Judgment 3/2012

W V H
– Royal Court - Matrimonial Causes Division
- 27th January 2012

Matrimonial Causes Division – Royal Court – Application for respondent to be responsible for one half of one child's school fees – application by respondent for variation in the amount of maintenance payable under the Consent Order.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

MATRIMONIAL CAUSES DIVISION

Between

W — **Petitioner**

-v-

H — **Respondent**

Date of hearing: 9th November 2011

Written Judgment handed down: 27th January 2012

Before: Richard John COLLAS Esq., Deputy Bailiff

Advocate for the Petitioner: F J Haskins
The Respondent was Unrepresented

JUDGMENT

Introduction

1. This judgment concerns the two children of the parties, the funding of their school fees and the former husband's obligations to pay maintenance in respect of them. I have written the judgment in an anonymised form so it may be published to third parties if it is considered appropriate to do so.

2. The Petitioner wife ("W") applied by application dated 15 June 2011 for, *inter alia*, an order that the Respondent ("H") be responsible for one half of the school fees in respect of their

younger daughter. In reply, H applied on 18 July 2011 for a variation of the existing consent order pursuant to which he is obliged to pay maintenance for both their daughters, one half of the school fees for the older daughter and other specified expenses.

3. In this judgment, I refer to the older daughter as "A" and to the younger daughter as "B". Both daughters are at the same fee-paying secondary school.

Background

4. By way of background, H is aged 43 years and W is 36. They commenced cohabitation in 1995 and married the following year. A was born in 1997 and is now 14 years old, B is three years younger. The marriage broke down in 2008 and a Provisional Order of Divorce was granted on W's petition on 22 May 2008, followed by a Final Order on 23 June 2008.

5. Ancillary matters were settled by consent in an Order dated 25 September 2008 pursuant to which W was given day to day care and control of the two children, with H having reasonable access to them. H was required to pay £287.50 per month as maintenance for each child subject to annual increases in line with the Guernsey Official Index of Retail Prices. The Order provided, at clause 13 and 14:

> *"13. That the Petitioner and the Respondent shall each be responsible for the payment of one half of [A's] private school fees at [a named school] and shall indemnify the other in respect of their one half contribution thereto.*
>
> *14. That the position with regard to [B's] private school fees and higher education expenses shall be determined at a future date"*

6. By clause 15, the parties agreed to share equally the cost of the children's medical, dental and optical treatment as well as one school trip for each of the children, on prior consultation.

7. The Order of 25 September 2008 was varied, by consent, by a further Order dated 23 July 2009 whereby the school named in the first Order was replaced by a different school. A moved from the first school to the second school at the start of the September school term in 2009 and is still at that school where she has now been joined by B. I will refer to the 25 September 2008 Order as subsequently varied as "the Consent Order".

8. B completed her primary education in the summer of 2011. Thereafter, H wanted her to go to a States school where there would be no fees payable but W wanted her to attend the same school as her sister. The parties could not agree on the choice of school so the matter came before me for decision and needed to be decided, as a matter of urgency, before the start of the school term. In the time available, it was not possible to decide how the cost of school fees should be borne so the application was determined on the basis that the only issue with which I had to be concerned was to decide which school it was in the best of interests of B to attend. W said that the fees would be paid even if it was later decided that H could not afford to contribute to the fees. I understood that W's parents were willing to assist if necessary. Having heard the parties and with the benefit of a report from the Safeguarder Service, I decided that B should attend the private school and she duly enrolled there at the start of the school term in September 2011.

9. I now have to decide whether H should contribute to the cost of B's school fees and I also have to decide whether to grant H's application for a variation in the amount of maintenance payable under the Consent Order.

