COURT OF APPEAL

164

30th October, 1990

Before: E.A. Machin, Esq., Q.C. (President)
J.M. Collins, Esq., Q.C., and
J.M. Chadwick, Esq., Q.C.

Between L Appellant

And J Respondent

Appeal of the appellant (with application to adduce further evidence) against the Order of the Royal Court (Matrimonial Causes Division), dated the 12th October, 1989.

Advocate P.C. Sinel for the Appellant.
Advocate R.J. Renouf for the Respondent.

Reasoned Judgment prepared by the President
(decision given on the 27th September, 1990;
reasoned judgment handed down on the 30th October, 1990).

L

-and-

J

JUDGMENT

On 25th and 26th September 1990 we heard an appeal by L against certain Orders in favour of his former wife, J, made by the Matrimonial Causes Division of the Royal Court on 12th October 1989, which Orders related principally to financial provision for his former wife, and to the custody of the son of their marriage, P.

In this Judgment, we shall refer to L as "the husband" and to J as "the wife".

The parties produced for the use of the Court three bundles of documents. The Appellant's documents are placed in a bundle numbered serially from pages 1 to 351, and we shall refer to these by prefixing the letter "A" before the page number. The Respondent's documents were bundled between lettered dividers, and to these we shall refer by prefixing the letter "R" before the letter indicating the appropriate divider. The third bundle was one prepared by the Appellant in support of an application which he made to adduce additional evidence; this bundle contains

documents separated by dividers, each of which bears a number and we shall refer to documents in this bundle by prefixing the letter "X" before the number of the appropriate divider.

The background

The parties were married on 9th April 1978; the wife was at the date of the hearing before the Royal Court aged 54 years; the husband was then aged 45 years. The wife is a native of India; she is Brahmin and her marriage to the husband was her third. She is described by the Royal Court as an educated and cultured woman of good family. The husband is by profession a civil engineer. The wife is currently resident in Bahrain; both the husband and P are resident in Jersey, where the husband is currently employed in his profession. P was born in July 1978, so that he is now 12 years of age.

After the birth of P difficulties arose within the marriage, into which it is, in the main, unnecessary for us to travel.

On 3.10.86 the wife presented a Petition on the grounds of the husband's adultery and cruelty; on 23.12.86 the husband cross-Petitioned on the grounds of the wife's cruelty. On 1.3.88 the wife's Petition was stayed by order of the Court and on 14.4.88 the suit proceeded on the husband's Answer as an undefended cause. A Decree Nisi was pronounced on the ground of the wife's cruelty and the co-Respondent was dismissed from the suit.

On 13.8.88 the wife issued a Summons asking that custody of P be granted to the husband and herself jointly, that care and control of P be granted as the Court should think fit, that the husband should provide for the maintenance of P and herself, and that the Court should make such transfer of real property as might in all the circumstances be just.

This Summons was heard by Commissioner Le Cras and two Jurats between 9th and 12th October 1989. Both the wife and the husband gave lengthy evidence, occupying nearly 200 pages of transcript. The wife was represented by Advocate Renouf, and the husband by Advocate Sinel, both of whom appeared before us.

In its judgment, which begins at A/58, the Court made some preliminary observations concerning the conduct of the parties (A/59 paras 2 and 3). The Court then considered the financial aspects of the Summons and for the reasons set out on A/59-60 ordered the husband to pay to the wife the lump sum of £27,500 to be charged on the husband's Jersey house, E , as set out in A/61 at para 1.

As to P , the Court ordered joint custody, that care and control remain with the husband, and that the wife should have access as set out on A/61 para 2. The husband having undertaken to the Court to be wholly responsible for P's education and maintenance the Court ordered that such subvention should continue until P should cease full-time education.

The Court ordered the husband to pay the taxed costs of the application.

The formal order of the Court is to be found at A/56-57.

