

JERSEY / JUDGMENT

W v O [2004] JRC 218A (14 December 2004)

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judgment

the REGISTRAR: 1. The parties in this case are divorced. The decree nisi was pronounced on 20 th September, 2000, and the decree absolute on 11 th July, 2001. 2. At the time the decree was made absolute, an agreement was ratified by the Court. The agreement dealt with child maintenance which was set at £225.00 per month for each of the two children, E and M, who were then aged 10 and 8. 3. There was a provision in the agreement for the maintenance to be increased annually in accordance with the Jersey cost of living. The existing rate now, as increased, is £488.00 per month, or £112.61 per week, or £56.30 per child per week. 4. The father has now remarried and he and his second wife have twin children born in March this year, so are now aged 9 months. The Father's case 5. The father is applying to reduce the maintenance:- (i) on the basis that he now has responsibility for looking after the children of the first marriage half of the time and effectively has shared care and control of them. Previously, according to the agreement he had them three days out of every eight over an eight day cycle; (ii) on the basis that since the time of the divorce, he has responsibility for two more children. The Mother's case 6. The mother's case is that the father agreed a rate of maintenance for the children at the time of the divorce. Since then he has fallen into debt due to his extravagant spending on property in France, which is no excuse for reneging on the maintenance agreement. A proportionate reduction, based on the extra time the father has responsibility for the children would be accepted. 7. No allowances should be made for having remarried and acquired for two more children, which was effectively a "lifestyle choice". The father must be held accountable for the financial implications of his choice. Open Offers 8. The father's open offer to settle the dispute is that he should pay £290.00 per month for the two children. The mother would accept a variation downwards only to £390 per month. The Law 9. The recent case of JEL -v- MSD [2004]JRC164 is authority for the proposition that where there is an agreement for the payment of child maintenance, one has to take the agreement as the starting point and then, in most cases, allow for the change in circumstances in order to determine any new figure. The Deputy Bailiff said (on page 5 of the judgment):- "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."

10. The views of the Deputy Bailiff must be contrasted with a judgment by Mr J. M. Chadwick Q. C., President of the Court of Appeal in the case of *Taylor-v-Hayter* (9 th January, 1987) Jersey Unreported; [1987/5] in which he said: "In exercising its powers under Article 32 of the Matrimonial Causes Law, the Court must have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage. The purpose of the variation must be, as it seems to us, to make such provision whether by way of periodic payments or by way of lump sum or otherwise, as the Court may think reasonable, having regard to the circumstances existing at the time when the variation order is made. Those circumstances must, of course, include the fact that an existing order has been enforced and the Court must take account of any transfers in property which have been effected by that existing order. The correct approach was stated by this Court in *Cameron and Archdale* namely, that in considering an application for variation, the Court is not confined to looking at changes in the means of the parties since the original order was made but is required to look at the actual means of the parties as they stand at the time the case is before it and to approach the matter as if it were fixing the payments 'de novo'. Accordingly, we begin by assessing the income resources available to the husband." 11. The Judge then calculated the available income available to the wife, and, finally the necessary income necessary to support the children. 12. The principle of referring to an existing order for maintenance as a starting point is not a new one. For example, in *Boudin -v- Smith* (23 rd June, 1995) Jersey Unreported; [1995/114B], in which application by a husband to vary maintenance set out in an agreement entered into in 1979, I referred to the case of *Taylor -v- Taylor (née Hayter)* , and continued:- "My starting point in deciding this case, even though approaching the payment of maintenance "de novo", is the existing order made in 1979 of £30." 13. As a result of adopting the starting point, adjusting the old figure of £30 upwards in accordance with the cost of living, but then halving the result having taken into account the financial circumstances then prevailing between the parties, I concluded that justice could be done between the parties without a detailed investigation of their means and taking decisions about the much increased wealth of the husband but his also much increased indebtedness. On page 5 of the judgement, I said: "His second wife receives an annual salary of £35,000 as a Director of a Garage and anticipates an income of £35,000, so their joint income for 1995 will be

