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ROYAL COURT - MATRIMONIAL CAUSES DIVISION
12th September, 1991.

Before: Mr. V. A. Tomes, Deputy Bailiff
Jurat J. H. Vint
Jurat E. W. Herbert

126.

Between Mrs G **Petitioner**

And Mr G **Respondent**

Advocate R. J. Renouf for Petitioner
Advocate W. J. Bailhache for Respondent

The parties were married in August, 1985, at a Church in St. Helier. They lived and co-habited at an address in Hong Kong, then in St. Lawrence, and finally at the matrimonial home.

The petitioner continues to reside at the matrimonial home and is employed on a part-time basis as a bank cashier. The respondent resides elsewhere and was employed as a legal assistant by a local firm of advocates and solicitors, but his contract of employment ended at the end of March, 1991.

There is one child of the marriage, namely M born on the 11th September, 1988, (the child).

On or about the 23rd August, 1990, the petitioner filed a petition for divorce in which she alleged that the respondent had committed adultery with R (the co-respondent). The particulars contained in the petition alleged, inter alia, that the respondent and co-respondent met as a result of their employment in the same legal practice and commenced an association during the latter part of 1989; that on 13th February, 1990, the

respondent admitted to the petitioner that he felt that he was able to confide in the co-respondent, that he had feelings for her which he ought not to have and that he had kissed her; that this distressed the petitioner greatly but the respondent refused to discuss the matter further with the petitioner and in particular refused to confirm or deny whether sexual intercourse had taken place between him and the co-respondent; that as a result the petitioner suffered further distress and upset; that the petitioner had become pregnant in November, 1989, but when she told the respondent he replied to the effect that he wished the petitioner had not become pregnant as the time was not right; that the petitioner miscarried in January, 1990, following which the respondent told the petitioner that he did not wish to have any more children, this despite the fact that the parties had been planning on having another child for some time; that on 13th February, 1990, the respondent advised the petitioner that he intended leaving the matrimonial home and did so on the 16th February, 1990; that on 18th March, 1990, the respondent admitted to the petitioner that he had committed adultery with the co-respondent; that the respondent and co-respondent had committed adultery at times and at places unknown to the petitioner in Jersey and continued to commit adultery with each other; and that as a result of the conduct of the respondent, the health of the petitioner had suffered and she had been obliged to seek medical advice.

The petitioner prayed that the marriage be dissolved; that custody of the child be vested in the petitioner and respondent jointly; that the petitioner be granted the care and control of the child; that the respondent be ordered to pay to the petitioner maintenance for herself in such sum as the Court might deem just; that the respondent be ordered to pay maintenance for the child in such sum as the Court might deem just; that the respondent be ordered to transfer to the petitioner all his interest in the matrimonial home owned by the parties jointly or, alternatively, that the Court make such other order with regard to the matrimonial home as it might consider just; that the respondent be ordered to transfer to the petitioner all his interest in the contents of the matrimonial home or, alternatively, that the court make such other order as it might

consider just with regard thereto; that the respondent be ordered to make a lump sum payment and/or secured provision; and that the respondent and co-respondent be condemned jointly and severally to pay the costs of and incidental to the suit.

The arrangements which the petitioner proposed should be made with regard to the child were that he should reside at the matrimonial home in the care of his mother the petitioner; that he should attend a nursery school and then a primary school in due course; that the respondent should pay maintenance in respect of the child at such rate as should be agreed, or determined by the Court; and that the respondent have reasonable access to the child by prior arrangement with the petitioner.

On the 18th September, 1990, the respondent filed an Answer to the petition. He admitted that on or about 15th March, 1990, he committed adultery with the co-respondent for the first time and that from time to time since then adultery had taken place between them. In response to the particulars he admitted, inter alia, that he met the co-respondent as a result of their employment in the same legal practice, but denied that any amorous association commenced until about February, 1990. He admitted that on the 13th February, 1990, he had admitted to having feelings for the co-respondent about which, as a married man, he felt guilty; that he may at that time have admitted to having kissed the co-respondent on one occasion; that the respondent was asked by the petitioner if sexual intercourse between him and the co-respondent had taken place but he denied it, and such denial was truthful; and that although the respondent accepted that the petitioner might have been upset, she showed no sign of it other than by delivering him a kick on the shins. The respondent denied that the petitioner and respondent were planning another child; he averred that the topic had been discussed but that both agreed to have no further children until their financial position had improved; that at the relevant time they depended on the petitioner's part-time employment because the income thereby generated was essential to their overall financial stability; that the respondent also had fears that their marriage would not stand the strain of additional children; and

that the petitioner had been taking a contraceptive pill and discontinued it (the respondent assumed) without any notice to him; the respondent admitted that the petitioner became pregnant in November, 1989, that he had said that he wished that she had not become pregnant as the time was not right, that the petitioner miscarried in January, 1990, and that the respondent had told the petitioner that he did not wish to have any more children; he averred that the petitioner sought to trap him in a marriage which she knew was foundering by becoming pregnant.

The respondent went on to plead generally to the effect that he much regretted the defence of the petition and requested the Court to give consideration to direct (pursuant to Rule 28 of the Matrimonial Causes (General) (Jersey) Rules, 1979) the separate trial of the issue of the respondent's adultery with the co-respondent which the respondent admitted had occurred from time to time since about 15th March, 1990. The respondent filed with his Answer an Affidavit of Means sworn by him on the 15th August, 1990, and a copy of which was sent to the petitioner's advocate on the same day; of his monthly salary over £1,050 was applied to maintaining the petitioner and the child and £100 was applied to cover a credit card debt which was partly incurred by the petitioner on her visit to her parents in Australia between March and June, 1990. It was clear that unless ancillary matters were settled soon the respondent's financial position would become increasingly desperate; the respondent annexed to his Answer an open letter (dated 14th August, 1990, but in fact posted on 15th August, 1990, after the Affidavit of Means had been sworn) from his advocate to the petitioner's advocate which emphasised both the direness of the situation and the urgency required to resolve ancillary matters; the situation had altered materially since then inasmuch as the respondent had had to borrow £1,000 from his brother-in-law at 15% interest per annum to meet ongoing expenditure.

In his affidavit of means of the 15th August, 1990, the respondent deposed that he was in full-time employment as a legal assistant with a local law firm; he had assets:- (a) as joint owner of the matrimonial home which had an estimated current value of £125,000

(b) a 1985 Rover 216 Vitesse motor vehicle, valued at £2,500; and (c) as joint owner of the contents of the matrimonial home which had a current approximate value of £18,000 and the majority of which were acquired with the proceeds of the parties' savings deriving mainly from the respondent's employment in the Police Force. The respondent deposed that save those three items he had no assets save for his personal clothing and his monthly income consisting of his salary (net of £48.08 social security) of £1,451.92. He further deposed that he had joint and several liabilities with the petitioner of (a) the mortgage on the matrimonial home with T.S.B. Bank of £67,000; (b) a loan from Mr & Mrs C of £7,000; (c) a loan from Mr & Mrs T of £2,500; a current account overdraft at T.S.B. Bank of £3,171.69; and rates to the Parish of St. Clement of £122.66; making a total of £79,794.35. The respondent further deposed that he had personal liabilities to T.S.B. Trust Card (Visa) of £899.38, part of which debt was incurred by the petitioner while she was in Australia, using a supplementary card in her name but chargeable to the respondent's account; telephone account for the matrimonial home for the then current quarter of £29.61; and an overdrawn current account with T.S.B. Bank of approximately £100; making a total of £1,224.99. The respondent further deposed that his monthly expenses including mortgage payments of £861.95, loan interest to Mr & Mrs C of £60, electricity for the matrimonial home, T.S.B. Life insurance - mortgage protection, water rates, parish rates, petrol, food, car tax, house insurance, car insurance, medical bills and dentist, clothing, car services, contribution towards temporary hire car for the petitioner, activities for the child and repayment of credit card liability totalled £1,449.74 per month. The respondent further deposed that it was clear that these expenses would exhaust all but £2.18 of his monthly salary; that he had excluded liabilities for rent, electricity, water rates, rates, telephone charges and heating for accommodation for himself, income tax, holidays, and all sundry expenses (of which one would be an annual sum of £350 towards the LLB degree course which he wished to take through London University); he estimated that these expenses would not be less than £700 per month.

