

JERSEY / JUDGMENT

D v E and F [2001] JRC 81B (05 April 2001)

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judgment

the Registrar: 1. These are Judicial Separation proceedings, and a decree was pronounced on 19th January, 2000, on the grounds of adultery. All ancillary matters were left over. 2. There are 3 children. They are all over 18, but the husband continues to make provision for the university fees of both the younger daughters. 3. The wife filed a summons on 17th of February, 2000, regarding financial provision for the youngest child, in addition to maintenance for herself, and for the Court to make such order concerning the matrimonial home, and for such lump sum payment, transfer or settlement of property as the Court may deem fit. 4. At the same time, the wife filed a summons asking for maintenance pending suit. After an adjournment, the case for maintenance pending suit was not heard until 31st March, 2000, by which time the decree had already been granted. At the hearing I decided that the husband should pay to the wife interim maintenance until further order in the sum of £1,200 per month plus a sum for the youngest child. 5. It is also necessary to explain that a hearing was fixed in July 2000, for the Court to deal with an application for the sale of the former matrimonial home, and what should happen to the net proceeds of sale. In the event, it was agreed that the matrimonial home should be sold, that the net proceeds of sale, having deducted usual expenses and sufficient to repay a loan taken out by the husband for ensuring the payment of school fees, should be held in escrow in a bank account to be opened jointly in the names of the parties' advocates. The consent order went further. It was agreed that the sum of £400,000 should be made available to the wife to purchase a new property. The wife has now purchased her own apartment. She paid a total price of £440,000, the sum of £40,000 being a sum taken out on loan and secured by way of mortgage on their apartment. The net proceeds of sale of the matrimonial home amounted to £534,545.79 and having paid to the wife the agreed sum in order to purchase her apartment the sum of £118,374.00 was placed on deposit in the joint names of the parties' advocates. The purchase of this property by the wife is criticised by the husband's advocate as being extravagant and an attempt to force his hand in the settlement of ancillary matters to her advantage. 6. The parties have certain share holdings, bank accounts, endowment policies and the husband has a Bank of Bermuda pension, the cash equivalent transfer value being initially declared as £417,739.00, but as I shall explain, this figure is subject to dispute. He has another smaller pension with a CETV of £27,122. The wife has a very small State pension, so small that it has been left out of my calculations. A table of assets was prepared by Advocate Whittaker. 7. This is a case in which the court has to take a view upon the division of assets in general, which will depend on the

application of the check list set out in Section 25 of the Matrimonial Causes Act 1973 . In particular, it is clear that relevant matters include the contributions which each of the parties has made to the marriage and the financial needs of the parties, bearing in mind that the husband, unlike the wife, does not own his own property. The wife is 54 years and the husband is 53. I must consider their standard of living, and 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. There is also the paragraph contained in Section 25 to the effect that the Court should take into account the value to each of the parties to the marriage of any benefit which, by reason of a dissolution or annulment of the marriage, that that party will lose the chance of acquiring. "Financial resources" includes any benefit under a pension scheme which a party to the marriage has or is likely to have. The hardship argument 8. At this stage, it is pertinent to remind ourselves that, as Mrs. Whittaker for the wife has stated in her submissions:- "the action is brought subsequent to D's petition for Judicial separation from E upon the grounds of his adultery, the decree being granted on the 9th January, 2000. E has expressed a wish and an intention to divorce and has indicated that he plans to bring a divorce petition after the second anniversary of the date of separation of the parties in May, 1999. It was and remains D's contention that she would suffer [grave or other] hardship should any such divorce petition be granted thus falling within the provision of Article 9A and 9B of the Matrimonial Causes Law 1949 , as amended." (The words in square brackets are mine - the use of the word "undue" by Mrs Whittaker was, I believe, a drafting error). Article 9A of the law reads:- "

- (1) The respondent to a petition for a divorce in which the petitioner alleges two years separation may oppose the grant of a decree on the grounds that the dissolution of the marriage will result in grave financial or other hardship to him and that would in all the circumstances be wrong to dissolve the marriage. (2) Where the grant of a decree is opposed by virtue of this Article, then:-
 - a) if the Court finds that the petitioner is entitled to rely in support of his petition on his allegation of two years' separation and makes no such finding as to any other ground specified in Article 7; and
 - b) if apart from this Article the Court would grant a decree on the petition; the Court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned and, if of the opinion that the dissolution of the marriage would result in grave financial or other hardship to the respondent and that it would, in all the circumstances, be wrong to dissolve the marriage, it shall dismiss the petition.
3. for the purposes of this Article, hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved." Mrs. Whittaker continues; "Under the provisions of that paragraph the Court is entitled to refuse a petition for divorce unless it can be shown that the wife (as is usually is the case), will not suffer undue financial hardship as a result of a divorce. In the event that the parties have not been able to agree a settlement of ancillary matters to take account of that potential