The Law as to Variation of a Consent Order

10. It is well established in this jurisdiction that a consent order may not be varied without good reason. The principles were explained by the Court of Appeal in A v A (Civil Appeal 340), 21 April 2004, where at paragraph 14 in the judgment of the Court delivered by Sumption J.A., he said:

> *"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 between the parties themselves, unless the arrangement 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."*

11. Such principles have been considered and applied in a number of subsequent decisions of the Royal Court, including two decisions of Finch L-B: C v C [2007-2008] GLR Note 1; and F v F (19 August 2009 (Judgment 39/2009)). In the former case, he followed the Court of Appeal's decision in A v A and the Note of the Judgment in the Guernsey Law Reports records that he added:

> *"Any variation will, however, have to consider whether one of the parties has organized his or her affairs on the basis of the original agreement, so as to make some possible variations unfair.*
>
> *If the consent order involved provision for the maintenance of the children of the marriage, the court considering variation should always bear in mind that their welfare is the "first consideration". Broadly speaking, a person having an obligation to provide maintenance for his children has a responsibility to order his financial affairs with due regard to meeting this obligation, and then to meeting his other reasonable financial obligations."*

12. In F v F, Finch L-B referred to both A v A and C v C in paragraph 9 where he commented that:

> *"As a general principle public policy requires finality in litigation, so orders, particularly Consent Orders, should not be materially varied unless there is a good reason to do so. A change in a party's financial circumstances which has taken place since the order was made would not normally give rise to a case for re-opening matters."*

At paragraph 11, he added that:

> *"The position of the children is not merely something additional to this application, as was stated in C v C, their welfare is a "first consideration" and H is obliged to order his financial affairs in a way which meets this."*

13. I believe that the passages I have cited set out the legal principles that I have to bear in mind in dealing with H's application to vary the Consent Order. They demonstrate the high hurdle that H has to overcome if he is to persuade me to order a variation.

H's Submissions regarding the Consent Order

14. H very much regrets that he agreed to the Consent Order on 25 September 2008 and asked that I should take account of the circumstances in which the Order was made. Although he was legally represented at the time and agreed to the Consent Order on the advice of his Advocate, he now believes that he was badly advised.

15. He said that following the breakdown of the marriage in February 2008, the parties proceeded quickly to obtain a divorce; a final order of divorce was made on 23 June 2008, followed by an FDR hearing on July 14th. By September 2008, they had prepared for a contested hearing in relation to ancillary financial matters. H says he was under pressure and was worried about the escalating legal fees. His Advocate advised him to agree to an Order and he did so but with the benefit of hindsight, he feels they settled their arrangements with too much haste and that he did not have sufficient time to reflect upon, and properly consider, what he was being asked to agree. H now says that the agreed levels of maintenance payable under the Consent Order are too high and were not calculated in accordance with the CSA guidelines that would apply in England and are often used in this jurisdiction as a guideline.

16. I am not persuaded that the parties acted too quickly or with unusual or undue haste. Their agreement was reached in September, seven months after the parties recognised that the marriage had broken down. It is not unusual for parties to reach agreement within such a period of time and many divorcing couples manage to do so more quickly. I believe it is also significant that two months elapsed after the FDR in July before the parties signed a consent order. I do not know what took place at the FDR and would not expect to be told but I see from the record on the file that the FDR was conducted by Judge Finch who is an experienced judge in cases of this sort. The normal practice is that he would have given an independent view as to what he considered the Court was likely to order. Thereafter, H, and his Advocate, had a further two months to reflect upon the matter before terms were agreed between the parties.

17. H said that he was worried at the time about the escalating legal fees. Again, that is not unusual. I would expect that, as part of the Advocate's duty to H, he would have been advised as to the costs that were likely to be incurred in pursuing the case to a contested hearing so that he could balance the costs against the cost of agreeing to any proposed offer of settlement. Many a litigant has found themselves in the position of accepting a less favourable offer than they may otherwise have considered in order to save costs and may have felt under pressure in doing so. The fact that an offer has been accepted in such circumstances does not render it liable to be set aside or reviewed at a later date. What is important is that the offeree makes an informed decision and accepts the offer of his or her own free will. It would have been the responsibility of H's Advocate to ensure that he did in fact make a properly informed decision and that the Advocate did not indicate to the Court

that the offer had been agreed unless the Advocate was satisfied that H had acted of his own free will and that he had a genuine desire to reach such an agreement.