The open letter from Mr. Bailhache to Mr. Renouf, dated the 14th August, 1990, confirmed the respondent's open admission of his adultery with the co-respondent after mid-March, 1990. The letter advised that the respondent's contention was that the marriage had broken down irretrievably at the time the petitioner left for Australia and subsequently (sic) when the respondent left the former matrimonial home. Mr. Bailhache expressly reserved the respondent's position as to the reasons for the break-down of the marriage, particularly insofar as concerned the petitioner's conduct. Mr. Bailhache expressed the view that there was nothing to be gained from cross-allegations of conduct in correspondence between lawyers. He enclosed the affidavit of means sworn by the respondent for two reasons, firstly to indicate the parlous financial state in which the respondent found himself and secondly to afford a basis upon which Mr. Renouf might advise his client for the purposes of discussions for settlement of ancillary matters. The respondent's view was that the matrimonial home would have to be sold. This could be achieved either by agreement or by an order of the Court for licitation. If neither course was acceptable to the petitioner she could issue divorce proceedings and the Court could be asked to adjudicate. If the property were placed on the market for sale by agreement the respondent would do what he reasonably could to assist the petitioner to find other, albeit rented, accommodation. The nett proceeds of sale could be frozen pending agreement on ancillary matters or an order of the Court. The respondent had paid £50 towards the hire car payment only for that month; if the petitioner wished to retain the car she would have to pay the balance; otherwise she should return it. The respondent had advised the T.S.B. Visa that the petitioner no longer had authority to draw on his account by use of the supplementary card which should be returned to the respondent.

On the 24th October, 1990, the Greffier Substitute by Act directed that notwithstanding that the respondent had filed an answer (1) the cause could proceed undefended and (2) the petitioner's evidence of adultery must be limited to the admissions set out in the respondent's Answer. The Greffier further directed that the respondent's Answer might form the basis of his allegations against

the petitioner in so far as they were relevant to ancillary issues between the parties.

Consequently, on the 20th November, 1990, the Court granted a decree nisi of divorce, unless sufficient cause be shown to the Court why the decree should not be made absolute within six weeks from the making thereof. By consent, the Court postponed the further hearing of ancillary matters.

On the 11th February, 1991, the petitioner filed a Reply to the respondent's Answer. The petitioner did not admit that the respondent committed adultery with the co-respondent for the first time on or about 15th March, 1990. The petitioner pleaded that the respondent had the inclination and opportunity to commit adultery prior to that date. The petitioner averred that she discontinued taking a contraceptive pill to the knowledge of the respondent as the parties were planning another child. However, they subsequently decided to delay a pregnancy until a later date for financial reasons but the petitioner became pregnant once again before the appropriate time for her to resume taking the contraceptive pill. The petitioner emphatically denied that she laid any sort of trap for the respondent by becoming pregnant. She also replied fully to the respondent's general plea.

Insofar as concerned the payment of £100 to cover a credit card debt which was partly incurred by the petitioner, the petitioner averred that the credit card was given to her by the respondent to meet expenses incurred for her and the child whilst in Australia visiting her parents; and the petitioner denied that the respondent's financial position was or would become "desperate". The petitioner annexed to her reply a copy of a letter from Mr. Renouf to Mr. Bailhache, dated 11th September, 1990, in reply to the open letter dated 14th August, 1990, in which the petitioner did not accept the respondent's view that the matrimonial home should be sold. Mr. Renouf had little doubt that the petitioner would agree an immediate sale if there were no children of the marriage but as a child had been born, his interest weighed very heavily in the petitioner's

consideration of the matter. The petitioner proposed that a sale be deferred until such time as the child had ceased his full time education and established himself as an independent person. The proposal that the matrimonial home be sold and the petitioner find rented accommodation for herself and the child was really the second best option and would only achieve any sort of financial saving in the short term. It was accepted that the mortgage repayments were a very great part of the respondent's income but it was considered that the repayments were manageable. The respondent's income would increase from time to time but the mortgage repayments would not vary significantly and indeed interest rates were expected to fall rather than rise once again. The petitioner was in part time employment and able to meet some of the expenses of maintaining the child and the household which previously had to be met from the respondent's income whilst the petitioner was not working. The parties had been in greater financial straits but had never considered the need to sell the matrimonial home. For example, during much of 1989 the respondent had been in receipt of an income of £14,000 out of which the monthly mortgage repayments had been made. At that time the petitioner had been in receipt of an annual income of £6,500, making a total income of £20,500 between the parties. It was true that interest rates had been lower at that time but the mortgage repayments accounted for a greater part of the joint income. It was also significant that the parties were paying £127 per month to a leasing company for lounge furnishings. That leasing agreement had ended in April, 1990, making available a further £127 per month. Notwithstanding the significant expenditure on the mortgage the parties had, in the second half of 1989, agreed that they would try to sell the matrimonial home and purchase another more expensive property with the aid of an increased mortgage. In an effort to accommodate the wishes of the respondent, the petitioner had been prepared to consider the sale of the matrimonial home and the purchase of another at a lesser value in order to reduce the amount of the mortgage indebtedness. Indeed she had found a property which at first sight seemed suitable but the respondent had not been prepared to pursue this possibility. Earlier in 1990 the petitioner had spent several weeks with her family in Australia with the consent of the respondent to enable her to

recuperate after her miscarriage and to consider her future in the light of the respondent's departure from the matrimonial home. As the respondent was driving the petitioner to the Airport he had assured her that there would always be a home for herself and the child and this was confirmed by him in a subsequent telephone conversation; at that time the respondent had been separated from the petitioner for at least four weeks and had thus been able to consider his financial situation in the light of his separation. The respondent would be filing her own affidavit of means in due course for any hearing that might be needed to resolve this and other ancillary questions; however the respondent's affidavit seemed to be lacking in some respects. For example, it did not refer to bonuses or other benefits from his employment, did not mention whether he was paying rent for any accommodation, or whether he was receiving a contribution to such expenses from any other source. (We took "any other source" to refer to the co-respondent). The TSB Visa card had not been used for a number of months and had been destroyed.

On the 27th November, 1990, the respondent gave notice of his intention to apply to the Court for the Court to adjudicate upon the prayers for ancillary relief contained in the petition. Accordingly, the Greffier Substitute sent notice of the application to the petitioner and required her to send an affidavit of means to the Judicial Greffier within fourteen days.

Consequently, the petitioner swore an affidavit of means on the 21st December, 1990. She deposed that she was in part-time employment as a cashier with a Bank. She chose to be employed on a part-time basis as she wished to devote her remaining time to the care of the child - then aged approximately 2 1/2 years. The petitioner's monthly income was salary (net of social security) £457.60 and lodging payments (two lodgers paying £50 per week each) £433.33, making a total of £890.93.

The petitioner estimated her monthly expenditure on food, drink and household goods for herself and the child, childminding charges, repayment of personal loan from Midland Bank used for the

purchase of a car, petrol, parking charges, heating, health insurance, third party car insurance, car tax, telephone, television licence, clothes and footwear for herself and the child, toiletries, cosmetics and hairdressing at a total of £573.22. This took no account of irregular expenditure such as doctors' and dentists' fees, vehicle maintenance and repairs, and expenses relating to the matrimonial home. Of the latter, the mortgage payments, electricity accounts, water rates and insurance premium were being paid by the respondent and the parish rates had been paid equally between the parties. From January, 1991, the child was attending a nursery school which was being subsidised by the petitioner's employers at a total cost of £99.05 per month. The petitioner would soon need to spend £100 on a new bed for the child.

The petitioner deposed that she had the following assets:- (a) joint ownership with the respondent of the matrimonial home; she agreed the estimated value of £125,000. (b) joint ownership of the contents of the matrimonial home, the value of which was uncertain; the respondent had stated that the majority of these were acquired with the proceeds of savings derived mainly from his employment in the Hong Kong Police Force; but the petitioner believed that she contributed significantly both financially and otherwise during the period of almost five years that the parties lived in Hong Kong and had it not been for her income at that time, they would not have been able to enjoy the standard of living that they did; (c) a 1986 Mini motorcar which she had recently purchased for £2,000; this sum was borrowed from the Midland Bank on a personal loan, repayable over two years at preferential staff rates. The petitioner deposed that save as aforesaid, she had no assets except for her personal clothing and effects and the savings to which we shall refer in the next paragraph.

The petitioner deposed that she had the following bank accounts in her sole name:- (a) current account at T.S.B. bank with a then balance of approximately £9.12; (b) a current account at Midland Bank with a then balance of approximately £330; and (c) a savings account at Midland Bank with a balance of approximately £550.

In evidence the petitioner said that the current account balances might have altered, but the savings account remained the same.

Finally, the petitioner deposed that she had the following joint and several liabilities with the respondent:- mortgage £67,000; Loan Mr & Mrs C £7,000; Loan Mr & Mrs T £2,500; current account overdraft with T.S.B. Bank £3,171.69.

