

JERSEY / JUDGMENT

JEL v MSD [2004] JRC 164 (14 September 2004)

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judgment

deputy bailiff: 1. This is an application by the respondent (to whom, for convenience, we shall refer as "the Husband" whilst recognising that the parties are no longer married) for a variation of child maintenance which was agreed by the parties at the time of their divorce on the grounds that there has been a material change of circumstances now that the petitioner ("the Wife") is co-habiting with another man. We announced our decision at the conclusion of the hearing and now give our reasons. Factual background 2. The parties were married in 1991. There are three children of the marriage aged 10, 7 and 3. The parties separated in May 2001. A decree nisi was granted on the grounds of the Husband's adultery on 20th March 2002; this was made absolute on 3rd May 2002. 3. On 19th March 2003, with the benefit of legal advice on both sides, the parties entered into an agreement ("the Agreement") to resolve their financial affairs. The Agreement was ratified by the Court on 24th March 2003. It amounted to a clean break. In essence the matrimonial home was to be sold and, after clearing the mortgage, the net proceeds were to go to the wife in order to enable her to re-house herself. She was to receive no maintenance for herself. She had care and control of the three children with agreed access to the Husband. The Husband agreed to pay maintenance for each child at the rate of £500 per month increased annually in accordance with the increase in the Jersey Retail Price Index. He also agreed to pay private school fees. Paragraph 5 of the Agreement provided that the maintenance payable for the children should be reviewed in a number of specified circumstances. That set out at subparagraph (e) required a review "in the event of a material change in the circumstances of either party". Save only for child maintenance, it was agreed at paragraph 16 of the Agreement that no change in the financial circumstances of either party would enable the other to seek a variation of the Agreement. 4. At the time of the Agreement, the Wife was not co-habiting. She lived at home alone with the children. It was however known that she had commenced a relationship with R, who is now her fiancée. Thus, in a letter dated 5th March 2003, Advocate Colley, on behalf of the Husband, wrote saying that she was instructed that the Husband had been told by the Wife that she would be co-habiting with R in the near future. Advocate Colley pointed out that no mention of this had been made in the Wife's affidavit of means and asked for details of R's income before she could advise the Husband on a financial settlement. Advocate James replied the same day to the effect that he was instructed by the Wife that she might co-habit with R at some time in

the future but that nothing had been formalised. He declined therefore to produce details of R's financial position. There the matter seems to have rested and the Agreement was concluded shortly thereafter. 5. As envisaged in the Agreement, the matrimonial home was sold and the Wife bought a new smaller home. Within a short time R had moved in with her. According to the Wife and R, this was sometime in May 2003. The house had been purchased in April and R had supported the Wife in obtaining the mortgage as she could not do so on the strength of her own financial position. He agreed to be jointly liable in respect of the mortgage (even though the house was purchased in the sole name of the Wife) and to contribute £500 per month to her in order to enable her to meet the mortgage repayments. It was initially described as payment for board and lodging but it was, in effect, a contribution to the mortgage. Once they began to co-habit it was simply a contribution to the joint family expenses. 6. On 28th August 2003 the Husband applied to reduce the child maintenance pursuant to paragraph 5(e) of the Agreement on the basis that there had been a material change of circumstances. He relied upon the Wife's co-habitation with R. For some reason the application does not seem to have come before the Greffier until 19th February 2004. On that occasion, having heard the advocates for both parties, it appeared that the summons raised an issue of general principle as to whether the Court should place weight upon the United Kingdom Child Support Agency tables and the Registrar referred the Husband's application to this Court for resolution. At the same time - and apparently, we were told, somewhat to the surprise of both parties, who had not addressed him on the matter - the Registrar reduced the child maintenance on an interim basis, pending the decision of this Court, to £312 per child per month. He reached this figure essentially by applying the CSA tables to the Husband's net income although it appears he may have departed in certain minor respects from the theoretical method of calculation used by the CSA. 7. Following the reduction in child maintenance the Wife states that she had to find additional employment to help with the shortfall. She had been working part time as an administrative assistant at Highlands. This involved working from 9.00 a.m. to midday five mornings a week with school holiday vacations. It therefore enabled her to look after the children. Following the interim order she took additional employment as a care assistant with Family Nursing & Home Care. This does not have fixed hours but on average involves working for four hours on three evenings a week. The financial position of the parties (i) The Husband 8. The Husband is employed as a client manager with a local financial institution. His gross income for 2003 (inclusive of pension and car allowances) was £89,966. His gross income for the first six months of 2004 was £48,830. He lives in a property with the co-respondent which was made over as part of the co-respondent's settlement with her former husband following their divorce. The two children of the co-respondent by her former husband live with them. The co-respondent is also employed in the finance sector. Her gross annual income is £37,689 and she also receives £500 per month as child maintenance from her former husband. The Husband and the co-respondent have re-mortgaged their property in recent times releasing £320,000 which was used to pay off the co-respondent's original mortgage, to pay £40,000 to the co-respondent's former husband in settlement of his share of the property and to acquire a holiday property in Cyprus for £205,000. 9. The affidavits before us refer to the Husband's expenditure but we have not been addressed on it and do not need to record it for the purposes of this

