

JERSEY / JUDGMENT

B v C (Matrimonial) [2020]

JRC 039 (03 March 2020)

[2020] JRC 039

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judgment

the commissioner: 1. This is an appeal against the decision of the Registrar of the Family Division on 13 th August, 2019, whereby she: (i) decided to proceed with the hearing for ancillary relief; and (ii) ordered the Respondent ("the wife") to pay the Appellant ("the husband") the sum of £4,500 in full and final settlement of all of his claims for financial provision contingently upon the husband vacating the former matrimonial home on or before 12pm on 13 th September, 2019. The husband did not vacate the matrimonial home within the specified period and there is therefore at present no order in favour of the husband. Procedural background 2. We propose to deal first with the procedural position and how we dealt with the appeal hearing. 3. The husband instituted proceedings for judicial separation on 31 st May, 2019. He was represented by an advocate under the legal aid scheme. The wife has been represented by Advocate Wakeling although, because of the restrictive nature of the current legal aid eligibility guidelines, she has not been eligible for legal aid. 4. At a case review hearing on 17 th July, 2019, the Registrar was presented with a letter from the husband's General Practitioner dated 12 th July which stated that, although the doctor could not comment on the husband's ability/capacity to participate in the court proceedings, he considered that the husband might have a psychiatric illness and there should be an expert/specialist opinion. The Act in relation to the case review hearing noted that the position in relation to the husband's mental health remained at large and directed that the husband's application for financial relief be heard on 13 th August. 5. At 16:38hrs on 12 th August, i.e. the day before the hearing, the husband's advocate emailed the Registrar seeking an adjournment of the hearing. He attached an unsigned note from Professor Marshall, the consultant psychiatrist, dated the same day. The note recorded that Professor Marshall had seen the husband in his clinic that morning. Although it was the first time he had met the husband, he said that the husband clearly had a chronic psychotic disorder of a schizophrenic type. He said that this manifested itself in the form of a disorder of thinking, meaning that he struggled to talk to the point of a question and to focus on the subject in hand. His thinking jumped between unrelated topics and he found it difficult to organise his thoughts in a logical manner. He also found it difficult to retain and evaluate complex information and would not be able to make sense under cross-examination. Professor Marshall considered that at that time, the husband did not have the capacity to give meaningful instructions to his advocate. He said that he hoped to engage

the husband in medical treatment for his condition on a voluntary basis although that might take some weeks. He noted from the husband's clinical record that this was a long-standing problem and accordingly there was no guarantee of a significant improvement. 6. On the morning of the hearing, the husband's advocate sent a further note to the Registrar repeating his request for an adjournment and further indicating that, as a close family member of his was gravely ill, he could not attend court. The Registrar understood about the illness of the family member and no criticism was made by the Registrar - or is made by this Court - of the fact that the advocate could not attend the hearing at the last moment. It was also the case that no-one else from his firm was available to attend in his place. 7. The Registrar had made it clear at the earlier hearing that there was considerable urgency in resolving this matter given the fact that the husband was living in the wife's property and the comparatively modest amounts involved. She decided to proceed by asking questions of the husband in order to see whether he wished to proceed and whether he could adequately represent himself. At the hearing, the husband told the Registrar in clear terms that he wished to go ahead. The Registrar asked him a number of questions and, taking into account the limited nature of the claim, the comparatively simple facts which were relevant and the need to conduct the hearing proportionally and justly, she found on the balance of probabilities that the husband did have litigation capacity and that she could properly go on to determine the claim. 8. Each party duly gave evidence and submissions were made by the husband and Advocate Wakeling . As already stated, at the conclusion of the hearing the Registrar ordered the wife to pay the husband a lump sum of £4,500, but payment of that sum was made conditional upon the husband vacating the former matrimonial home by midday on th September, 2019. 9. In support of the husband's appeal, Advocate Wauchope sought to introduce a detailed psychiatric report from Professor Marshall dated 26 th September, 2019. This report expanded upon the short note of 12 th August. It explained the Professor's conclusion that on 12 th August, the husband lacked capacity to participate in matrimonial proceedings and was unable to make decisions pursuant to Article 5(1) of the Capacity and Self-Determination (Jersey) Law . The report went on to explain that Professor Marshall had seen the husband on three further occasions since 12 th August and had prescribed him anti-psychotic medication, which he had been taking. The report concluded that the anti-psychotic medication had been effective and that on 23 rd September, 2019 (being the occasion of the husband's last attendance upon Professor Marshall), the husband did have capacity to pursue matrimonial proceedings and make rational decisions when choices were explained to him. Although the husband had improved, Professor Marshall felt that he was not yet in a position to give evidence himself or cross-examine the wife or respond to questions in cross-examination by the wife's advocate but he did have the capacity to give coherent and rational instructions to his advocate. 10. We agreed to receive this report. In our judgment it was not evidence which was reasonably obtainable on 13 th August. The husband had only attended upon the Professor for the first time on 12 th August and we fully accept that there was no time for the Professor to prepare a detailed report in time for the hearing the next day. Accordingly we gave leave for the report to be adduced in evidence on the appeal. In the light of the report, there is no question about the husband's capacity to instruct Advocate Wauchope at the hearing before us. 11. At an early point in the hearing, we indicated that, whilst we had considerable concerns about the Registrar's decision to proceed in the face of