In this case we do not consider that a detailed review of the evidence as to conduct would assist the Court or the parties. We proceed on the basis that an amorous association between the respondent and the co-respondent commenced in or about February, 1990, and that adultery had occurred from time to time since about 15th March, 1990. We further proceed on the basis that the adultery of the respondent was the cause of the breakdown of the marriage. It is unnecessary for us to decide questions of detail regarding, for example, the petitioner's pregnancy in November, 1989, and subsequent miscarriage in January, 1990. Notwithstanding the reservation contained in the open letter, the respondent did not give or adduce evidence to substantiate his claim that the marriage had irretrievably broken down before his departure from the matrimonial home and his admitted adultery. Mr. Bailhache restricted himself to a submission that very rarely is there a marriage where all the fault is on one side. He argued that the respondent would not have left the matrimonial home if the marriage had been a happy one and that imponderables apply in every matrimonial case. However, no evidence was adduced to show that there was any fault on the part of the petitioner. We are convinced that the respondent was happy in, and satisfied with, his marriage until he became involved with the co-respondent. The manner in which he left the matrimonial home and, later, admitted his adultery on the eve of the petitioner's departure for Australia was unfeeling if not callous. In our judgment the conduct of the respondent, although falling short of gross and obvious, was reprehensible. It is a matter to be taken into account. Counsel for the respondent, entirely properly, accepted that the Court would want to take conduct into account.

It was agreed between the parties that the matrimonial home and its contents represent, in reality, virtually the sole asset available to be divided between the parties.

The law to be applied was fully set out in Faiers v. Faiers (née Winter) (8 June 1987) Jersey unreported, as follows:-

"We must now consider the law to be applied to the division of this asset of the parties. (The matrimonial home). The relevant parts of Articles 28, 29 and 29A of the Matrimonial Causes (Jersey) Law, 1949, are as follows:-

"Article 28

(1) Where a decree of divorce....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:-

(a) that one party to the marriage transfer to the other party to the marriage .... any property whether real or personal to which the first mentioned party is entitled; ...

"Article 29

(1) Where a decree of divorce ... 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 .....

(c) that security be given for the payment of any sum or sums ordered to be paid under sub-paragraph .... (b) of this paragraph;

"Article 29A

(1) .....where the court makes an order under Article..28 or 29 of this Law, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest .....

(2) Any order made under paragraph (1) of this Article may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality of the foregoing provision, may include -

(a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates;...."

"Thus the court is required, when deciding whether the former matrimonial home should be transferred to one of the parties, to have regard to all the circumstances of the case including the conduct of the parties. We mention this because counsel for the respondent, very properly, drew our attention to the English case of Wachtel v. Wachtel (1973) 1 All ER 133, and, on appeal at (1973) 1 All ER 829, which has been considered in several Jersey cases, particularly in Urquhart v. Wallace (1974) 2 J.J. 119. The decision in Wachtel v. Wachtel was

made against the background that the law of England permits divorce on the ground of irretrievable breakdown of the marriage, and the Court held there that the conduct of the parties should not be taken into account in determining the apportionment of the assets, except where the conduct of one party had been obvious and gross.

"Mr. Valpy also invited us to consider Harnett v. Harnett (1973) 2 All E.R. 593. In that case the husband had discovered the wife committing adultery with a youth half her age. The husband reacted violently, ordering the wife out of the home; she left with the children. Her association with the youth did not survive. The husband thereafter treated the marriage as at an end because of the wife's disloyalty. He obtained a decree nisi on the ground of the wife's adultery, the wife not proceeding with a cross-petition alleging cruelty.

"At page 601, Bagnall J., having reviewed a number of cases, including Wachtel v. Wachtel, extracted certain principles from the decisions and, on the subject of conduct said:-

"It will not be just to have regard to conduct unless there is a very substantial disparity between the parties on that score. Ormrod J. and the Court of Appeal in Wachtel v. Wachtel used the phrase "obvious and gross". In this phrase I think that 'gross' describes the conduct; 'obvious' describes the clarity or certainty with which it is seen to be gross. But the conduct of both parties must be considered. If the conduct of one is substantially as bad as that of the other then it matters not how gross that conduct is; they will weigh equally in the balance. In my view to satisfy the test the conduct must be obvious and gross in the sense that the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless. I think that there will be very few cases in which these conditions will be satisfied".

"In Cuzner v. Underdown (1974) 2 All ER 351 the Court of Appeal found, (at page 357) that -

"The conduct of the wife in taking a half share of the house while she was committing adultery with the co-respondent was "obvious and gross" misconduct and, even allowing for the fact that she had brought up the children and that a portion of her earnings had been used in the home, it would not be just that she should have a share in it, particularly (per Walton J.) in view of the finding that she was entirely to blame for the breakdown of the marriage".

"The ratio decidendi of Urquhart v. Wallace is that as, in Jersey, divorce is still based substantially on the concept of the matrimonial offence, a stronger emphasis is placed by the Court on the conduct of the guilty party when apportioning the assets. Conduct must be taken into account, whether or not it is obvious and gross. In that case the Court found that the wife was solely to blame for the ending of the marriage. Nevertheless, at page 145, the court said "We have accepted that there are exceptional circumstances, such as existed in Cuzner v. Underwood, where it would be repugnant to justice to order the husband to make any payment. Although we have been obliged to hold the wife solely responsible for the ending of the marriage we do not place this case in the same exceptional category as the Cuzner case. The parties continued to live together for some years after the property was bought jointly. Had it been possible for us to find that both parties had contributed equally to the breakdown of the marriage, we would probably have ordered the husband to pay to the wife half the agreed value of the property if the wife were making no further claim on the husband. Her conduct disentitles her in justice to such a proportion. Nevertheless we think that she is entitled to some payment in recognition of the fact that she has given the husband eleven years of good companionship. She has not contributed to the purchase price of the property, but she has contributed indirectly to the financial position of the husband by looking after the home and bringing up the child. That form of contribution merits, as we have seen, as much consideration as a financial contribution of a more direct nature".

"In Urquhart v. Wallace the Royal Court approved the matters to which the courts shall have regard in exercising their powers. These were as set out in section 5(1) of the Matrimonial Proceedings and Property Act 1970, as follows:-

"It shall be the duty of the court ... to have regard to all the circumstances of the case including the following matters, that is to say:-

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension)

> which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;
>
> and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other". (The underlining is ours).

"The principles laid down in Urquhart v. Wallace were followed and applied in Elwell v. Knight (1976) 2 J.J. 383 and in James v. Patterson (1980) J.J. 125. Reference to Urquhart v. Wallace was also made in Billot v. Perchard (1977) J.J. 33 although in that case both counsel had agreed that "in this respect our discretion is unfettered, whether we proceed under Article 27 or Article 28 of the Matrimonial Causes (Jersey) Law, 1949 (as amended)."

"The same principles were applied in the recent case of Hickman v. Norton (as yet unreported). In that case the Court found that in all the circumstances of the case, and having regard to the conduct of the parties, it would be repugnant to justice to allow the wife any share in the husband's assets and to make an award to her. But that case turned on its particular, and unusual, facts.

"The overriding principle, in all these cases is that set out by Lord Denning M.R. in Wachtel v. Wachtel, at page 842:-

"In all these cases it is necessary at the end to view the situation broadly and see if the proposals meet the justice of the case".

"To summarise, therefore, we have to 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."

Both Counsel referred extensively to the judgment of this Court in O'Connell née Huish v. O'Connell, (30th November, 1988) Jersey unreported, which Mr. Renouf described as the principal case upon which he relied.

The Court there said that the tests to be applied were those set out in Faiers v. Faiers (supra). Mr. Renouf referred us to page 20 of O'Connell v. O'Connell where the Court cited Rakusen and Hunt's Distribution of Matrimonial Assets on Divorce 2nd edition Part 2 Chapter 4 at page 43:-

> "It will be suggested in Chapter 5 that one of the greatest factors influencing the distribution of matrimonial assets is the very large emphasis that is to be placed by the courts on the provision of homes. However, if there is one consideration which is more than emphatic and might be said to be paramount, it is the need to consider what are herein described as the 'overriding requirements of dependent children'. Accordingly, it may safely be stated that in nearly every case which comes before the courts where there are children, there is a simple and unalterable starting point. It is that the availability of the house as a home for the wife and children should ordinarily be ensured while the children are being educated. The reason for this clear policy is self-evident. But as well as the desire to protect children as much as possible from the consequences of divorce, there may also be seen to be a desire on the part of many courts to protect and compensate the party (usually the wife) who is left with the financial, mental and physical burden of caring for the children of the family".

He also relied on Mesher v. Mesher (1980) 1 All E.R. 126 C.A. Hector v. Hector (1973) 3 All E.R. 1070 C.A. and Chamberlain v.

