

Matrimonial Law – wife/petitioner’s application for ancillary relief – consideration of factors set out in Section 25 of the Matrimonial Causes Act 1973 as amended – detailed review of the petitioner’s complaints about conduct – the ante-nuptial agreement – level of Advocates’ fees incurred by the parties.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Before Sir de Vic Carey - Bailiff.

On the 12th day of August, 2004.

Between

E

Petitioner

and

E

Respondent

In the matter of the application by the Petitioner and the Respondent under the provisions of Parts VII and VIII of the Matrimonial Causes (Guernsey) Law, 1939 , as amended;

WHEREAS on the 26th, 27th April and 25th May, 2004, THE COURT having heard Advocates F. J. Haskins and P. T. R. Ferbrache for the Petitioner and Respondent respectively **RESERVED JUDGMENT;**

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

THAT the Respondent shall pay to the Petitioner £105,000. £25,000 to be paid by Friday 20th August, 2004, £80,000 by Thursday 26th August, 2004 subject to any further directions that the Court may make concerning issues on vacation of the premises by the Wife and items belonging to the Husband which he claims to be unaccountable. A schedule of such items to be delivered by Friday 20th August, 2004.

AND THE COURT reserved judgment as to costs.

C. S. WEETMAN
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
MATRIMONIAL CAUSES DIVISION

Between:

E

Petitioner

and

E

Respondent

JUDGMENT OF THE BAILIFF ON PETITIONER'S APPLICATION FOR
ANCILLARY RELIEF

Dates of hearing: 26th, 27th, April and 25th May, 2004

Judgment handed down: 11th August, 2004

Advocate for the Petitioner: F. J. Haskins

Advocate for the Respondent: P. T. R. Ferbrache

[After reviewing the financial resources and responsibilities of the parties, their standard of living before the breakdown of the marriage, their respective ages and the duration of the marriage, the Bailiff considered the wife's complaints about the conduct of the husband. In particular he found as follows as respects the ante-nuptial agreement.]

The pre-nuptial agreement

46. Both parties consider that the agreement that they entered into on the 5th November, 1998, should be taken account of by me but for very different reasons. So far as the Wife is concerned "the behaviour of the Husband in demanding that she sign the pre-nuptial contract was a factor that compelled the Petitioner to terminate the marriage". (I am quoting from page 8 of Mrs. Haskins' closing submissions). I do not understand what she is trying to say.
47. Rather than at this stage try and work through the actions of the Husband to see if there is a conduct point in his actions at getting the Wife to complete the pre-nuptial contract I feel it best to work through Mr. Ferbrache's case as to the weight that must be given to the contract. I will then come back to the contract as a conduct issue.
48. Mr. Ferbrache is saying that the conclusion of this agreement is a factor that this Court must take into consideration in deciding what order to make.

The facts surrounding the ante-nuptial agreement

49. This agreement was drafted by Advocate Peter Ferbrache who quite properly informed the Wife that he was the Husband's Advocate and not the Wife's. The circumstances

surrounding asking Mr. Ferbrache to prepare the document are explained in paragraphs 13-17 of the Husband's first affidavit. It is admitted by the Husband that the relationship between him and the Wife during the summer of 1998 had not been as good as he hoped it might. He had told her about the problem he had had with his first divorce and he told her that he would want a pre-nuptial settlement.

50. She on the other hand claims that she was taken by surprise at receiving the letter from Mr. Ferbrache and that she felt let down. The first difficulty is that there had been no disclosure of assets by either side before this agreement was completed. There is no evidence that the Wife had express notice of the extent of the Husband's Estate or what her entitlement would be in the event of his death. Clearly she could see that the Husband was living in a valuable property, had a good job and enjoyed a good standard of living which he was prepared to share with the Wife. In a situation where an advocate has drafted an agreement on behalf of one party and the other party has been unrepresented one might have the benefit of evidence from the advocate of the surrounding circumstances.
51. Here the advocate who drafted the agreement has appeared as Counsel for the Husband and so the Court has not had the benefit of exploring the circumstances of the completion of this agreement with Mr. Ferbrache as to do so would really involve his giving evidence. He invites me to re-read the letter which he wrote to the Wife on the 12th October. I have done so. That has to be read in the context of the Husband's evidence that as far as he was concerned the agreement was non-negotiable. It is true that the Wife was given some 3 weeks notice of the appointment before the Royal Court on the 5th November and that there is advice from Mr. Ferbrache that the Wife should take independent advice on the document and its consequences. However no effort to facilitate the obtaining or financing such advice is apparent. The Wife says quite fairly that she did not have any funds to go to an advocate and indeed did not know any advocate.
52. Mr. Ferbrache goes on to say in his letter to the Wife that the document is "not balanced in favour of [your Husband] against you or the other way round and that it applies reciprocally to both of you" and he again repeats the advice about separate representation. This is not really the truth of the matter. The Wife had negligible assets of her own whereas the Husband as we have seen was a man of some wealth. The effect of the contract, therefore, was one-sided because the Wife was giving up any entitlement to participate in the estate of the Husband against which he was not going to have any claim against the Wife's estate which was in any event not substantial.
53. In my view it was imperative, if the Wife was to be held to this agreement, for her to receive independent advice and for that advice to be financed by the Husband, in view of the fact that she apparently had no funds of her own, as she was not at that time