Against this decision the husband appeals by Notice dated 2.11.89 (A/68) and by that notice he asks this Court to order

(1) that the lump sum payment be reduced

(2) that the period for its payment be enlarged

(3) that he has sole custody of P

(4) that the wife should pay the costs of P travelling to meet her

(5) that her access to P be reduced and

(6) that she should pay the costs of the appeal and of the hearing at first instance.

Each of these grounds of appeal has been pursued before us.

Application for leave to adduce further evidence

On 17.9.90 the husband issued a Summons which despite its inelegant wording we have treated as an application for leave to adduce further evidence at the hearing of the appeal. That Summons we heard before embarking on the appeal proper. The Summons refers to "the letters, documents and authorities attached hereto" and Advocate Sinel told us that these were the documents comprised within X/2-18. The documents contained within X/2-4 were plainly not evidence at all, and should never have been

included within the application. We held that documents X/8-18 should not be allowed in evidence before us, but for the reasons we then gave we allowed the reception of documents X/5-7, in relation to which Advocate Renouf agreed that despite the plainly hearsay nature of much contained therein we might look at them and draw such inferences from them as we thought fit. We have indeed found some of the documents within X/5-7 to be of assistance in relation to that part of the appeal which deals with the lump sum payment.

Discretion

Before we turn to the facts of the case, we desire to state what are in our view the principles to be applied by this Court in hearing appeals relating to custody and maintenance.

The decision of a Court of first instance in such cases involves the exercise of a discretion, with which the appellate Court will only interfere on well-recognised grounds. That a decision relating to maintenance falls within such a category appears from Bellenden v. Satterthwaite [1948] 1 All ER 343, C.A., and that custody cases equally fall within the principle appears from G. v. G. [1985] 2 All E.R. 225, H.L., which must be regarded as the most authoritative decision upon review of discretion by an appellate Tribunal.

In the latter case, Lord Fraser, in a speech with which the remainder of their Lordships agreed, said this:

"I entirely reject the contention that appeals in custody cases, or in other cases concerning the welfare of children, are subject to special rules of their own. The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so it will leave his decision undisturbed. The limited role of the Court of Appeal in such cases was explained by Cumming-Bruce LJ in Clarke-Hunt v Newcombe (1982) 4 FLR at 488, where he said:

> 'There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the matter. Whether I would have decided it the same way if I had been in the position of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation. I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer? I emphasise the word "plainly". In spite of the efforts of [counsel] the answer to that question clearly must be that the judge has not been shown plainly to have got it wrong.'

That passage, with which I respectfully agree, seems to me exactly in line with the conclusion of Sir John Arnold P in the present case, which I have already quoted. The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might

reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion and they are cases to which the observations of Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343 at 345 apply. My attention was called to that case by my noble and learned friend Lord Bridge after the hearing in this appeal. That was an appeal against an order for maintenance payable to a divorced wife. Asquith LJ said:

> 'It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'

I would only add that, in cases dealing with the custody of children, the desirability of putting an end to litigation, which applies to all classes of cases, is particularly strong because the longer legal proceedings last, the more are the children, whose welfare is at stake, likely to be disturbed by the uncertainty.

Nevertheless, there will be some cases in which the Court of Appeal decides that the judge of first instance has come to the wrong conclusion. In such cases it is the duty of the Court of Appeal to substitute its own decision for that of the judge. The circumstances in which the Court of Appeal should substitute its own decision have been described in a number of reported cases, to some of which our attention was drawn. We were told by counsel that practitioners are finding difficulty in ascertaining the correct principles to apply because of the various ways in which judges have expressed themselves in these cases. I do not think it would be useful for me to go through the cases and to analyse

the various expressions used by different judges and attempt to reconcile them exactly. Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' used by Sir John Arnold P in the present case, and words such as 'clearly wrong', 'plainly wrong' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. The principle was stated in this House by Lord Scarman in B v W (wardship: appeal) [1979] 3 All ER 83 at 96, [1979] 1 WLR 1041 at 1055, where, after mentioning the course open to the Court of Appeal if it was minded to reverse or vary a custody order, he said:

> 'But at the end of the day the court may not intervene unless it is satisfied either that the judge exercised his discretion on a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly.'

