22 pages.

COURT OF APPEAL

65.

5th April, 1995.

Before: Sir Godfray Le Quesne, Q.C. (President);
E.A. Machin, Esq., Q.C.;
Lord Carlisle, Q.C.,

Between	Mrs L	Petitioner
And	Mr L	Respondent

Appeal of the Petitioner against the Order of the Royal Court (Matrimonial Causes Division) of 15th July, 1994:

(1) ratifying the agreement on ancillary matters reached between the parties on 11th February, 1993, after noting the Respondent's undertaking not to remove the Petitioner from the matrimonial home until 3 months from the date of the said Order;

(2) staying the petition for judicial separation, in accordance with the said agreement;

(3) striking out the Order of Justice with effect from 3 months of the date of the said Order, or from the date on which the Petitioner vacates the matrimonial home, whichever is the earlier;

(4) ordering the Petitioner to pay the Respondent's taxed costs of the hearing, incurred subsequent to 30th April, 1993, save those costs incurred by the Respondent before the Court of Appeal; and

(5) noting that, by consent, either party may request the Royal Court to order a report from a Welfare Officer advising on difficulties relating to the children of the marriage.

Advocate J. Melia for the Petitioner
Advocate R.G.S. Fielding for the Respondent

JUDGMENT

THE PRESIDENT: What I am about to deliver is the judgment of the Court, although Mr. Machin has had to leave before it is delivered.

The parties to this appeal are husband and wife. They were married in 1973. There are three children of the marriage, two sons born respectively in 1982 and 1984 and a daughter born in 1989. The matrimonial home was always a house in St. Brelade which has always belonged to the husband who is the Respondent.

In March, 1992, the wife, who is the Appellant, instituted a petition for judicial separation on the ground of the Respondent's alleged cruelty. He denied the allegations made against him. In December 1992, the appellant issued an Order of Justice to exclude the Respondent from the matrimonial home. An order excluding him was made *ex parte*, the Respondent left the house and has never been able to return. At this stage, therefore, there were two sets of proceedings pending. There were the proceedings for the judicial separation and the proceedings instituted by the Appellant's Order of Justice. An order was made consolidating the two sets of proceedings and the trial of the consolidated proceedings began before the Royal Court on 8th February, 1993. What happened then we can described by quoting part of the judgment of the Royal Court, delivered in circumstances to which we shall have to advert later, on 30th April, 1993. I quote from that judgment:

> ***"Five days were set aside for the hearing and there were some forty-six witnesses warned to give evidence for the parties.***

At the close of the hearing on Tuesday, 9th February, 1993, the Court saw both counsel in chambers and suggested that in view of the financial circumstances of the parties it might be more appropriate if they could seek a compromise rather than continue with prolonged and necessarily expensive proceedings. The Court was asked not to sit on Wednesday and Thursday, and negotiations were started. There was some discussion on the Wednesday between Advocate Fiott, acting for the Respondent, and Mrs. Whittaker, acting for the Petitioner, about the possibility of the Petitioner's acquiring a house, either by renting or purchasing, and leaving the matrimonial home for the Respondent.

These discussions did not come to anything, mainly because a suitable property could not be found, but also because the Petitioner was worried about the security of a proper home for her children. ... Mr. Fiott and Mrs. Whittaker, with the assistance of Mrs. Linda Williams, a Solicitor who was one of the employers of the Respondent, discussed a possible settlement and, partly Mr. Fiott, but mainly Mrs. Williams, put the suggested terms to the Respondent and Mrs. Whittaker put them, in turn, to the Petitioner. The whole morning (that is Thursday morning) *was taken up with these discussions until about 1.30 p.m. At that time a number of matters had been discussed and, it is said by the Respondent, agreed to, and all that remained to be done was for Mrs. Whittaker to set down in formal language the terms to which the parties had consented and which would be presented to the Court on Friday morning when it resumed...*

Mrs. Whittaker, who gave evidence for the Petitioner, said that she felt it necessary at the end of the negotiations to add words to the effect that what had taken place was subject to a final agreement. She said

that she had hoped that they had reached a basis for finalising matters during the Thursday afternoon, but that neither party would be bound until an agreement had been signed. Her instructions were that the Petitioner, who confirmed this during her evidence, required time for reflection on the financial implications and to assess the effect of her leaving the matrimonial home which she was reluctant to do because that would deprive her children of a secure home.

