

Judgment 7/2010

P v P - Royal Court (Divorce File 7056) - 10 February 2010

Matrimonial Causes (Guernsey) Law, 1939 – Wife’s application for ancillary relief – late disclosure by Husband of deterioration in his financial position – principle of equal sharing – costs awarded to the wife.

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
(MATRIMONIAL CAUSES DIVISION)**

No 7056

On the 10th day of February 2010 before Sir De Vic Carey, Lieutenant Bailiff sitting alone

Between

P

Wife/Petitioner

and

P

Husband/Respondent

IN THE MATTER of the Final Order for Divorce granted to the Petitioner on the 14th day of December 2009.

IN THE MATTER of the Application of the Petitioner dated 7th day of January 2008.

The Court having heard from Advocate A N Brown for the Petitioner and Advocate A J Ayres for the Respondent.

THE COURT this day orders as follows:

1. That the former matrimonial home, [.....] shall henceforth be re-vested in the names of the Petitioner and the Respondent as to an undivided 72% share therein in the name of the Petitioner for herself and for her heirs and as to an undivided 28% therein in the name of the Respondent for himself and his heirs the costs of such re-vesting to be borne equally by the parties.
2. That the Property shall be placed upon the market for sale forthwith and both the Petitioner and the Respondent shall use their best endeavours to achieve an early sale thereof at an arms length transaction at the best price possible.
3. That pending the sale of the Property the Petitioner shall enter into sole and exclusive occupation of the Property.

4. That pending the sale of the Property the Petitioner shall be solely responsible for payment of household and utility bills save that the following expenses shall be discharged jointly by the Petitioner and the Respondent, the Petitioner being responsible for 72% of each cost and the Respondent being responsible for 28% of each part:-
- i) the house insurance of the Property;
 - ii) the tax on real Property;
 - iii) the occupiers rates for the Property; and
 - iv) the maintenance and general upkeep of the Property.

For the avoidance of doubt, it is hereby recorded that the Petitioner and the Respondent shall be responsible for the costs of rectifying the boundaries of the matrimonial home in the proportion 72% as to the Petitioner and 28% as to the Respondent.

5. That in the event that the parties shall find a willing purchaser and shall enter into conditions of sale with regard to the Property, each party hereby undertakes to indemnify the other against all actions, claims, proceedings or any liability whatsoever arising out of the failure to complete the sale of the property in accordance with the said conditions of sale caused by the fault of that one party alone.
6. That in the event of a prospective purchaser failing to complete the purchase of the Property and the deposit being forfeited, it is agreed between the Petitioner and the Respondent that such forfeited deposit shall be distributed between them 72% to the Petitioner and 28% to the Respondent.
7. That upon the sale of the Property and after payment of estate agents commission, the remaining balance is to be divided between the parties as to 72% to the Petitioner and 28% to the Respondent.
8. That the contents of the Property shall become the sole and absolute property of the Petitioner save for the Respondent's personal belongings a list of which shall be provided by the Respondent to the Petitioner by 17 February 2010 where after, in the event of no dispute, the Petitioner shall deliver the said items to the Respondent.
9. That the Petitioner will transfer her interest in the boat [.....] to the Respondent to the effect that the said boat shall be his sole and absolute property.
10. That the Respondent shall retain as his sole and absolute property any money in the following bank accounts held in his sole name:-
- [.....]
 - [.....]
- And the Petitioner hereby relinquishes all and any claim and claims and any interest that she may have in the same.
11. That the Petitioner shall retain as her sole and absolute property any money in her [cheque account] held in her sole name and the Respondent relinquishes all and any claim or claims and interest that he may have in the same.
12. That the parties' joint bank account with [.....] shall be closed forthwith and the credit or debit balance transferred into the sole name of the Respondent.
13. That the Petitioner and the Respondent shall each retain their respective pensions as their sole and absolute property.
14. That the Respondent shall retain any shares held in his sole name as his sole and absolute property.

