

JERSEY / JUDGMENT

M v N (Matrimonial) [2021]

JRC 209 (13 August 2021)

[2021] JRC 209

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[2021] JRC 209 [New search] [Help] Matrimonial [2021]JRC209 Royal Court (Family) 13 August 2021 Before : Elizabeth Daultrey, Registrar, Family Division Between M Petitioner And N Respondent Advocate H. J. Heath for the Petitioner. Advocate N. P. B. Le Quesne for the Respondent.

REASONS

the REGISTRAR:

Background

1. The petitioner is aged 65 and the respondent is aged 62 at the date of this hearing. The parties come from Country A, they each moved to Jersey to work, the respondent in 1976 and the petitioner some years later. Parties met in Jersey in 1987, married in 1988 and their first child was born shortly after the marriage, their second child was born in 1991. 2. At the time of the marriage the respondent owned a guest house which he subsequently sold yielding the net sum of £96,669. The parties then purchased another guest house using these monies. They worked together in both businesses. The parties then purchased a restaurant which was sold in 2013. The former matrimonial home ("FMH") includes a number of self-contained lodgings which provide an income. Neither party is currently working. 3. In 1995 the parties purchased a plot of land in Country A and subsequently built a house upon the land, the house and land have throughout been owned in the sole name of the respondent. 4. The petitioner issued divorce proceedings in Jersey on the 9 th November 2018, decree nisi was granted on the 20 th February 2019, at the time of hearing decree absolute has not been sought. Country A Property 5. The property in Country A has always been held in the respondent's sole name, although his position is that he incorrectly thought that the initial purchase of the land in 1995 was in the parties' joint names. The parties agree that this property should be sold, it has been on the market for a number of years and remains on the

market. There is however no consensus as to the value to be attributed to this property. The petitioner has produced an emailed market evaluation dated 30 th June 2021 prepared by an estate agent in Country A, Mr B. He advises marketing the property at an asking price of 490,000 euros. Mr B is the son of the petitioner's friend. The respondent does not accept this market evaluation, his sworn evidence is that the property has been on the market since 2018 with an asking price of 550,000 euros. The respondent has produced an undated email from his selling agents which says that the property has been on the market for almost 2 years without interest and suggesting a price drop to 390,000 and 425,000 euros. The property has remained on the market at the original asking price. The property is mortgage free. Assets and liabilities 6. Aside from the property in Country A, the parties are largely agreed regarding the value of their assets which comprise the following: (i) The FMH in St Helier held in joint names. The parties have agreed a gross value of the property in the sum of £665,000 on the basis that the parties were offered this sum to sell the property in September 2020. No up to date valuation has been obtained by either party. The property is mortgage free. (ii) Monies held in bank accounts: (a) Petitioner £14,188; (b) Respondent £5,300 (after recent payment of legal fees); (c) Joint £1,299; (iii) 3 Vehicles: a Mercedes in Country A valued £12,000; a BMW in Country A valued £2,500; a fiesta in Jersey valued £3,000; (iv) The parties' liabilities are limited to their outstanding legal fees, the petitioner owes £34,732, the respondent owes £29,185. Country A matrimonial property regime 7. It is common ground between the parties that under Country A law, the petitioner is not entitled to a share of any property held in Country A by the respondent. The respondent's position is that this was as a consequence of the parties registering their son's births in Country A in 1992, he says that this was explained to them at the time they registered the births, that the petitioner was fully aware of these consequences and that therefore, the court should regard the parties as having entered into a quasi pre-marital agreement which the court should take into account. The petitioner's evidence is that she first became aware of any limits upon her claims in Country A from 2018 when she sought legal advice in Country A. 8. The documentary evidence before the court is limited to a document in foreign language for which no translation has been provided. A date in 1992 can be read as well as both parties' names, but it does not carry their signatures and neither the nature or content of the document is provided in English. The respondent has also produced a document in English, prepared and signed by Mr C, the Honorary Consul of Country A in Jersey. In this document, Mr C confirms that the parties' marriage was "transcribed" under Country A Law in 1992, and that the parties are married in Country A under the imperative regime of separation of assets. No documentation has been filed at court to confirm that: (i) What was involved in the transcription under Country A Law in 1992, nor whether both parties were involved; (ii) The terms of the imperative regime of separation of assets; (iii) That this regime applies as a consequence of the transcription of the marriage in 1992; (iv) That there is a direct link between the transcription in 1992 and the limits upon the petitioner's potential claims against Country A property in the respondent's name. Open position and evidence of the Petitioner 9. The petitioner's position is that this is a needs case and therefore the assets should be divided broadly on an equal basis with a clean break, although she seeks an