The same principle was expressed in other words, and at slightly greater length, in the Court of Appeal (Stamp, Browne and Bridge LJJ) in Re F (a minor) (wardship: appeal) [1976] 1 All ER 417, [1976] Fam 238, where the majority (Browne and Bridge LJJ) held that the court had jurisdiction to reverse or vary a decision concerning a child made by a judge in the exercise of his discretion if it considered that he had given insufficient weight or too much weight to certain factors. Browne LJ said ([1976] 1 All ER 417 at 432, [1976] Fam 238 at 257):

> 'Apart from the effect of seeing and hearing witnesses, I cannot see why the general principle applicable to the exercise of the discretion in respect of infants should be

any different from the general principle applicable to any other form of discretion.'

Bridge LJ agreed with Browne LJ and I quote a passage from his speech where, after stating that his view was different from that of the judge, he went on to say ([1976] 1 All ER 417 at 439-440, [1976] Fam 238 at 266):

> 'Can this conclusion prevail or is there some rule of law which bars it? The learned judge was exercising a discretion. He saw and heard the witnesses. It is impossible to say that he considered any irrelevant matter, left out of account any relevant matter, erred in law, or applied any wrong principle. On the view I take, his error was in the balancing exercise. He either gave too little weight to the factors favourable, or too much weight to the factors adverse, to the father's claim that he should retain care and control of the child. The general principle is clear. If this were a discretion not depending on the judge having seen and heard the witnesses, an error in the balancing exercise, if I may adopt that phrase for short, would entitle the appellate court to reverse his decision [and Bridge LJ then cited authorities]. The reason for a practical limitation on the scope of that principle where the discretion exercised depends on seeing and hearing witnesses is obvious. The appellate court cannot interfere if it lacks the essential material on which the balancing exercise depended. But the importance of seeing and hearing witnesses may vary very greatly according to the circumstances of individual cases. If in any discretion case concerning children the appellate court can clearly detect that a conclusion, which is neither dependent on nor justified by the trial judge's advantage in seeing and hearing witnesses, is vitiated by an error in the balancing exercise, I should be very reluctant to hold that it is powerless to interfere.'

The decision of Re F is also important because the majority rejected, rightly in my view, the dissenting opinion of Stamp LJ

(see [1976] 1 All ER 417 at 429-430, [1976] Fam 238 at 254), who would have limited the right of the Court of Appeal to interfere with the judge's decision in custody cases to cases 'where it concludes that the course followed by the judge is one that no reasonable judge having taken into account all the relevant circumstances could have adopted ...' That is the test which the court applies in deciding whether it is entitled to exercise judicial control over the decision of an administrative body: see the well-known case of Associated Provincial Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948], 1 KB 223. It is not the appropriate test for deciding whether the Court of Appeal is entitled to interfere with the decision made by a judge in the exercise of his discretion."

We have included within our judgment this long and authoritative passage since we were not referred to this authority by either Advocate who appeared before us and it seems to us therefore to be necessary that the relevant principles should be re-stated, since in our view they clearly apply equally to the exercise by this Court of its function in reviewing the discretion of an inferior Tribunal.

Financial provision

The power of the Jersey Court to make financial provision for the party to a marriage in case of divorce is contained, so far as is here relevant, in Art. 29 (1)(b) of the Matrimonial Causes (Jersey) Law 1949, as amended. The provision which here applies is in the following terms:

> "Where a decree of divorce, nullity of marriage, judicial separation or restitution of conjugal rights has been made the Court may, having regard to all the circumstances of the case including the conduct of the parties to the marriage and to their actual and potential financial circumstances, order.... (b) that one party to the marriage shall pay to the other party to the marriage such lump sum or sums as the Court may think reasonable whether or not any sum is ordered to be paid under sub-paragraph (a) of this paragraph".

