

JERSEY / JUDGMENT

J v K [2001] JRC 209A (24 October 2001)

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judgment

the registrar: 1. In this case the parties were divorced by decree nisi pronounced on 21st May, 1997 on the grounds of one year's separation. The decree was made absolute on 27th January 1999. 2. A summons was filed in September 1999 by the husband with regard to the care of and maintenance for the children. 3. A notice in Form 2, being a cross-application, was also filed by the wife. 4. There is also, in the file, a summons which was never signed by the Greffier concerning an application by the husband for a "draft" agreement entered into between the parties to be ratified. 5. Whatever happened to that application, I am not certain. In any event, a memorandum of agreement signed by the parties on 23rd December, 1998 was eventually ratified by the Court on 30th December, 1998. 6. It deals with the custody care and control of and access to the children, maintenance for them, a 'Mesher' order in respect of the former matrimonial home, and other matters, including provisions in the event of the death of one of the parties prior to the occurrence of a 'trigger' date, income tax child relief and the disposal of other assets of the parties. 7. It is comprehensive and finishes with a paragraph frequently used to indicate that it is made in full and final settlement and intended to constitute a "clean break". 8. The Court order ratifying the agreement states:- "And it is further ordered that neither the petitioner nor the respondent be entitled to make any further applications under Articles 27, 28, 29 and 29A of the Matrimonial Causes (Jersey) Law 1949 as amended." 9. The agreement contains the following paragraphs 4 to 7:- "4. That from the 1st January, 1998, the Petitioner shall pay to the Respondent the sum of £40.00 per week by the way of maintenance for each child payable by standing order on the first day of each month into her bank account [at this point, details of the account are given]. The maintenance in respect of the children shall cease once each has respectively attained the age of sixteen years or ceased full-time education (including any course undertaken at Highlands College or any equivalent A Level type course) whichever shall be the later of such events. 5. That the maintenance payable by the Petitioner for the children shall be reviewed:- a) annually on the anniversary of the 1st June in accordance with the terms of clause 6 below; b) in the event of either of the children undertaking tertiary education; c) if either of the children cease to live with the Respondent; d) in the event of a material change in the circumstances of either party or the needs of the children or any one of them so require. 6. That the maintenance for the children shall be increased in accordance with any increase in the Petitioner's salary. The Petitioner shall not be liable to commence payment of the reviewed maintenance until he receives his increased salary but immediately upon receipt of any increase he will amend the

standing order payable to the Respondent in and in addition, will pay to her a sum equivalent to the shortfall in the maintenance from the 1st June to the date upon which the standing order is amended. 7. That the former matrimonial home (hereinafter referred to as "the property") shall remain in the joint ownership of the parties until either:- a) they agree that it should be sold; or b) such time as the last of the children shall have attained the age of 16 years or ceased full-time secondary education (including any course undertaken at Highlands College or any A Level equivalent type course) whichever is the later event; whereupon the property home shall be sold and the sale proceeds divided as hereinafter set out. In the event however of either of the children going on to tertiary education the sale of the matrimonial home shall be reviewed." 10. The husband, in June 2001, some 2½ years later, filed the following application that the Memorandum of Agreement entered into between the parties on the 23rd December 1998 should be varied as follows:- (i) the deletion of clauses 4, 5 and 6; (ii) by providing for maintenance to be paid by the Respondent to the Petitioner in respect of A at such rate as the Registrar deems fit; and (iii) by ordering that the former matrimonial home should be immediately placed on the market for sale." 11. I have no hesitation in hearing the husband's application for a variation in child maintenance, or even for a re-instatement of maintenance for a "child" if he is attending a college of further education, even if over the age of majority. 12. However, I do have reservations about disturbing the agreement about the former matrimonial home. 13. The leading Jersey case, the facts of which are not dissimilar, is *Braid -v- Barnes and Brée* (9th January

1998) *Jersey Unreported*. In that case a consent order had been ratified, by virtue of which the former matrimonial home was to be sold. In the event, that proved difficult and the Greffier referred the matter to the Court. The Court had no hesitation in setting aside the order of the Greffier and returning the case to him with a direction to impose a *Mesher* Order. 14. Sir Peter Crill, sitting as Commissioner, having satisfied himself on the authority of *Thwaite -v- Thwaite* [1981] 2 All ER 7 that the Court had the power to change an order of the Greffier as it thought fit, continued:- "So the question is, having got the power to vary the consent order of December, 1996, should we do so? The Petitioner relies on four heads; first, mistake; secondly, bad advice from her then legal advisor; thirdly, that she had in fact been given a bad deal; and fourthly, there had been a number of intervening events, two in fact, which were that she was unable to find the sort of house she wanted because of the housing situation and secondly that her financial position had changed. The Respondent denies that any of these grounds have been sufficiently proved by the Petitioner during the last two days we have been sitting, however we do not feel called upon to settle the argument in respect of those four matters because, as it is the duty of the Court to examine every consent order before it makes an order, and thereby converts the consent order into an order of the Court, - again I refer to the passage I previously mentioned in *Rennell -v- Le Miere*, -and as there is no evidence that, in December, 1986, the Judicial Greffier did so, - even if he may have done so, as seems to be apparent from his notes and the transcript at the August hearing, I am bound to say that I can find nothing in the transcript of any particular passage referring to these matters. But in our view because he may not have done so in December, that apparent omission is sufficient for us to order that the consent

order of December be set aside, and furthermore the Court of Appeal in England made it very clear in the case of Tilley -v- Tilley