approximately £70,000. I do not propose to go through all his expenses, loans, mortgage details etc. Suffice it to say that he is committed to the hilt with all of these." 14. The principle of assessing maintenance "de novo" as set out in the cases of Taylor -v- Taylor (née Hayter) and Cameron -v- Archdale were cited with approval by the then Deputy Bailiff in Cooke -v- Leach (17 th November, 1994) Jersey Unreported; [1994/231], and referred to by the Court in Manning -v- Manning (née Le Normand) (29 th January, 1990) Jersey Unreported; [1990/18A]. 15. Article 32 of the Matrimonial Causes (Jersey) Law, 1949, as amended, reads:- "ARTICLE 32 POWER TO VARY ORDERS (1) The court may from time to time discharge or vary any order made under Article 25, 27, 28 29, 29A or 30A of this Law 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 either of the parties to the marriage." 16. The question arises as to what the words "all the circumstances of the case", in sub-paragraph 2 of the Article, mean. 17. In the course of any one year, I have to deal with about 12 cases (approximately one every month) in which I have to assess child maintenance in disputed cases. 18. The following are examples in recent cases of factors which I have been invited to include as "circumstances of the case":- (i) The income of the payer; (ii) The income of the payee; (iii) The available capital of the payer and the payee; (iv) The contributions to the household by any subsequent husband/wife/partner of the payer and/or payee and if not considered adequate, the lack of adequate contribution; (v) Additional expenditure on the children by the payer e.g. during access visits or the payment of school fees and/or extra curricular activities; (vi) A change in the parties' circumstances or the needs of the children e.g. the co-habitation of the payer or payee with a different partner who is impecunious (alternatively wealthy) or the commencement of a university course or change of school of a child; (vii) The recent over payment of child maintenance by a payer causing the payer to get into debt; (viii) A windfall, such as winning the lottery; (ix) The life style of the payer, which, it was argued, was inconsistent with the payer's income; And with special reference to this case:- (x) A pre-existing order or agreement with regard to child maintenance; (xi) The debts of the payer and/or payee; (xii) An order or agreement whereby the care of the children is shared between the parties; and (xiii) The acquisition of a new family and new family responsibilities by the payer. 19. This list is not intended to be exhaustive, merely an indication of the diverse circumstances which can make up "all the circumstances of the case". 20. I have confidence in the Deputy Bailiff's conclusions in JEL -v- MSD [op. cit] that a pre-existing order must be taken into account if there is one to which reference can be made. But I am equally confident that, under our existing law, in default of any system which exists in the UK for calculation of child maintenance by reference to a set of tables, all circumstances are relevant, not just the order or agreement and the change in circumstances since it was made. As the Deputy Bailiff said:- "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." What other than "all the circumstances" can determine "insufficient maintenance" and "well able to afford it"? 21. So the debts of a payer must be relevant if they affect his ability to pay, as must be also the birth of another child or children, for which the payer is financially responsible. 22. In the case of Rabet -

v- Vautier (2 nd February, 1994) Jersey Unreported; [1994/17], it was recognised that when a parent re-marries he takes on new responsibilities especially if his second wife has children. In that case, the Court attempted a comparison between the gross incomes of the two households in order to balance the fair distribution of income between the 2 families. There was absolutely no doubt that the obligations of a maintenance payer towards a second family were a relevant consideration. Can the use of the UK Child Support Agency Tables help to resolve Child Maintenance Disputes in Jersey? 23. In the case of S - v - G [2003]JRC091A, I said this:- "I am not saying that maintenance for children should be tied rigidly to the United Kingdom formula, but it does provide a useful guide, certainly in cases which require a rate of maintenance well above the £55 - £60 per week tariff, to which I have referred. In the lower rates, it is more practical to attribute the maintenance to a share of the family budget. However, when the rate of maintenance approaches or exceeds £100 per week, the assessment is more difficult to achieve in a fair manner. Reference to a table of figures makes sense, at least as a guide. 24. In summary I proposed a limited application of the tables to resolve a difficulty in choosing a suitable figure for child maintenance in cases involving the wealthier client. The existing figure of £56.30 per child per week in this case does not come into that category. 25. However, as I shall describe, I believe that the CSA tables can be a useful comparative tool which can be used constructively to resolve child maintenance issues in a broader perspective. My Decision 26. I propose to work out a new rate of maintenance:- (i) On the basis of a proportional reduction of the rate of maintenance set out in the agreement (following JEL -v- MSD), as proposed by the mother's lawyer, so as to take into account the extra time the children spend with the father; (ii) On the basis of a further reduction, (following Rabet -v- Vautier), using the CSA tables as a guide, (as an extension of the very limited use of the tables proposed in S -v- G) to take account of the father's new family; (iii) Checking the result against overall fairness, taking into account all relevant up-to-date circumstances of the case Taylor -v- Taylor (née Hayter). 27. I do not see it as inconsistent to do both actions proposed in (a) and (b) and then follow them with a check on fairness. The House of Lords in the case of White -v- White

