

JERSEY / JUDGMENT

J v M [2008] JRC 031A (26 February 2008)

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judgment

the registrar: 1. J has applied to reduce the maintenance he pays to his ex-wife M:- (i) as spousal maintenance, and (ii) in respect of their younger daughter L. 2. J and M were divorced in January 2002 when an agreement on ancillary matters, including maintenance, was ratified. At that time, both children of the marriage were still of school age, but G the elder boy has now left school and found a simple job. 3. The agreement provided a capital distribution to M of some £700,000 out of total joint assets of over £2,000,000. It is worth mentioning that she acquired no pension provision, but did acquire the more available capital, which included bank accounts, a nice car, insurance policies and a Norwich Union Bond valued at £245,000. 4. As for child maintenance, there was to be a payment of £1,000 per child per month, linked to the Jersey Cost of Living Index, until the children:- "reach the age of 18 or cease in full time education up to primary degree level (or its equivalent) whichever is the later..." Maintenance has ceased to be paid for G, who is now 18. Maintenance was also to cease if either child left school and obtained a job before reaching 18 years. 5. The agreement provided for the payment of certain extra expenses, like fees, extra curricular activities and uniforms. 6. As for spousal maintenance, the provision was that the J paid M the monthly sum of £4,000. The spousal review clause is in two parts:- "The maintenance payable...shall be subject to review in the event of the respondent's co-habitation for a period 6 months or her re-marriage but shall not otherwise cease by operation of law upon the respondent's remarriage. Notwithstanding the foregoing and in the event of such review a factor to be taken into account will be the extent to which it is appropriate for the respondent to depend financially upon her co-habitee or husband (as the case may be) rather than the petitioner." And:- "The maintenance payable...shall be subject to review no later than September 2005." 7. M has not remarried or cohabited. The review in September 2005 never actually took place, although the petitioner complains that it should have done. However, several things have happened which have resulted in a reduction, partly by agreement and partly by interim order of the Court. These can be summarised by:- (i) an agreement in April 2007 that both spousal and child maintenance (for both M and L) be reduced to a total of £4,666 per month; (ii) the fact that in October 2007, the older child (then 18) left school and looked for a job; (iii) the case put by J that his business JSL had suffered a set back in having acquired a building for development which lacked the planning consent necessary, coupled with a measure of acceptance by M to manage on less; (iv) changes in the circumstances of M, e.g. the deferment of her Art degree course and her intention to acquire a larger home with potential for running a bed and breakfast business; (v)

the interim order on 30 th October, 2007, that the total maintenance payment be reduced further to £3,900 per month. 8. In the agreed statement if issues for this hearing, it is said that the issues before the Court are the following:- (i) what should the level of spousal maintenance be, given the scheduled review in September 2005 and given the parties' material changes in circumstances? (ii) should the review in spousal maintenance be back dated? (iii) should spousal maintenance be capitalised? (iv) what is the appropriate level of child maintenance? (v) should maintenance for L include any "extras"? (vi) should maintenance for L be paid direct to her? 9. Child maintenance is the simpler of the 2 sides to the present disagreement. I propose to make the order that the new figure for child maintenance will be £1,000 per month, marginally above what is offered but roughly in accordance with the CSA guide figure. Even without any increase for the cost of living, child maintenance was agreed in 2002 at £1000 per child. This seems to me a fair compromise for the present. It will continue to be increased annually by the Cost of Living increase in the UK. 10. I can see no valid reason to make the maintenance payable directly to L rather than to her mother as is usual. It is the mother who has to pay family bills incurred for children or partly for children and the maintenance is designed to enable her to pay the bills. I fear that making payment directly to a child could be divisive and could give J a discretionary control over payment, a control which he should not have. 11. L is in the process of doing her GCSE course at school. I can see no reason why J should not honour the provisions of the agreement insofar as it deals with extra expenses and, for that matter, health insurance, although the subject did not form part of the submissions of either side. Therefore I decided to make no specific order in relation to the subject, intending that the provisions of the agreement should stand for the remainder of the time L stays at school. 12. With regard to the payment of spousal maintenance, the parties have very different ideas of how much is appropriate. Despite what I have called "a measure of acceptance to manage on less", M now wants the original £4,000 per month to be increased in line with the United Kingdom Cost of Living and reduced only to the extent of 50 per cent of any earnings from her bed and breakfast business as and when it might get established. She seeks a further review in January 2013 to take into account both her own and J's financial circumstances, her health and the desirability of capitalising spousal maintenance. 13. J wants spousal maintenance to be reduced with effect from 1 st October 2006 to £2,083.33. From 1 st January 2009, he wants a further reduction to £1,666.00. From 1 st January 2010, he wants a further reduction to £1,250.00 until, in September 2010, spousal maintenance is to be dismissed altogether. 14. The question arises: what was the purpose of the review in September 2005? 15. Advocate Rose Colley (acting for J) in November 2001 (in correspondence leading to the agreement in January 2002) wrote to Advocate Fitz, acting for M stating:- "Maintenance for M would be subject to review as follows:- in the event of her cohabitation for more than 6 months with a new partner and/or re-marriage but will otherwise not terminate by operation of law in the event of re-marriage; no later than September 2005 in order to reflect your client's attempts in finding employment. I note from your correspondence of 10 May 2001 that your client's present attendance on an art course is designed for that purpose. As you know, our client is disappointed that your client appears to have given up more than four years of serious and expensive academic training which allowed her to apply for a part time post with the States of Jersey (whilst the children were two years younger than they are now) and which led to gainful employment with