Mr. Fiott, who appeared for the Respondent, did not give evidence but Mrs. Williams said that when Mrs. Whittaker made the observation we have mentioned, Mr. Fiott replied that they had reached an agreement and that Mrs. Whittaker merely smiled in reply to that observation."

We have no doubt that when the Royal Court made its suggestion that the matter might advantageously be compromised, they made it with the best of intentions. The results, unfortunately, can hardly be described as satisfactory. As appears from the extract from the judgment which we have just read the first result was that to the existing differences between the parties another was added. The new difference being whether any settlement of the proceedings had in fact been agreed.

On 16th February, 1993, the Respondent issued a summons to stay or dismiss the petition for judicial separation and the Order of Justice on the grounds that they had been compromised by agreement. This summons came before the Royal Court on 29th April, 1993, evidence was heard and the Court in its judgment held that an agreement had been reached and then remitted the matter to the Court constituted as it had been when the trial had begun on 8th February. It will be apparent from what I have said that the parties were agreed that in a sense certain matters had been the

subject of agreement in February. The dispute was whether the agreement which had then been reached was provisional or final.

Mrs. Whittaker, immediately after the end of the negotiations, made a draft of an agreement setting out what had been the subject of either provisional or final agreement. This was subsequently accepted by the parties as a correct draft of what had emerged from the negotiations. I therefore turn to that draft in order to see the parts of it which are most important for today's decision. It begins like this:

> *"WE the Petitioner and the Respondent in the above cause hereby submit an Agreement for the consideration of and ratification by the Court.*
>
> *1. THAT the Order of Justice shall, by consent, be dismissed and the injunctions contained raised.*
>
> *2. THAT the Petition for a judicial separation shall, by consent, be stayed upon the terms set out in this Agreement.*
>
> ...
>
> *5. THE Petitioner and the Respondent hereby record their agreement and intention to apply for the dissolution of their marriage by consent upon the ground of their separation for two years. On the expiration of two years from the aforesaid date of separation the Respondent shall present to the Matrimonial Causes Division of the Royal Court a petition for divorce*
>
> ...

8 *IN making this Agreement, the parties have attempted to reach a 'clean break" having disclosed to the other all material facts and circumstances and the parties hereby agree that this present Agreement shall be final and binding between them and that neither party shall make or cause to be made any further claim against the other including, without prejudice to the generality of the foregoing, a claim for maintenance, contribution towards support, secured provision, lump sum or vesting of property nor make any claim for variation of this Agreement and that this present Agreement shall be submitted for ratification by the Royal Court of Jersey as the whole agreement between the parties in respect of ancillary matters.*

...

11. (a) *THE Petitioner shall have care and control of the said children and the Respondent and the Petitioner shall have the joint custody of the said children.*

...

12. (a) *THAT the Respondent shall pay unto each of the three children of the marriage the sum of £45 per week gross payable monthly in advance for their maintenance and support. It is hereby agreed that the Petitioner shall have access to the said monies as and when required for the purposes of maintenance and support of the said children.*

...

19. (a) THE Petitioner shall have the right to exclusive occupation of the former matrimonial home in St. Brelade, Jersey, (hereinafter called "the property") together with the three children of the marriage until the 30th April, 1993, upon which date she shall vacate the matrimonial home with the children of the marriage and thereafter the Respondent shall have the right to exclusive occupancy of the property which property shall remain vested in the Respondent's sole name.

...

21. (a) THE Respondent shall pay to the Petitioner the capital sum of Thirty-five thousand pounds Sterling (£35,000) payable as follows:-(and what follows is that £30,000 was to be paid upon vacation of the property and then the balance of £5,000 on the anniversary of the signing of the agreement.)"

It will be observed that that agreement provided that it was to be presented to the Royal Court for ratification. The reason for that appears to us to lie in Article 25 of the Matrimonial Causes (Jersey) Law 1949. That article provides that:

"(1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect of the custody, maintenance and education of the children."

At the time that these matters were discussed, that is to say in February, 1993, proceedings for judicial separation were pending. It was therefore within the power of the Court at any time to make provision for the custody, maintenance or education of the children.

