Judgment 52/2005 **H v. H – Royal Court (Divorce file 5850) – 4 October, 2005**

Matrimonial cause – husband's application to vary consent order made in 2003 as to payment of school fees – application of article 45 of the Matrimonial Causes (Guernsey) Law, 1939, to agreed orders – application for variations dismissed.

IN THE ROYAL COURTOF THE ISLAND OF GUERNSEY

Before John Russell Finch, Esquire, Lieutenant Bailiff.

On the 4th day of October, 2005

Between:

H

Applicant/Husband

and

H

Respondent/Wife

IN THE MATTER OF the Applicant's application of the 16th March, 2005 to vary the Consent Order dated 7th April 2003;

WHEREAS on the 12th September 2005, the Lieutenant Bailiff, having heard Advocate A. N. Brown, Counsel for the Applicant and Advocate N. J. Barnes, Counsel for the Respondent respectively, reserved Judgment;

THE LIEUTENANT BAILIFF this day issued written Judgment in the terms attached hereto, and DISMISSED the application.

AND THE COURT reserved costs.

C. S. RODGER
Her Majesty's Deputy Greffier

The Lieutenant Bailiff set out the law, and his conclusion, in paragraphs 7 to 13 of his judgment, as follows: -

7. Advocate Brown cited Article 45 of the Matrimonial Causes (Guernsey) Law 1939, which empowers the Royal Court after the making of a decree of divorce or nullity to:

> *"cancel, vary or modify ……*
>
> *any marriage contract, marriage settlement, post-nuptial settlement, or terms of separation subsisting between the parties to such marriage, in any manner which, having regard to the means of the parties, the conduct of either of them, or the interests of any children of such marriage appears to the Court to be just".*

This is the basis of the application. Advocate Brown referred to the English case of *Lewis v Lewis [1977] 3 ALL E.R. 992* (page 134 of the bundle). The headnote reads (in part):

> *"……the Court, in considering an application for variation, is not confined to looking at changes in the means of the parties since the original order was made, but is required to look at the actual means of the parties as they stand at the time when the case is before it and to approach the matter as if it were fixing the payments de novo".*

It was submitted that the Court had to look at 'basics' and the husband's income and expenditure shows a deficit of over £16,000. There is no authority to suggest that there is a higher burden in varying a Consent Order, it was submitted that this does not make any material difference, it is just the same as any other Order.

Applicable Legal Principles

8. The recent Guernsey case of *A v A: Court of Appeal (Civil Appeal 340)* 21st April 2004 was not cited to the Court and has since come to my notice. Although largely a case on judicial separation, it offers very helpful guidance on the application of Article 45 of the Law of 1939 to agreed orders. Interestingly enough counsel for the unsuccessful Appellant was Advocate Dawes, a colleague of Advocate Brown; and counsel for the Respondent was Advocate Whitmore, a colleague of Advocate S.Morgan, who was the husband's original Advocate in the present matter at the time of the Consent Order. The most useful part of Sumption J.A.'s Judgement is at paragraph 14, which states:

> *"We turn to the second head of the husband's case on appeal, as put by Advocate Dawes, which was based on the objectively onerous character of the terms.*
> *There was much argument before the Lieutenant Bailiff, and before us, about whether the Court should hold the parties to their agreement, and whether the English authorities on the jurisdiction to make and enforce consensual arrangements between the parties were relevant. This may well be the right way of looking at the matter at the stage when the Court is being invited to sanction, and thereby make enforceable, the agreement which the parties have made. But it is of much more limited relevance when the judicial separation has been superseded by a divorce, as it has in this case, and the Court is being invited to exercise its express powers under Article 45 following a divorce to cancel or vary the agreed terms 'having regard to the means of the parties, the conduct of either of them or the interests of any children of such marriage.' In that context, two things can perhaps be said. First, the fact that the parties have themselves agreed certain arrangements as reasonable is strong evidence that they are indeed reasonable, at least as between the parties themselves, unless the agreement was unfairly procured or made under some misapprehension, or unless circumstances have changed in some material respect. But even strong evidence may be displaced by other evidence that the terms operate unreasonably, in which case a variation will be made. Secondly, in many cases, the Respondent to an application to vary will have organised his or her affairs on the basis of the agreement in a way which would make some variations unfair. The Court needs to be sensitive to this".*

9. Whilst noting the somewhat different facts in <u>*A v A*</u>, this is guidance from the Court of Appeal that I should follow. In the present case (unlike in <u>*A v A*</u>), H was legally represented and his Advocate made clear, plain terms for settlement, including the clause relating to school fees – which was embodied in the Consent Order. One starts with the proposition that *"….the fact that the parties have themselves agreed certain arrangements as reasonable is strong evidence that they are indeed reasonable ……".* This "*strong evidence*" may be displaced "*by other evidence that the terms operate unreasonably, in which case a variation will be made*". In this case I do not see any such evidence, we have a Consent Order where each party has given something up – so that W did not receive maintenance and has no share of the matrimonial home. Accordingly, this seems to me to be a fairly typical arrangement that rational persons, with the benefit of legal advice, made to avoid protracted, emotive and expensive contested hearings. Nor is there anything before the Court to show that the Consent Order was "*unfairly procured"* or "*made under some misapprehension".*

10. Sumption J.A. went to say (at page 14 of his Judgment) that in many cases, the Respondent to an application to vary will have organised his or her affairs on the basis of the agreement in a way that would make some variations unfair – "*The court needs to be sensitive to this".* The wife has not only had to organise herself, but also discharge a notable part of the school fees from her own resources. It seems unjust that she should find her position further weakened because the agreement is not being kept up.

Conclusion

11. On the facts presented at this hearing it seems, with respect, impossible to say that the terms of the agreement freely entered into by legally represented parties should be varied. The decision in *A v A* provides valuable guidance on the approach to be taken in such situations and the husband has not shown any grounds to justify setting aside the terms of the school fees arrangement. Unfairness or mistake have not been shown, even though the situation might be different if the husband's circumstances had changed so radically that it would be manifestly unjust or unconscionable to hold him to his agreement of 7th March, 2003, signed by Lieutenant-Bailiff Brelsford. In all the circumstances I am unable to avoid the conclusion that the original agreement was indeed 'reasonable' and the fact that the husband now finds it onerous is no good reason to relieve him of the burden he voluntarily assumed.

Decision

12. The application for variation is dismissed.

Costs

13 Costs are reserved.