hardship, or that the Court has been unable to order a division of the assets and income to take account of such hardship which would otherwise been endured, a divorce will be denied. The Registrar is therefore asked to settle the matter of ancillary relief following the decree of Judicial Separation to take account of the fact of E's expressed intention and to reach an order which would obviate any financial hardship on the part of the wife. In the event that the Court finds itself unable to do so, then it is submitted the position should be made clear in order to obviate another hearing should E go ahead with his expressed intention." The facts and allocation of capital 9. The facts of this case are, briefly, that the parties married on 5th September 1970. They both had careers. Generally speaking, what they have, they have earned. Their first home was purchased in 1971. In 1975, the first child was born. Later in the same year, the wife terminated her employment as Deputy Principal Careers Officer for a London Borough. The parties moved to Jersey in 1981, initially the husband working for Royal Trust Company of Canada, then for Standard Chartered Trust Company, which was subsequently acquired by Bank of Bermuda. The marriage was very much a joint enterprise, although the way things worked out was that the wife had principal responsibility for running the home and looking after the children, and the husband went out to work. It could equally have been the other way round. 10. The discovery by the wife in 1999 that the husband was conducting an affair was a shock to her - not that I imply that the conduct of the parties is relevant. It isn't. However 19 years of married life came abruptly to an end. 11. The wife's activity setting up and working for a charity company was also to some extent a joint enterprise with the husband. He gave her help and encouragement, suggesting that she be properly rewarded for her efforts. Their interest was more than a little to do with their active membership of a Church congregation. 12. Having heard the evidence, I take the view that, although the wife's primary responsibility was with her family, she gave active support to the husband in his career, and he lent support to hers. As far as capital is concerned, I see no reason to depart from an equal division of capital, bearing in mind, however, that the husband's pension is not an immediately realisable asset. 13. Having distributed capital, the Court may still need to examine the income needs of the parties. How the Court should assess fairness and rejection of "hardship" argument 14. In a recent House of Lords case, *White -v- White*

[2000] 2FLR 981 the headnote makes the obvious statement: "the objective implicit in the provisions of part 2 of the Matrimonial Causes Act 1973, Section 25 was to achieve a fair outcome in financial arrangements on or after divorce, giving first consideration where relevant to the welfare of children." In his judgment, Lord Nicholls of Birkenhead, says:- "Everyone would accept that the outcome on these matters, whether by agreement or Court order, to be fair. More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder." Later in the judgment under a paragraph entitled "equality", the judgment reads:- "Sometimes, having carried out the statutory exercise, the judge's conclusion

involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the Court to focus on the need to ensure the absence of discrimination." However, the judge goes on to say that there is no presumption of equality, nor even a starting point, only a "yardstick". 15. It has to be said as it was pointed out by Advocate Le Sueur for the husband, that the case of *White -v- White* is a case where very large assets were concerned. This case is not quite in the same league, but, nevertheless, I do find the judge's comments about equality most helpful, which, I am sure, were intended to have more general effect. 16. The total net assets set out in table 1 amount to the sum £1,172,964.00, of which, at the moment, the wife, arguably, has set her sights on approximately £563,245.39. The balance of proceeds of the former matrimonial home is, however, held in escrow and the wife does not actually have control of any of Lamasco capital. 17. We must also bear in mind that the wife derives an annual total income of £37,433 (net) (including maintenance). She works for a charity, known as ACET Jersey, whilst the husband has declared an income in his affidavit based on the previous 52 weeks of £107,176 (net) per annum. 18. I found the case of *Le Marchant -v- Le Marchant*