15. That the Petitioner and the Respondent hereby agree that each will do such acts or things and shall execute all such documents as reasonably necessary for the purpose of implementing the terms this Order.
16. That each party hereby renounces and surrenders all rights or claims which they may have or at any time claim to have as against the other in respect of either individually or jointly owned assets of the other party by way of maintenance, transfer of property, lump sum order, secured provision, contributions to the support or otherwise and whether arising under the Matrimonial Causes (Guernsey) Law, 1939, as amended or otherwise.
17. That the Respondent shall be responsible for the Petitioner's recoverable costs from 2nd July 2009.

C A RODGER
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
MATRIMONIAL CAUSES DIVISION

Between P Wife/Petitioner
and
P Husband/Respondent

Judgment of Lieutenant Bailiff Carey
on the Petitioner's Application for Ancillary Relief

Date of hearing: 25th November 2009

Judgment handed down and perfected: 22nd December 2009

Advocate for the Petitioner: A N Brown
Advocate for the Respondent: A J Ayres

Cases, texts and statutes referred to:

- 1) *White v White* [2000] 2FLR 981 1AC 596
- 2) *Miller v Miller*, and *McFarlane v McFarlane* [2006] 1 FLR 1186
- 3) *Charman v Charman* [2007] 1 FLR 1246
- 4) *E v E* [2007 - 2008] GLR 133
- 5) Duckworth Matrimonial Property and Finance B4 [1A]
- 6) *Elliott v Elliott (2001) 1 FCR 477*
- 7) *L v L* (2008) 1 FLR 142
- 8) Matrimonial Causes (Guernsey) Law 1939 as amended in 1990, Article 46(1)

Introduction

[In paragraphs 1 to 5 of his judgment the Lieutenant Bailiff summarised the history of the marriage and its breakdown]

The Assets of the Parties

6. As is now the practice, Forms A were filed by the wife and the husband in March and June 2008 respectively. Relevant information can be extracted there from and from other documentation in the file to establish the financial position of the parties as at the time of the exchange of the Forms A as follows:-

Former matrimonial home, [.....] (in husband's sole name) agreed estimate
£375,000.00

Bank Accounts:

Wife's [Cheque Account] £1,627.00

Joint Account (operated by husband)	£2,566.42
[Savings Account] (in name of husband)	£17,566.82
[Savings Account] (in name of husband)	£20,279.93
Boat in joint names of husband and wife	£20,000.00
Portfolio of shares as at June 2008 (husband's valuation)	£117,279.40
TOTAL	£554,319.57

7. Turning to income the husband receives four pensions totalling £18,411.33 (with a total CETV of £125,923). The wife is still working and is contributing to [a pension], which has a CETV at the present time of £27,771.04. The wife's income from her employment is currently £13,706.64 net.
8. An attempt to settle this matter was made by attending before Finch LB for an FDR hearing on 3rd June. As we shall see there was a depletion in the husband's assets which was only disclosed the day before the hearing before me. I have noted that much of the apparent depletion of the husband's assets took place before 3rd June. I am of course not privy to what Lieutenant Bailiff Finch was proposing thereat, but I cannot see how without full disclosure the appointment could have achieved anything. The wife has made offers to endeavour to settle the matter, but these do not appear to have been the subject of any meaningful response from the husband. In evidence he accepted that he had no proposals to put before the Court adding rather gloomily that nothing I decided would be fair.

The Law to be applied

9. It is clear that neither from the point of view of the earning potential of the parties, nor the valuations of the matrimonial assets, is this court dealing with a big money case.
10. It is hardly surprising that most of the leading cases that have in recent years come before the Appellate Courts in England and from which the principles of equality and sharing have been emphasised, involve very much larger matrimonial fortunes than that with which I am dealing here. I refer to the learning to be derived from the decisions in *White v White*, *Miller v Miller*, *McFarlane v McFarlane* and *Charman v Charman*. Helpful guidance from our Court of Appeal is to be derived from its decision in *E v E*, although as always, that case was decided on its own peculiar facts.
11. In paragraph 62 of its judgment in *E v E*, the Court quoted at length from a summary from Duckworth Matrimonial Property and Finance B4[1A] recording the Court of Appeal Decision in *Elliott v Elliott* (2001) 1FCR 477. From this extract it is clear that Thorpe LJ was recognizing the entitlement of the husband to his share of the capital tied up in the former matrimonial home at the earliest time, acknowledging that deferral was inevitable to meet the needs of the children of whom the wife had primary care.
12. Here, I am not faced with a claim that the wife needs protection as carer of the children, as the children are now all over 21, albeit they are still around and not, in the case of the youngest at least, wholly self-supporting. Ideally, both parties would like a situation where the children can come and stay with either parent, but as we shall see, this may not be possible. The rest of the judgment in *E v E* is of assistance in giving guidance as to the way in which courts should protect the position of parties who are not the primary carer of the children, in situations where the primary carer has to be given preference with regard to enjoyment of the