the note from Professor Marshall, we would be very reluctant, if the appeal were successful, to remit the matter for a further hearing before a different Registrar as requested by Advocate Wauchope on behalf of the husband in his written submissions on appeal. Such a hearing would incur further time and expense as well as delay and, in view of the comparatively modest amounts at stake, would not be consistent with the overriding objective. We therefore invited the parties to consider whether, given that this Court exercises an original matrimonial jurisdiction in appropriate cases as well as hearing appeals from the Registrar, it would not be preferable for the matter to be considered *de novo* on its merits by this Court rather than spending time on the procedural aspects before the Registrar and then remitting the matter if we had been persuaded that the Registrar should have agreed to adjourn the case in the light of the note from Professor Marshall and the unavoidable absence of the husband's advocate. The Court adjourned for the parties to consider this matter with their advocates. 12. When the hearing resumed, both advocates confirmed that their clients agreed to proceed in this manner. In other words, this Court would consider the matter afresh, unencumbered by the findings of the Registrar, and reach its own decision on the husband's application for financial relief. The appeal therefore proceeded on that basis. The Court also gave the parties the opportunity of filing further written submissions following the hearing. 13. Following the conclusion of the hearing on 10th December and after consideration of the further submissions we notified the parties on 17th December that we ordered the wife to pay the husband a lump sum of £2,000 payable within 28 days. We now give our reasons for that decision. Factual background 14. The wife is aged 40 and the husband aged 37. The wife is a teacher and owns a property ("the Property") in Jersey which she purchased in 2013 in her sole name with the aid of a mortgage and a loan from her parents. 15. The husband comes from South Africa. He met the wife on a visit to Jersey in March 2016. They were married in Jersey on 29th July 2017 having co-habited for a few months before then at the Property. Following the marriage they continued to live together at the Property. 16. Problems in the marriage arose at an early stage and the parties separated in February 2019 when the wife left the Property. The husband remained in the Property and the wife stayed mostly with her brother. 17. As mentioned earlier, the order of the Registrar was that the husband should receive £4,500 provided that he vacated the Property by 13th September. The husband did not do so with the result that ouster proceedings which the wife had instituted came before the Royal Court on 31st October, 2019. The Court ordered the husband to vacate the Property by 7th November. The order of the Registrar for payment of £4,500 having lapsed because of the husband's failure to move out of the Property, the wife offered before the Royal Court to contribute £1,000 towards his removal expenses and the Royal Court incorporated a direction for payment of £1,000 within its order. The Royal Court also made a provisional order that the husband should pay the wife's costs in respect of the ouster proceedings on the standard basis, but said that this provisional order should be reviewed at the hearing of the appeal against the Registrar's decision. 18. Since he vacated the Property in November, the husband has been staying with friends. We were informed by Advocate Wauchope that the husband has made an application for asylum in Jersey and he is not permitted to work pending consideration of that application. If the application is successful, he will then be able to work in Jersey; if it is unsuccessful he will have to leave the Island. 19. Turning to the parties' finances, we take first the capital position. As already mentioned, the wife

