

Judgment 29/2008

F v F – Royal Court (Divorce File 6690) – 8 August 2008

Matrimonial Causes (Guernsey) Law, 1939 – application for ancillary relief – powers of the Court to order vesting or division of real and personal property – assets insufficient to provide for the needs of the two homes – entitlement of each party to a fair share of the available property – relevant factors

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 8th day of August 2008 before Richard John Collas, Deputy Bailiff, sitting alone.

Between

F (The Petitioner)

v

F (The Respondent)

IN THE MATTER of the **FINAL ORDER FOR DIVORCE** made on the 23rd January 2006

IN THE MATTER OF THE APPLICATION for ANCILLIARY RELIEF pursuant to Part VIII of the Matrimonial Causes (Guernsey) Law 1939 (as amended)

THE COURT having heard the parties and their counsel Adv P A Allen for the Petitioner and Adv C M Fooks for the Respondent made the following Orders:-

1. **THAT** the former matrimonial home comprising [.....] shall vest solely in the Respondent for himself and his heirs;
2. **THAT** on the 20th September 2008 in consideration for the above the Respondent shall pay to the Petitioner the sum of £89,016.00 (Eighty Nine thousand and sixteen pounds)
3. **THAT** the Respondent shall assume sole liability for the repayment to the Royal Bank of Scotland of all monies now or at any time owing to the Royal Bank of Scotland by virtue of a bond for £86,500 in favour of the Royal Bank of Scotland to which the parties consented jointly [.....] and to use his best endeavours to procure the removal of the Petitioner's

name from the registry and as Guarantor of the said bond and, should the same be required by the Bank forthwith to consent to a new bond in his sole name and at his expense to repay all liability under the said bond.

4. **THAT** the present contents of the said former matrimonial home shall become the sole and absolute property of the Respondent.
5. **THAT** the Respondent and the Petitioner shall each retain as his or her sole and absolute property the assets standing in the bank accounts in their sole names at Barclays and HSBC respectively.
6. **THAT** the account at Bristol and West [.....] in the joint names of the Petitioner and Respondent shall be closed forthwith and the proceeds divided equally between the Petitioner and the Respondent.
7. **THAT** the Petitioner shall from her share of the Bristol & West account aforesaid pay to the Respondent the sum of £2,000.00 in respect of his compensation claim.
8. **THAT** the Petitioner and Respondent shall each retain their respective motor vehicles and personal possessions as their sole and absolute property.
9. **THAT** the Petitioner and Respondent shall retain [their respective occupational pensions].
10. **THAT** the Respondent shall retain his endowment policies with Norwich Union and Royal London as his sole and absolute property.
11. **THAT** the Petitioner and the Respondent shall each be solely responsible for any other debts and liabilities in their respective sole names and shall indemnify the other from any claim that may be made there under.
12. **THAT** the Petitioner and the Respondent shall forthwith execute all such deeds, documents and other acts as may be reasonably necessary for the purpose of implementing the above terms.
13. **THAT** the Petitioner and Respondent will each bear their own costs and fees, the Petitioner will bear the costs of registering the associated Vesting Order including the document duty

arising from the deferred payment should she wish to register a charge and the Respondent will bear the costs of the new bond to Royal Bank of Scotland International

C A RODGER
Her Majesty's Deputy Greffier

Approved Text
11 January 2008

IN THE ROYAL COURT OF THE ISLAND OF
GUERNSEY

MATRIMONIAL DIVISION

Date of hearing: 8 & 13 August 2007

Before: Richard John Collas Esq., Deputy Bailiff

Between: F (Petitioner)
v
F (Respondent)

Judgment handed down: 20 September 2007 &
Amended 11 January 2008

Advocate for the Petitioner: P A Allen
Advocate for the Respondent: C M Fooks

Cases, texts and statutes referred to:-

- 1) Article 46 of the Matrimonial Causes (Guernsey) Law 1939
- 2) Section 25 of the Matrimonial Causes Act 1973
- 3) Miller v Miller and McFarlane v McFarlane [2006] 2 AC 618
- 4) White v White [2001] 1 AC 596
- 5) Wachtel v Wachtel [1973] Fam 72