- [1977] 1WLR 559 helpful in deciding whether the wife could be said to be suffering "hardship". I quote from an article in Volume No.7 of *Family Law* at page 193 regarding that case. "The question was whether a plea of grave financial hardship, set up in answer to the husband's divorce petition, should be dealt with prior to the granting of the decree nisi or - the Court being satisfied that the husband had means to alleviate it, - the respondent should be left to raise the issue on the application to make the decree absolute. Section 5 of the Matrimonial Causes Act 1973 provides that a respondent to a divorce petition based on 5 years separation (as it was in the case of *Le Marchant*) may oppose the grant of a decree on the ground that the dissolution of the marriage would result in grave financial hardship to the respondent and that in all the circumstances it would be wrong to dissolve the marriage. Section 10(3)(b) provides that the Court shall not make a decree absolute unless it is satisfied "that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances". 19. The financial hardship pleaded by the wife respondent in *Le Marchant* was loss of her index linked widow's pension under the Post Office pension Scheme - a loss which was recognised by the Court as amounting to grave financial hardship within the above cited sections. At the hearing, the husband made no precise financial proposals to cure the hardship and *Purchas J* held that the respondent's remedy lay under Section 10. His Lordship was reversed on this point by the Court of Appeal. 20. It was wrong. *Ormrod LJ* indicated that to approach a case of this kind on the footing that the respondent was entitled to be

compensated for what she would lose in consequence of the divorce: "She has to show, that not she will lose something by being divorced, but she will suffer grave financial hardship, which is quite another matter altogether." 21. In the present case, it seems to me that, having taken into account the guidelines of Section 25 of the Matrimonial Causes Act 1973, and bearing in mind the substantial assets of the parties, a large portion of which has already been used up in providing the wife with a new home, it does not seem to me that she is or will be suffering any "hardship" in the event of a divorce, provided that the assets are divided in a "fair" manner as set out in the case of White and provided the CETV of the husband's pension (as seen in the light of correspondence provided) is taken into account in accordance with the guidelines provided in the case of Southern. How to Value the pension 22. The matter is complicated by virtue of the fact that the parties are not agreed on the value of the husband's pension in respect of which more than one cash equivalent of transfer of value has been given by actuaries but which is still subject to dispute. Calculations have been made with the help of accountants Deloitte and Touche and with the assistance of Rossborough's, insurance brokers, in order to provide annuity benefit in respect of the perceived losses of the wife in the event of divorce. 23. In a book entitled Ancillary Relief Handbook, second edition, by Roger Bird LLB, published by Family Law in the year 2000, at page 97 the author writes:- "Although the CETV is the conventional method of valuation, it is not the only one and this method is not without its critics. It is sometimes argued that in defined contribution or money purchase schemes, the CETV is likely to be less than the actual value of the funds accrued for the member due to certain costs being deducted. In final salary and defined benefits scheme, the CETV maybe considerably less than the true value of the lost benefits as the scheme actuary may adopt conservative assumptions to protect the remaining scheme members. The Court cannot, in principle, depart from this CETV method of valuation, but it may be persuaded to take other matters into account, provided that they were supported by expert evidence. In particular, evidence of matters not included in the CETV, such as death in service benefits or discretionary benefits, might be admissible, as might evidence as to future expectations where it seemed that the CETV provided an inadequate indication as to its value." 24. In Jersey, in the case of Southern

[1999] JLR 94, the Bailiff states that the method of valuation of a pension should generally be the cash equivalent transfer value of the member's benefits of the pension scheme, calculated at the date of divorce. He continues (on page 102):- "Those benefits will include any contingent spouse's pension payable in the event of the member's death to the surviving spouse during his or her life time. The benefits will also include, to the extent that it is appropriate in the context of the pension scheme in question, loss of any share in a death in service lump sum benefit. They will not include loss of a contingent share in any lump sum through commutation of a pension because that will already have been taken into account in valuing the pension entitlement. Depending on the length of the period between the date of divorce and the normal date of retirement, the valuation may need to be enhanced to take an account of the likely difference between wage inflation and price