permitted to work. In my view a further reason why it was imperative for her to receive separate advice was that there was specific reference as to what would happen in the event of the break-up of the marriage, whether or not the same was attributable to the fault of the Husband. Again this would only work one way – the Husband could not have practically been able to lay claim to any part of the Wife's Estate in the event of divorce or separation.

54. Indeed the Wife gave evidence of having asked about this at the meeting with Advocate Ferbrache. She said she asked whether it would be possible for a clause to be added to the effect that if they were to divorce and she was the cause of the divorce she would walk away with nothing but that if the Husband was the cause she would receive a settlement. In his affidavit the Husband denied this but in his oral testimony he could not recall what was said. I prefer the Wife's account of the meeting at Advocate Ferbrache's office. I find credible the answer from the Advocate was that it would be impossible to make provision in the agreement to cover such a point as it would be impossible to predefine who was in the right and who was in the wrong. I do not find fault with this response, but it does show the complexity of the issues raised by asking her and indeed insisting upon her signing this form of agreement. I accept that here was nothing for her to negotiate because the Husband was saying that the terms were non-negotiable.
55. It may well have been that the Wife would with the benefit of independent advice still have signed the agreement. Whether she would have done depended on a number of factors on which I cannot at this stage reach any conclusion. The Husband makes play of the fact that she was, by marrying him, getting rights to obtain British citizenship. If this coupled with whatever affection she may have had for the Husband were the predominant matters of importance for her, then she might have been quite ready to sign away any entitlement to the Husband's estate and future support from him and depend entirely on his goodness in making provision for her by Will.
56. Mr. Ferbrache has quoted a number of cases to me in support of the proposition that Courts will hold parties to properly negotiated pre-nuptial contracts. I do not disagree with this line of authority. The cases which he cites are not altogether helpful to him.
57. The first case is Edgar v. Edgar [1980] 1 WLR 1410. I accept that in that case the disparity of bargaining power was discounted, but there, there was a formal deed of separation which was signed by the wife after getting legal advice but against that advice. I do not find that of assistance.
58. The next is X v. X [2002] 1 SLR 508 which like quite a lot of other cases cited to me in these proceedings are unusual in that they involve the complexities of matrimonial breakdown in the Jewish community. The crux of the decision in that case which

involved holding a wife to an agreement to pay to the Husband funds that were in fact provided by other members of her family to the husband is to be found in paragraphs 1 and 2 of the headnote:-

"(1) An agreement between the parties was a very important factor in considering what was a just and fair outcome. The court would not lightly permit parties to an agreement to depart from it, and a formal agreement, properly and fairly arrived at with competent legal advice, should be upheld by the court unless there were good and substantial grounds for concluding that an injustice would be done by holding the parties to it. The court must, however, have regard to all the circumstances, in particular to the circumstances surrounding the making of the agreement, the extent to which the parties themselves attached importance to it and the extent to which the parties had acted upon it (see para [103]).

(2) In this case the wife should be held to an agreement which she had entered into after the benefit of the most expert legal advice....".

Clearly Mrs. X was properly and separately advised

59. The third case N v. N [1999] 2 FLR 745 does not really take us any further from the Husband's point of view. It is another case, involving the Jewish community, and illustrates the limits on enforceability of ante-nuptial agreements.