Sub-paragraph (a) relates to periodic maintenance and is not here in point.

The reference to "the conduct of the parties" in this Article founded a submission by Advocate Sinel, both in the Court below and before us, that any lump sum otherwise payable by the husband to the wife should be reduced by a reason of her conduct towards the husband during the marriage, being conduct which had led to the pronouncement of the Decree Nisi on grounds of cruelty.

This matter was considered by the Royal Court and dealt with as follows (A/59):

> "As to conduct we have heard evidence by both the parties and in assessing it we should say at once that we accept that the Respondent has proved the cruelty which he alleged in his cross-Petition. However, we have to say that there is before us counter-balancing behaviour by him, not least what we regard as his extraordinary conduct in sending Miss B. away at the behest of the Petitioner and then bringing her back without informing his wife. In circumstances such as these it is easy to see how the Petitioner's suspicions became inflamed and these suspicions were in our view made worse by entirely different temperaments aggravated by such different backgrounds. It is quite clear to us that the parties now fail to understand or to communicate their own point of view to each other.
>
> In the circumstances and taking into account all the allegations each of the parties make we are not prepared to

say that the conduct of one or the other disentitles them to relief."

It will be noted that the conclusion of the Royal Court was framed in terms of complete disentitlement to relief, and that reduction in the lump sum on the grounds of conduct on the part of the wife was not expressly adverted to. Although, of course, it is possible for the conduct of the party who applies for maintenance to have been so gross as to disentitle that party entirely to relief, such a case was not advanced before either the Royal Court or ourselves, nor could it fairly have been. The case advanced was for a reduction.

Nevertheless, as we read the judgment the Court below was of the opinion that misconduct on both sides was such that the one cancelled out the other, so that there would have been no room even for reduction of the lump sum which otherwise would have been awarded.

The evidence relating to the conduct of the parties was carefully placed before us and submissions were made by both Advocates relating to it. We have no hesitation whatsoever in coming to the conclusion that if the Court below in fact exercised its discretion not to reduce the lump sum on account of misconduct by the wife, then there is no ground upon which this Court could interfere with that exercise.

However, the phrasing of the second paragraph of the passage from the judgment quoted above might be said to leave it uncertain whether the Court below appreciated that it could reduce, as distinct from annihilate, the lump sum, and so we have considered the matter of misconduct afresh, as if we were not merely reviewing a discretion, but exercising the ordinary jurisdiction of an appellate Tribunal rehearing the facts of the matter.

The misconduct alleged on behalf of the husband was cruelty; that alleged on behalf of the wife was the husband's conduct in relation to Miss B, who was the co-Respondent.

So far as conduct on the part of the wife is concerned, Advocate Sinel urged upon us that the Royal Court found that the cruelty alleged by the husband in his cross-Petition had been ...ed. The cross-Petition contained 23 allegations of cruelty, only some of which were the subject of evidence before the Royal Court. Therefore, the Royal Court could not have intended the quoted passage to bear the meaning that all those allegations had been proved before it. The finding of the Royal Court can only mean that some or all of those allegations pursued before it had been proved, but since the judgment does not identify which of the allegations had been proved, we are left in ignorance as to the ambit of the relevant cruelty found. The cross-Petition, as we have said, went through undefended, and proof of the allegations of cruelty on that occasion would have been of the most formal character. We have, however, considered those passages in the evidence which bear upon the wife's conduct, with regard to which

Advocate Sinel relied principally upon the wife's publication to the husband's friends and colleagues in Bahrain of her suspicions concerning the husband's conduct in relation to other women, and with Miss "B" in particular, and its effect upon the husband's reputation and career, as set out at A/165-167. He relied also upon the wife's jealousy, as the husband expressed it, of his relationship with P ; see A/168-169.