judgment.

The Husband accepted that he was in a financial position to pay maintenance at the rate of £500 per month per child. The basis of the application was not hardship on his part. The application relied entirely upon the change in the Wife's circumstances. (ii) The Wife 10. The Wife earns £427.56 net per month from her part time job at Highlands College. As we have said, following the Registrar's order she took on additional part time work as a care assistant. The work is variable but on average it is four hours for three evenings per week. She has estimated her net income from this source as £380.52 per month. She therefore has a net monthly income of £808.08 i.e. £9,696 per annum. At the time of the Agreement she received Family Allowance of £244 per month, but that has ceased following her co-habitation. 11. R is a plumber. His gross income is approximately £24,000 per annum and both counsel were content that we should take his net income as being some £19,000 per annum. Thus the combined net income (excluding child maintenance) of the Wife and R is £28,696 per annum. 12. Turning to expenditure, it has not been entirely straightforward to analyse the outgoings of the Wife and R because they have sworn separate affidavits listing their individual expenditure but some items appear in both affidavits, although it is usually made clear who pays that particular outgoing. The Wife's expenditure is listed and comes to £2,604 per month. Doing our best to strip out from R's affidavit any expenditure which appears already to have been counted in the Wife's affidavit, we estimate that R's additional expenditure is £956 per month. So that the basis of our calculations may be understood we list below the items (as described in R's affidavit) which we have taken to be extra expenditure to that contained in the Wife's affidavit:- Car insurance Car maintenance Travel (petrol & car park) TV rental SKY Entertainment for children Hire purchase repayments (3-piece suite) Additional payments to cover debts (MasterCard) Loan repayments (his car loan) Dentist Doctor/prescriptions Savings for Christmas/birthday presents Memberships/subscriptions House maintenance repairs Clothing and shoes Endowment £ 31.22 40.00 38.00 41.00 100.00 60.16 100.00 143.45 17.00 13.00 50.00 58.00 50.00 20.00 194.31 956.14 On this basis the total annual expenditure of the Wife's family is £2,604 + £956 = £3560 per month i.e. £42,720 per annum. 13. It follows that, in the absence of child maintenance, there would be substantial deficit of £42,720 minus £28,696 = £14,024. Since the order of the Greffier in February 2004 the Husband has been paying the reduced sum of £312 per child per month i.e. £11,232 per annum. Adding in this figure results in a total income of £39,928, which still suggests a deficit of £2792 per annum despite the fact that the Wife has taken on an evening job in order to make ends meet. 14. We accept that these figures are not necessarily to be treated as exact to the nearest penny. Miss Colley suggested that she was not to be taken as conceding the reasonableness of the monthly figure of £2,604, although no cross examination of the Wife took place in this respect. Nevertheless we have had the opportunity of seeing and hearing the Wife give evidence before us and we find her to be a truthful and reliable witness. Accordingly we have no doubt that the figures give a broadly accurate picture and are satisfied that the Wife's family is struggling to get by on the current reduced level of child maintenance. The legal principles applicable on a variation 15. It appears from the referral of the Registrar and the skeleton argument submitted to the Court that the case was felt initially to raise a fundamental issue of principle. The Wife contended that, assuming a