additional capital sum of £7,500 to meet her income needs in the short term. The petitioner defines her needs as being £553,808 which would enable her to purchase a 2 bedroomed property and to cover moving costs, legal fees, a car, maintenance, and an emergency fund. She wishes to receive this sum primarily from the proceeds of sale of the matrimonial home, with the respondent retaining the Country A property and the balance of the proceeds of sale of the FMH. 10. The petitioner presently receives a Jersey pension in the sum of £201.72 per month, her pension entitlement is low, as during the marriage the parties agreed that she would not pay social security payments to enhance their net income. Upon decree absolute, she will receive an enhanced pension in the sum of £579.66 per month taking into account the respondent's social security contributions. Upon sale of the matrimonial home, the petitioner will lose her share of the income from the lodgings within the home, this is currently £800 per month. Her current total income is a little over £1,000 per month and her current outgoings are £980.25 per month. After sale of the FMH and the decree absolute her income will be £579.66 per month and her anticipated income needs £1,358.04, leaving her with a shortfall of £778.38. The petitioner plans to meet the shortfall by taking cleaning work which she feels sufficiently fit and able to undertake. In due course when she can no longer work, she wishes to be in a position to supplement her income by taking a lodger, and it is for this reason that she requires at least 2 bedded accommodation. 11. The petitioner accepted in evidence that the respondent brought assets into the marriage but says that she worked very hard in the original guest house and in each subsequent business the parties purchased jointly, whilst also raising the 2 children of the family, she described working 24 hours per day for most of each year. She says that she is entitled to 50% of the assets as both she and the respondent worked hard for the money they now have. 12. Regarding vehicles, she wishes to retain the Mercedes which is in her name. 13. Regarding the Country A property, the petitioner gave evidence that she thought it was in their joint names as "we worked for it together". Her understanding having sought legal advice in Country A in 2018, is that under Country A law, because the property is in the respondent's sole name and the parties did not marry in Country A, she has no rights against that property. The petitioner was challenged in cross examination to agree that her lack of rights against the Country A property dated back to 1992 and that she understood this to be a consequence of registering the children's births in Country A. In reply, the petitioner confirmed that she recalled going to see the Country A Consul in London in 1992 but could not recall why, she also recalled registering the children in Country A when they were 18, she denied knowing prior to 2018 that her rights against the Country A property were limited. 14. The petitioner gave evidence, that in 2015 she had discovered that the respondent had withdrawn 50,000 euros from their joint funds to give to his brother, he had not told her about this. She reacted by withdrawing 40,000 euros from the same joint account. Over the following 2 year period she repaid into the joint account 9,900 euros, the remainder she used on living expenses and running costs for the Country A property. In 2017 a joint fixed deposit account matured, and the petitioner transferred one half being 20,000 euros into an account in her sole name. From this she spent 9,000 euros on dental work, paid for an MRI scan and retains 10,000 euros in an account. She was not aware

whether the sum of 50,000 euros had been repaid by the respondent's brother, she thought it had not. Open position and evidence of the Respondent 15. The respondent's position is that there is a surplus of assets over needs, as the petitioner's needs can be met by a one bedroomed property and therefore she does not need half. The respondent argues that the surplus should be his to reflect firstly his superior contributions. The guesthouse he brought into the marriage yielded £96,669 upon sale in 1988, an inflation calculator would put this figure at £265,089 in 2020. The respondent also inherited £43,271 from his mother in 2005, he put this into the marriage to supplement income and wishes it to be taken into account. 16. Secondly, he claims that upon the registration of the births of the children in Country A which he says took place in 1992, this resulted in the parties being subject to the Country A separation of property regime. The petitioner fully understood this, and therefore the court should regard this as the equivalent of a pre-marital agreement and take it fully into account. 17. The respondent's open position is that he should retain both the FMH and the Country A property, he will sell the latter property but pending sale he would raise by way of mortgage the sum of £372,500 to pay to the petitioner which would cover all her needs. 18. The respondent has not worked for several years, his current income comprises long term incapacity allowance of £43.33 per month and rental income from the FMH lodgings of £1,174 per month making a total monthly income of £1,217.33. The respondent's outgoings are £1,602 per month which includes the running costs of the Country A property. In addition, he is currently paying £1,000 per month towards his legal fees. The respondent wishes to live in Jersey. 19. The respondent has not yet reached pension age. He did pay social security throughout his working life in Jersey, he may be entitled to a full Jersey state pension as he started working in Jersey in 1976, however the respondent has not provided information as to what his pension entitlement will be. 20. The respondent says that his health problems affect him a lot, however he could work but not a full day. He has been working on his son's property since 2013 and carries out maintenance work for the lodgings. This year he has undertaken some limited paid work for a friend. 21. The respondent confirmed that he gave his brother 50,000 euros in 2015 but says that this was immediately repaid. 22. Upon cross examination by Advocate Heath on behalf of the petitioner, the respondent admitted that he saw all of the assets as being his, saying that he felt that the petitioner had let him down, and that she didn't deserve half of the assets. The Law 23. The petitioner's claims are made pursuant to Articles 28, 29 and 30 of the Matrimonial Causes (Jersey) Law 1949 ("the law"). Article 29(1) of the law requires the Court to have "regard to all the circumstances of the case, including the conduct of the parties to the marriage insofar as it may be inequitable to disregard it and to their actual and potential financial circumstances". The court shall also have regard to the factors set out in section 25 of the Matrimonial Causes Act 1973, I have considered the following:-