Against this, Mr. Renouf relied upon the conduct of the husband in first expelling Miss "B", and then bringing her back to the ignorance of the wife and against her wishes. Advocate Sinel frankly conceded before us that the evidence disclosed

(1) that by 1983 the wife had become suspicious that the husband was having an affair with Miss B

(2) that she then became very emotional and wanted Miss B sent back to Sri Lanka, whence she had come

(3) that the husband sent her back but provided her with a return air ticket

(4) that the husband procured her return to Bahrain, where the parties were then living

(5) that this constituted a breach of a promise by the husband that he would not do so

(6) that she did return, but not to the matrimonial home

(7) that the husband did not tell the wife that Miss B was coming back or had come back

(8) that the wife discovered the return of Miss B, whereupon the husband sent Miss B back to Sri Lanka.

We are satisfied that Advocates Sinel's concessions were properly, indeed inevitably, made, having regard to the evidence to which our attention was directed, particularly at A/149, 197, and 210-213.

In the light of the evidence relating, on the one hand to the wife's cruelty, and on the other hand to the husband's conduct in bringing back Miss B, we have ourselves come to the conclusion that the misconduct on each side was so nearly equal in terms of gravity that no alteration in the lump sum would be justified by virtue of it.

We turn now to consider the quantum of the financial provision order, and this we do not, of course, by reviewing the evidence in order to decide whether we should come to the same conclusion as the Court below, but having regard to the constraints of interference with discretion set out in G. v. G.

Before the hearing, the husband had sworn two Affidavits of means, pursuant to orders of the Court, the first in March 1987, which related to the financial position on 16.10.86, the second in December 1988. At Court he produced a draft Affidavit which he swore in the course of the proceedings. These Affidavits dealt with his capital position, with his income position, and with his major expenses, and their contents are helpfully summarised by Mr. Renouf at R/D.

It is at once apparent that the husband's principal asset, and the only real source of subvention to his wife, was his interest in his house, E , in Jersey. In these circumstances it is wholly lamentable that despite the previous orders of the Court, there was not placed before it any valuation whatever of this property. The house was then occupied by the husband's tenants. He told the Court that they had told him that they had had the house valued at £70,000. A less satisfactory item of evidence it would be difficulty to conceive, and we are not surprised at the comments of the Royal Court upon this evidence to be found at A/60. Mr. Renouf brought to our attention the decision of the English Court of Appeal in Payne v. Payne [1968] 1 All ER 1113, in which Willmer, L.J, at p.1117, stated that it was well established that the Court was entitled to draw inferences adverse to a husband who had not made a proper disclosure of his available resources. The matter does not rest there, since it now appears, from documents in Bundle X, that on 27.10.89, about two weeks after the hearing, the house was valued by Messrs. Le Gallais at the sum of £108,000 (X/5). It appears also from the documents within that divider that the tenants were willing to buy the house for that sum, paying a moiety 10 days after the passing of contract and the balance three years later. The sale in fact went off, because the tenants on 30.5.90 received a surveyor's report from N.V. Bate Associates Limited (X/7) revealing structural defects. In the penultimate paragraph of this report, Bates stated that the property should be monitored for one year, and if movement continued they would recommend underpinning, the ground works alone costing between £10,000 and

£15,000, plus repairs to the drainage and decorative remedial work. That report was never properly proved before us and what the effect of it would have been if its author was subject to cross-examination and if a report on behalf of the wife were obtained from other surveyors, is a matter of speculation. Since we have not seen the report of Messrs. Le Gallais, we do not know whether their valuation took into account any defect in the property or whether it did not. We do however note that the husband, who is after all an engineer, expressed the view in a letter of 2.1.90 to his Advocate (X/5) that the valuation which he had obtained might be low. On a review of discretion such as that with which we are presently engaged it is open to the appellate Tribunal, where there is evidence which has come into being since the hearing at first instance, to take into account evidence that has become available by the time of the appeal, on the ground that there has been a change in circumstances after the Judge made his order which would have justified his acceding to an application to vary it (Hadmor Productions v. Hamilton [1982] 1 All ER 1042, H.L., per Lord Diplock at p. 1046). Although this passage relates to interference of discretion, it must follow equally that the exercise of the discretion can be upheld on the ground that subsequent evidence has appeared which would further justify the original order.