material change of circumstances, the Court should nevertheless take the maintenance figure set out in the Agreement as the starting point and decide merely by how much that figure should be varied in the light of the change in circumstances. The Husband, on the other hand, appeared to be arguing that, once the Court was satisfied that there had been a change of circumstances, the level of child maintenance was completely open. One in effect started from scratch and decided the case as if there had never been an Agreement in the first place. In that respect it was said that the CSA tables were a useful guide. 16. However, during the course of the hearing, Miss Colley made it clear that this was not in fact her position. She accepted that, when parties had reached an Agreement, one had to take that Agreement as the starting point and then allow for the change of circumstances in order to determine any new figure. In our judgment Miss Colley was correct to accept that proposition. One starts with a strong presumption that parties are free to enter into such agreements as they think fit and that, once they have done so, they should be held to their bargain. It is in the public interest that this should be so and that parties should not be encouraged to re-visit and seek to re-open an agreement simply because of some change in circumstances. The Court should take the agreed figure as a starting point and then simply decide what variation would be fair and reasonable in the light of the changed circumstances. This principle is particularly applicable where the Court is considering financial provision for a spouse. It is not quite so strong in relation to child maintenance. The Court must always do what is necessary to ensure that children are adequately maintained and do not suffer hardship as a result of insufficient maintenance when a parent is well able to afford it. Accordingly if, for example, an agreement fixes a very low level of maintenance, as a result of which the children are not being properly provided for, the Court may, on an application to vary, do what is necessary to ensure that fair and proper provision is made. The children's interests must come first. But that will be the exception. In the average case, where the parties have agreed a reasonable figure (even if it is not the figure which the Court itself might have fixed upon initially had it been called upon to resolve the matter) it is not appropriate to re-open the whole level of maintenance simply because there has been a change of circumstances. The correct course is to acknowledge and respect the fact that the parties have reached an agreement and the Court's role is limited to determining what variation, if any, would be fair and reasonable taking into account the change in circumstances. 17. This is not an appropriate case to refer to the CSA tables. The parties agreed a figure which apparently exceeded the applicable CSA rate. That was their right. We understand that the Registrar has, in some recent cases, indicated that he considers that he should pay considerable regard to the CSA tables when fixing child maintenance in contested cases. It may be that he thought that this was a suitable case in which to seek guidance from this Court on whether he is correct to have adopted that approach. Unfortunately, given the principles which we have described above, it is clear that this is not a suitable case to consider that issue. The Court must take the agreed rate of child maintenance as a starting point and the CSA tables are not relevant. Is the Wife's co-habitation a material change of circumstances? 18. Miss Colley submitted that co-habitation amounts to a material change of circumstances. In support she referred to *Atkinson -v- Atkinson* (1988) 2FLR 353 where the English Court of Appeal held that, on the facts of that case, co-habitation on the part of an ex-wife amounted to a change of circumstances which it would be inequitable to ignore when considering whether maintenance