- 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; 24. The assets

available to each party are considered above. Neither party is currently in employment, however they each accept that they have a limited earning capacity. They are both in their 60s. The petitioner is of retirement age, therefore any earning capacity she may currently have cannot be assumed to continue in future years. The respondent is 3 years younger but has suffered some health difficulties and is in receipt of incapacity benefits, likewise his earning capacity cannot be guaranteed to continue in the future. Both parties need an income to provide for their needs, the respondent's monthly outgoings are higher than that of the petitioner, however, much of this is accounted for by the expenses of running the Country A property, these will fall away when that property is sold. Both parties intend to live in Jersey and therefore both have broadly equivalent income needs in the future. The petitioner's future income is known and she has a shortfall of expenses over income. She hopes to meet this by taking on work for as long as she can, and by taking in a lodger. The respondent's present income is known, but his income in retirement from his state pension is not known, there is therefore no clearly identified long term income shortfall as there is for the petitioner. 25. The parties each have modest cash assets in their respective names. They have a joint property, and the respondent has the benefit of the Country A property which he intends to sell.

- 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; 26. Both parties will need to be rehoused, pay their legal fees, and have a capital cushion to meet any unforeseen future expenses. Their capital needs are equivalent. The respondent says that they can each be rehoused in one bedroomed accommodation. The petitioner wishes to have a 2 bedroomed property so that she can let a room to meet her income shortfall. 27. Advocate Heath on behalf of the petitioner argues that there is no surplus of capital over needs and that therefore division of the assets must be conducted on the basis of needs alone and refers the Court to the judgement of Lord Nicholls in the case of *Miller / McFarlane*

[2006] UKHL 24 paragraphs 10 to 12 where he says:- "[10].... The statute provides that first consideration shall be given to the welfare of the children of the marriage. In the present context nothing further need be said about this primary consideration. Beyond this several elements, or strands, are readily discernible. The first is financial needs. This is one of the matters listed in s 25(2), in para (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."

- [11] This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these

needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter.

- [12] In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs. Especially where children are involved it may be necessary to augment the available assets by having recourse to the future earnings of the money-earner, by way of an order for periodical payments."
- d) the age of each party to the marriage and the duration of the marriage; 28. The parties married in 1988, there does not appear to be consensus as to the date upon which they separated. Divorce proceedings were issued in 2018. Their finances have remained enmeshed following separation in that they share the income produced by the family home. On any assessment, this has been a very long 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; 29. This is a major issue for the parties. The petitioner accepts that the respondent brought capital into the marriage from the property he owned before the marriage and inheritance during the marriage, however she argues that she made the fullest contribution by her labours in the parties' financial enterprises over the decades of the marriage. 30. The respondent argues that his financial contributions should be taken into account and that he should be reimbursed by receiving an unequal share of the capital assets. He relies upon the Jersey case of *C v D*
- [2016] JRC 044 A. In that matter, the parties married in 2008 and separated in 2015, the husband had brought into the marriage a mortgage free home that he had owned since 1971. During the marriage, the husband sold his property and bought another on several occasions, each time releasing capital to fund the parties' outgoings, at the time of the divorce, all of the capital was in the husband's name and could be directly attributed to the assets the husband had brought into the marriage. The wife received sufficient capital to meet her basic needs which equated to approximately 38% of the capital assets. 31. The Registrar in *C v D*
- [2016] JRC 044A referred to the case of *B v B*
- [2008] EWCA Civ 284
- [2008] 2 FLR where it was held that: "One possible reason for departing from equality was recognised to be that there were assets that were the product not of efforts of different kinds during the marriage, but of inheritance by one spouse only". In *C v D*
- [2016] JRC 044A the Registrar stated that: "A Court has to identify the assets available for division. One method of deciding this is to apply the principle of sharing to all the assets but to the extent the property is not matrimonial then there is likely to be a better reason to depart