Chamberlain (1974) 1 All E.R. 33 C.A., all cited in O'Connell v. O'Connell.

In Mesher v. Mesher the wife remained in the matrimonial home with the one child; she intended to remarry. The husband was also going to remarry, and he and his intended wife had bought a house on mortgage. The matrimonial home, which was in joint names, was on mortgage, but had a substantial equity. The court ordered that it was to be held on trust for sale in equal shares, but was not to be sold until the child was seventeen, or until further order.

In Hector v. Hector the matrimonial home was in the husband's name but was already held in equal shares beneficially. The wife remained there with four of the children. There was a maintenance order of £1 a week for the wife and £2 a week for each child. The wife was working, and since the husband left she kept up the mortgage, rates and other outgoings. The equity was about £4,000. The Court ordered the husband to transfer his interest to the wife, reduced the wife's maintenance to a nominal sum and gave the husband a charge on the house for £1,000 to be paid on the death of the wife, or on the sale of the property or on the youngest child reaching sixteen.

In Chamberlain v. Chamberlain the wife and three children remained in the matrimonial home, which was in joint names, and it was agreed that they should live there until the wife remarried or co-habited with another man, when it was to be sold and the proceeds divided equally. The husband lost his job and defaulted on the mortgage, and the wife had to compromise proceedings by the mortgagees and to pay the mortgage arrears and current payments. It was held that because of the change of circumstances the wife was entitled to a greater interest than that agreed and it was ordered that the property be held on trust for sale in the proportions of two-thirds to the wife and one third to the husband, the sale not to take place until every child of the family had ceased to receive full-time education, or thereafter without the consent of the parties or order of the court.

Mr. Renouf submitted that these four cases demonstrated that the Court had all kinds of options open to it, but that in all four cases the house had been preserved.

At pages 23 - 25 of O'Connell v. O'Connell the Court cited extensively from Smith v. Smith (1975) 2 All E.R. 19:-

> "In that case both parties had equal beneficial interests in the house. There was no conduct aspect to be taken into account. The wife remained in the house with the child of the marriage who had suffered from serious kidney trouble since infancy. There was a likelihood that the child would need the wife's continuing help and care even after leaving school. The wife was unable to work full-time because of the need to look after the child during the school holidays. There was a maintenance order of £1 a week for the wife and £3 a week for the child and the husband did not have very much to spare. Latey, J. ordered the husband to transfer his interest in the house to the wife, in which event he would be relieved of any obligation to pay rates, repairs or mortgage. The maintenance order was left as it was. After considering Wachtel -v- Wachtel, Mesher v. Mesher, Chamberlain -v- Chamberlain and Hector -v- Hector, Latey J. said:-
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> > "In applying to the facts of a particular case the provisions of ss 4 and 5 of the Act of 1970 what further guidance is there from those decisions? In my view the following emerges. Where the house is the sole or principal asset and the wife and children are living in it: (1) The court's approach should remain flexible, and, with the provisions of the sections in mind, it should suit its decision and order to the particular facts of the particular case (Mesher, Hector and Chamberlain). In many cases the Wachtel orders are appropriate but that decision does not lay down any universal or general rule binding on the court. (2) The availability of the house as a

home for the wife and children should ordinarily be ensured while the children are being educated. (3) When the children have ceased to be educated and the house is to be sold the husband and wife should ordinarily receive their shares absolutely. (4) If the wife has remarried or is going to remarry her financial position on remarriage must be considered. If it is guesswork whether she will or will not remarry prospective remarriage should be ignored.

"With that guidance in mind as well as the provisions of the sections and not least the overriding consideration in the words at the end of s 5(1) what should be the order in this case? There is no evidence to suggest a likelihood of the wife remarrying. With her daughter in fragile health the wife is unlikely to be able to embark on full-time employment for several years to come. The wife like so many wives when there are children has come off worse as the result of the breakdown of the marriage. It is a sad fact of life that, where there are children, both husband and wife suffer on marriage breakdown, but it is the wife who usually suffers more. The husband continues with his career, goes on establishing himself, increasing his experience and qualification for employment - in a word, his security. With children to care for a wife usually cannot do this. She has not usually embarked on a continuous and progressing career while living with her husband, caring for their child or children and running the home. If the marriage breaks down she can only start in any useful way after the children are off her hands and then she starts from scratch in middle life while the husband has started from youth".

"Having referred to the terms of s 5(1)(a) and (b), ((a) and (b) in Urquhart -v- Wallace, supra) Latey, J. continued:-

"All that I have just mentioned concerning many wives applies with the fullest force in this case. The wife will be 36 or more before she can begin to forge any real career with prospects of continuity and perhaps some pension rights. The only real security for her future is to be found in this house. Counsel for the husband contended that this is a case which should fall into the Mesher category. I do not think it does. In Mesher the central fact was that on the wife's remarriage the two families were going to be similarly placed and she had every prospect of security in the future regardless of the house. And there are other substantial points of distinction as counsel for the wife urged. In the present case short of remarriage the wife on the long view is going to be much worse placed than the husband. I have considered too counsel for the husband's contention that the husband should be left with part of his half share. But in my view in this case that would do less than justice to this wife because I do not think that anything less than the whole equity would meet the requirement at the end of s 5(1). What Lord Denning M.R. said in Hector about the position of the wife had the marriage not broken down is very much to the point in the present case. If the marriage had not broken down in 1969 the husband and wife would have remained together in the house with the children. She would have had the benefit of his earnings, payment of the outgoings, mortgage instalments and the like. She would have been secure. All that has gone. Furthermore in this case there is the important factor of the child's state of health. It does not at all follow that when she

leaves school - at 17, say - she will not thereafter need a home with her mother and continuing help and care. With only half the equity, or indeed with anything less than the full equity, and no settled full-time employment, she would find it very difficult if not impossible to get a new home with a new mortgage in the Bournemouth area which is where her and the child's roots are. The husband with a record of full employment since youth giving him a strong position in the labour market would be far better placed if he wanted to start buying a house on mortgage. For all those reasons in my judgement in this case the right order is that the whole of the husband's half share in the house should be transferred to the wife."

"The husband appealed. The Court of Appeal dismissed the appeal and Latey J's comments were cited with approval. (1974) Bar Library transcript 74."

Mr. Renouf argued that there was strong force in this case for a long term view to be taken. The respondent would be able to go on establishing himself in a new career. Whilst Mr. Renouf accepted that he would have some difficulty in arguing that the whole of the respondent's interest in the matrimonial home should be transferred to the petitioner, the fact remained that if the marriage had not broken down as a result of the respondent's conduct the parties would have remained together in the house with the child. The petitioner would have had the benefit of the respondent's earnings, payments of the outgoings, mortgage instalments and the like. She would have been secure. Therefore the property need not be held on a fifty-fifty basis. The value to the petitioner was vital because she would need a house when the matrimonial home was ultimately sold. A half share would not be sufficient to buy her a property then. He relied on a further extract from O'Connell v. O'Connell at pages 28 and 29:-

"Whilst not disagreeing with the general approach Mr. Slater stressed the need for the Court to consider the provision of a home or accommodation for the respondent. He referred us to Ostroumoff v. Ostroumoff (née Martland) (1979) J.J.125 at page 132, where the Court said this:

"We agree with respect, with the observations of Ormrod L.J. in Browne (formerly Pritchard) -v- Pritchard (1975) 3 All E.R. 721 at page 725 (although the parties here are of much more substantial means than those in the case cited) that property rights are ancillary to the family. The learned Lord Justice also said on the same page:-

"It is therefore to the provision of homes for all concerned that the court should direct their attention in the first place."

"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."

And at page 35:-

"We accept that, on the authorities, the provision of a home to both parties to the marriage has now reached a stage of some considerable emphasis and that it is of primary concern that the parties should, if possible, each have a roof over his or her head. But the respondent is housed, albeit in a one bedroom rear flat in the guesthouse, the continued occupation of which, beyond the 25th December, 1990, is uncertain. The fact that the respondent does not enjoy the same luxury as the petitioner cannot weigh heavily with us, having regard to his conduct and the paramount needs of the children. We have little doubt that if he should lose the occupation of the flat, he will be re-housed in other accommodation belonging to his father or be otherwise assisted by him."

