14 pages.

ROYAL COURT

10A.

31st January, 1991

Before: P.R. Le Cras, Esq., Commissioner, and
Jurats Hamon and Vibert

Between: Mrs D — Petitioner

And: Mr D — Respondent

Advocate Mrs. M.E. Whittaker for the Petitioner
Advocate R.J. Renouf for the Respondent.

JUDGMENT

COMMISSIONER LE CRAS: This is a petition for divorce brought by the wife on the ground that the husband has treated her with cruelty since the celebration of the marriage.

The petition, of course, is brought under Article 9 of the Matrimonial Causes (Jersey) Law, 1949.

The four ingredients of matrimonial cruelty were stated by the Jersey Court of Appeal in Urquhart -v- Wallace (1973) JJ 2483 at p.2484. Although the passage is well-known it may be useful to restate it here.

> "In the case of Mulhouse v. Mulhouse [1966] P.39 at pp.49 and 50 Sir Jocelyn Simon P. after stating that cruelty is a serious charge which the law requires to be proved beyond reasonable doubt went on to state the four ingredients in the marital offence of

cruelty which must be established. These four ingredients may be summarised as follows:

(i) Misconduct must be of a grave and weighty nature; it must be more than mere trivialities, though there may come a point at which the conduct threatens the health of the other spouse, in which event the Court will give relief:

(ii) It must be proved that there is a real injury to health or a reasonable apprehension of such injury;

(iii) It must be proved that it is the misconduct of the spouse against whom the complaint is made which has caused the injury to the health of the complainant; and

(iv) Reviewing the whole of the evidence and taking into account the conduct of one party and the extent to which the complainant may have brought the trouble on himself or herself the Court must be satisfied that the conduct can be properly described as cruelty in the ordinary sense of the term.

In stating of the law as summarised above the President was following the House of Lords decision in the case of Gollins v. Gollins [1964] A.C. 644, and in the course of his speech in that case Lord Reid said at p.660 "moreover a judge must give reasons - he cannot just say I think these facts prove cruelty".

The duty of a court of first instance is to find the relevant facts and then to give its reasons as to why those facts do or do not establish that a charge of cruelty has been proved".

These principles have been followed in this Court for many years and both Counsel adopted this statement.

Where Counsel disagreed was as to the standard of proof which is required. Counsel for the Petitioner preferred that in Elwell -v- Knight (1976) JJ 367, when the Court found that the standard of proof required was the preponderance of probabilities (at 373).

However, in Jones -v- Jones (1985-86) JLR 27, the Court, after mentioning the four ingredients from Urquhart (supra) went on to say:

"There are two preliminary matters which require mentioning before we consider the evidence.
First, the question as to what standard of proof is necessary to satisfy the court as required by art. 9 of the Law. This question was considered by the Royal Court at length in Elwell v. Knight (2) and the court there concluded (1976 J.J. at 369-373) that it was entitled to find a petition alleging cruelty proved by a

preponderance of probability. The parties in the present case did not dissent from that conclusion, but counsel for the respondent did refer us to the words of Lord Denning in Blyth v. Blyth (1) where he said ([1966] 1 All ER at 536):

"In short it comes to this: so far as the grounds for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear".

We agree that an allegation of cruelty is a serious matter, and that in such a case as this, therefore, the degree of probability should be substantial".

Although this standard does not appear to have been followed in Perkins (née Routier)-v-Perkins (1987-88) JLR 372 at p. 388, we do note that the conduct was found to be of a grave and weighty nature. In Pinson-v-Pinson (23rd May, 1988) Jersey Unreported, the question was argued again, and the Court there stated at p.4:

"As to cruelty it appears that the Court in Elwell v. Knight was saying that something less than that high standard was required. However, in Jones (née Ludlow) v. Jones it adopted the dicta from Blyth v. Blyth and, therefore, virtually equated the standard of proof required for cruelty with that required for adultery; in the one the degree of probability must be substantial and in the other a high standard of proof is required.

In this Court's view, both cruelty and adultery are serious matrimonial 'offences' and whilst the offences may be proved by a preponderance of probability the Court will require a high standard of proof".

In our view the proper test is that set out in Jones and followed in Pinson.