60. Then we have M v. M [2002] 1 FLR 654. There are two helpful quotes from the judgment of Connell, J. at page 664.

The first is at paragraph [24]:

"In the circumstances the wife overrode Mr. Buchanan QC's clear advice that she should not sign anything. Thus she committed herself to an agreement from which she now seeks to distance herself..."

This again shows that we are dealing with a wife who had been properly and independently advised.

The second quote is paragraph (26):

"The circumstances of this case illustrate vividly that the existence of a pre-nuptial agreement can do more to obscure rather than clarify the underlying justice of the case. On the one hand this husband would not have married the wife unless she signed the agreement. On the other hand this wife signed the agreement because she was pregnant and did not relish single parenthood either for herself or for her child and because she wanted to marry the husband. In my view it would be as unjust to the husband to ignore the existence of the agreement and its terms as it would be to the wife to hold her strictly to those terms. I do not bear the agreement in mind as one of the more relevant circumstances of this case, but the court's overriding duty remains to attempt to arrive at a solution which is fair in all the circumstances, applying s25 of the Matrimonial Causes Act 1973."

In my view this is an admirable summary of how a court should approach a pre-nuptial agreement in the round.

61. The final case is K v. K [2003] 1 FLR 120.

Here there was a short marriage where the wife was pregnant. At the time of the marriage a pre-nuptial agreement had been entered into at the instigation of the wife's father. There had been no investigation as to the husband's assets which were considerable. The pre-nuptial agreement provided that the wife was to receive £100,000 if the marriage was dissolved within 5 years, such sum to be increased by 10% per annum compound. In addition, the husband was to make provision for the children. Here it was held:

"The wife understood the pre-nuptial agreement, was properly advised as to its terms and signed it willingly without pressure. There had not been full disclosure, but the husband did not exploit his dominant financial position. Both parties entered into the agreement in the knowledge that the wife was pregnant with their child, and there had been no unforeseen circumstances arising since the agreement which would make it unjust to hold the parties to it. The meaning of the agreement was clear as to capital provision for the wife and there were no grounds for concluding that an injustice would be done by holding the parties to its terms.

Yet again the words that distinguish this case from the present one are the words "properly advised". That was not an end to the matter if one looks on to the second paragraph of the headnote one sees

"Even if the pre-nuptial agreement were to be construed as precluding a claim for maintenance by the wife, it would be unjust to the wife to hold the parties to that part of the agreement because of the on-going contribution she was making in caring for the child of the marriage."

62. I accept that the case before me is one where to use the words of Connell, J. in M v. M it would be as unjust to the Husband to ignore the existence of the agreement and its terms as it would be to the Wife to hold her strictly to those terms and I do bear the agreement in mind as a relevant circumstance of this case. However, because the Wife was not separately advised I do not give it the weight that I might otherwise have given it. As I have shown this lack of independent advice distinguishes this case from all those cited.

The ante-nuptial agreement as conduct

63. I accept that the Wife can complain about the circumstances in which she was required to sign this contract. However, she still went ahead with the marriage having signed it and she may have been feeling very let down at having been asked to consent to it. Having gone to Court and consented to this freely and of her own accord, albeit without independent advice I do not consider that she can now claim in ancillary relief

proceedings that there is a discrete issue of conduct to be teased out of the actions of the Husband in getting her to sign this pre-nuptial agreement.

64. I do not accept that there was any malice aforethought on the part of the Husband to the extent that it was in his mind, when he encouraged the Wife to come and live with him in April 1998, that he was going to ask for the pre-nuptial settlement. By the autumn of 1998 however red lights were flashing in the Husband's mind – hence his visit to Mr. Ferbrache. So should they have been in the Wife's. Quite apart from the issue of imposing the pre-nuptial contract about which she complains so vehemently she had been able to live with the Husband for some months and some of the complaints she later makes about him must have been self-evident. Like the Husband she went ahead with the excursion to the [overseas] Marriage Registrar regardless. In my judgment she cannot now complain about something that predated that event and was wholly apparent to her, particularly as at the end of the day she is not being unduly prejudiced as to what provision I make for her in this judgment, as a result of the marriage contract.