Mr. Bailhache stressed the need always to look at the facts of particular cases. In O'Connell v. O'Connell the Court was dealing with a marriage which had lasted twenty years and the children were respectively seventeen and fourteen years of age. The matrimonial home was substantial and included commercial lettings. The property was owned by both parents of the respondent, the petitioner and the respondent jointly and for the survivor of them, not so much as a gift from the respondent's father but because he wanted the property to be in the joint names of the four members of the family; he wanted it to be the family home for all time and it would, in due course pass to the children of the marriage. In Smith v. Smith the child had a serious kidney illness and the wife was therefore needed in the house full time. The needs of the child had to be paramount on the particular facts of the case. Even then, the husband was relieved of

the obligation to pay rates, insurance and mortgage. There was no conduct aspect to be taken into account. But it was easier to say that the needs of the child were paramount where freedom from liabilities including the mortgage would also do justice to the husband. Mr. Bailhache said that he was not playing down the interest of the child but there was a danger here that the petitioner was using the child to obtain something which was not fair to the respondent. The child was being used by the petitioner as a trump card, whereas the interests of the child could be treated as paramount only so far as it was practicable and just to do so.

In Clarke née Mitchener v. Clarke (16th December, 1987) Jersey unreported, Mr. Commissioner Dorey delivering the judgment of the Court said this:-

> "The legal principles governing the division of capital assets on divorce have changed progressively in recent years. It is now rare for one party to be completely deprived of any share in the capital assets, and it is now considered right to pay regard to the needs of the parties rather than to adopt a purely arithmetical approach. In particular, as is stated in Rakusen and Hunt, Distribution of Matrimonial Assets on Divorce (Second Edition) page 79, "the provision of a home to both parties to the marriage has now reached a stage of some considerable emphasis". In the leading case of Martin v. Martin (1977) 3 All ER 762 at page 765, Lord Justice Stamp said: "It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head". Each case must, of course, stand on its own merits, but the court feels that the best way that the above principle can be achieved in the present case is to divide the net amount realised from the sale of the former matrimonial home, at present on deposit at Lazard Brothers & Co. (Jersey) Ltd., as to two-thirds to the wife and as to one-third to the husband. This will go a long way towards providing each of the two parties with a secure home."

Mr. Renouf submitted that Clarke v. Clarke demonstrated the importance of the home. But in that case the former matrimonial home had not been preserved; it had been sold; and Commissioner Dorey accepted that the parties should, if possible, each have a roof over his or her head. But he did not completely deprive one party of any share in the matrimonial assets, which, effectively, Mr. Renouf was asking us to do in the short term in the present case, and Commissioner Dorey accepted that it is not possible in every case to ensure that the parties should each have a roof over his or her head because he divided the assets to "go a long way towards" it.

Martin v. Martin, referred to in Clarke v. Clarke was called in aid by both parties. It was held, inter alia, at p.763 that:

"It would be contrary to public policy to order the sale of the matrimonial home in reliance on the rehousing of the wife in council accommodation for that would enable the parties to obtain free capital, i.e. the proceeds of sale, at public expense."

At page 765, Stamp, L.J. said that:

"It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head. That is perhaps the most important circumstance to be taken into account in applying s 25 of the Matrimonial Causes Act 1973 when the only available asset is the matrimonial home. It is important that each party should have a roof over his or her head whether or not there be children of the marriage."

And at pages 766 and 767, Stamp L.J. continued:-

"The judge went on to consider the effect of s 25(I)(c) of the 1973 Act, pointing out that it was 'relevant to have regard to the fact that the family before the breakdown of the marriage lived in modest, comfortable circumstances in their own house on which a reasonably small mortgage was being paid

off'. In this connection I would emphasise that had the marriage continued the parties would almost certainly, as the judge pointed out, have remained in the house and would not have been in a position to enjoy the equity comprised in the matrimonial home in the form of a liquid asset until they reached the age of retirement and perhaps moved into smaller or more modest accommodation. The judge added:

> 'At least, therefore, it is likely that for a further 16 or 20 years until the husband retired the inchoate asset represented by the matrimonial home would have been of no practical financial value to either party. In a sense the proceeds of the sale of the matrimonial home in the immediate or not too far distant future would represent an uncovenanted bonus arising out of the breakdown of the marriage from which both parties might benefit, provided that the wife is fortunate enough to find a partner who will provide her with secure and suitable accommodation as the husband has been able to do. Such a course would clearly be just as between the parties and in accordance with the provisions of s 25 of the Matrimonial Causes Act 1973. However, such a sale giving one the bonus unimpaired but the other the bonus impaired by its immediate and necessary application to secure a roof would not, in my judgment, be doing justice between the parties. Bearing these matters in mind I am unable to say, nor indeed is there any evidence to this effect, that by deferring the realisation of the only asset, namely the matrimonial home, will either party and in particular the husband suffer any damage in relation to the financial position in which they would have been had the marriage continued and each had discharged his or her financial obligations and responsibilities to the other. If it is appropriate to balance the incidence of the order upon each of

> the parties in studying whether it is just to make the order ... then I would say, without hesitation, that in these circumstances the degree of hardship likely to fall on the wife if she is forcibly removed from the matrimonial home will greatly exceed the hardship inflicted on the husband by being "kept out of his money" which in this case means little in the context of the continuation of the marriage and the unavailability of the matrimonial home as a liquid asset.'

The learned judge concluded that it would be wrong to order an immediate sale of the property. I can only say that I agree so much with the way that the matter was put by the judge that I do not think it could be put better, and I entertain no doubt that he came to the right conclusion."

Mr. Renouf described this as an "attractive argument". The matrimonial home was not to be regarded as a liquid asset. In the instant case the fact that the respondent had contributed to it was not the approach to adopt.

Once again, Mr. Bailhache sought, very properly, to relate the decision to the facts of the particular case. The facts were set out at p.762. The husband had left the matrimonial home to live with another woman some two years before the parties were divorced. The husband had a secure home. It was probable that the tenancy of the house would be transferred to the husband. The wife continued to live in the matrimonial home. The property was worth £11,000. The equity in it was valued at £10,000 and it was accepted that the parties were entitled to the equity in equal shares. The wife had applied for Council accommodation but there was no evidence that she was likely to obtain such accommodation. The wife was then aged 46 and the husband 43.

In the headnote, at p.763, one found this:-

"Per Ormrod L.J. (i) In exercising the wide discretionary powers given to the court by the Matrimonial Causes Act 1973, the court should preserve, so far as it can, the utmost elasticity to deal with each case on its own facts. It means that decisions of the Court of Appeal can never be better than guidelines. They are not precedents in the strict sense of the word.

(ii) .....

(iii) The practice of postponing the sale of the matrimonial homes until after the youngest child has reached the age of eighteen is in danger of ousting the general discretion of the court under s25 of the 1973 Act. It is not intended to be the general practice. It is a matter of weighing each individual case on its merits, of weighing up each side's resources and trying to ensure that neither party is rendered homeless".

Mr. Bailhache pointed out that in Martin v. Martin the debt was but £1000 out of £11,000. It was all very well to say that the house in the instant case was not a liquid asset but it would not be an asset at all if it was not sold. The respondent would not afford the mortgage payments and the parties would be bankrupt.

Mr. Renouf also sought to rely on Browne (formerly Pritchard) v. Pritchard (1975) 3 All E.R. 721. There, the husband lived in the matrimonial home with his two children by a former association. The wife was living in a council house which she had occupied with her new husband who had deserted her. Ormrod L.J. said this (commencing at page 724):-

"In the past the courts were primarily concerned with property rights. They had to be, because property rights were the material with which they dealt;..... But .... property rights are now ancillary to the interest of the family ..... Whenever a court is dealing with families of limited resources, needs are likely to be much more important than resources, when it comes to exercising discretion. In most individuals and most families the most urgent need is a home. It is therefore to the provision of homes for all concerned that the

courts should direct their attention in the first place. Where, as in this case, it is found that the wife has a secure home in a council flat, then she has what in these days is a very valuable asset. If the former matrimonial home is sold ..... the husband and his two children will have no home; and it is ..... idle to talk about renting accommodation in these days. For people in this income group it is impossible. So, to order the sale of this house now could properly be described as socially disastrous, if not irresponsible. Therefore the sale must be postponed."

And at page 725:-

"The next point to which I want to refer is the phrase which one hears so often in these cases: 'The wife will be kept out of her money'. That is, in my view, a complete misapprehension. She is not being kept out of her money. If the marriage had not broken down, as Lord Denning MR has said, she would never have touched a penny of the value of the house, because investment in a home is the least liquid investment that one can possibly make. It cannot be converted into cash while the children are at home and often not until one spouse dies unless it is possible to move into a much smaller and cheaper accommodation. So we have to find some compromise, postponing the sale till when? The 18th birthday of the younger child may be taken as a somewhat arbitrary date, but probably the fairest between the parties. It is often too early for the children, but that cannot be helped. I would not contemplate ordering the sale of this property unless the husband chooses to sell it earlier, before the younger boy reaches the age of 18 years".