matrimonial property during the minority of the children. None of that guidance however is directly relevant to the problem before me.

13. Whilst I will have to consider, in the course of this judgment, what weight I give to these issues, I must remind myself that this is not a case where the husband is being impugned with allegations of conduct which it would be inequitable for the court to ignore when making an order.
14. Before leaving issues of law, I record what Richard Anelay QC said, when sitting as a Deputy Judge of the High Court in the Family Division in the case of *L v L* (2008) 1FLR 142 at paragraph 15:

“In my judgment, following the guidance of the Court of Appeal in Charman, I must approach the s 25 statutory exercise as follows. First, I must determine what are the assets and general financial position of the parties. Secondly, I must decide how all the property of the parties should be shared between them. That property should be shared equally between them unless there is good reason to the contrary. Thirdly, I must decide whether the result produced by the application of the sharing principle meets the needs of the parties. Those needs should be generously interpreted. It is only if the result of the application of the sharing principle fails to meet the needs of the parties that those needs will dictate a greater share of the property than that produced by the application of the sharing principle. If the needs of the parties are less than the sum produced by the application of the sharing principle, that will not lead to a reduction of that sum.”

15. Mr Brown in his initial skeleton, sought nothing more than division on principles of equality. As this case has developed, he has come to be asking for a larger share for the wife and his position, revealed in his final submissions, is that the wife should have the former matrimonial home vested in her and that she would then sell it with the proceeds of sale, after payment of costs, being divided as to £300,000 to her, with the balance due to the Respondent. I will have to decide whether the needs of the wife are not adequately met by the strict application of the sharing principle. There is also complaint from Mr Brown as to the way in which the husband behaved in unsuccessfully defending the unreasonable behaviour petition and the undoubted distress caused by the wife in having to give evidence thereon. (Mr Brown reminded me that he had made an offer to amend the grounds to two years separation by consent on the morning of the hearing, an offer which was admitted to have been rejected by the husband).

The Husband’s late disclosure of deterioration in his financial position

16. It is well established that parties to ancillary relief proceedings are under duty to provide ongoing disclosure of any material changes in their financial position. Despite requests from Mr Brown, on behalf of the wife (apparently relayed on by Mr Ayres to the husband – see e-mail of 24 November 2009), the husband failed to provide this information to Mr Ayres until the day before the hearing between me. The husband denied seeing either the request for information or the offer obtained in Mr Brown’s comprehensive letter of 2nd July. I can see no excuse for the husband’s behaviour in this regard
17. As a result of this late disclosure, the valuation of the assets of the parties contained in paragraph 6 above, has to be adjusted downwards as follows:

● Former matrimonial home	£375,000.00
● [Cheque Account]	£2,743.92
● Husband’s Account (joint account operated by husband)	£607.64
● Savings Account	£1,614.75
● Savings Account	£1,207.00
● Shares in the name of the husband (husband’s own valuation)	£43,183.06

• Boat (husband's revised estimate)	£16,000.00
Total	£440,356.37

18. There has been a deterioration in the husband's financial position as disclosed in his original Form A and his position today of in excess £110,000. The husband produced up to date bank statements showing a number of transfer payments which neither Mr Brown or I could be expected to get our head around during the course of the hearing. There are a number of items of expenditure which can be explained to account for part of the deterioration and these have been highlighted in part of Mr Ayres' final address.