(1979) 10 F. L. R. 89, in the words of Donaldson, L. J, as he then was: "However the fact that execution of the order would render a family, and above all the children homeless, was a paramount consideration in this case." There is no doubt in our mind that were we not to set aside the order and were we in fact to say that the consent order should apply and to order that the Greffier should put a new purchaser in possession, that would be the position here, and that in our view would not be just and right in the circumstances. We therefore set aside the consent order of December 1996, and remit the matter to the Greffier Substitute with a direction that he makes a Mesher order subject to such conditions as may be just, obviously the condition of the matrimonial home and the financial position of the parties are at least two of the matters which no doubt he will take in to account in making his order. It may be necessary for him to hear further evidence, but that is a matter for his discretion." 15. The preliminary matters which I have to decide are whether the agreement which was ratified can be varied and, if so, can it be varied by the authority of the Greffier alone. 16. My decision is that the agreement can be varied, in a similar way to which the Court in Braid -v- Barnes did not feel constrained from doing so. 17. In this case the variation requested comes under the bracket of "implementation" and does not affect the existence of the Mesher Order itself. In effect the husband is asking for an earlier sale date than that originally envisaged, although I have to remark here that both children are already over the age of 16 years, which means that the earliest possible trigger date has already passed. 18. I believe that a consent order, ratified by the Court in Jersey, can be varied more easily than the United Kingdom. In the first place Article 32 of the law so provides, without any particular limitations. Secondly, in most cases the Court or the Greffier ratify agreements in good faith and in reliance on the good advice which litigants have received from their lawyers, who in most cases, countersign the agreement to be ratified. But that is the only confirmation which the Court has, that the agreement is fair and reasonable. Since the Court has a duty, which is set out clearly in the case of Rennell -v- Le Miere (5 th April 1995) Jersey Unreported to establish that an agreement is fair and reasonable before ratifying it, it seems to me that, as in the Braid -v-Barnes case, it is a relatively simple matter for the Court, at a later date, to override the very simple process undergone at the time of ratifying the agreement. 19. In the United Kingdom the process is different in that a Form M.1. "Statement of Information under F. P. R. Rule 2.61 in support of information for financial relief" has to be submitted to the Court at the time any application is made for an order by consent. No such requirement is in place in Jersey, where, in most cases, not even the parties' lawyers, let alone the parties themselves, have to appear before the Greffier or Court in order to satisfy him or the Bailiff that an agreement is reasonable before it is ratified. 20. In this case I have no background knowledge of events, and know nothing about the means of the parties which led to them signing the agreement. I only have the counter-signatures of their lawyers, Mrs Canavan and Advocate Fitz. 21. In my opinion, the agreement can be varied by the Greffier alone,

because the Court in the Braid -v- Barnes case, remitted the case to the Greffier with an exhortation to deal with the case himself, hearing further evidence if necessary, according to his discretion. It would be not so if the Court had dealt with the Mesher order and the conditions to be imposed with it. Curiously enough, in the event, the parties finally agreed an immediate sale after all, and the Greffier ratified an agreement to that effect. 22. It is, therefore, I would suggest, as compared to the United Kingdom procedure, a simpler matter to satisfy the Court or Greffier, at a later date, that it is just to vary an agreement, solely on the ground that insufficient material was available to the Greffier to satisfy himself as to the fairness of the agreement. 23. That is not to say that agreements are not worth the paper they are written on. Matrimonial agreements should not be displaced unless injustice would be done by holding parties to an agreement. This is clear from the case of Edgar -v- Edgar

[1981] 2FLR 19. 24. That case dealt with a party's application to vary an earlier agreement not to apply for a lump sum. A quote from the head note of the case reads:- "The existence of a prior agreement not to claim a lump sum must be considered having regard to all the circumstances, including the circumstances surrounding the making of the agreement: undue pressure, exploitation of a dominant position, inadequate knowledge, possible bad legal advice, an important change of circumstances, were all relevant to the question of justice between the parties, but it was also important that formal agreements, properly and fairly at with competent legal advice, should not be displaced unless there were good and substantial grounds for concluding that an injustice would be done by holding the parties to the terms of their agreement; in this case, although the husband had the advantage in bargaining power, there was nothing to suggest any pressure on, or exploitation of, the wife and there was no adequate explanation of the wife's conduct in deciding to agree to the deed and then ask the court to disregard it, therefore there were no grounds for holding that justice required the court to relieve her from the effects of her agreement." 25. When I come to hear the application, these are criteria which I will have to consider in relation to the facts of the case. 26. As for the Court's further order not to entitle either party to make further application in this case, I take the view, like Mrs Canavan for the husband, that this is not actually a "further application", and Article 32 is not mentioned in the list of Articles proscribed by the order. 27. The substantive order made in December 1998 was a Mesher Order. The Mesher Order remains. No further application in that regard is necessary. The variation requested falls, in my opinion within the scope of Article 32 of the Law. It amounts to a variation as to the implementation of the Mesher Order. 28. Having considered the matter, I agree with Mrs Canavan that it is within the powers of the Greffier to vary both matters: the child maintenance and the provisions which allow the sale of the former matrimonial home. I have, therefore fixed a date for hearing that application. Authorities Matrimonial Causes (Jersey) Law 1949, as amended. Braid -v- Barnes and Brée (9th January 1998) Jersey Unreported. Thwaite -v- Thwaite [1981] 2 All ER 7. Rennell -v- Le Miere (5 th April 1995) Jersey Unreported. Edgar -v- Edgar [1981] 2FLR 19. Page Last Updated: 11 Apr 2017 BAILII: Copyright Policy | Disclaimers | Privacy

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