If the agreement had remained simply an agreement between the parties it would have been open to either party who might become discontented with its terms to apply to the Court under Article 25 to make different provision for maintenance, custody or education. There was therefore greater security for the parties if the Court was asked to ratify the agreement, since by ratifying it the Court would be exercising its power under Article 25 and converting the terms of the agreement into an order of the Court for custody, maintenance and education.

If the agreement were to be referred to the Court in this way it would become the duty of the Court to consider whether the agreement was fair and just and to ratify it only if so satisfied. It would not have been a matter of the Court's applying a rubber stamp to the agreement or ratifying it without any exercise of the Court's discretion. This position has not been disputed between the parties to this appeal but there is clear recent authority showing that that is the effect of the law. We refer to the case of Le Geyt -v- Mallett [8th July, 1993] Jersey Unreported. That was a case in which the Deputy Judicial Greffier had referred three questions to the Royal Court. The first two of those questions were these:

(1) Whether it is the duty of the Judicial Greffier to dismiss claims for maintenance or other ancillary relief if agreed by the parties.

(2) Whether the case of Mrs L -v- Mr L has any bearing on the ratification of matrimonial agreements.

The reference there is to an earlier stage of proceedings in this matter to which we shall come in a moment.

Those questions were answered by the Bailiff in these terms:

1. ***"If he is satisfied that the agreement is fair and just, he may ratify it and dismiss any claims in the petition not proceeded with even though that might have the effect, as far as they were concerned, of preventing the wife from applying in future to the Court in respect of those items so dismissed.***

2. ***Mrs L -v- Mr L was a decision only about whether an enforceable agreement had been concluded between the parties. It did not deal with the merits of that agreement; nor with whether that agreement should be ratified by the Matrimonial Causes Division, which had heard the original proceedings. In fact it went to great lengths to refer its judgment and its decision back to that Court in order for it to decide whether it would or would not ratify the agreement.***

It is obvious that the basis of these answers was that when an agreement of this kind is presented for ratification it is the duty of the Court to form its own judgment whether the agreement is a fair and just agreement to which the Court's approval ought to be given.

In exercising this consideration it appears to be settled that the paramount factor in the mind of the Court has to be the needs of any dependant children of the marriage. For that we refer to the Judgment of the Royal Court in Huish -v- O'Connell

(30th November, 1988) Jersey Unreported. In the course of its judgment the Royal Court said this:

> *"We summarise the principles to be applied:- We must have regard to all the circumstances of the case, both financial and personal, and including conduct, viewing the situation broadly, in the exercise of our discretion, and attempt to do justice to both parties. We must have regard to financial resources and needs, obligations and responsibilities which each of the parties is likely to have in the foreseeable future. Thus we must take the prospects of inheritance into account. A very large emphasis must be placed on the provision of homes, but the paramount consideration is the requirements of the dependent children. The Court has very flexible and wide-ranging powers. If it is guess work whether the petitioner will or will not remarry, prospective remarriage should be ignored. It is generally better to allocate shares in the matrimonial home rather than to give a spouse a fixed amount which might be eroded by inflation when it comes to be realised. In appropriate cases the whole of one spouse's interest in the matrimonial home should be transferred to the other spouse. A 'clean break' whilst attractive and to be encouraged, is not appropriate in all circumstances, especially where the interests of the children are paramount. Decisions of the courts can never be better than guidelines. They are not precedents in the strict sense of the word; there are no rigid categories, and the aim must always be to meet the justice of the particular case."*

Later in the judgment when dealing with the provision to be made in that case the Court said:

"Furthermore, we accept that the needs of the children are paramount."

This was the jurisdiction which had to be exercised by the Matrimonial Causes Division when, after the surprising delay of one year and three months, the case eventually came back to it, on 15th July, 1994. No transcript is available of the hearing and considerable debate has taken place in the hearing of this appeal about the course of the hearing in July, 1994, and whether certain things were or were not submitted by either side.