Accordingly, we have examined the discretion exercised by the Court below, first, without reference to the later evidence indicating a higher value for the house, and, secondly, taking that evidence into account.

We consider that there is no ground for interference with the discretion of the Royal Court on the evidence which it had before it. If the house were worth only £70,000, then the mortgage of £27,000, that being the figure at the date of the hearing, left an equity of £43,000; to that figure must be added the shares valued at £4,782, and deducted the overdrafts totalling £10,322. The husband's assets were, thus, worth about £35,000. Advocate Sinel complained that the lump sum award of £27,500 represented about 80% of the net assets, as indeed it did. This, however, is not the test. Article 29, which we quoted above, requires the Court to have regard to all the circumstances of the case, and not merely to the husband's capital position. When one looks at the income position, one finds that the Court held that the husband, although then unemployed, had approximately 20 years' working life quite probably with a salary of £18,000 per annum (A/60). We now know that this forecast has come to pass, since Advocate Sinel frankly told us that the husband was now in employment in Jersey in his profession at a salary of £18,000 per annum. In contrast, the wife had a modest employment in Bahrain at a salary equivalent in Jersey to about £5,000 p.a., of uncertain tenure, and she had only a few years' working life ahead of her. The Royal Court quite properly proceeded on the basis that the house would be sold in the very near future, since this was the evidence before it, and it had been the husband's wish to sell the house quite apart from the divorce proceedings, in order to clear his indebtedness. If the house had been sold shortly after the hearing, many of the outgoings set out in R/D, would

have disappeared. Already, the school fees had reduced to £1,440 p.a. The mortgage repayments would have disappeared. The legal expenses were not continuing expenses. The overdraft interest would have disappeared, since the overdrafts would have been liquidated out of the proceeds of sale. The house maintenance figure would have disappeared. In place of the expenses relating to E , the husband would of course have been faced with providing himself with a roof, but this he had already done by taking a flat in his mother's house at a rent of £2,040 p.a. Expenses in relation to P would continue, and might be supposed to increase as the boy got older, but his holiday expenses would not have run at the sum of £2,870, the figure set out in the December 1988 Affidavit, but at a lesser figure, say, of about £1,000 p.a., as we understood the position to be.

Without making any minute analysis of the husband's future economy, it can be seen that on the basis upon which the Court below was asked to consider the matter, that is, the sale of E for about £70,000 and the extinction of the husband's expenses relating to it, and the husband's overdraft, the husband would have been left, so far as income is concerned, in a very favourable position compared with his wife. When one remembers that the lump sum of £27,500 if prudently invested so as best to hedge against inflation, would provide only about £1,500 p.a., at the most, for the wife over the remainder of her possible life, we see no ground whatever for supposing that she has been too generously treated.

In these circumstances, even were there no information concerning events which have come to pass since the hearing, we should have declined to interfere.

However, if we take into account, as we are entitled to do, the fact that the house is now probably worth considerably more than the sum of £70,000, that being the only sum put before the Court below, even allowing for the possibility that some structural repair may have to take place, and if we take into account also that the husband's employment, projected at the time of the original hearing ~~but~~ now certain at the sum we have stated, the assessment of the lump sum at the figure in which it was assessed appears to us to be even more justified. The wife married the husband and the marriage subsisted for about ten years. At a late age she bore his child and she acted in the office of a wife for many years. Her present position, both financially and socially, contrasts starkly with that of the husband, comfortably circumstanced in Jersey. We do not interfere with the discretion of the Court below.

Custody

As we have recorded the wife asked for joint custody and this the Court granted. We were informed by Counsel that the propriety of an order for joint custody was not subject to debate below, and that no evidence was directed to it. In these circumstances, it is hardly surprising that the Court made the order it did.