[2000] 2 FLR 981 , directed the judge in family cases to check his views against the "yardstick of equality". In a similar way, I can see no reason why, having reached a tentative calculation by the use of a starting point, be it a previous order or agreement or an informal "tariff", and varied it according to new circumstances, the result should not be checked by applying ordinary common sense as well as all other available knowledge about the case. 28. So, I start with the existing amount of child maintenance for the two children, based on the agreement, which is now £56.30 per child. 29. Mr. Syvret, for the mother, agrees that there should be an adjustment downwards to take account of the extra time the children spend with their father or his new family. My calculation is this:- Old situation: Father's care of children: Mother's care of children: 3 days in 8 day cycle days in 8 day cycle = $\frac{3}{8} \times 365 = 137$ days = $\frac{5}{8} \times 365 = 228$ days. New Situation Father's care of children Mother's care of children $\frac{1}{2}$ time $\frac{1}{2}$ time = $\frac{1}{2} \times 365 = 182.5$ days = $\frac{1}{2} \times 365 = 182.5$ days. 30. If mother has the children 228 days and receives £488 for maintenance, then if she has the children only 182.5 days, then she should receive $£488 \div 228 \times 182.5 = £390.6 = £90$ per

week for both children. 31. The 'new' rate of maintenance of £90 per week must be further reduced, to take into account the fact that the father has now responsibilities in respect of his second family. Rather than to embark on the speculative comparison attempted by the Court in *Rabet -v- Vautier* [op. cit] in order to arrive at a new figure, I propose to use the CSA tables, (*At a Glance Tables 2004 - 2005* published by the Family Bar Association p.

- 8) which were not available to the Court at that time. If the figure is £90 per week for two children in column 1 of the table, where there are two other children living with the paying parent, column 3 applies. The relevant figure is £72, or £36 per week per child. 32. So, the new monthly figure for child maintenance, to be inserted in the existing agreement, is £156 per child per month, or £312 for both children. 33. In checking the result against the "informal tariff" referred to in the case of *S -v- G* [op. cit], further use of the CSA tables for comparative purposes, and my general knowledge of all the circumstances of this case, which include a wealth of detail gleaned from a number of different hearings since the filing of the respondent's summons in February 2003, I believe this result to be a fair outcome. 34. In conclusion, I must take this opportunity of saying how extraordinary it is that parents will continue to argue before the Court over levels of child maintenance and, in the process, spend thousands of pounds which could have been better spent in caring for their children. In my opinion, it is not in the public interest for the Court to encourage the continuance of such disputes by allowing "all the circumstances of the case" to cloud what in many cases, boils down to common sense. On a comparison with previous cases, in *JEL -v- MSD* the Court admirably short cut the assessment process by relying on a previous agreement and amending it to suit present circumstances. In this case, I have attempted to do the same, whilst acknowledging that all the circumstances must remain relevant, but also placing reliance on the UK CSA tables for reference purposes. Authorities *Taylor -v- Taylor* (née Hayter) (9 th January, 1987) Jersey Unreported; [1987/5]. *Manning -v- Manning* (née Le Normand) (29 th January 1990) Jersey Unreported; [1990/18A]. *Rabet -v- Vautier* (2 nd February 1994) Jersey Unreported; [1994/17]. *Cooke -v- Leach* (17 th November 1994) Jersey Unreported; [1994/231]. *Boudin -v- Smith* (23 rd June 1995) Jersey Unreported; [1995/114B]. *S -v- G* [2003]JRC091A. *JEL -v- MSD* [2004]JRC164. *White -v- White*

[2000] 2 FLR 981 . *Matrimonial Causes (Jersey) Law 1949*, as amended: Article 32. *At a Glance Tables 2004 - 2005* published by the Family Law Bar Association: p.8. Page Last Updated: 24 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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