the States of Jersey in the last year of our clients' cohabitation. It is unfair to expect our client to bear the whole of the financial burden of your client's wish to change direction in her career from the therapeutic field, where she seems to have strong potential, to the perhaps less certain field of art. Be that as it may, my client is prepared to allow your client up to four years to pursue her efforts. If she is not successful in that field then it would be incumbent upon her to reconsider the appropriate deployment of her skills". 16. However, in response to that, Advocate Fitz wrote back later the same month:- "... The fact that your client is prepared to agree that maintenance would not cease by operation of law in the event of remarriage is greatly appreciated. I fully understand the need for a review and appreciate your client's frankness in setting out his views at this stage. Our position is that we are happy to agree a view as suggested. We do not, however, accept that M. has an earning capacity that should be taken into account or should feel obliged to work." 17. Clearly therefore, although there was agreement as to whether a review was necessary, there was no agreement as to the means for implementing the review. What is it to be? 18. Over the years the Court in Jersey has laid greater or less emphasis on different things. The case of *Cameron v-Archdale* (unreported JJ 12 th July 1983) has been often cited as authority for the Court needing to assess maintenance de novo , when being asked to review it. However the Matrimonial Causes (Jersey) Law 1949, as amended would seem to imply that the Court should begin with a starting point of maintenance and decide whether the changed circumstances of both parties should cause an increase (or decrease) when considering a review. This is apparent in Article 33 of the Law which reads:- "(1) The Court may from time to time discharge or vary any order made under Article 25, 27, 28, 29, 30 or 31 or suspend any of the provisions thereof temporarily or revive the operation of any of the provisions so suspended. (2) In exercising the powers conferred by this Article, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of the parties to the marriage." 19. In many cases, the starting point will be a previous order. In *L v D and R*

[2004] JRC 164 , the Deputy Bailiff preferred a previously agreed maintenance figure. In *W v O*

[2004] JLR N 53, the Registrar chose a previous order, but relied heavily on a number of other factors, such as the changed custodial arrangements, the paying parent's debts and his financial responsibility for a new family. 20. In this case the parties' evidence and the lawyer's submissions paid great attention to M's earning capacity (or lack of it) on the one hand and J's continued ability (or inability) to pay on the other. The arguments on both sides were well prepared and extensive. 21. However, it might depend on the starting point taken whether or not these arguments are both strictly relevant. For example, it could be argued that, even if the starting point is the amount which was agreed (£4,000 per month plus cost of living annually), M's future income potential was not agreed to form part of the review. Furthermore, it was clearly spelt out in correspondence at the time of making the agreement, that it was not accepted that she would ever have an earning potential . In other words, through a failure to agree the basis of the review, any argument on earning potential, or lack of it should be excluded from the review in accordance with Article 33(2). On this hypothesis, the review would have to be done solely on any increase or decrease on the means of J. In practical terms the Court would have to