Here again, Mr. Bailhache contrasted the facts. In particular, the fact that the wife had suitable accommodation was a decisive factor in the decision. The interests of the parties were merely re-adjusted. Another important factual difference was that there was no danger of foreclosure. In the present case it was impossible to say that the wife, if she obtained a full share of the sale proceeds, would be unable to find alternative accommodation for herself and the child.

Mr. Renouf also referred us to Hanlon v. Hanlon (1978) 2 All ER 889. Without seeking to rely on any particular passage of the report, he said that it served to indicate the options available to the Court and the preference for the transfer of the matrimonial home to the wife. The court there held that an order postponing sale of the home until the youngest child had attained 17 would not, in many such cases, provide a satisfactory solution, for the family would not dissolve when the youngest child attained 17 and the reality was that the wife would have to maintain a home for the children for many more years, until they married and were settled in their own homes. Therefore, an order for outright transfer to the wife was to be preferred.

However, in Hanlon v. Hanlon, the home was transferred to the wife, together with all the liabilities for its upkeep including the mortgage, and the husband was relieved so far as it was reasonable to do so from liability for periodical payments. This would be impossible in the instant case. The petitioner would be unable to accept responsibility for all the outgoings, including the mortgage, and without maintenance for herself, even with maintenance for the child and income from lodgers. Moreover, in Hanlon, the husband was housed in a police flat rent free and both parties would receive lump sums on their retirement.

Mr. Renouf referred us to Harvey v. Harvey (1982) Fam. Law 83, which he described as an example of an alternative approach. In that case, the court ordered that the matrimonial home would be transferred into the joint names of the husband and the wife on trust for sale in shares of two-thirds to the wife and one-third to the husband, such sale to be postponed during the lifetime of the wife until her re-marriage, voluntary removal from the premises, or her becoming dependent upon another man; and that after the mortgage had been repaid or the youngest child had reached the age of 18, whichever was the later, the wife should pay a reasonable market figure by way of an occupation rent to the husband to recognise that she was having the enjoyment of a property of which he owned a one-third share. Mr.

Renouf sought to show that the petitioner should not be placed in such a situation that she was required to apply to the States' Housing Committee for accommodation. At page 88, Purchas J. said:-

" ..... what, in effect, is being said here is that each of these parties hopes to realise the assets and use the proceeds for other purposes and yet achieve over their heads a roof at the public expense, subject, of course, to the council rent. That is not an approach which I find very attractive. There is a matrimonial home here, there is a roof under which at least one party can be housed, and if that can be done, doing justice to both parties ...., that is a course which we ought to take."

Counsel for the petitioner relied, in particular, upon the last sentence of the cited extract. Of course, the proposal can be implemented only if it does justice to both parties.

Mr. Renouf argued that, having regard to all the cases, there was clearly a very strong presumption that if at all possible the matrimonial home should be retained for the child and for the petitioner as the parent having care of the child. If that were not possible, one of the paramount considerations would be the provision of a suitable home for the child. If there were no child in the instant case a sale of the matrimonial home would be appropriate. The child was of great importance; his needs must take priority over the needs of the parties themselves. Counsel urged that it was essential, and in the best interests of all concerned, that the matrimonial home be preserved. The argument against was that the respondent could not afford to continue the mortgage payments; but the mortgage had been paid over the past twelve months, since the respondent left the matrimonial home. The mortgage payments would gradually be reduced. The outgoings relating to the matrimonial home, i.e. electricity, water rates, etc., would become the petitioner's responsibilities. Mr. Renouf made further submissions as to the amounts involved in parish rates, insurances (including mortgage protection) and the amounts which the respondent might reasonably pay. These were calculated on the basis of the respondent's earnings but we had

evidence that his employment was shortly to cease and his future earnings were thus speculative. Mr. Renouf did not suggest that the respondent would be comfortable; there would be financial constraints; but he could manage to live as a single independent person. Counsel proposed a nominal maintenance payment to the petitioner. He sought a maintenance order for the child, which could be reviewed from time to time. Mr. Renouf invited the Court to take the view that the respondent would be able to obtain other employment, that both parties would be able to re-build their lives, and that the respondent would be able to re-establish himself in a very short time in employment at or about similar remuneration. The Court should also take into account the support which the respondent was receiving from the co-respondent and his family, which was likely to continue in one form or another. The proposed sale of the matrimonial home was a very short-term view and in this case a long-term view was demanded. All the respondent's arguments were based on short-term expediency. The respondent's salary was likely to increase from time to time; he had shown that he was capable of bettering himself; mortgages became easier as time went on; even if there were financial constraints now and for the next year, they would lessen in the long term; the respondent had said that he was prepared to pay the whole of the cost of the child's education; this would commence in two or three years' time and would be a significant expense; this showed that the respondent accepted that his situation would improve and that he would have money; the mortgage repayments should not be equated with maintenance of the petitioner because a capital asset was being built up from which both would benefit; all three should benefit; the child from the security of a home; the home would not be regarded as a liquid cash asset; it had been purchased as a home and so it should remain. It was to be hoped that Mr. and Mrs. C would allow time for the repayment of their loan and not take a course of action which would precipitate the loss of the child's home but if it must really be repaid this should not require the sale of the matrimonial home but replacement by another loan. There was the possibility of increasing the existing mortgage which should not be unreasonable since the present mortgage was taken out when the joint income of the parties was only £10,000. An alternative was to raise cash by the

sale of the respondent's car which should produce £2,500 on account of the loan.

Mr. Renouf argued that the retention of the matrimonial home would have seven advantages: 1) Disruption to the child's upbringing, who had grown up in the matrimonial home, would be avoided; in particular he would have the availability of the garden; 2) It would satisfy the primary consideration that the petitioner should have a roof over her head; as to the respondent he had demonstrated his ability to find accommodation; 3) It would restore the petitioner to the position she would have been in if the marriage had not broken down and the respondent had fulfilled his obligations; 4) The petitioner would not be required to take full-time employment; it was not desirable that she should work full-time whilst the child was young and she should be treated as having only an earning capacity from part-time work (v. Taylor v. Taylor, 1987-88 JLR Note 14 C.A.); 5) The capital assets of both parties would be preserved and would go on increasing; 6) The petitioner would retain her home and could supplement her income from it - the more funds there would be the better for both parties; 7) The parties would avoid the payment of legal fees and estate agents' commission on a sale.

In particular, Mr. Renouf urged, the retention of the matrimonial home for the petitioner's occupation would take into account and reflect the respondent's conduct. In the alternative the petitioner should be placed in a position to purchase another home of her own. If the marriage had not broken down, the parties would have enjoyed their own property and a good standard of living. The acquisition of her own home would restore the petitioner to the position in which she would have been had the marriage not broken down by reason of the respondent's conduct. However, she could only do this if she received the whole of the equity from the matrimonial home and borrowed, on a subsidised mortgage, the maximum allowed by her present employer to a full-time employee, which would mean that she would be tied to a single employer and, contrary to the Court of Appeal's view in Taylor v. Taylor, have to work full-time. If the matrimonial home were to be sold, with the petitioner receiving half

the proceeds, it would be unlikely that she would or could buy another home; she would have to invest the money and rent; whereas, with or without the co-respondent, the respondent would be able to raise a mortgage of his own; he would have no expenditure other than maintenance; even if the petitioner were to receive the whole of the equity, the respondent would still, within a short time, have the wherewithal to purchase on mortgage.

Further urging the retention of the matrimonial home, Mr. Renouf argued that the petitioner would have no security if she were required to rent property; that large ingoings were often demanded by landlords; that some landlords prohibited children; that rent, in contrast to a mortgage, was subject to increase; and that rent was wasted from a capital point of view.

In summary, the petitioner applied: 1) for an order whereby the property would be retained until the child's education was complete, or later; 2) for the shares of the parties in the matrimonial home to be apportioned 'en indivis'; 3) for the petitioner's share of the matrimonial home to be greater than 50%, taking conduct into account. Mr. Renouf suggested an apportionment of 70% to the petitioner and 30% to the respondent; 4) for orders for maintenance in the nominal sum of £1 per annum for the petitioner and the small sum of £10 per week for the child, taking into account that the respondent would continue to pay the mortgage; 5) for the contents of the matrimonial home to be dealt with in the same way as the property i.e. upon sale to be shared in the same proportions. On the other hand if a sale were to be held to be necessary, the petitioner applied for the whole of the equity, not in order to be punitive but to satisfy her needs. People were to be put before property rights. In such event life would still be difficult for the petitioner and such an order should not be regarded as full and final because the petitioner would still need to be maintained for a limited time. Further in such event the petitioner would wish to retain the whole of the contents of the matrimonial home to furnish her new home; the home contained very good quality furniture which she regarded as an heirloom to be passed on to the child. If the property were to be

sold then a clean break would be appropriate insofar as maintenance for the petitioner was concerned. However she would then have to work full-time and this would attract annual nursery fees of over £2,000. Maintenance should be, therefore, at the rate of £4,000 per annum or approximately £75 per week.