for the ex-wife should be reduced. That case was relied upon for the statement in Duckworth: Matrimonial Property and Finance (Update 5) at E1(15) that:- "If the wife begins to co-habit with a man from whom she can reasonably derive some financial support, this is a circumstance justifying a reduction in maintenance, but not usually an outright dismissal (since the relationship may break down)." 19. Both Atkinson and the comment in Duckworth relate to maintenance for a spouse, not child maintenance and Miss Colley was unable to refer us any authority where the issue has been considered in the context of child maintenance. We are therefore left to consider the matter as one of general principle. 20. It seems to us that the argument in favour of regarding co-habitation as amounting to a material change of circumstances leading to a reduction in maintenance is much weaker in the case of child maintenance than in the case of spousal maintenance. Maintenance for a wife ceases on re-marriage and one can see the force of the argument that an ex-husband should not have to maintain an ex-wife who is in fact being maintained by a wealthy co-habitee, even if they are not married. But the position is very different in relation to child maintenance. The children are not the responsibility of the co-habitee. He has no duty to maintain them. They remain the responsibility of the parents. In many cases, therefore, the fact that a co-habitee is willing and able to pay for or contribute towards the feeding, clothing and general maintenance of the children cannot amount to a material change in circumstances. It is an entirely voluntary act on his part and cannot reduce in any way the obligation of the father to provide for his children. However, child maintenance covers a variety of factors including the cost of housing the children. If a mother who has custody of the children has hitherto had to pay for the housing of the children but then moves to the house of a co-habitee so that her need to pay for providing a roof over the children's head is extinguished or reduced, it hardly seems fair to ignore this and insist that the father should continue to pay maintenance at a rate which encompasses an element of housing the children. Our conclusion therefore is that, in many cases, the fact that a wife who has custody of the children begins to co-habit will make no difference to the husband's duty to maintain the children. But, in cases where the co-habitation has had a material effect on the costs which the wife has to bear in circumstances where it would be unfair to continue to make the father pay for or contribute to such expenditure, the Court can vary the child maintenance to take account of these new circumstances. However we would emphasise that, even in such cases, the variation is likely to be small. The essential duty to feed and clothe the children remains the duty of the parents and any voluntary contribution by a co-habitee does not extinguish or reduce that responsibility. 21. Turning to the facts of this case we conclude that the fact that the Wife is now co-habiting with R who has a net income of £19,000 and is contributing to the mortgage and other household expenditure, which the Wife would otherwise have to bear alone, does amount to a material change of circumstances which entitles the father to ask the Court to re-visit the Agreement. But we repeat that it is not R's responsibility to feed, clothe, educate and generally maintain the three children in this case. That remains the responsibility of the Husband and the Wife. The only significance is that R's co-habitation has had the effect of indirectly relieving the Wife of some expenditure with the result that it is right to re-visit the allocation of the child maintenance. In this connection we would point out that, under the CSA tables, the income of the receiving spouse and any co-habitee are ignored. The general

philosophy is that the obligation to maintain children is fixed by reference to the income of the paying parent and that is the sole criterion. This is an added reason for concluding that, even where co-habitation does amount to a material change of circumstances, its effect on the agreed child maintenance is likely in most cases to be non-existent or minimal. The level of variation 22. One begins with the position that, as conceded by him, the Husband can well afford to continue to maintain the children at the rate of £500 per month. What effect has the co-habitation had? Has it meant that the Wife is much better off and is therefore in a position to bear a much greater proportion of the cost of maintaining the children? Looking at the figures we are quite satisfied that, whilst it has undoubtedly had some effect, it has not had such an effect that we should make a substantial variation of the maintenance. The Wife has had to take a second job in order to make ends meet following the Greffier's interim decision to reduce maintenance. We see no reason why she should have to do that. It was agreed by both counsel that it was always anticipated that she would only be able to work part time to a modest extent while the children were young. The job at Highlands is clearly ideal in this respect. The Wife explained to us in evidence the difficulty that had been caused by her having to work three evenings a week. She has to rush to give the children their supper after school and then go out to work leaving R to put them to bed. They are asleep by the time she returns and in effect she is not there for them those three evenings a week. If the income from her second job (namely £4,566 p.a.) is deleted, the combined income (including child maintenance at its current rate) drops to £35,362 p.a. which clearly puts the family in substantial deficit compared with their annual expenditure of £42,720. Furthermore the co-habitation with R has resulted in the loss of family allowance. 23. It is of note that the Agreement has in fact already been varied to the detriment of the Wife by agreement between the parties. The Agreement provided that there should be a cost of living increase in March 2004. It is not entirely clear whether, given that the March 2003 cost of living figures would not have been known at the time the Agreement was entered into, the relevant cost of living figures are December 2002 to December 2003 or March 2003 to March 2004. In the former case the cost of living increase was 4% which would mean that the monthly maintenance for each child would have risen to £520. On the March figures the increase was 3.7% and the figure would have risen to £518.50. The Wife has already agreed that, in the light of her co-habitation, she would not press for this cost of living increase and there has therefore already been a variation of the Agreement to that extent, which we taken into account. 24. Assuming that the Wife were to give up her second job and even if maintenance remained at the original level of the Agreement, the position of the Wife's family would not be overly comfortable. Their total net income would be:- R's income Wife's income (Highlands College) Child maintenance Total £ 19,000 5,130 18,000 42,130 25. This would therefore broadly balance the expenditure of £42,720; but the financial position of the Wife's family (and therefore the children) would remain tight. We do not consider that the Wife or R have been extravagant and accordingly we find that the degree to which R has contributed to the Wife's household is not such as to justify a substantial reduction in the level of child maintenance bearing in mind that the children remain the responsibility of the Husband and not R. If we were to order a substantial reduction we are satisfied that this would cause hardship to the children in circumstances where their father is well able to support them at a level which would avoid such hardship. 26. We have also analysed R's contribution to the