assess his continued ability to pay maintenance at the rate spelt out in the agreement. 22. However, there is a consideration which I am bound to make which escaped much attention in the submissions made to me (although it is listed at (iii) of the issues at paragraph 8). The Court, in reassessing the rate at which spousal maintenance is to be paid and the duration of it, must also consider whether or not a clean break is desirable between the parties. Although it does not appear in the brief report of the case in [1995] JLR N 15A, the Registrar pointed out in the case of *Boudin v Smith*, that a clean break was desirable. When hearing the appeal from the case, the Inferior Number agreed and adjourned the case for an agreement on quantum of a lump sum to be paid. 23. More recently, in *Fleming v Fleming*

[2003] EWCA Civ 1841, Thorpe LJ said this in hearing an appeal from a maintenance payer against an extension of an existing order:- "The Judge had before him an application for the variation of periodical payments order under s31 of the Matrimonial Causes Act 1973. By an amendment to that section which came into force on 12 th October 1984, in such circumstances the court is under an obligation to consider whether it would be appropriate to terminate continuing financial responsibility between the parties provided that that outcome is achievable without undue hardship to the payee." 24. In considering this additional factor one can make more sense of the spousal review clause set out at paragraph 6 above. It seems to me that the review must take place on the basis of a consideration of whether or not, under the circumstances, M could become financially independent. This can include consideration of whether or not she is making reasonable efforts to help support herself and whether a lump sum should be paid either immediately or in the future in order to achieve that aim. 25. The best way of doing this is to look at how she is managing at present with the maintenance reduced as it is in accordance with the order of 30 th October 2007. Therefore my starting point will be the present maintenance as it is presently paid, namely, £3,900 per month, bearing in mind that I have already proposed child maintenance at the rate of £1,000, which would leave £2,900 payable to M for herself. The question is whether or not M could reasonably manage on this. 26. As we know, G is now working and contributing as he is able to his mother's budget. Bearing this in mind, these are the figures she claims on a monthly basis:- Mortgage Food and household Rates Endowment policy Water rates Electricity Gas Wood / oil Telephone landline House maintenance Car tax 13.50 Car insurance Car maintenance Petrol TV licence Internet connection 24.95 Health insurance Doctor (self) Dentist (self) Optician (self) Entertainment and holidays Clothing (self) etc Christmas and birthdays Parking Books and newspapers Cleaner Chimney sweep Garden Pet food Vet Pet insurance Dry cleaning Aga and boiler maintenance Plus extra expenses for L Total £5,643.80 27. Bearing in mind my duty to consider the possibility of a clean break I have to be critical of this budget. Is it excessive or unreasonable? At the same time I must make proposals for bridging the gap between the budget and present maintenance, so that in the words of Thorpe LJ, M does not "suffer hardship." 28. I can find no fault with M's budget of £5,643. M's complaint was not so much that she was short of money to make the