Mr. Bailhache referred us to Rakusen, Hunt and Bridge's Distribution of Matrimonial Assets on Divorce, 3rd edition, at page 104, where the following summary of Crewe v. Crewe (1984) Times 4 April (1984) Fam. Law 213 C.A. is to be found:-

"Wife's sentimental attachment to matrimonial home - husband's housing needs of greater importance. To attach weight to a wife's sentimental attachment to the matrimonial home on the break-up of a marriage at the price of depriving the husband of an opportunity to purchase his own home was difficult to reconcile with the court's obligation to do justice to both parties, Cumming-Bruce LJ, sitting with Wood J. held in the Court of Appeal."

Counsel submitted that the petitioner's case was partly sentimental; she expected the matrimonial home to be her personal home; but the Court should make sure that if this were done it was not at the expense of the respondent.

At the same page of Rakusen the case of Goodfield v. Goodfield (1975) 5 Fam. Law 197 C.A. is reported:-

> "Matrimonial home owned in equal shares - one half of net sale proceeds sufficient to rehouse wife - sale ordered. The parties had agreed before the hearing for ancillary relief that the beneficial interest in the former matrimonial home should be divided between them in equal shares. There was one child of the marriage, now over 17 years of age, but still living with the mother in the house. The registrar ordered that the wife be permitted to remain in the house until her remarriage or death or the sale of the property, such sale not to take place without her express consent.

"Scarman LJ (as he then was) said that the problem before the court was whether the husband, who was entitled to an equal share of the one capital asset of the family, should be subject to an order which in all likelihood would deprive him of the benefit of his share of that asset. Since the wife's case was largely based on the difficulties she would have in finding other accommodation, there was a very strong probability that if the wife were allowed to remain in the house, she would continue to do so for a very considerable period. While the wife would be in a difficult accommodation market, it was really inconceivable that a single woman with £4,750 behind her (half the equity in the house) and a steady job could not find accommodation if she were forced to. That accommodation might not be the accommodation to which she had been accustomed for 20 years. It was a sadness of matrimonial breakdown that neither side was able to maintain quite the standard of life they were able to maintain when they were united. The wife must accept a measure of disadvantage if the Matrimonial Causes Act 1973, section 25 were to be applied and justice be done to the husband as well as to her. A matrimonial home for a family such as this was not only a place in which both could live; it was a security for old age, a capital resource to which they could turn in times of trouble or emergency. Postponing the sale indefinitely meant that the husband was deprived of the backing of that capital asset. That was clearly a very serious problem for him, causing genuine hardship. It might be otherwise if he had other capital or was earning a substantial income. The fact that he had acquired what appeared to be a stable home with the lady with whom he was living went only to his accommodation problem, whereas the hardship imposed by the order was the deprivation of immediate access to his capital asset. A postponement of the benefit of the capital asset for a period of time was often a reasonable burden to place on a spouse, e.g. where there were young children living with the wife. The menace of this order to the husband was the prolonged and indefinite nature of the postponement and the

possibility that he might require the asset and be unable to realise it. Cairns LJ agreed.

"The court ordered that the house be sold, but not before the elapse of one year from the date of the order unless in the meantime the wife died or remarried or consented to such sale; until such sale the wife was to be entitled to remain in occupation but with the duty to pay the rates and mortgage instalments. Upon sale the proceeds were to be divided equally between the parties."

Mr. Bailhache emphasised, and Mr. Renouf accepted, that it was a sadness of matrimonial breakdown that neither side was able to maintain quite the standard of life they were able to maintain when they were united. The Court of Appeal overruled the Registrar who had made an order which effectively would deprive the husband of the benefit of his share of the capital asset in the matrimonial home, albeit it deferred a sale for one year. Justice has to be done to the husband as well as to the wife. The court so ordered notwithstanding that the husband was housed satisfactorily elsewhere. During the delay of one year the wife was required to pay the mortgage instalments.

At page 105 of Rakusen the case of M. v. M. (1988) 1 FLR 389 CA is reported:

"Power to order immediate sale of the matrimonial home - retention of manor house would paralyse family finances. The parties were married in 1970 and had two children. In 1981 they bought a manor house with a view to obtaining an income from it by showing it to the public, and letting it out for functions. In fact they did not derive much income from it at all, and when the marriage broke down the indebtedness on the property was £280,000, and there was not sufficient income to meet the liabilities. One of the creditors offered £550,000 for the property, and deposited with the wife's solicitors a signed contract and a deposit of £55,000. That offer was only

open until close of business on 31 July. The husband wished to keep the property and placed before the judge a proposal that he should retain the house and pay the wife £50,000. The judge accepted that proposal, and ordered that the wife should transfer to the husband her interest in the house on the payment of £50,000, on the basis that the wife would get that sum free of capital gains tax. The wife appealed.

"The Court of Appeal found that the judge had misdirected himself in not addressing his mind to the question of whether the private residence exemption would apply, since the wife had from 1984 lived in the converted stable block rather than the ho[illegible] The husband was unemployed and would have a liability for interest payments of £75,000, whilst the house would not produce more than £4,000 per annum. Their Lordships adjourned the case to enable the husband to raise money by 31 July, so that he could pay the wife a larger sum than that formerly proposed by him. He failed to do so. Their Lordships found that the wife should not be deprived of the benefit of selling the house to the prospective purchaser. Furthermore, it was not in the interests of the children that the husband should be burdened by large debts. The welfare of the children was the primary, but not overriding, consideration. The retention of the house was likely to paralyse the family finances, and that would not be good for the future stability of the family. The court had jurisdiction to order the sale of the house, and ordered that the offer of £550,000 must be accepted."

The aspect of that case which is applicable here is that it was not in the interests of the children that the husband should be burdened by large debts. The welfare of the children was the primary, but not the overriding consideration. The retention of the house was likely to paralyse the family finances. Mr. Bailhache argued that these aspects applied in the instant case. Mr. Renouf sought to distinguish M. v. M. because in that case the retention of the house was going to paralyse the family finances for all time. That would

not apply in the instant case although there would be problems perhaps for a few months. He claimed that Mr. Bailhache had failed to have regard to the future prospects of the parties as independent persons; they would be in a position to build up some capital.

Mr. Bailhache referred us to Godfrey, née Richecoeur v. Godfrey 1987/48 (unreported series). This was an appeal against the Judicial Greffier Substitute's decision that the respondent's individual half share in the matrimonial home be vested in the petitioner on condition that the petitioner pay to the respondent the sum of £7,500. The Royal Court increased that amount to £12,500. Mr. Bailhache cited the case merely to show that what the Court has to do is a balancing exercise. At page 6 of the judgment the Court said that:-

"In the present case, where both parties are in work, but the respondent has left the matrimonial home which was his sole major asset in the circumstances we have outlined above, we have to balance the interests of the parties. On the one hand the Respondent, who is now living in rented accommodation and has virtually no capital, spent nineteen years living and working with the petitioner and building up the family capital. We believe this is a factor which we are entitled to take into account, as we are her statement that she has capital resources available, albeit unspecified .... Against that we do not wish to make an order which would be so high as necessarily to force a sale, nor do we forget our finding as to the responsibility for the break-up".

In that case the respondent was responsible for the break-up of the marriage; a half share in the house would have been approximately £20,000; instead the respondent received £12,500. As Mr. Renouf said, the respondent husband in that case was in a similar position to the respondent in the present case and yet the home was retained. However, this does not help us because the petitioner in the present case has no capital resources whereout she could make a lump sum payment.

In Bashforth, née Whitwham v. Bashforth 1989/127A (Unreported series) the Judicial Greffier Substitute made an order that the former matrimonial home be sold within two months of the date of the order and that the nett proceeds of sale be divided as to 65.7% to the petitioner and 34.3% to the respondent. The Judicial Greffier Substitute delivered the following judgment:-

"The parties were married in 1977; there are no children issue of the marriage. A decree nisi of divorce was pronounced in March, 1989, on the ground of the husband's adultery with the co-respondent. The decree was made absolute on 3rd July, 1989. Other than the fact of the husband's sudden departure from the matrimonial home in January, 1989, no allegations of conduct were raised by the parties in relation to these proceedings for ancillary relief. The wife admitted that she was taken completely by surprise by the husband's departure as she was totally unaware of any reason for his precipitous decision. The husband admitted that he felt the marriage had been under strain for some time prior to his departure coupled with the strain he felt in coping with his work, a factor he never discussed with the wife.