We have had the advantage of being able to read the notes made by the Deputy Bailiff at the time and both sides have also helpfully obtained the recollections of counsel who appeared then. From this material certain things seem to be clear. First, no evidence was put before the Court, neither oral evidence nor, subject to what I am about to say, any evidence by affidavit. This is confirmed by summary of the proceedings which is given in the Court's judgment. Secondly, counsel on each side did make some reference to the affidavits of means which had previously been filed by the parties and some references, though not it appears detailed references in their arguments, to the financial position of the parties. Thirdly, the Divorce Court Welfare Report which had been prepared in April, 1993, by Miss Bridget Ahier, was referred to in the course of the proceedings.

We turn, therefore, to the proceedings in the Royal Court on 14th and 15th of July. Let us look first at the submissions of the parties as recorded by the Court.

Advocate Fitz who appeared then for the Appellant, submitted that the agreement should not be ratified. The judgment goes on:

"In this it was accepted by both counsel that the real concern of the Petitioner was that she would have to leave the matrimonial home and that she considered that it would be to the advantage of the children to stay there with her.

Her first submission was that the agreement should not be ratified on the grounds of public policy. It had been reached in haste and without reflection in the middle of contested proceedings; and that within two hours of agreement (as the Court subsequently found) she had advised her counsel that she was unhappy with it.

Furthermore, the Respondent had not acted on it.

It was not, she submitted, in the Petitioner's interest to rent a property and she and the children were better off where they were in the matrimonial home.

In her submission, the agreement sufficiently affected the interests of the children and was sufficiently prejudicial to the Petitioner that, given the way that the agreement was reached, the Court, on grounds of public policy, should not ratify the agreement.

She conceded however, as we think she had to do, that the issue of accommodation must have been central to the negotiations."

There was then a reference to a point about the possibility of the agreement even if ratified being subsequently re-opened under Article 29 of the Matrimonial Causes (Jersey Law) 1949.

As to the submissions on the other side the judgment reads like this:

> *"In answer Advocate Fiott submitted first that an agreement had indeed been reached and the Court had so found: and that where an agreement had been reached it should ordinarily be respected.*
>
> *Second, that the Respondent must have taken advice before the proceedings; she was advised during the negotiations and that her then advocate, Mrs. Whittaker, was experienced in these matters, and would have been able to assess her client's evidence over the first two days in conducting the negotiations and advising on them.*
>
> *Third, that, as conceded by Miss Fitz, the issue of accommodation was central. That the Respondent wanted to live at home arose from a simple financial requirement: the parties, although reasonably well off, are not wealthy; the Petitioner would get a considerable rent rebate (a point conceded by Miss Fitz) whilst the Respondent would not. We may say that we saw considerable force in this submission.*
>
> *In his view* (that is Advocate Fiott's view) *there is an agreement which was reached which was the same as any other agreement."*

Having set out those submissions of the parties the Court came ultimately to the expression of its own views and I read this part of the judgment:

"So far as the point raised by the terms of Article 29 of the Matrimonial Causes Law is concerned, we find that the submissions of Advocate Fiott accurately represent the position so that whatever we decide, it will be for the Court pronouncing the decree to make such order as it thinks fit after considering all the circumstances.

This does not, in our view, prevent us from ratifying an agreement at this stage if we think it right to do so.

It is clear that the question of accommodation was of central importance. Mrs. Whittaker is an experienced counsel and we find find it inconceivable that she should not consider the position.

In our view, on what is before us, the agreement was a sensible arrangement in what are very difficult circumstances and, although we realise that this is not, for the reasons adumbrated above, a final decision, we have no hesitation in ratifying the agreement. In doing so we note an undertaking by counsel for the Respondent that the Respondent will not require the Petitioner to remove from the matrimonial home for three months from today.

It remains only to stay the petition for Judicial separation; to strike out the Order of Justice three months from today or sooner should the Respondent regain possession of the matrimonial home before that date."

Before proceeding we should record that at the outset of this hearing there was a challenge on behalf of the Respondent to the right of the Appellant to bring the appeal.

In order to see the grounds on which this challenge was made it is necessary to look at the Court of Appeal (Jersey) Law, 1961 Article 13 (c). That provides:

"No appeal shall lie under this part of this Law-

(c) without the leave of the court making the order, from any order -

(i) made with the consent of the parties.."

The way in which reliance was placed upon that provision is this: Advocate Fielding submitted that as the Royal Court found on 30th April, that agreement had been reached by the parties on the terms of the document to which we have referred in February, therefore, Advocate Fielding submitted, an attempt to persuade the Court that the terms of that agreement should not be put into effect was an attempt to appeal from an order made with the consent of the parties.