Conclusions

65. I reject any of the allegations of conduct, as being of such significance that it would be inequitable for me to disregard them. I further consider that any figure that Mrs. Haskins is seeking should not be substantially discounted by virtue of the ante-nuptial agreement. I now come to the simple issue what provision, if any, the Husband should be making for the Wife after this short marriage.
66. It may be convenient to dispose of one further point namely the claim by the Husband that he is entitled to some credit for the fact that as a result of his marrying the Wife, she had the benefit of becoming a British citizen. No authority has been produced indicating that this is a factor which should be taken into account in matrimonial proceedings. Its only relevance can be in considering issues as to possible motivation on the part of the Wife for marrying the Husband. I have noted that the Wife was prepared to come and make a home with a man about whom she knew very little. He is 9 years older than her and had at the time of marrying her been on his own for 6 years and had probably let himself go a little. He was no doubt well settled into his ways living, as he was, on his own. She on the other hand presents herself well and seems to have looked after herself. After hearing both parties I lean towards the conclusion that the Wife's response to the Husband's advances might have been different had the Husband been a [professional man] of similar age and qualities resident in [her country of origin].
67. Whilst I would not wish to suggest that there was not an initial rapport and meeting of minds, I fear that the attraction for the Wife was not just the Husband but also Guernsey and Britain. That, however, does not mean that the Wife is entitled to less, than she

would otherwise be entitled to after a short marriage, a short marriage that in my view resulted as much as anything else from basic incompatibility as a result of their mutual stupidity in not getting to know each other far better before living together and more importantly marrying.

68. Despite my conclusion that there was an element on the part of the Wife of choosing to ignore future problems which she might experience by marrying a man about whom she knew so little and who came from such a different background to her, the Husband for his part still went ahead and married her. The Husband really should have faced up to the situation that he had got himself into. If he felt that this was not a relationship that was not going to develop into a satisfactory marriage then he should have had the matter out with the Wife long before making bookings for the holiday and wedding [overseas].
69. We cannot speculate on what went on between him and Mr. Ferbrache, but if the Husband felt that he was morally committed to marrying the Wife by that stage he could have by insisting on her being separately represented, probably made some form of pre-nuptial contract that would have ensured that if they did not stay together she would not be able to claim a substantial part of his estate. I cannot see how anyone advising her would not have sought from the Husband some cushion out of his not inconsiderable estate in the event of the marriage not working so as to enable the Wife either to go back to [her country of origin] or, as she now wants, to go and settle in England near her child. I therefore feel it fair to make provision for the Wife on the lines sought by Mrs. Haskins. However having, without justification, relied on conduct in an attempt to increase her claim the Wife cannot expect a settlement in the amount she originally claimed.
70. I have looked at the cost of accommodation in south-east England. I have already made reference to the fact that the Wife's employment prospects are going to be greater there than other parts of the country where property prices are less. I also take note of the proximity of the Wife's child to her if she goes to the area south of London. This, I regard as very important in the Wife's present state. I consider that she should have a £100,000 towards a property and its contents and that a further £5,000 to cover her resettlement costs and living expenses pending getting a job. She may have to furnish her new accommodation very modestly with second hand furniture. I accept she may not be able to walk into the kind of employment she seeks, but I am quite satisfied that with her personality and abilities that she will be able to find a full or part time job fairly quickly in the south-east which should provide her with enough to live on whilst she settles into her new home and finds a more congenial employment.
71. There is one further reason why I do not consider that I can accommodate the figure that Mrs. Haskins proposes having regard to the way in which the Wife has conducted these

proceedings. I refer to all the time and effort wasted with the proceedings for unreasonable behaviour. That is not to say that the Husband who has run up with Mr. Ferbrache an astonishing bill of £56,000 is blameless in this matter.

72. Mr. Ferbrache in his closing letter to Mrs. Weetman complaining of some errors in Mrs. Haskins closing submissions which I have not found it necessary to review in any detail says this:

"It is unfortunate that this litigation, as with many pieces of civil litigation of an ancillary type in divorce proceedings is conducted in the way that it has been."

I entirely endorse this sentiment. In fact I go further to say that in my twelve years as a judge I cannot think of a case where there has been more unnecessary contention, more time wasted and more unnecessary expense run up than this one. I accept however that it is always difficult to apportion blame between parties to litigation and their Advocates because one simply does not know what advice is given and what instructions are given in the course of proceedings. I will say no more in case there are to be submissions on costs. I hope both counsel will reflect on how they let this matter escalate as it did and now that I have decided the relatively modest outcome see what adjustment they should be making in fees which any right minded member of the Guernsey public might justifiably regard as scandalous.