necessary bed and breakfast alterations to her new house and, at the same time, maintain the household and look after the children, but more, a fear for the future, if maintenance was to be, as she put it, "capped". She has cashed in the Norwich Union bond which had performed well and provided necessary capital. Her fear is linked to factors such as the dyslexia she maintains she suffers from, the stress of these proceedings and the fear, possibly the reality, though I have seen no proof, that she suffers from a kind of depression. Despite her problems, my conclusion is that she is indeed making reasonable efforts to support herself by setting up the bed and breakfast business. 29. J's Advocate made no complaint except that she had been "hijacked" in the sense that no advance notice had been given of the figures and house conversion details and gave instances of inaccuracy. Another complaint of J was that maintenance at the previous level had enabled M to pay off her mortgage more quickly than planned and she still appeared to have money to spare. 30. In my judgement, a fair budget figure is that of £5,000 to provide the present income needs for M and L. G, as we know, now contributes to his keep, so is excluded for the purpose of maintenance calculations. 31. Do I have to decide on whether or not M is capable of finding a job and maintaining herself? I accept that J hoped so. He is disappointed that M did not continue her career as a counsellor and maintains that she was almost qualified to apply for a position as a psychologist though I tend to favour what M said in this respect. She is not so qualified, principally because she does not have a first degree in a relevant subject. 32. J is also disappointed that M has interrupted her Fine Art degree studies. However, he can't have it both ways, in that M has proposed earning a partial living running a bed and breakfast business, something which J himself had suggested and which it will not be feasible for M to run unless she employs expensive outside help if she returns to Art College. 33. I do not think it is relevant for me to decide whether or not M could be a counsellor, a psychologist or, for that matter, an artist. What matters is that she has now an alternative for providing herself with some income. 34. When the guest house business opens, M hopes to make about £18,000 (or reducing it by one third for expenses) approximately £12,000 per annum net, or, on a monthly basis, about £1000. 35. So, if income needs are assessed at approximately £5,000 per month, bearing in mind that maintenance for L will cease on her leaving school (after GSCE exams) or on leaving college after about a further 3 years, these needs could quite simply be met by:- (i) spousal maintenance £3,000 (ii) child maintenance £1,000 (iii) bed and breakfast income £1,000 £5,000 36. Before making any assumptions that J is capable of continuing to fund M's lifestyle in this way, let us look at his case that his company, JSL, has suffered a downturn in its fortunes, and that, despite his return to work as a professional person, his income is insufficient. 37. JSL is a property owning company. In the notes to financial statements for the period 6 th October 2005 to 31 st March 2007, it is stated: "Exceptional Items During the period a property was purchased by the company on the basis that existing planning permission allowed the company to convert the property into flats. Subsequent inquiry has cast severe doubts as to whether this is the case and legal opinion has been obtained to suggest that it isn't. A May 2007 valuation of the property for mortgage purposes has valued it at £900,000 where neither vacant

possession or planning permission exist. The costs incurred in buying and working on the property up to the period end amounted to £1,460,218, therefore the company has considered it on fairer reflection to write down the property to the May 2007 valuation."

38. To be fair to J, he has tried to explain his financial fortune to the Court with great clarity and honesty. However, one can't help expressing a little surprise at the sums involved and the enthusiasm with which he maintains that the expenditure of capital from the company to provide an income for himself and his family could be a recipe for disaster. 39. In his updating affidavit on page 3 he explains the latest developments on the "exceptional item". Apparently it is now worth £900,000 plus at least £300,000 if the rear basement flat is sold. HSBC will be lending on that security for a further development project. 40. In the meantime he has been withdrawing as much as £7,896 to spend on his own family and house improvements per month since October 2006 which he insists is "capital". He explains that he will in addition be entitled to £2,000 per month from his professional firm as fees during this period, but considerably more than that now. The amount drawn from JSL has reduced his director's loan of £900,000 to a mere £447,000. 41. The impression I am left with is that J is an accomplished professional person and a clever businessman. Things did not go according to plan in the purchase of the "exceptional item", but, with a little fair wind, could easily improve. The company has a great potential to make such profits as will justify his and his father's investment of £900,000 each. His father has not received his interest on the £900,000 lent by him, but, according to J, is content that his interest is secure. I have no doubt that given a little time (J suggests 5 years), the company JSL will be successful. 42. I therefore do not follow J's argument that maintenance should be reduced below the present level. Despite the fluctuation in his company's fortunes, he can afford it. Indeed, spousal maintenance must continue at the slightly higher level of £3,000 for 5 years. There is no need to backdate this increase. At the review in 5 years, the primary consideration of the Court will be to decide whether or not J should be released from the payment of maintenance altogether, probably, though not necessarily, upon the payment of a lump sum. The next consideration will be to assess the size of the lump sum, if such a payment is considered appropriate. The assessment of it should not be on the basis of provision of maintenance during the parties' joint lives, but more on the basis of the time needed and the size of payment necessary to enable M to become financially independent. Authorities Matrimonial Causes (Jersey) Law 1949, as amended. *Cameron v Archdale* JJ 12th July 1983. L v D & R

[2004] JRC 164 . W v O

[2004] JLR N 53. *Boudin v Smith*

[1995] JLR Note 15A . *Fleming -v- Fleming*

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