However, before us Advocate Sinel submitted that the order for joint custody was not appropriate since it was unlikely that the parties would co-operate in taking any major decision regarding P . And also on the ground, as we understood it, that the wife was not a fit person having regard to her conduct to have any kind of custody in relation to her son.

In support of his submission, Advocate Sinel relied upon the jealousy of the wife in regard to P deposed to by the husband at A/168, to lack of interest with regard to P's schooling (A/178) and to an episode relating to P's passport, dealt with at A/180-181, to which, we were informed, the husband attached very considerable importance. In these circumstances, it was surprising that no cross-examination about the passport was directed to the wife at the hearing, and in the absence of her being given any opportunity to deal with this matter, it was in our opinion wrong for it to be advanced against her as one of the grounds upon which the custody order should be varied.

Advocate Renouf stressed the evidence of the husband that the wife had been a very well-intentioned and loving mother (A/168) although in the event we did not consider it necessary to trouble him concerning the custody issue.

We regard it of great importance that the Royal Court heard the parties to the marriage give evidence over a period of some 2 or 3 days and had an opportunity, denied to us, to form its own view concerning them. Not only do we consider that there is no

ground upon which the discretion of the Court below is to be interfered with but we consider for our part that the joint custody order, although it may not be commonly made, was appropriate in this case because it may well result in P , who is the product of a marriage of persons of different races, may be kept in touch with the culture and traditions of his mother's race, the inference of which he is entitled to receive.

Access

We have primarily to deal with a submission made by Advocate Sinel that the wife's access to P should be reduced by providing that her access to her son during the summer holidays should be exercised only every other year.

These holidays are the longest holiday during which the mother could have access to P . and the only holiday in which she could have access for three weeks, as the order of the Court below provided. Suffice it to say that we see no ground upon which it could be said that the discretion of the Royal Court was in this respect improperly exercised.

Conclusion

We were informed by Counsel that although E has not yet been sold the husband has, on 11th July 1990, paid into Court the sum of £27,500, which sum has been earning interest. Counsel have agreed jointly to sign an application for the payment out of these monies to the wife, and we order that payment out.

Any adjustment to the sum of interest will, we trust, be readily arrived at by agreement. But in case agreement should prove impossible, we have given liberty to apply to the Royal Court for the purpose of assessing the interest properly.

Authorities

Matrimonial Causes (Jersey) Law, 1949: Article 29.
James -v- Patterson (1980) JJ 125.
Billot -v- Perchard and Chambers (1977) JJ 33.
Fitzgerald -v- Northcroft (1974) JJ 35.
Wachtel -v- Wachtel (1973) 1 All ER 829.
Urquhart -v- Wallace (1974) JJ 119.
S -v- S (1972) 2 All ER 600.
Jussa -v- Jussa (1972) 2 All ER 600.
Knight -v- Elwell (1977) JJ 169.
Hurst -v- Hurst (1984) FLR 867.
Payne -v- Payne (1968) 1 All ER 1113.
Hoyle -v- Le Bail (1968) JJ 859.
Scherer and Another -v- Counting Instruments Ltd and Another (1986) 2 All ER 529.
Bateman -v- Bateman (1979) FLR 25.
Clissold -v- Clissold (1964) Sol. Jo. 220.
Elwell -v- Knight (1976) JJ 383.
Goodfield -v- Goodfield (1975) 5 FLR 197.
Hunter -v- Hunter (1973) 3 All ER 362.
Eshak -v- Nowojewski (19th November, 1980) TLR.
H -v- W (1981) JJ 133.
Bellenden -v- Satterthwaite (1948) 1 All ER 343 CA.
G -v- G (1985) 2 All ER 225 HL.
Ostrounoff -v- Martland (1979) JJ 125.

On application for leave to adduce further evidence

Hacon -v- Godel & Anor (27th October, 1989) Jersey Unreported.
Kirk -v- Blackwell (31st October, 1986) the Court of Appeal of Guernsey.
Hadmor Productions -v- Hamilton (1982) 1 All ER 1042 HL.