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ROYAL COURT
(Matrimonial Causes Division)

17th November, 1994 231.

Before: The Deputy Bailiff and
Jurats G.H.Hamon and M.J. Le Ruez

BETWEEN C Petitioner

AND L Respondent

Advocate D.J. Petit for the Petitioner
Advocate M.S.D. Yates for the Respondent

THE DEPUTY BAILIFF: This is a summons issued by L seeking a variation of a memorandum of agreement entered into by him and his former wife, C on 23rd May, 1990, and ratified by the Court on 29th May, 1990. Although the parties have been divorced now for some years, we shall, for convenience, continue to refer to them as "the husband" and "the wife".

This summons was issued on 11th February, 1994, and came before the Greffier Substitute on 5th April, 1994. The Greffier referred the matter to the Court for decision pursuant to Rule 50 (2) of the Matrimonial Causes (General) (Jersey) Rules 1979 because it appeared to him:-

(i) that the grounds for the application as disclosed in the husband's affidavit of means were substantially those put forward in a similar application in 1993 which he had refused, and

(ii) that the renewed application was in the nature of an appeal.

We approach the matter of course, *de novo*.

The background to the application is an agreement entered into, as we have stated, on 23rd May, 1990. The material financial aspects of that agreement were that the former matrimonial home, a substantial property in St. Lawrence, was transferred by the husband to the wife. The wife abandoned to the husband her joint interest in a bungalow in Grouville. The husband paid the wife a lump sum payment of £10,000 for herself and a further lump sum payment of £50,000 in respect of maintenance for the children of the

marriage. The husband further undertook to pay *"all school fees (including additional fees for extra-curricular activities) in respect of the said children and reasonable travelling expenses incurred by them in attending school....."*.

It is in that last respect, that the husband now seeks a variation of the agreement. The two children in question are A , now aged 12, and B , now aged 9. Both currently attend a local School. It is the wife's wish that they should continue at the school and thereafter attend a public school in England. The husband's contention is that, by reason of changed financial circumstances, he cannot now afford the considerable expense entailed in meeting the wife's wishes. His view is that the boys should be educated locally at Victoria College.

Affidavits of means were filed and we heard evidence from both parties. At the conclusion of the hearing on 8th July, 1994, we decided to adjourn until 10th October. The reason for that decision was that the husband had given evidence of an expectation of receiving an offer of employment. We wished to ascertain whether that expectation would be fulfilled. In the event, it was fulfilled, and we were told on 10th October that the husband was now employed with Coutts and Co. at an annual salary of £35,000. We have taken that new factor into account.

The husband's evidence was that his financial position had deteriorated considerably as a result of the huge losses suffered in recent years by Lloyds of London. In 1990, he had not anticipated the tremendous losses of the 1987, 1988 and 1989 years of account. Since then, he had paid £114,760.84 to Lloyds and his outstanding indebtedness at 31st December, 1993, was £295,309.92. The losses at Lloyds had been compounded by his having been made redundant by his employer in April, 1992. He had been unable to find alternative employment and in September, 1992, had enrolled as a student to read for a Masters degree in business administration. He completed the degree but had, until very recently, been unsuccessful in finding employment. The husband's principal assets and liabilities may be summarised as follows:-

	£
A Grouville house (purchased in December 1993 as a replacement for the bungalow in Grouville.	230,000
Manama Trust	234,000
Pension Policies	50,000
C.M.G Lloyds Deposit	227,240
Cyprus building plot	7,000
Unquoted investment in Barnfarth Ltd.	50,000
Furniture and personal effects	18,000
Cash at bank	2,000

Total	818,240
Less liabilities at Lloyds	295,310
Net assets	£522,930

The husband's evidence was that there could well be further losses from his membership of Lloyds. His obligation to Lloyds would, in his view, all but remove his available assets, i.e. the securities and cash in the Manama Trust and the C.M.G. Lloyds Deposit. He estimated his current unearned income from the C.M.G. Deposit and the Manama Trust at £16,692 to which must now be added his salary of £35,000, making a total of £51,692. His estimated expenditure on living expenses, including the fees for the two boys at their School, was £32,128. Payment of the debt to Lloyds would, of course, reduce his income to little more than his salary. The husband's evidence as to the cost of educating A and B in England (and it was not contested by the wife) was that it would total some £160,000 over a period of 10 years. He could not meet that expenditure out of income and, if required to meet it, would be obliged to sell his house or his pension fund. He pointed out that he was now aged 47 and that the usual retirement age in the world of finance was 55. He had never tried to run away from the cost of educating his children. He had, however, been educated in Jersey and he thought that a perfectly reasonable education for A and B could be provided by Victoria College. He therefore asked the Court to vary the agreement either by providing that he should meet the cost of the boys' education at Victoria College or by capping his financial obligation under this head at a sum equal to the cost of the fees at Victoria College or at such other sum as the Court thought fit.