Apart from that, both counsel were agreed. The test is subjective i.e. was this conduct by this man to this woman cruel? It is a single question to be answered only after the whole of the matrimonial relations have been taken into account (see, for example, Evans-v Roberts and Cunliffe-Owen (1961) JJ 131, at pp 141-143) and it may of

course be cumulative in the sense set out, for example, in Jones at p.30, where the Court went on to say:

> "The second preliminary matter is this: In the present case the petitioner relies on a series of events continuing over a period of time. Taken individually it might be possible to argue that each would not in itself constitute cruelty. But the proper test in such cases was described by Lord Reid in King v. King (3) ([1953] A.C. at 140): "The question whether the respondent treated [the petitioner] with cruelty is a single question only to be answered after all the facts have been taken into account"."

(And see also Pinson p.6, Perkins at 375 and Knight at p.369).

It is equally clear that intention is not a necessary element in cruelty, viz Holley-v-Syvret (1972) JJ 2073 at p. 2081:

> "We have already indicated the possibility that the Respondent may genuinely believe that he has behaved towards the Petitioner in a fair and proper manner. However, it was held in Gollins that an actual presumed intention to hurt is not a necessary element in cruelty: if the conduct complained of and its consequences are so bad that the complaining spouse must have a remedy, it does not matter what was the state of the offending spouse's mind.
>
> The question whether the Respondent treated the Petitioner with cruelty is a single question only to be answered after all the acts alleged and the whole of the matrimonial relations have been taken into consideration".

Counsel also referred us to Hartley -v- Dautun (1969) JJ 1221 where a pattern of indifference was one of the elements in the complaint by the wife Petitioner; followed in Holley -v- Syvret where the Respondent's indifference and lack of affection were held to be the basic cause of the breakdown (for that Counsel referred us to the headnote).

As we say, with the exception of the question as to the standard of proof, Counsel were agreed on the Law. Although, with the exception we mention it is fairly well known, and settled, we have thought fit to recapitulate the cases cited to us, as we have, in the hope that it may be of assistance to those who have to advise on this question in the future.

We turn now to the facts.

The Petition is brought by the wife, Mrs D , against her husband, Mr D .

The parties were married, in England, in August, 1974. After they married they lived in Jersey where the Respondent husband is employed as a schoolteacher.

There are three children of the marriage, namely A born in 1975; S born in 1977; and B born in 1978.

When the parties were married, the Respondent was 29 and the Petitioner nearly 23. They had been going out together for some five years. The Petitioner gave evidence that at one stage the engagement was broken off and then resumed. She went on to say that he had had trouble with his kidneys and wanted children as quickly as possible.

Although she agreed that, looking back, it might have been better if they had waited, she became pregnant almost at once. In examination in chief she affirmed that A was a "wanted" child.

At the time when A was born, their accommodation in St. Helier was very poor. The parents of both the parties lived in Manchester, the Petitioner had no relations in the Island, and most of her friends who had been transferred to the Bank with her either had babies or had moved away.

In a third floor flat, with no relations and few friends, a mother who was unable to help her as much as she might have liked, on account of family problems which are unrelated to the present proceedings, and having given up work, it was no wonder that the Petitioner came under pressure.

A was, as we say, born in 1975. Fairly shortly afterwards the Petitioner became pregnant again, and S

was born in 1977, that is, some eighteen months afterwards.

The Petitioner stated that S 's pregnancy was very hard for her. There was a threatened miscarriage at three to three and a half months requiring her to have complete rest for a time; and later on she suffered from blood pressure, and S 's delivery was by forceps.

Dr. Osment, who delivered S , confirmed this, and although he stated that, other than these factors, the pregnancy was straightforward there is no doubt in our minds but that it affected the Petitioner powerfully.

In October, 1977, Dr. Osment noted that she had complained of marital difficulties and was thinking of returning to Manchester.

In November, 1977, she did indeed leave home and returned to Manchester. She did not tell the Respondent that she was thinking of going but left a letter to explain to him that she had gone, giving as her reason that he was nasty and offhand.

When she left she had no idea how long she would go for. She saw no point in returning to the same situation until some at least of the problems were sorted out.

It is clear that one of her problems was that she had no one to talk to in the day time and that when the Respondent came home he wanted to read his paper and have a few hours with the children.

Although she stated in examination in chief that she had threatened to call the Police she conceded that he had asked her if she wanted him back. In January, 1978, she did return, they did discuss the situation and she did say that when S was older she wanted to work to get out of the house.

Before she returned in January, 1978, the Petitioner had left off the pill which she was taking. The parties were going to use condoms, but intercourse took place and once again she became pregnant. Quite

fairly she conceded that she had failed to disclose the position to him.

During the pregnancy, not least as a result of her experience when pregnant with S she felt very depressed. On occasion she would go into the bathroom and cry. She felt so alone she said.