The implications of the deterioration for these proceedings

19. Taking the husband's downward revisions to his wealth at face value, adding up the combined matrimonial assets as of today and dividing them by 2 would produce a figure of £220,000. That would not provide the wife with a fund for housing which would buy the kind of property that she seeks. [I will consider the precise figure she needs base on the information she has produced later]. The first question for me is how much credit I should be giving the husband for his largely self induced change in fortune.
20. The information produced in connection with the share portfolio is neither complete nor comprehensible, relying as it does, on papers wholly generated by the husband. It does appear that there have been some sales and purchases since the form A was filed by the husband. The husband blithely says that the stock market has gone down since June 2008 and that this has affected the shares traded on the Alternative Investments Market worse than others and accounts for the losses in value. That may be so, but in the absence of any satisfactory analysis of the portfolio, with a history of how each holding fared I cannot make any sensible assessment of how much the fall in value is attributable to the husband taking money out for his own purposes or suffering unavoidable losses in the market collapse. I have to say that whilst it may be entirely proper for a man in the husband's position to invest in equities rather than fixed interest it does seem to me to have been somewhat foolhardy to keep all his equity investment into what appear to have been more speculative holdings at a time when he was on notice that ancillary relief proceedings were under way.
21. The stock market was beginning to tumble in June 2008 but even comparing the level of the FTSE index which covers the main line equity market at 1st June 2008 with the value of that index on 25th November the fall is nothing like that claimed by [the Respondent] in respect of his own portfolio. In all the circumstances including the totally unsatisfactory disclosure that has been made, I am not minded to give him any substantial credit for this alleged market fall.
22. I now need to look at the various items of expenditure which the husband has identified and claims that I should accept be treated as being knocked off the amount available today to the parties. So far as the bank accounts are concerned, I am prepared to accept the evidence of the husband that he has spend £11,641.13 on repairs [.....]. He has also spent £7,225.50 in respect of maintenance of the [children] at university. He has also paid a year's rent of [his current home] at the rate of £15,000 with a deposit of £1,250.00. He has also bought a new car for £9,025. These items of expenditure come to something under £45,000 which is less than half the shortfall I have identified.
23. I accept that the former matrimonial home was purchased and paid for by the husband before the parties got together and that it is still in his sole name, a fact that may have escaped the attention of Mr Brown until late in the proceedings. That fact however, does not persuade me that I should be treating the former matrimonial home other than an asset of the marriage which is brought in for treatment in the Section 25 exercise in precisely the same way it would have been, had the property been in joint names. Under Article 46(1) of the Matrimonial Causes (Guernsey) Law 1939 as amended in 1990 the Court has power to vest a property in name of one of the parties in the other

24. The husband has been on notice since these proceedings started that the wife was seeking at least a half share in the former matrimonial home and I therefore find it unsatisfactory that he has not consulted with the wife (or if he could not speak to her sensibly, communicate with her through his Advocate) to raise with her the issue of whether the money he has spent on repairing the roof was in the interest of both parties. Notwithstanding this unfortunate omission, I will give credit for the fact that the money spent [on repairs] has been for the benefit of the parties and will hopefully be reflected in what is received when the house is sold. However, it is worth pointing out that generally when one is about to sell a house, it is not always wise to carry out other than absolutely essential repairs because a purchaser might well wish to make alterations to the property which would render nugatory the benefits of any improvement. The husband acknowledged in his evidence that this was an issue and that is why I think he should have referred the matter to his wife. Likewise he told me that there were problems with the boundaries which he was consulting another member of the firm the wife is employing, to advise. This again should have been disclosed.
25. The husband went out and rented [his current home] without telling the wife, and more importantly without moving fully out of the former matrimonial home. I suppose he might have been suffering from some anxiety that in moving into rented property he was conceding something, but this was a matter that he should have talked to his advocate about and again made prompt disclosure. The important thing is that in the special circumstances of this case, by openly moving out the husband could have claimed some credit for seeking to improve the situation which would no doubt have reduced the stress that he has been causing to the wife, evidence of which was found by Lieutenant Bailiff Finch at the hearing of the unreasonable behaviour petition. On the husband's own admission he has not got the wherewithal at the present time to persuade a landlord that he is in a position to be spending £15,000 a year on rent and even after the most optimistic assessment of his chances under these proceedings, it would not seem that he will have sufficient capital to be able to produce an income at the present time to sustain this level of rental payment. He has said that he has had to take more than single bedroom accommodation in order to accommodate [the children], but that to me is a counsel of perfection which he is not going to be able to achieve. He has chosen to use capital for what is a wasting item of expenditure, rent and likewise for a new car, which again is a wasting asset. I will not pass judgment on him for so doing at a time when he is going through the trauma of divorce, but these are his choices and he must not expect that the wife's share of the matrimonial assets should be depreciated to take account of this expenditure.
26. I have noted what has been said about the parental contributions to the [children's] university education contribution being borne by the husband. Again, this was disclosed so late that no proper enquiry could be carried out into the incidence of these charges, but I have noted that the husband was in employment until the 1st April 2008 and it may be that it was because of his income that parental contributions were payable. I have to say that I doubt very much whether if [the wife's] income was all that was to be taken into account by the Education Authorities, a parental contribution at this level would have been sought. Without any proper analysis by the husband in support of this claim, I am only prepared to debit the wife's notional share to capital with a small part of it.