After setting out his findings on the duration of the relationship and marriage, the respective contributions of the parties to the matrimonial home, the health of the parties and their assets, the Deputy Bailiff set out the law and his conclusions in paragraphs 72 to 107 of his Judgment:

The law

72. The Court's powers to order a vesting or division of Real and Personal Property are set out in Article 46 of the Matrimonial Causes (Guernsey) Law 1939. In deciding how to exercise its powers the Court has regard to the matters listed in section 25 of the Matrimonial Causes Act 1973 and I must regard decisions of the English courts as highly persuasive.
73. The starting point was described by Lord Nicholls of Birkenhead in Miller v Miller and McFarlane v McFarlane [2006] 2 AC 618 at page 631 H:
 - i. "(9) *The starting point is surely not controversial. In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party for the*

other, still typically the wife, is not in the nature of largesse. It is not a case of “taking away” from one party and “giving” to the other property which “belongs” to the former. The claimant is not a supplicant. Each party to a marriage is entitled to a fair share of the available property. The search is always for what are the requirements of fairness in the particular case.”

74. He continued at paragraph 11 on page 632C:

- i. “(11) This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties’ housing and financial needs, taking into account a wide range of matters such as the parties’ ages, their future earning capacity, the family’s standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.*
- ii. (12) In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties’ needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments.”*

75. This is a case where the available assets are insufficient to provide adequately for the needs of two homes. The equity available in the matrimonial home is modest; and the ages and health of each of the parties are such that they cannot raise substantial mortgages (even if the Petitioner’s partner’s earnings are taken into account). The challenge is undoubtedly to seek to stretch their modest resources as far as possible to meet their needs. In doing so I have to consider what are the requirements of fairness.

76. Each of the parties has a very different view of what is fair. The Respondent considers he should be able to keep, and to continue to live in, what he considers to be his house in which he will provide a home for his children (presumably for his lifetime). He is offering to make a payment to the Petitioner but only as much as he can afford without selling the house and without postponing his long held desire to retire at 55.

77. The Petitioner holds the view that the marriage was an equal partnership the fruits of which namely the home and the Bristol & West account should be shared equally. She argues that the extent of the partnership is evidenced by a number of matters including: the conveyance to her of a survivorship interest in the property; the transfer by her of the Bristol & West account into joint names; the money received from her father, part of which was spent on the home; and her contributions to the household expenses.

78. As Lord Nicholls held: “Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded on social and moral values.” (Para 4 of *Miller* at page 631C). I will be guided by the principles set out in *Miller*.

79. The first issue I must address is the relevance of the parties’ argument over the duration of the marriage. I bear in mind that the principal asset involved is the former matrimonial home. Lord Nicholls held at page 634C:

- i. *“The parties’ matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.”*

80. Baroness Hale considered whether there was a distinction to be drawn between “family” and other assets. She referred (at page 663G) to Lord Denning MR’s description of family assets in Wachtel v Wachtel [1973] Fam 72, 90:

- i. *“It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.”*

81. She referred to the family home as a prime example of a family asset (page 663H).

82. At page 665D she said:

- i. *“We can assume that the family assets, in the sense discussed earlier, should be divided equally.”*

83. Earlier, at page 664 H she held that :

- i. *“the court is expressly required to take into account the duration of the marriage: section 25(2)(d). If the assets are not “family assets”, or are not generated by the joint efforts of the parties, then the duration of the marriage may justify a departure from the yardstick of equality of division.”*

84. I understand her to have agreed with the view she quoted at page 664D:

- i. *“If the law is to avoid discrimination between the gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise.”*

85. In the light of those principles I conclude that the duration of this marriage is of little relevance in this case. As I have stated, it was by any measure a marriage or relationship of short duration. There is an assumption that the matrimonial home and other family assets are to be divided equally unless there are reasons to depart from equality.