inflation over that period, or any other material factors. These are all matters upon which actuarial advice will be important." 25. A letter dated 17th January, 2001, from Bacon and Woodrow, the actuaries, addressed to Advocate Le Sueur, states that the transfer value of E's benefits in his Bank of Bermuda Group Sterling Area Pension Plan is £417,739.00. The valuation is on the assumption that E had left the pension plan on 31st December, 2000, that the retirement age was 60 years and various other matters. I note, attached to the pension plan, is a form of designation of nominee in which E appoints D as his nominee to receive any benefit provided under the plan. The pension plan itself provides a normal retirement date of the employee's 60th birthday. Finally it is noteworthy that a member, on his retirement date, may elect to commute such pension or partner thereof for a lump sum not greater in one quarter of the capital value of the pension. 26. Despite an agreement between the parties which was confirmed by Court order dated 4th December, 2000, no independent actuary was appointed subsequent to the obtaining the up to date cash equivalent transfer value and I have made no further order in relation thereto. However, I have read, attached to Mrs. Whittaker's submissions, letters from Messrs. Deloitte and Touche dated the 6th July, 2000 which relate to a cash equivalent transfer value provided on 31st March, 2000, of only £307,919.00. Furthermore I have two more letters, one dated 23rd March, 2001, and another 26th March, 2001 regarding the Bacon and Woodrow CETV as at 31st December, 2000. I have considered the criticisms made in relation to these letters made by Advocate Le Sueur. Arguably I should not consider them at all. Should the value of the widow's pension be excluded from the benefits available to E and be excluded from the cash equivalent transfer value of his pension? D has no entitlement to 50% of E's pension as might appear from the letters. However, I see no reason why I am not entitled to examine constructive criticism of the methods used by Bacon and Woodrow in calculating the cash equivalent transfer value. I am particularly interested in the paragraph on the third page of Deloitte and Touche letter dated 26th March, 2001, which reads as follows:- "Bacon and Woodrow have used long term assumptions to calculate the transfer value and have applied a market value adjustment factor based on long term index linked and fixed interest gilt yields to convert into current market terms. These assumptions are not unreasonable. However, it should be noted that the resulting transfer value that Bacon and Woodrow have calculated using this basis is approximately 8% lower than the minimum transfer value that would be calculated under UK legislation (i.e the later figure would £457,000...)" I therefore propose to use the figure of £457,000 as the cash equivalent transfer value in the allocation of assets between the parties. 27. I note that, if I had accepted Mrs Whittaker's argument for an increase in line with an assumed rate of salary increase at the rate accepted in the Southern case, (1.5% per annum above the deferred pension revaluation) the figure would have worked out at £459,000. So the acceptance of the increased figure is not only reasonable on the basis of the Deloitte and Touche letter, it is in effect a compromise between the highest proposed figures and the lowest proposed by the actuaries. The Decision 28. I have, therefore, decided to divide the parties' capital equally, with the adjusted figure for the CETV of the husband's pension. I decline to make any adjustment in the figures to reflect recent stock

market trends. I accept that the table is sufficiently accurate as at January 2001, which is a convenient date to choose, being just one year from the date of a Judicial Separation and when Divorce proceedings are contemplated by the husband. 29. The grand total of assets including the adjusted figure for the pension comes to £1,212,225, but excluding the funds in escrow, the figure is £1,093,851. The wife's half share is, therefore £546,925, including the value of her new apartment (£440,000). Using table 2, it will be seen that the difference in net assets is £85,735. Adding her share of Lamasco, she is, therefore, due total compensation of £154,251, in order to balance the books. The Decision in Practice 30. I propose that the whole of the remainder of the escrow account (£118,374) be released to the wife upon the expiry of 10 days from the distribution of the order. I further propose that the husband should make the payment of a lump sum of £50,000 due upon his presumed retirement in July 2007, but that no interest be payable. I should add that the wife will be entitled to the interest on the funds in escrow and the husband to all accrued interest on Lamasco. 31. Having received the benefit of a high proportion of the assets, I propose that maintenance continue to be payable to the wife, for the moment, but at a reduced rate of £650 per month, with no cost of living increases, until such time as the lump sum has been paid, but not thereafter. Financial provision for the children will remain unaltered. 32. Finally, I could not be more in agreement with Advocate Le Sueur's submission that this is a suitable case for a clean break. Fortunately, there are sufficient assets to achieve this without damaging the husband's capital unreasonably far, but not until his 60th birthday. The wife has her new property and the husband has his pension, both of which are, by any standards, very valuable assets. I accept, however that, despite his high income, it will be difficult for him to purchase his own property in the short term unless he sacrifices other assets or finds another source of funds. 33. The wife would appear to benefit in the short term, but she has inadequate provision for her retirement in order to maintain herself as now. I fear that her present accommodation may prove to have been a rather a luxury. 34. I anticipate that the parties' advocates will wish to address me on the matter of costs. Authorities Matrimonial Causes Act 1973 s 25. Matrimonial Causes (Jersey) Law, 1949, as amended. White -v- White

[2000] 2FLR 981 . Le Marchant -v- Le Marchant

[1977] 1WLR 559. Family Law [1977] vol. 7: p.193. Bird: Ancillary Relief Handbook. (Family Law :2 nd ed'n.) p97. Southern

[1999] JLR 94 . Page Last Updated: 11 Apr 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 23 October 2026 · Esheria