However, despite her problems, B was born in 1978. There is no particular note in Dr. Osment's files save that in February, 1978, the home situation seemed fair. According to the husband, the birth of B unlike that of S , caused no problem.

The family had moved from the poor accommodation in St Helier when S was about two and a half months old that is in about June or July, 1977. It is clear that the new accommodation, although better, was nonetheless very cramped for a family of their size; and it would seem that it was only when they moved to the present matrimonial home in 1985 that their accommodation became satisfactory. One of the problems which they faced, on the husband's evidence, is that having bought this accommodation, to get on the housing ladder, he was unable to sell it when he wished.

Following the birth of B two important events took place which, to our mind, were to have a great effect on the marriage and the relationship of the parties.

These were, first, that the Petitioner decided to go out to work and, second, that she decided to go on the pill.

These events occurred more or less at the same time.

There is no question but that the decision of the Petitioner to go on the pill affected the Respondent very deeply.

Both the parties were brought up as Roman Catholics. The Petitioner knew that the Respondent had received a Roman Catholic education and had attended a Roman Catholic training school. Both, in the early days of the marriage, attended Church regularly.

The Respondent quite clearly takes great note of, and sets considerable store by, Papal pronouncements on birth control.

The Petitioner claimed that the parties had discussed this though they had not agreed on the best way. The Respondent stated that after B 's birth he received what was in effect an ultimatum virtually in the terms of: "I'm on the pill, that's it". He was quite clear that the decision was taken without consultation and, as the Petitioner conceded, it clearly upset him greatly, to the extent that he has now ceased to attend Church.

Although we appreciate that the Petitioner was under stress, we prefer the Respondent's account as to the consultation and discussion.

So far as employment is concerned, the Petitioner told us that in about January, 1979, that is about four months after the birth of B she wanted a break and to go back to work. She could not remember if she explained the reason. The Respondent objected to putting the children in a nursery, indeed she claimed he said she should take them everywhere.

In his evidence the Respondent disagreed with this account. He stated that he was told by the Petitioner, on the Sunday evening before she started work, that she had got a job the following morning and that she had nursery schools lined up; although he did not know that B, at a few months old, was to go to a different one to his brother and sister.

With his experience as a teacher and his background, he found nursery schools for very young children abhorrent. His view, firmly expressed, was that very young children were better at home. So far as the children were concerned, he did his best by having them at home in the school holidays.

Nonetheless, as with the contraceptive pill, once again the Respondent permitted the Petitioner to act as she wished. Once again

the Court accepts the account of the Respondent in preference to that of the Petitioner.

We are satisfied that, as with the departure to her parents, these were unilateral decisions delivered without warning or consultation and clearly had an enormous impact on the Respondent.

It is quite evident that the deplorable accommodation in which the parties lived in the earlier years of the marriage, both in St Helier placed a great strain on both the parties, as did shortage of money, which was only rectified comparatively recently.

It is clear that the Petitioner, despite her upbringing, neither could nor wished to cope at home with a young family. She enjoyed her work and was unhappy away from it.

By contrast, the Respondent is in our view a dedicated schoolteacher. He firmly believes that the best place for young children is in the home; indeed he went so far as to say that he found nursery schools abhorrent. His views have been confirmed by what he has himself experienced in his work.

We find it inconceivable that the Petitioner did not know his views on this, as indeed on the matter of contraception before the parties married.

Against this, it is clear that the Respondent was less considerate than he should have been and could and should have done more than he did in and around the house. He was too rigid in his views and clearly wished his wife to run the house as his mother had. He must accept responsibility for not realising the problems which his younger wife was facing.

Although he rallied to in emergency, his day to day conduct placed too much weight on the Petitioner.

Against that though, we believe that she did not speak to him or really make any attempt to get through to him what were her problems. This lack of communication, on both parts, was, we find, compounded first by his rigidity and then by her unilateral decisions which were vital and which went, in our view, to the root of the marriage. Furthermore, although he might have objected to her decisions, he did not prevent her from acting as she wished. For example, she went on and came off the pill as she wished, went to work as she wished, played netball (and captained her team) and served on the Committee of a well-known local Club.

It is our view that responsibility for this lack of communication must rest with both parties, and we are reluctant to blame one more than the other for the problems of those early years and the results which inevitably flowed from them.

It is clear that the Respondent had not, as he admitted, realised the depth of feeling on the Petitioner's part until he had heard her evidence. We have no doubt but that, engaged as he was in his work, he concentrated on that. Money was tight and living conditions, as we say, very poor at the start. To say that his conduct amounted to such indifference as to amount to cruelty, or was not contributed to by the Petitioner, is in our view going too far.