Other Issues

27. The husband suggested that the house could be divided and redeveloped so that he could live in the part of the property where the garage is situate. The wife cannot accept the idea of his being near her, so if this proceeded she would no doubt wish to move. There were no details provided or advice on planning possibilities. Neither was there any estimate of cost, so I do not consider that this should be taken as a serious alternative in all the circumstances. The wife should have two bedrooms, so [the children] one of whom has a medical problem can stay with her. Ideally the husband should have the same, but that may not be possible as he is probably going to have to rent and it looks as if his income may not be able to support renting a property with the qualities he now enjoys at [his current home].

Conclusions

28. From the above it will be clear that I am not persuaded that on the limited evidence that the husband produced at the last minute I should be giving him credit for the bulk of the money that has disappeared. Reverting to the original information I would propose deducting from the valuation of the matrimonial pot based on the husband's original figures the sum of £20,000 to take account of the house repairs and diminution in the value of the boat plus a small amount to cover the other losses and expenses (including part of the parental contributions) suffered by the husband without conceding that any of them can be properly laid at the door of the wife.
29. That would bring the value of the wife's half share to a figure (slightly rounded up) of £267,500, which I consider will just be adequate to meet her housing needs. Looking at the Estate agent's particulars she should just be able to make do with this if she buys a very modest apartment in an urban area. I am not persuaded that in all the circumstances, including the husband's feckless behaviour, I should be departing from the principles of equal sharing if at all possible as expounded in L v L.
30. The mechanics for achieving this are a matter upon which I have heard from counsel. I propose that the whole of the wife's share be raised by giving her an interest in the real property. The property will be vested in the parties in undivided shares as to 72% in favour of the wife and as to 28 % in favour of the husband (making allowance for sale costs). The husband would keep all his bank accounts (including the joint account) and his shares. The wife will transfer her interest in the boat to the husband. The wife would keep her [cheque account], which unlike the husband's accounts shows a modest appreciation.
31. I have made no mention of pensions. The husband's pensions are now in payment. They do represent a valuable resource to him which will not now enure on his death to the wife, but I do not consider that they should be brought into account when calculating capital resources for sharing. The wife will hopefully work for over 10 years and although she will only have a modest pension she will have an income during the remainder of her working life. I reject the suggestion that the husband canvasses of the wife being expected to take a second job.
32. Mr Brown has had full disclosure of the boundary problems from Mr Bainbridge and is satisfied that are surmountable without diminishing the value of the property.
33. As to costs of these proceedings Mr Brown asks for the wife to have her costs after the date of the open offer of 2nd July 2009. He pointed out that no offer had been forthcoming from the husband as I recorded earlier in this judgment. Mr Ayres resisted on behalf of his client but in my view the wife is so entitled to recoverable costs in accordance with modern principles that in matrimonial litigation both sides must engage sensibly in the process of trying to settle their differences without resort to litigation