The wife's affidavit of means and viva voce evidence showed that her principal asset was the former matrimonial home which had been made over to her in 1990 by the husband. By dint of investment in, and development of that property, it was now worth a figure in the region of £1,000,000. It now comprised the main house and nine units of accommodation. One of those units had, by 10th October, 1994, been sold for £124,000 thus reducing the wife's borrowing to about £175,000. Her income was of the order of £50,000 per annum but that was fully committed in meeting the costs of bank loans and living expenses. She told us that she lived frugally.

The wife's view of the husband's predicament was that he had made an agreement and should be held to it. In her view, he had brought his financial problems on his own shoulders. She regarded his membership of Lloyds as being tantamount to gambling, and thought that he had gambled with the future of his children. The wife also took a dim view of the husband's purchase, at a cost of £110,000, of a property for the co-respondent, F

and her child by the husband. The husband's answer to this last complaint was that he had an obligation, moral if not legal, to provide for his illegitimate child.

Counsel referred us to a number of authorities, but we do not need to cite them at length. We accept, on the authority of Cameron v. Archdale (12th July, 1983) Jersey Unreported; (1989) JLR. N.8, that it is proper to have regard to the capital assets of a party in making a maintenance assessment for children. We do not consider however that a husband can fairly be required to make very substantial inroads into his capital to meet the cost of private education when there is an adequate and reasonable alternative. We cannot accept the submission that membership of Lloyds was tantamount to gambling. We do not consider that the husband can fairly be criticized for failing to anticipate the enormous losses suffered in the insurance market, and particularly at Lloyds in recent years. In our judgment, there has been a material change in the financial circumstances of the husband since the agreement was made in 1990. We understand that the wife should feel aggrieved by the purchase of a property by the husband for the co-respondent and her child; we accept the husband's submission however, that he had an obligation to make appropriate provision for them. Whether or not the sum expended was an appropriate provision, we do not need to decide. It is sufficient to state that any over provision was not sufficiently material to affect our conclusion on the summons before us. Our conclusion is that the husband ought not to be required to meet the cost of providing an education at an English public school for C and D . The summons invites us to consider ordering the husband to pay school fees subject to a maximum of £2,000 per annum for each child (estimated to be the cost of education at Victoria College) or "*such maximum amount as determined by the Court*". We propose to make an order which will require the husband to pay £2,500 per annum per child. This is a sum sufficient to cover the school fees and expenses at the level currently charged by Victoria College, but which would also leave over a modest amount to be used by the wife for other educational purposes. Alternatively, it is open to the wife to use the husband's contribution towards the cost of private education in England and to make up the balance from her own resources.

We leave over for settling by Counsel and, if necessary, adjudication by the Greffier Substitute, the precise terms of the amendment to paragraph 11(a) of the memorandum of agreement to give effect to the order which we propose to make.

There remains to be determined the date at which this variation of the memorandum of agreement should be effective. Our intention is that A should remain at his current School until the time when he has taken his common entrance examination or the entrance examination to Victoria College as the case may be. The operative date of the change so far as A is concerned

is therefore 1st September, 1995. We think it is desirable that B should remain at his current School in any event until the age of eleven, which would be the appropriate age to transfer to Victoria College if that is to be his destiny. We therefore order that the operative date of the change so far as B is concerned is 1st September, 1996.

The summons also invited us to delete paragraph 9 and to amend paragraph 11(b) of the memorandum of agreement, but as we were not addressed by Counsel on these points, we make no order at this stage. We are of course prepared to hear argument if necessary.

Authorities

Matrimonial Causes (Jersey) Law 1949 as amended, Article 32.

Cameron -v- Archdale (12th July, 1983) Jersey Unreported; (1989) JLR N.8.

Taylor -v- Taylor (1987-88) JLR N.4; (9th January, 1987) Jersey Unreported.