18. There is nothing before the Court to show that the conduct of the Advocate acting for H failed to achieve the requisite standard. Even if there had been such a failure, H's first line of action would have been to seek redress against the Advocate, not to seek to have the terms of the settlement varied some three years after the agreement.

19. Consequently I do not consider that H's concerns about the circumstances under which he agreed to the Consent Order including, in particular, the agreed Order of 25 September 2008 should be taken into account in the present decision.

Change of Circumstances

20. The facts upon which H relies in support of his allegation that there has been a change in the parties' circumstances since the terms of the Consent Order were agreed can be summarised as follows:

> He has changed employment. His previous employer provided non-contributory pension benefits, paying a sum equivalent to 15% of his salary into the pension scheme. His present employer does not offer a pension scheme, so he has to make his own provision for retirement. The amount he has to pay in respect of his children is such that he can only afford to pay into his pension fund £25 per month which, he says, is inadequate for someone of his age of 43 years. I had understood H to say that the change in employment occurred after the Order of 25 September 2008 was agreed. However, in further written submissions from him dated 21 November 2011 he said that he changed jobs in August 2008. If that is correct, it is not a change of circumstance since the making of the Order and could only be taken into consideration if I am satisfied that, for other reasons, there has been a change that justifies a variation of the order.
>
> H is struggling to make ends meet. He has been to the Citizen's Advice Bureau where a debt counsellor has advised that he could not afford the additional school fees. He is worried about the impact of future inflation and of any increase in the cost of his mortgage. Repair work is required on his house which he is unable to afford.
>
> By contrast, W's financial situation has improved considerably. She has not re-married but is in a long-term relationship and has been so most, if not all, of the time since the marriage ended. Her new partner can afford a far more lavish life-style which is apparent, for example, in the value of the house they occupy together, in her choice of a Mercedes car and in the holidays they enjoy together. W has a new Mercedes whereas H has a Skoda motor car purchased in 2003 for £1100 as a replacement for a car that was 22 years old and beyond repair. W and her partner are able to enjoy a high standard of holidays out of the Island that H is unable to contemplate for himself. W has the services of an Advocate but H cannot afford legal representation.
>
> H claims that as W works only part-time when she could work longer hours, she is not maximising her earning potential whereas he is unable to do more. In reply, W says that her working hours are limited by the need to be available for the children after

school and she also says that H is not maximising his earnings. For a while he worked late at night as a driver, but had to give it up because the late hours were affecting his ability to work properly at his principal job. Even if he was to re-apply for this work, he questioned whether work would be available, or if it was, that it would make a sufficient difference to his earnings to justify the disruption it would cause to his sleep patterns and hence to his daytime work.

21. Both H and W are now cohabiting but the circumstances of their respective cohabitants are very different. W did not disclose details of her partner's circumstances but the standard of living and lifestyle she enjoys is obviously made possible by his wealth and earnings. She is dependent on him and not vice versa. The house in which W lives belongs to her new partner. W does not pay rent and her contribution towards the household expenses appears to be limited to purchasing food for the family. W is not alleging that she lacks the financial resources to pay the school fees and in my view, my decision in this case would not be altered if W was working a few additional hours each day and receiving a proportionately increased salary.

22. H refused to disclose details of the earnings of his cohabitant on the grounds that he did not see why he should do so when W had not done the same. However, the circumstances are different. H's cohabitant, who moved into his house in April 2011, is on low earnings. In evidence, H said that the contribution his cohabitant makes towards their joint expenses is that she shops and contributes towards the cost of their food occasionally. In written submissions sent after the hearing, H said that his cohabitant pays her way. The evidence given at the hearing was insufficient to enable me to conclude whether her contribution is sufficient to cover the costs of her living in the house or even to make a contribution towards the general overheads. H hoped that the relationship would be permanent although it was too early for him to be sure. If it is permanent, I can see no reason why the cohabitant should not contribute towards the general household expenses of the home in which she lives (as opposed simply to paying the additional costs incurred by H in accommodating her). If she does, her financial contribution will undoubtedly assist H in meeting his commitments. Having a second income earner living under the same roof can only be of assistance to him.