86. Next I consider the significance of the parties’ respective contributions. Conduct and contributions are treated together by Baroness Hale at paragraphs 145 and 146 of *Miller*. She says they should both be approached in much the same way. She points out that section 25(2)(f) of the 1973 Act refers to contributions made to the welfare of the family, not to the parties’ accumulated wealth. She concludes at page 663A:

- i. *“Only if there is such a disparity in their respective contributions to the **welfare of the family** that it would be inequitable to disregard it should this be taken into account in determining their shares.”*

87. In the present case I find there is no evidence of disparity in the parties’ respective contributions to the welfare of the family.

Conclusion

88. [The former matrimonial home ("the property")] is without doubt a "family asset" or in the words of Lord Nicholls, "matrimonial property". Should I also treat the balance of the Bristol & West account as a family asset? It represents the compensation claim for mis-selling the endowment policies so, in my view, it and the policies should be considered together. Most, but not all, of the value of the policies accrued outside the period of the marriage. Having regard to Lord Denning's definition of family assets I believe the Petitioner should be given some credit for the amount by which the value of the policies increased during the marriage as a result of contributions made during that time.
89. That view is confirmed if I look at it in a different way. If the parties had been paying a repayment mortgage (rather than an endowment mortgage) the capital owed to their bank would have reduced during the marriage and there would be a greater equity in the property to share between the parties.
90. How much credit should I give to the Petitioner? The Respondent's expenditure analysis shows he paid £111.70 and £38.57 per month in respect of the policies. That is £1803.24 p.a. So during the five and a half year period when the Petitioner started to contribute to the household expenses until the marriage broke down, the total premiums paid were £9,917.32. I do not know how the investments have performed so I have to take a broad view of what would be a fair share for the Petitioner.
91. The policies were taken out nearly 15 years ago; the Petitioner made a financial contribution to their joint household expense for 5 ½ years or just over a third of the total time. The combined value of the policies and the account is now about £47,000. A third of that amount is £15,667 which is similar to the balance on the Bristol and West account. I therefore consider it is fair to regard the balance of that account as a matrimonial or family asset in the sense described earlier. It is also fair that, as both parties suggest, the Respondent should keep the endowment policies as his sole asset.
92. I therefore conclude that the total value of the family assets is the sum of the equity in the property (which the Petitioner in her Form A claims to be £267,072.61 and the Respondent says is £266,500) and the Bristol & West account balance of £15,950.19. In round figures I will call the total £283,000. If the house has to be sold, the total will be less after estate agent and other fees have been paid.
93. In taking into account all the circumstances of the case, are there reasons to depart from the yardstick of equality of division? Do the parties' needs, in particular their housing needs, justify a departure? I stress that it is their needs not their desires that I have to consider.
94. The Respondent may desire a four-bed-roomed house in order to maintain family stability and to provide a home for his adult children for the foreseeable future but he does not **need** four bedrooms.
95. At the end of the coming academic year the second son will also have completed his degree and, similarly, it cannot be said that the Respondent needs to house him once he starts employment. His only need will then be to house himself and his daughter during her vacations when she is not with her mother.
96. On a similar basis the Petitioner needs only one bedroom; for herself and her partner. Her son is in full time employment and she is no more obliged to house him than the Respondent is to house his two older children.