owns the Property which she acquired before she met the husband. After deduction of the outstanding mortgage and the loan from her parents, there is an equity of some £185,000 - £189,000. She also has a pension plan which had a transfer value as at June 2019 of some £125,000. However the pension will not become payable until March 2039 at the earliest. 20. The wife has a car in Jersey and the husband has a Land Rover in South Africa which is in storage. The wife has no material savings in any bank account although she has a sum of £3,500 held in the client account of her advocates on account of outstanding fees. In his affidavit prepared for this appeal, the husband says that he has savings of £4,500 in a bank account, which he is living off. 21. As to income, the wife is employed as a teacher. According to the information before the Registrar, her gross annual income is £56,285 and her net annual income is £40,141 after deduction of tax, social security and pension contribution. As already mentioned, the husband does not have any income at present as he is unable to work pending his asylum application. 22. As to contributions during the marriage, it is agreed that the wife was responsible for the mortgage payments and all the household bills in respect of the Property. The husband earned a total of approximately £12,000 during the whole of his time in Jersey as he was not working all of the time. He accepts, through his advocate, that his contribution to the family expenditure during the marriage could be described as 'modest' but he did contribute to the purchase of food and other occasional expenses. Discussion 23. The husband is aggrieved about certain of the findings of fact of the Registrar in connection with his behaviour during the marriage. Each side blames the other for the breakdown of the marriage and gives example of conduct by the other party which is said to have led to the breakdown. 24. We have reviewed the allegations on both sides but are entirely satisfied that, even taken at their highest, none of the alleged conduct comes anywhere near the high level which requires it to be taken into account when considering what financial orders to make - see J -v- H

[2014] JRC 140A at paragraph 39 with its reference to 'gross and obvious' conduct. We therefore proceed on the basis that neither the husband nor the wife has not been guilty of any behaviour or conduct during the marriage which would have any effect on our award. 25. As to the legal principles to be applied, they are well established. Although not contained in our statute, the Court considers the factors set out in section 25(2) of the English Matrimonial Causes Act 1973 which is in the following terms: "(2) As regards the exercise of the powers of the court ... in relation to a party to the marriage, the court shall in particular have regard to the following matters:-

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;

- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit ... which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring." 26. As the English courts have indicated on a number of occasions, the statutory provision indicates factors to be taken into account but does not explain how they are to be applied. That has been left to the courts to develop. 27. Since the leading English case of *Miller -v- Miller, McFarlane -v- McFarlane*