This does not appear to us to be a proper way to look at the matter now before us. It is true that as must now be accepted, in view of the finding of the Royal Court, agreement had been reached in February. However, that agreement itself contemplated that it would be submitted to the Royal Court for ratification. It was submitted to the Royal Court for that purpose on 15th July, 1994, and on that occasion the Appellant opposed the ratification and submitted to the Court it was not a proper case for ratification to be granted. The Court's decision on that occasion was that the agreement should be ratified and it is from that decision that this appeal is brought. In other words this appeal is brought from the Court's decision to ratify the agreement which decision clearly was not made by the consent of the parties. Secondly, Advocate Fielding relied on paragraph (e)

of the same Article of the Court of Appeal (Jersey) Law, 1961. that reads:

> *"No appeal shall lie under this Part of this Law -*
> *(e) without the leave of the court whose decision is sought to be appealed from, or of the Court of Appeal, from any interlocutory order or interlocutory judgment, except -*
> *(i) where the liberty of the subject or the custody of infants is concerned.."*

We assume for the purposes of this point that Advocate Fielding was correct in submitting that the order made by the Royal Court on 15th July was interlocutory. If it was, nevertheless, it was an order ratifying, that is to say giving the Court's approval to, the agreement reached by the parties in February. One of the terms of that agreement dealt with the custody and care of the infant children of the marriage. The effect of the Court's decision on 15th July was to convert that provision from having been simply a matter of agreement between the parties to an order of the Court. In our judgment, therefore, the appeal which is now before us is an appeal where the custody of infants is concerned. That is the correct position, it appears to us, because the appeal is brought from an order of the Court which dealt with the custody of the children. It therefore appears to us that this case falls within the first of the exceptions to paragraph (e) of Article 13 and is not a case in which leave to appeal is a prerequisite.

We come, therefore, to the arguments which were presented to this Court.

Advocate Melia, on behalf of the Appellant, submitted that an agreement providing for the Appellant to have care of the three

children but to be ejected from the matrimonial home after a brief interval, was an agreement so flawed that it should not have received the approval of the Court. The matrimonial home being a four bedroomed house was, she said, a very suitable house for the children; it was the only home they had known, and the Court had a duty not to ratify an agreement which provided for them to leave it in those circumstances. Advocate Fielding, on behalf of the Respondent, while conceding that the interests of children are very important when a question of ratification of such an agreement arises, submitted that they could not be used to dictate an impractical, unworkable and unjust solution. The Court's decision had to be taken, he submitted, on all relevant material which included material relating to the history of the marriage and the financial position of the parties. The Court in this case, he said, was not in a position to say that the judgment was wrong because the Appellant had not put any such material before it. The Royal Court had been entitled to assume that the parties had their financial position and the interests of the children in mind in the course of the negotiations and the Appellant had accepted that it was she who eventually would have to leave the matrimonial home. Advocate Fielding submitted that it was impossible for the Respondent to continue making the payments which he has been making for the support of the Appellant and their children unless he recovered possession of the house. He could not afford, in view of those payments which he has always maintained, to pay rent and was living free in a very inadequate room.

In order to reach a decision between these arguments, we turn back, first, to the terms of the agreement. The agreement provides for the care of the children to be the responsibility of the Appellant. It follows that the interest of the children requires that there should be some suitable place where they and the Appellant can live. However, the agreement provided that on 30th April, 1993, that is two and a half months after an agreement was made, the Appellant and the children were to leave the

matrimonial home in order that it might be occupied by the Respondent who, as far as we have been told, has no responsibility to provide living accommodation for anyone but himself. On leaving the house the Appellant was to received £30,000 and another £5,000 a year later. The effect of this was that under the provisions of the agreement, after a short time, the Appellant and the children were to leave the house, which was the only home the children had known, receiving as they did so, a sum of money which would not go very far towards the provision of alternative accommodation. This obviously involved a risk that under the provisions of the agreement the Appellant and the children might have to get out of the house with nowhere suitable to which to go. It is interesting to observe, when one is considering the consequences of this, one passage in the report provided to the Court by the Court Welfare Officer. This is the report which we have already mentioned which was prepared in April, 1993, by Miss Bridget Ahier. At one point in that report she says this with reference to the children:

> *"Presently the family home is providing them with a degree of stability and continuity. They see it as part of their lives and are not aware that this may be liable to change."*

Now, what did the Royal Court say in giving its approval to this agreement.