Although he did not communicate particularly well with her, we are satisfied, on the evidence that, likewise, she failed to communicate with him; and that her manner of proceeding was to make him an ultimatum and then continue along the path which she had planned regardless of his wishes. She must also bear her share of the blame.

It is equally clear that despite the present difficulties the Respondent is doing his best to keep the family together for the sake of the children. He is, and always has been, keenly aware of his responsibilities to the children; and in our view, was still genuinely fond of the Petitioner.

Although we accept that intention is not a necessary part of cruelty, we should perhaps note at this point that we thought his

expressions of regret at the state the marriage had reached were genuine.

We formed the impression that the Petitioner is determined; and indeed her conduct when she had taken decisions, in our view, bears this out.

It is of course for the Petitioner to prove her case.

Having said that, we now turn to the particulars in the Petition.

We find absolutely no evidence to support the suggestion that the Respondent lives a life of his own completely independent of the Petitioner, nor that he tries to control every aspect of the life of the Petitioner.

The Petitioner has worked since the youngest child was a few months old, played netball, and indeed captained the team and served on a Club Committee. The Respondent was happy, he said, once the children were old enough to go to school, that she should work and should enjoy herself at netball.

Likewise we find no evidence to support the allegation that when the children were small the Respondent treated the Petitioner with contempt.

Equally we find no evidence to support the third allegation.

It does not surprise the Court that the Respondent should enquire of the Petitioner at half past one in the morning on her return from a social function at an unknown discothèque where she had been and show some concern for her safety. We find no evidence of harassment in the ordinary sense of the term on her return from netball.

As to the allegation of the interception of telephone calls, we find it hardly surprising that the Respondent should on occasion make enquiry when unknown men ring up and refuse to leave a name. We find

neither the allegation that the Respondent has cut off the telephone nor that he intercepts and reads mail supported by the evidence.

The allegation that the Respondent tries to cut the Petitioner off from all social contact and resents anyone who contacts her seems to us to bear no foundation in fact; nor is it borne out in our view by the evidence of the Petitioner's witnesses.

There was no substance in the allegation that he discouraged her from getting in touch with her own family; indeed he appeared genuinely fond of his father-in-law. As to the allegation that he fails to tell her when his family are coming to Jersey, this relates to one visit in about 1984. The Petitioner knew of this visit as she had received a letter from her parents-in-law, and the Respondent's failure to tell her was, we think, in the context of these proceedings, trivial.

As to the allegation of harassment, we heard no evidence led on this point.

We have already dealt with the Respondent's failure to help around the house, and, as we say, are satisfied that he could and should have done more to help.

So far as the allegation that the Respondent only looks after the children with the greatest reluctance, we have to say that we found this allegation unkind, hurtful and unfair. We think he has shown every sign of being a caring and responsible father, who indeed while his wife went to work, took them from nursery school in the school holidays and did his best with them.

In parenthesis, we should add that we were glad to see no criticism by the Respondent of what the Petitioner had done for the children.

There was a complaint that the Respondent refused to let the Petitioner do anything to the house without his prior consent and that he refers to it as "his" house and "his" furniture. It will suffice to

say that we heard no evidence which would substantiate such an allegation.

Finally, we have to say that we find no evidence, either from the account of the witness herself, nor from those she called, including their Doctor, which indicates that the health of the Petitioner has suffered.

Turning to the ingredients described above.

The conduct of the Respondent is not of such a grave and weighty nature as to meet the first definition. Over the course of the marriage as a whole, the conduct and the failings of the Respondent, which we have described, fail to meet this criteria.

There is in our view no conduct which has either caused a real injury to health or reasonable apprehension of such injury.

The third ingredient seems to us therefore to fall away; whilst given that in our view the Petitioner herself is responsible in considerable part for the difficulties, we are satisfied that there is no conduct on the part of the Respondent which can be described as cruelty in the ordinary sense of the term.

We should perhaps add that had we adopted the lower standard of proof in Elwell -v- Knight our finding would have been the same.

This is an unhappy marriage between two respectable and responsible people. In our view both bear an equal responsibility for the difficulties which they now face. It would seem that the marriage may well have come to an end; but to seek a divorce on grounds of cruelty when the allegations do not remotely reach the requirements necessary to prove the charge is not the way to proceed.

We are truly sorry for both parties and hope that the considerable good sense and responsibility they have shown in so many areas may permit them to resolve their difficulties. So far as the present Petition is concerned, however, we dismiss it.

Authorities cited:

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