household. Looking at his monthly expenditure, as listed in his affidavit, we consider that £604.98 relates to purely personal expenditure e.g. his car, clothing, medical expenses, entertainment etc. This totals £7,259 p.a. If we deduct this from his net annual income of £19,000, it leaves £11,740 which he is contributing to the Wife's family expenditure. Against this must be set the loss of Family Allowance of £2,928 p.a. The benefit he brings, as compared with the position set out in the terms of the Agreement, is therefore £11,740

- £2,928 = £8,812. We do not consider this to be a very significant change bearing in mind the responsibility of the Husband to maintain his children and the lack of any such duty on R. 27. In the circumstances we find that an appropriate varied order, taking into account that already made by the agreement not to activate the cost of living increase, is £475 per child per month. The school fees will remain payable as set out in the Agreement and the cost of living provision will also remain, so that the sum of £475 will be increased in accordance with the cost of living in March 2005. 28. That leaves only the question of the date upon which the variation should take effect. We have to say that, with all respect to the Registrar, we consider that he erred in varying the maintenance order on an interim basis in this case. This was an application by the Husband to vary the child maintenance contained in the Agreement on the grounds that there had been a material change of circumstances. Until the Court (or the Registrar if he had retained the matter) had determined that there had been a material change of circumstances, it was not clear that there should have been any variation. The Agreement between the parties provided for a certain level of maintenance unless or until there had been such a change. No such determination had been made as at 19th February. It was therefore effectively to pre-judge the matter by ordering the maintenance to be reduced on an interim basis. Furthermore the Registrar did so to such an extent that he reduced the maintenance to the very best that the Husband could ever have hoped for, even if he had been wholly successful. In effect the Registrar decided the matter wholly in the Husband's favour on an interim basis. Indeed the extent to which he so decided is shown by the fact that, having considered the matter carefully, the Husband, through his advocate, made an open offer of £1,150 per month for the three children, which exceeded the amount ordered by the Registrar. This was the sum for which Miss Colley (in our judgment very realistically and sensibly) contended in the hearing before us. She did not seek to defend the interim level ordered by the Registrar. 29. We are not to be taken as suggesting that it is never appropriate to make an interim order where a party applies to vary a maintenance level contained in an Agreement. Thus, suppose a husband with well paid employment, paying child maintenance at a generous level, suddenly loses his job so that he is receiving only Parish welfare in circumstances where the Court is satisfied that he has no capital savings to fall back on. In those circumstances the Registrar might well take the view that it was so obvious and uncontested that there had been a material change of circumstances that he should make an interim order because it is clear the husband simply does not have the funds to continue at the original level of maintenance. But that would be the exception and it was certainly not the situation here. There was no suggestion in this case that the Husband's income had reduced or that he could not continue to afford

maintenance at the agreed level. The sole question was whether the co-habitation of the Wife meant that it was no longer fair and reasonable that the Husband should continue to pay at the agreed rate. In our judgment, in such circumstances, the Agreement continued in effect unless or until a court had concluded that there had been a material change of circumstances which justified a variation. The unfortunate consequence of the Registrar's decision was that the Wife suddenly found her family income reduced by £564 per month when she could ill afford it. She was therefore compelled to take the evening job to which we have referred in order to compensate for the loss. Now that the position has been fully investigated, it can be seen that only a very small variation is called for. She has been receiving much less for the children than she was entitled to. 30. In the circumstances the Court has considered whether the Husband should be ordered to continue to pay the agreed maintenance level of £500 per month per child for the period from 19 th February to the date of the Court's decision on 26 th July. However we consider that a fairer course is to order that the variation ordered by the Court should take effect from the date of the appearance before the Registrar on 19 th February 2004. The Husband must therefore pay the difference between the amount ordered by the Greffier and the amount now ordered by the Court in respect of that period. He must pay such sum within two months. Authorities. Atkinson -v- Atkinson (1988) 2FLR 353. Duckworth: Matrimonial Property and Finance. (Update 5) at E1(15). Page Last Updated: 24 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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