97. So, in twelve months' time the Respondent will need two bedrooms and the Petitioner will need one bedroom. If the Petitioner says she needs two bedrooms she should not complain if the Respondent has three. The point is that while his youngest child is studying, he can reasonably justify slightly larger accommodation than the Petitioner.
98. The Petitioner is in a better position to pay for her housing as her partner can help with the cost.
99. I also have to weigh in the balance their respective ages, their current state of health, the prognosis for each of them and their future income expectations. The balancing exercise is difficult and impossible to quantify. To a large extent the factors balance each other out but in my view the balance tilts in favour of the Respondent.
100. How do I view the Respondent's argument that the house belonged to him before the marriage? English case law has held that the source of an asset, even a family asset, cannot be completely ignored although it was recognised in White v White [2001] 1 AC 596 that the importance of the source of the assets diminishes over time. I cannot attach great weight to the source of the matrimonial home without undermining the principle of the yardstick of equal division. I do however take some account of the fact that, unlike the Petitioner, the Respondent had owned a property before the marriage and, more importantly, if the Respondent retires at 55 he will be less able to afford rent than the Petitioner and her partner with their combined income.
101. If the available assets were sufficient to enable both parties to own their own home fairness would dictate that the assets should be split in such a way that would enable them both to do so. However they are not sufficient.
102. It is very difficult in this case to decide what is fair but after agonising over the facts I do believe that this is one of those unusual cases where some departure from equality is justified.
103. The next difficulty is to decide how much of a departure is fair. I reject the Respondent's argument that if he keeps [the property] he can afford to pay only £40,000 or £50,000 and he must keep all the Bristol & West balance because I have decided he does not **need** such a large house.
104. The Respondent will receive a lump sum of £46,638.73 on retirement. He will have the endowment policies currently worth, in total, £31,203.21. He also has a borrowing capacity (as he admitted) as long as he is in his current job and thereafter he will have an (unquantified) earning capacity which should enable him to service borrowings after his retirement. I therefore conclude that I do not need to ensure that he has sufficient to pay the whole cost of a two or three bedroom house. However I accept that his borrowing capacity is limited so he should not have to incur large borrowings to buy such a property. If he chooses to buy something bigger or to remain [the property] at he could, as Advocate Allen suggested, take in a lodger or ask his children to provide financial support if they continue to live with him after they finish full-time education.
105. I do not consider it to be fair to treat the compensation payment received under the Petitioner's health insurance in respect of the Respondent's [treatment] as a family asset. Nor would it be fair to regard it as her property even if she had been solely responsible for paying the premium. The money has been spent so it cannot be transferred to him but it should in my view be taken into account in deciding the amount she is entitled to receive.
106. My decision is that the Respondent should be allowed to remain in [the property] for twelve months to enable his younger son to complete his degree and his daughter to complete her

‘A’ levels. Thereafter he should receive a two-thirds interest in [the property] and the Petitioner a one-third interest. The Bristol & West account should be divided equally between them forthwith and out of her one-half share the Petitioner shall pay the Respondent £2,000 in respect of the compensation payment received, and spent, by her. The decision could be expressed either in terms of a Vesting Order revesting [the property] in the above proportions. Or, as an Order vesting [the property] in the Respondent subject to an obligation to pay one third of its current value to the Petitioner in twelve months’ time. Or, if the Court has the power to do so, as an Order that the property be sold in one year from now.

107. I wish to release this decision to the parties as soon as possible so they are aware of my conclusions but I consider it would be inappropriate to finalise the terms of the Court Order until the Court of Appeal have handed down their decision in the case of E v E, 2007 – 08 GLR 133. When that is available I invite Counsel to agree the terms of the Order but I will hear further from them if required. I direct that Counsel list this matter in a Matrimonial Interlocutory Court within one month of the date of handing down the E v E judgment.

Addendum

The Court of Appeal has now handed down its judgment in E v E and the parties in this case have, as directed, prepared a draft order for my approval. They have drawn to my attention that my decision expressed in paragraph 106 above is ambiguous. I referred to the "*current value*" of [the property]. One party has understood that to mean the current market value of the property and the other party has understood the net value or equity in the property after allowing for the value of the Bonds charged against it. I confirm that I intended to refer to the latter i.e. the net value or equity in [the property]. I apologise for any inconvenience caused.