23. However, I accept H's evidence that it would be too disruptive to him to work late at night. It is important that he is not so tired that he cannot properly perform his day-time job which is his principal source of income.

24. In September, H lent £782 to enable his partner to fly out of country. H did not explain why she was unable to pay for the flight out of her own earnings. Advocate Haskins sought to argue that the fact of the loan indicated that H treated his partner as a higher priority than the education of his children. I accept H's explanation that it was convenient for him to pay for the flights on his credit card, that his partner was repaying the loan and that it was to be be fully repaid by Christmas 2011. The fact of the loan is therefore not a factor to be taken into consideration by me. However, it illustrates the difference between the circumstances of each of H and W and their respective new partners.

25. H sees a significant disparity between the level of disposable income enjoyed by his former wife and her new long-term partner and his own modest means that leave him struggling to cope and worried about any adverse financial changes that may happen and that would make it even more difficult for him to make ends meet. He even sought to show that W's

expenditure is higher than she had disclosed. In my view, W's standard of living is not a factor to be taken into consideration in deciding whether there has been such a material change of circumstances that a variation of the Consent Order would be justified. As the authorities cited at the start of this judgment demonstrate, one of the advantages of parties reaching agreement over financial matters following divorce is that it enables them to organise their affairs on the basis of the agreement.

26. H had to be able to satisfy me that there had been a material change in his circumstances that would justify a variation and he has failed to do so. H fears that circumstances may change in the future in a way that would make it unreasonable or impossible for him to comply with the terms of the Consent Order but it is not for me to speculate as to what might happen, what inflation may be, how interest rates might increase, whether he might lose his job or he might have to incur major expenditure to carry out repairs to his house. The application has to be judged on the basis of circumstances as they are and facts that have been established in accordance with the burden and standard of proof. H may be finding it difficult to make ends meet but he is able to do so. H must remember that the courts take the view that the welfare of his children has to be his first consideration.

27. In conclusion, H has failed to persuade me to order a reduction in the maintenance, school fees and ancillary expenditure payable by him under the present terms of the Consent Order.

Should H contribute towards the cost of the school fees of his daughter, B?

28. W submitted that it was always their joint intention to send their children to a fee-paying or private school. The children's names were put down for a private school when they were young and they had planned, if necessary, to make sacrifices in order to pay the fees. In H's original Form A, sworn in May 2008, it is stated that *"Private education was a real possibility at that time"*. Under cross-examination, he denied that was accurate, saying it had been drafted by his then Advocate. Having observed H in Court and having seen the way he prepared for the hearing of the present applications, I am of the opinion that he is conscientious and pays attention to detail (qualities that are no doubt invaluable in his professional trust administration work) and I therefore think it unlikely that he would have signed a Form A containing a sworn declaration that the contents were true unless he believed that to be so. In evidence he said that it he had always understood that W's parents would assist with the school fees if necessary.

29. H gave evidence that W's parents are more affluent than his own and hence W has greater inheritance expectations than he. Expectations of any inheritance from parents who, as in the present case, are living are too uncertain for me to take into consideration and therefore I do not do so.

30. Having reviewed all the evidence in connection with the present applications and at the hearing in August, I believe that when they were married, H and W hoped that their two daughters would attend private schools. It may be that they hoped their daughters would be awarded scholarships but even if fees had to be paid, my view of the evidence is that it was their hope that the girls would attend private schools. I am sure they hoped their earnings would be sufficient to pay the fees themselves and if they were unable to do so, they intended to rely upon support from W's parents to enable the daughters to attend their school of first choice.

31. The possibility of B attending a private school was envisaged at the time of the Consent order, as is indicated in paragraph 14 thereof, but I conclude from the wording of paragraph 14 of the Order that there was no agreement as to how the cost of the school fees would be funded.