from equality. The focus is on needs and the non-matrimonial assets are to be "invaded" last or to the least extent to meet these. Alternatively one can identify the non-matrimonial property, leaving the matrimonial property to be divided equally." 32. Advocate Le Quesne on behalf of the respondent argues that although his contributions mingled with matrimonial assets, this was not a barrier to recognition of those contributions. He quotes the Registrar in *C v D*

[2016] JRC 044A at paragraph 24 where she in turn quoted Mostyn J in the case of *JL v SL*

[2015] EWHC Fam 360 in which he considered the issue of non-matrimonial assets in the following way: "the fact that there had been some mingling of monies... does not mean that the non-matrimonial source of the monies in question is destroyed as a relevant consideration."

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; 33. Article 57(3) of the Matrimonial Causes Rules 2005 states:- "When, in the opinion of the Court, or a party alleges that, an application for ancillary relief gives rise to a contested issue of conduct of a nature likely materially to affect the question whether any, or what, order should be made, application must be made to the Greffier by summons for directions as to the filing and service of pleadings relative to the application and as to the further conduct of the proceedings." 34. The respondent did not raise an issue of conduct at any case management hearing, nevertheless, Advocate Le Quesne in his skeleton argument on behalf of the respondent seeks to raise this issue, his skeleton argument states:- "It is submitted that the Court can take into account, as part of the conduct of the parties, that the parties freely submitted to the separation of property regime and that this was fully explained to them by the [Country A] Consul when they registered the births of their children. The effect of this agreement in [Country A], is that upon divorce neither would have a claim against assets held by the other in [Country A]." 35. In support of this argument, Advocate Le Quesne refers the court to *Versteegh v Versteegh*

[2018] EWCA Civ 1050 where Lady Justice King stated that:- "In my judgment, when an English court is presented with a PMA such as the present one; signed in a country where they are commonplace, simply drafted and generally signed without legal advice or indeed disclosure, it cannot be right to add a gloss to *Radmacher* to the effect that such a spouse will be regarded as having lacked the necessary appreciation of the consequence absent legal advice to the effect that some of the countries, in which they may choose to live during their married life, may operate a discretionary system. As Lord Philips said in *Radmacher*: "[78] The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. The court should accord respect to the decision of a married couple as to the manner in which their financial affairs should be regulated. It would be paternalistic and patronising to override their agreement simply on the basis that the court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future." I am reinforced in that view by the fact that *Radmacher* in recognising

PMA's carries within it a safety net through its expectation of both fairness [73] and that needs will be provided for" 36. Advocate Le Quesne argues:- "It is submitted that the parties were aware that they were subject to the separation of property regime following the advice from [redacted] of the Country A Consul in 1992, and that the Royal Court should therefore find that the Country A property, purchased in the sole name of [N], is non-matrimonial property."

Analysis

37. This has been a marriage of over 30 years duration. The parties have bought and run successive businesses together as well as bringing up 2 children together. The assets exceed a million pounds. 38. The respondent raises legal arguments as to why he should retain more than half the assets, but in his sworn evidence he stated that he regards all the assets as being his and that his wife does not deserve a half share of the assets because "she let me down in the marriage". 39. The respondent argues that his financial contributions should entitle him to a greater share of the assets. I reject his arguments, *C v D* was a case where fairness dictated that the wife's bare needs be met and the balance of the assets be retained by the husband. The facts were unusual in that, although that marriage at 7 years duration was not short, all of the assets directly related to that which the husband had brought into the marriage. The present case is very different. The respondent brought money into the marriage in 1988 which assisted the parties to buy and build a number of successive businesses together, however after 30 years of joint enterprise and hard work, any benefit conveyed by the initial contribution some 3 decades earlier has become entirely enmeshed and absorbed within the joint marital assets. 40. The respondent also received an inheritance in 2005 in the sum of £43,271. The respondent confirms that those monies were used for the upkeep of the 2 properties owned by the parties "as well as for living expenses". In these circumstances, the respondent's claim that he should be entitled to recoup monies he contributed towards day to day living expenses, has no more validity than the claims of a spouse who had a higher income during a marriage that they should retain the lion's share of assets on divorce because of their superior contribution to the family income. 41. The respondent also raises an argument that a quasi marital agreement exists and that therefore the Country A property should be treated as a non-matrimonial asset. This argument is deeply flawed. There is no agreement as such, the respondent's evidence is that the parties registered their children's births in Country A in 1992 and that this gave rise to a legal consequence that the parties would not have any claims against property owned by the other in Country A, and further that the petitioner was aware of and accepted this. The petitioner does not agree any part of these claims and the respondent has failed to satisfactorily evidence as to any part of his claims by reference to independent documentation, and his own evidence of the alleged events of 1992 is far from compelling. In any event, in my view, the act of registration of children's births, is not the equivalent of entering into a formal marital agreement. 42. The petitioner argues that all the assets are required to meet the parties' reasonable needs. If the Country A property were to sell for as little as 390,000 euros,