[2006] UKHL 24 , it has been generally accepted that, when considering questions of financial relief on divorce, the court will bear in mind three aspects, namely sharing, compensation and needs. 28. Sharing involves the idea that the parties should share in the fruits of the matrimonial partnership i.e. in wealth created or increased during the course of the marriage. In this case, there has been no creation or increase in value of matrimonial property given the short duration of the marriage. The Property was acquired solely by the wife well before the marriage. There is no evidence that its value has increased during the marriage. The only other capital asset is her pension which may have increased marginally through her contributions during the period of the marriage, but this is an unrealisable asset and any increase will have been minimal. In our judgment, given the short duration of the marriage and the absence of any increase in the value of assets during the marriage, this is not a case where the sharing principle has any significance. 29. The second aspect is that of compensation. This relates, for example, to the common position where a wife gives up her career in order to look after the children and the home thereby enabling her husband to concentrate on his career and accumulate either wealth or a higher income. In those circumstances, on the end of the marriage, the wife should be compensated for any significant prospective economic disparity which arises from her decision to give up her career. Again, we do not see that any question of compensation can arise in the present case. There is no suggestion that the husband gave up work in order to look after the home and there were of course no children of the marriage. He continued to work during the marriage as and when he was able to find employment. 30. That leaves the third aspect, namely financial needs, and that would appear to be the applicable aspect in this case. 31. But the overriding objective is to achieve a fair outcome. In our judgment, the shortness of the marriage (under 19 months plus a few months of co-habitation) is an extremely significant aspect when considering what is fair in the present case. Furthermore, the husband has already benefitted substantially from the marriage.

The wife gave him £6,000 during the marriage to settle debts he had incurred in South Africa, he lived rent free in the Property from February to November 2019 at a time when the wife was having to stay with members of her family and the wife has paid him £1,000 to assist in the costs of his moving from the Property. 32. We do not in Jersey have the statutory equivalent of Section 25A of the Matrimonial Causes Act 1925 which gives encouragement to achieving a clean break. However, this Court has often sought to achieve a clean break where that can be achieved without unfairness. 33. In our judgment, a clean break is appropriate in this case. This has been a very short marriage of two people then in their 30s where there are no children. As already mentioned, there has been no wealth accumulated during the marriage and neither party has adjusted their way of life by giving up work so as to give rise to principles of compensation. 34. Each has an earning capacity. The wife is a teacher and will presumably continue in that career. The figures before the Registrar suggest that she certainly has no excess of income over expenditure. She has no material savings and has liabilities in respect of her legal costs. 35. The husband also has an earning capacity. It is true that he is not able to work at present pending the outcome of his asylum application, but he was employed in South Africa and during the marriage, although we accept that his mental health issues may occasionally cause difficulties in retaining employment; but he is a man who has been employed and is perfectly capable of being employed in the future. 36. In our judgment, given the shortness of the marriage, this is a clear case where each party should be left to make their way independently in future without dependence upon payments by the other party. However, given the fact that the husband is unable to work in Jersey at present, that he is relying on his savings of £4,500 (which will not last indefinitely) and that his mental health issues may cause him some difficulties, we think that a modest lump sum payment by the wife to the husband is appropriate in order to assist the husband in adjusting to the situation post marriage. 37. In our judgment, a fair sum is £2,000. The wife will either have to borrow this or use monies held on client account intended towards payment of her legal fees, but we think this would be a fair outcome in all the circumstances. 38. We also consider that, having regard to the parties' respective financial positions, we should vary the order of the Royal Court in the ouster proceedings so that, rather than the husband being ordered to pay the costs, there should be no order for costs. We consider that this is being fairly generous towards the husband in that he forced the wife to incur the expense of taking ouster proceedings by reason of his refusal to leave but, given that he has no employment at present, he is on legal aid and has savings of only £4,500, we think that the enforcement of a costs order against him would lead to undue financial hardship for him. 39. As to the costs of these provisions, our provisional view is that there should be no order for costs but we are willing to hear the parties if they wish to make any submissions for a different order. Any application with accompanying submissions should be submitted within 14 days of delivery of this

judgment.

40. In summary, we order the wife to pay a lump sum of £2,000 to the husband within 28 days and we vary the costs order of the Royal Court in the ouster proceedings so that there is no order for costs in relation to those proceedings. Authorities Capacity and Self-Determination (Jersey) Law. J -v- H (Matrimonial)

[2014] JRC 140A . English Matrimonial Causes Act 1973. Miller -v- Miller, McFarlane -v- McFarlane

[2006] UKHL 24 . Matrimonial Causes Act 1925. Page Last Updated: 23 Mar 2020 BAILII:
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