13. Advocate Ferbrache argued that the Court did not have the power under Guernsey law to make such an Order or in the alternative that if the Court could make such an Order it was inappropriate in that the Wife had sufficient security under the CIS Life Insurance Policy the proceeds of which were due to shared between Husband and Wife on the 1st March, 2007, pursuant to paragraph 11 of the Judicial Separation dated 29th May, 2001.
14. Advocate Ferbrache drew my attention to two English cases, McKay (formerly Chapman) v. Chapman (1978) 2 All ER 548 and Cornick v. Cornick (2001) 2 FLR. In McKay v. Chapman in similar circumstances (although in this case it was the wife who had chosen to emigrate) it was held per Lionel Swift Q.C. that there was no evidence that the husband had failed to comply with the existing periodical payments or would fail to comply with an increased order in the future or that the husband was so unreliable that a lump sum was so desirable to secure the children's future and therefore the wife's application for the children's maintenance then paid to be capitalised would be refused. In Cornick v. Cornick which substituted a lump sum for a periodical payments order granted to a wife it was held per Charles J:

“The overall purpose of the court was to achieve a fair result by applying s31(7) of the Matrimonial Causes Act 1973 which contained a discretion, and which required the court exercising that discretion to have regard to all the circumstances.”.

15. The unfortunate breakdown of communication between the Husband and Wife exacerbated by the previous Court proceedings was only worsened by the Husband’s decision not to inform his Wife or at least his daughters of his apparently sudden decision to leave Guernsey, and if he had informed the Wife the recent injunction hearings might not have been necessary. As it is while one can perhaps understand why because of the acrimony involved the Husband did not tell the Wife of his plans, this only gave her reasonable doubt with regard to his intentions. The Husband at the Court hearing of the 4th March, 2004, when questioned about his future plans [...] was adamant that he was going to return to work full-time [...]. I consider it quite reasonable, therefore, that when the Wife heard that the Husband’s house had been sold without the details appearing in the usual Press insertion and that he was leaving the Island permanently and without informing her or their daughters that she felt, to safeguard the elder child’s position, that she should apply for an injunction and I do not criticise her for that. However, I accept that at the recent hearing no evidence was produced by the Wife of any conspiracy to block the Press publication and the fact that the house was advertised in the Press and the Husband had sent out invitations to his “leaving party” to common friends of himself and his wife might lead one to believe that not only did he know that the Wife would be aware of his departure but that he considered this was a less acrimonious if perhaps more hurtful way of letting her know.
16. The Wife did confirm also that the maintenance had been paid regularly since the Order of the 17th March, 2004, and I accept that at the moment the Husband has every intention of continuing to pay it. I am also of the opinion that in all the circumstances it would be wrong to substitute the maintenance for a lump sum in that this maintenance is specifically to support the elder child only while she remains in full-time education or training which could in theory cease before September, 2006. I do feel, however, that it is in the elder child’s interest that the maintenance should be secured.
17. At the hearing on the 4th March, 2004, the Husband was adamant that he intended to return to work full-time [...]. In his evidence on 7th June, 2004, he stated that it was not until he received the judgment of the 17th March, 2004, that he decided to sell up and go and live abroad with his cohabitee. This was therefore obviously a hasty decision with the house appearing in the Guernsey Press for sale in March 2004, being sold in April 2004, and with a leaving party in May 2004. The Husband therefore has obviously had no time to arrange his future and in evidence he confirmed to me that he had no employment in view [...]. He also

confirmed that he had not yet decided whether to buy a house [*overseas*] or in Guernsey. For the time being therefore he will be living off his capital. Also, I am aware, as confirmed by Counsel, that [*the country in which he intends to live*] is not a country named in the Maintenance Orders (Facilities) (Enforcement) (Reciprocating Countries) (Guernsey) Ordinance 1959 and therefore it could prove very difficult to enforce the Order if necessary.

18. The Husband has suggested that the Wife would have security under the CIS Life Insurance. I do not think this is relevant or adequate. Maintenance is payable to the elder child and needed now while it is in full time education not in 2007. The Husband informed me, when asked for the reason why he opposed the Wife's application, that it made him feel he was not to be trusted. At no time did he suggest that he could not afford for the suggested sum to be secured.

19. I would like to stress that I fully accept that the Husband intends to continue to pay the maintenance but for the above reasons I feel that the elder child's maintenance should be secured in that circumstances might well change. I am therefore going to make an Order that the sum of £6,272.00 being 28 months maintenance until the child finishes her training course in September, 2006, less May, 2004, if now paid, be paid into an account in the name of Ozannes and Randell and Loveridge with a standing order payable to the child each month for £224, on the understanding of course that if the child ceases full-time education before that date any remaining monies would be released to the Husband to whom interest should also accrue. I hope Counsel can liaise and agree how best this can be done.

Cost of the proceedings of the 7th June

20. These latest proceedings, as previous ones, have been overshadowed by the obvious mistrust and suspicion felt by the parties towards each other. Issues in family proceedings are seldom as clear-cut as non-family proceedings and in this matter neither party has "won" in the conventional sense. The Husband's apparent secrecy about his departure gave the Wife good reason to apply for an injunction. Nothing however was proved in Court to justify the Wife's fears that the Husband was intending at this time to cease the maintenance payments although for the other reasons outlined above I feel they should be secured.

21. In the circumstances I order that each party bear their own costs of this present application.