the 2 properties collectively are worth approximated £996,500 gross. An equal division gives each party less than £500,000. Once sale costs are deducted the figure is further reduced. 43. Both parties have put forward estate agents details of suitable properties for their rehousing, these are all for 2 bedroomed properties, the prices range between £465,000 and £599,000. In my view both parties require 2 bedroomed accommodation so that they can if needed, let out a room to supplement their income. It is clear that there is no surplus of assets over reasonable needs. 44. The petitioner wishes to receive all of her share of the assets from the sale proceeds of the FMH. I accept that this is the only practical arrangement as the petitioner will have no involvement in the sale of the Country A property and has no legal route in Country A to enforce sale or recovery of her share of the sale proceeds. The court must therefore attribute a value to the Country A property as the parties are not in agreement. 45. The valuation evidence offered by each party regarding the Country A property is flawed. The petitioner asks that the court attribute a value to the Country A property of 490,000 euros based upon a market appraisal which was prepared by someone who is not wholly at arm's length from her, moreover it is not clear that the appraisal has been based upon physical inspection of the property. The respondent values the property in accordance with the undated email from his selling agents which recommends reducing the price to between 390,000 and 425,000 euros, the median figure is 407,500 euros. Each party challenges the valuation of the other. In the absence of independent evidence as to the value of the property I shall take the midway figure and attribute a value to the Country A property at 448,750 euros, which is approximately £381,500. 46. The parties therefore hold property valued together at £1,046,500. A half share would give each £523,250. If the respondent retains the Country A property he would need £141,750 from the sale of the Jersey property to bring him to parity. The value given for the FMH is a gross figure and following costs of sale would be lower, conversely, the property valuation is out of date and the property may sell for a greater figure. In my view the approach which gives fairness is for the order to determine each party's share of the sale proceeds of the FMH by reference to a percentage of the net proceeds of sale. 47. The respondent shall receive 21.31% of the net proceeds of sale of the FMH and retain the Country A property. 48. Each party has modest capital in bank accounts. The petitioner has slightly more, but her unpaid legal fees are also higher, each party shall retain monies held in their sole name and the monies in the joint account shall be transferred to the respondent to better balance the cash assets between the parties. The petitioner shall retain the Mercedes vehicle in her name and the respondent shall retain the other 2 vehicles. 49. The petitioner does not seek ongoing maintenance to reflect the likely disparity in the parties' pension incomes, she does however ask for a capitalised sum of £7,500 to tide her over when the FMH is sold. I agree that this is a reasonable request and I make that award which shall be paid to the petitioner from the respondent's share of the proceeds of sale of the FMH. 50. Finally, I must consider whether there should be any adjustment made to reflect the sums of 40,000 and 20,000 euros the petitioner removed from joint funds. The sum of approximately 30,000 euros is accounted for by the petitioner in specific sums. The balance she says was spent over a period of years before the petitioner received her state pension or a share of the income from the lodgings, in any event there is

no evidence that it remains available to her. I do not make any adjustment in respect of these monies which date back to 2015 and 2017. It is wholly impractical and entirely undesirable to attempt to go back this far into the parties' marriage to assess who spent what, with a view to carry forward adjustments. Moreover, this is a needs case, and any such exercise could only undermine the funds available to the parties to meet their needs. Authorities Matrimonial Causes (Jersey) Law 1949. Matrimonial Causes Act 1973. Miller / McFarlane

[2006] UKHL 24 . C v D

[2016] JRC 044A. B v B

[2008] EWCA Civ 284 , [2008] 2 FLR. JL v SL

[2015] EWHC Fam 360 . Matrimonial Causes Rules 2005. Versteegh v Versteegh

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