32. The estimated net income of the parties during 2011 is stated in their respective Form As to be £17,160 for W and £33,542 for H (from his principal employment without including any income from part time employment which I accept should not be taken into account for the reasons I have explained). The school fees payable in respect of each of their daughters is £6,360 per annum, of which H is required to pay £3,180 under the terms of the Consent Order, that is one half of A's fees. The sum payable as maintenance is now £622.66 per month, or £7,472 per annum after adjusting for the most recent cost of living increase. He estimates that his obligation under the terms of the Consent Order in respect of school trips costs £540 per annum. He is therefore currently required to pay a total of £11,192 (£932.66 per month) or one third of his annual salary in respect of the two daughters. If he was to pay one half of B's school fees, the total commitment would amount to £14,372 or nearly 43% of his salary.

33. H's other expenditure includes his mortgage payments of £751.29 per month or £9,015 per annum. In his recent Form A, he claimed the mortgage payments were £1,120 per month but under cross-examination he explained that was what he thought they might become if interest rates increase. As I have already said, we should be looking at actual outgoings.

34. In part 3 of the Form A, H declared his "Income Needs" to be £2,867.80 per month or £34,413.60 per annum excluding maintenance. However, the declared expenditure includes £500 for a pension which he is not currently paying although he would like to do so; he said in evidence that for the time being he can only afford to pay £25 per month. The figures have therefore been overstated by £368.71 and £475.00 in respect of mortgage and pension payments respectively, a total of £843.71. The listed expenditure does not include his maintenance payments in respect of which his current obligation is to pay £932.66, as I have said.

35. With the exception of the pension and mortgage, Advocate Haskins did not challenge the amount of expenditure included. The largest items of monthly expenditure are £300 for food and household goods, £100 for petrol, £100 for a family holiday with children and £120 in respect of entertainment and leisure for children. Such amounts should enable him to enjoy a reasonable, but modest, lifestyle and I accept that the figures are not excessively over-stated.

36. I do not see how H could afford to pay one half of the school fees due in respect of his second daughter, B on his present income.

37. I have reflected carefully on the question of whether H should be expected to improve his position by requiring his cohabitant to contribute towards the household expenses by an amount that would be at least sufficient to enable him to contribute towards the school fees. In principle, I can see no reason why the cohabitant should not make a contribution to their joint overheads. My understanding is that at present she does no more than contribute to the additional costs that are incurred by her living in the house. I assume that is what H meant in his further written submission where he wrote that she "pays her own way" although, at the conclusion of the oral evidence, my impression was that she did not even do that. She is in effect living rent-free in the house and, in my view, it would be reasonable for her to make a

contribution. H emphasised that they had not known each other and she had not been living with him for very long, he has had other relationships that have not lasted and it is too early to say what will happen with the present partner.

38. In my judgment, the lack of permanence and the uncertainty as to the future of the relationship, when taken together with the overall financial position of H, are sufficient to persuade me that I should not take account of any contribution from the cohabitant.

39. Consequently, the decision I have reached is that it would be unreasonable to require H to pay towards B's school fees at present.

40. I took note of W's submission that both children should be treated equally and that unfortunately B has the impression that her father favours her sister rather than her. I hope that is untrue but, if it is true, H must find ways of reassuring both girls that he regards them equally and loves them both as a father should. Sadly, H's income is such that he cannot afford to pay one half of both sets of school fees.

41. If there is any improvement in H's circumstances, he must inform W immediately. "Improvement" could mean any pay increase or anything else that improves his financial standing. It also includes any change in the relationship with his cohabitant. If it becomes more permanent, she should be treated as making a contribution to the household whether or not she in fact contributes. I would expect that, for example, by the summer of 2012, H will know whether they are planning to continue living together. If they are, she should be deemed to be making a contribution and it may well be that he will then have sufficient means to be able to afford to pay his one half share of B's school fees for the following school year and, if so, he must pay a half share unless there has been another change of circumstance or other reason that will have prevented him from doing so.

Decision

42. For the reasons I have given, I dismiss H's application for a variation of the Consent Order, I also dismiss W's application for an order that H contribute towards B's school fees at the present time. As I indicated above, I would expect that as soon as there is an improvement in H's circumstances, he shall contribute.