The first thing to be said about the judgment of the Royal Court is that it contains no indication that the Court attributed any particular importance, let alone paramount importance, to the interests of the children nor that the Court appreciated the threat to those interests which the agreement represented. We say that because - and it is surprising to notice this - there is no reference in the judgment to the interests of the children

requiring any particular consideration, or being given any particular priority in the various matters which it was incumbent upon the Court to weigh. It is clear from the Court's own recitation of the submissions that it had been made clear to them on behalf of the Appellant that it was anxiety about a stable home for her children that weighed principally with her in opposing the ratification of the agreement. When the Court came to deal with this matter in expressing its own view, it said this:

> ***"It is clear that the question of accommodation was of central importance. Mrs. Whittaker is an experienced counsel and we find it inconceivable that she should not consider the position."***

The question for the Court, however, was not whether Mrs. Whittaker had or had not considered the question of accommodation, the question was: whether the conclusion which she reached and apparently recommended to her client was a fair and just solution which the Court exercising its own discretion could regard as something to which approval should be given.

The judgment goes on:

> ***"In our view, on what is before us, the agreement was a sensible arrangement in what are very difficult circumstances."***

The description of this as a sensible arrangement seems to us to be somewhat surprising when the agreement had the effect upon the interests of the children which we have already described. We acknowledge that, in spite of that effect upon the interests of the children, the agreement might have been justified and might

have deserved the approbation of the Court. That would have been the position if it had been shown that, although the agreement gave inadequate protection to the interests of the children, it was nevertheless the best which could be achieved in view of the circumstances of the parties. Such a conclusion could only have been reached after detailed consideration had been given to the financial position of either party and to any suggested alternative arrangements which might have been made. There is no sign that the Court ever put its mind to any detailed consideration of the financial position of the parties or ever considered what arrangements those circumstances might or might not make possible. The simple reference in the sentence which we have read to very difficult circumstances cannot, in our judgment, replace detailed consideration of that kind.

It follows from what we have said that in our view the Court approached this matter without giving to the interests of the children the degree of importance which in law it was their duty to give. It follows from this in giving its approbation to the agreement, the Court was exercising its discretion upon wrong principles and it is abundantly settled by authority that when that has happened an appellate Court is justified in intervening. In our judgment, therefore, we are compelled to conclude that because the discretion was exercised upon wrong principles, the decision of the Court must be set aside and this appeal must be allowed. The practical effect of that will be that the order of the Court ratifying the agreement will be set aside. With that order must also fall the Order staying the petition for judicial separation and the order striking out the Order of Justice and the position will therefore be that the petition for judicial separation remains, as it always has remained in being but is no longer stayed, the Order of Justice is no longer struck out and the injunctions contained in it therefore remain in force.

We do not wish to leave this case without saying something more. It is obvious that the position which has now been

achieved is very unsatisfactory. We say that for two reasons. First, because it is highly desirable in the interests of all parties, and particularly of the children, that these disputes should now be laid to rest. We do not see much prospect of their being laid to rest by agreement between the parties and they must therefore be laid to rest by decision of the Court. The second reason why we say the present position is very unsatisfactory is this: it appears to us from what we have been told that it is working considerable hardship upon the Respondent. The Respondent is living in what are obviously unsuitable conditions and he is doing that in order that he may be in a position to keep up his payments for the support of his family. At present, in view of the decision to which we have been obliged to come upon the agreement there seems to be no means of putting an end to that situation. But, as I have said it is one of the reasons which leads us to say that the position, at present, is wholly unsatisfactory and must as soon as possible be resolved. The orders which we are making on this appeal will leave the parties free to bring the matter back before the Matrimonial Causes Division of the Royal Court, either by continuation of the judicial separation proceedings or by the institution of new proceedings for a decree of dissolution. We express the hope that one or other of those courses will be taken as soon as possible. That the proceedings will be pursued as soon as possible and that as soon as possible all these ancillary matters will be submitted to the Court for its decision.

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