"In this application the parties confined their evidence largely to the financial implications brought about by the divorce.

"There is one matrimonial asset of any substance and that is the former matrimonial home, still occupied by the wife with her mother. The parties agreed a valuation of some £200,000 to include the figure of £20,000 attributable to the unit of accommodation within the house which was occupied by the wife's mother. Back in 1983 the parties had mutually agreed that the wife's mother should leave her home in Exeter and come to live in Jersey and funds were used out of the proceeds of sale of the mother's home in Exeter to enable a double garage at the matrimonial home to be converted so as to accommodate the wife's mother and for a new double garage to

be built. The property has two charges registered against it in favour the Trustee Savings Bank, some £54220.92 in respect of the mortgage and £5072.23 in respect of a joint home improvement loan. (These figures are calculated to include interest due up to the end of July, 1989). A total of some £59,293.15 is therefore owed jointly by the parties.

"The wife has applied for a transfer of the property into her sole name. At present she is working part-time earning £414.35 per month. She indicated the possibility of full-time employment which would probably bring her income up to some £9000 per annum. Other than that she had no source of income. The wife admitted that the prospect of securing maintenance from the husband was slim. He was presently unemployed and living off the interest from limited capital funds in Teneriffe. He made it clear that it was his intention to seek employment again in the United Kingdom later this year, however at the moment that was but an expression of his optimism for the future. It was claimed on the part of the wife that with an enhanced income plus the possibility of letting the unit of accommodation presently occupied by her mother she could cope with the substantial monthly re-payments due to the T.S.B. That is of course on the assumption that the Bank would agree to the transfer of the mortgage to the wife's sole name.

"No information was available on that issue. The husband, as a former employee of the T.S.B. did express the view that it was unlikely that the Bank could agree to such a course.

"Even if recourse were made to this solution it would mean that the husband would be totally deprived of any interest in the sole matrimonial asset, a course which could only conceivably be followed if conduct of a gross and obvious nature had been found proved against the husband. This is not the case. It is a well-accepted principle that the power to

order a transfer of property should not be employed as a punitive measure.

"Neither party is in a position to pay any lump sum to the other in order to buy out the other's interest in the property.

"There remains, in my view, the other alternative course. That is to order the sale of the property and for the net proceeds to be divided between the parties either equally or else in some other proportion having regard to all the circumstances of the case. Let us look at this course from both angles. From the wife's point of view she would lose her home. She would have the added complication of finding accommodation suitable both for herself and for her mother. There is no doubt that it would fall very hard on her. From the husband's point of view, he would receive a lump sum out of which he would be able to meet his own not inconsiderable debts to Income Tax, and to two other personal loans. At the end of the day his share would be some £18,000 after reimbursement of personal loans.

"Having considered all the circumstances of the case I am of the opinion that the only equitable course to adopt is to order that the property be sold as soon as possible; I must emphasise that an early sale is essential because the longer it remains unsold the greater the inroads of outstanding interest into the capital available to each of the parties becomes. As to the proportions which each party should receive it is self-evident that the wife's needs are by far the greater in that she is, unfortunately, the one who is going to suffer most from the sale of the property. She must be in a position either to finance the purchase of alternative accommodation or else be able out of the income from the capital sum, to rent suitable accommodation. It seems proper that out of the net proceeds of sale the wife should receive 65.7% and the husband 34.3%. The proportions have purposely

been expressed in percentages rather than fixed sums because of the uncertainty of the final sale price of the property.

"On the question of maintenance I propose to make a nominal order only of £1.00 per annum thus leaving the door ajar in the event of the wife encountering severe financial difficulties in the future. Although a clean-break between the parties is the ideal, I do not think that the nominal maintenance order will affect the de facto separation of the parties' financial affairs. The respondent will pay the costs of these proceedings. Conveyancing costs will be deducted out of the gross sale price of the property."

Mr. Bailhache equated the dependant mother in that case with the dependant child in the present case. On the facts there was a great similarity with the present case. He submitted that the Court might find that case of some interest and help. Mr. Renouf pointed out that the wife's mother had contributed towards the capital required to provide her with a house, a factor which clearly did not exist in the case of the child. The Greffier had had regard to the needs of both parties but, in the instant case, if the matrimonial home had to be sold, the resources of the petitioner were so inadequate that she would need 100% of the proceeds. He was asking the Court to accept that the respondent does not need a capital sum because he has an earning capacity. The Court would have to arrive at what his earnings are likely to be; his outgoings would be about £10,000.

Counsel for the respondent also referred us to O'Brien, née du Val v. O'Brien 1989/17A (unreported series). In that case the matrimonial home had been sold, the petitioner had become a tenant of the States and the respondent was housed, on very favourable terms from his point of view, by the co-respondent cited in the original petition for divorce. Thus, the test of provision of homes to both parties had been satisfied already. The respondent's adultery had been the cause of the break-up of the marriage. The Court, at page 6 of the judgment, cited Mr. Commissioner Dorey in Clarke v. Clarke,

supra: "The legal principles governing the division of capital assets on divorce have changed progressively in recent years. It is now rare for one party to be completely deprived of any share in the capital assets ...." The Court then expressed this opinion:-

"We concur with that view. There must be exceptional circumstances which would make it repugnant to justice for one party to receive anything, before the Court will completely deprive that party of any share in the capital assets. The contribution of the respondent by his long work over long hours and his financial contributions entitle him to some part of the capital monies available".

The Court went on to refer to the costs involved in protracted litigation between the parties and the sad fact that a substantial proportion of the monies available would be swallowed up in legal costs. The Court decided that the proportion to be allocated to the respondent should be such that something would be left over for him after he had met his liability for legal costs. The Court directed that £6,500 should be paid to the respondent.

Whilst Mr. Renouf did not comment on O'Brien v. O'Brien in his reply it is to be noted that his proposal that, in the event of the matrimonial home being sold, the petitioner should receive the whole of the equity flies in the face of the decisions of the Court in Clarke v. Clarke and O'Brien v. O'Brien.

In O'Connor v. O'Connor (1974) J.J. 179 the Court of Appeal varied an Order which excluded the husband from all interest in the matrimonial home. The judgment, delivered by Settle J.A., is as follows:-

> "This case arises out of the divorce which took place between the parties. The learned Bailiff made an order vesting the property, the matrimonial home, in the wife, excluding the husband from all interest in that property. We think that the reason underlying this decision, from the

limited information available to us, was that the learned Bailiff took the view that the conduct of the husband had led to the divorce and that it would be unfair on the wife that she should be deprived of the roof over her head by a compulsory sale because the conduct of her husband was such as entitled her to present a petition, which was undefended, for divorce. With that view we concur; but we are not happy that a more equitable means of achieving that result was not considered by the learned Bailiff, and we have it in mind that this is not a penal jurisdiction but a discretion to achieve the best possible result in equity. We have thought therefore that it was a Draconian measure to deprive the husband of all interest in the property, and, indeed, when he is excluded from his residence there, not to determine his liability for maintenance.

"For these reasons we have come to the conclusion that the property should be vested in the wife; that she should have the sole right to reside there to the exclusion of the husband; but that the property should be charged with the payment of £2,600 to the husband upon the happening of any of four events, whichever of those four events shall first occur. The four events are: the death of the wife; the remarriage of the wife; the wife ceasing to occupy the house as her usual place of residence; or the sale of the property in the lifetime of the wife. On the happening of the first of those events, £2,600 will be payable to the husband or his estate. We further cancel the order for maintenance, that cancellation to take place when the husband vacates that part of the matrimonial home which is at present occupied by him. In the circumstances that both parties have in some measure been successful in this appeal, we think the appropriate order is that there should be no order as to costs".

Mr. Bailhache emphasised the point made in the judgment of the Court of Appeal that this is not a penal jurisdiction but a discretion to achieve the best possible result in equity. Even in 1974 the Court

of Appeal was unwilling to deprive the husband of all interest in the matrimonial home.

Counsel for the respondent described his opponent's approach to the problem which we face as a "litany of venom". The alternative proposals put forward by Mr. Renouf, whether retention of the matrimonial home with a continuing responsibility on the respondent to pay the mortgage or a sale of the matrimonial home with the whole of the equity, after payment only of the loans and costs of sale, would leave the respondent bankrupt. The proposals applied the "roof over heads" principle only to the petitioner. Mr. Renouf requested justice only for the petitioner; it would not be justice for the parties for the Court to make any such order. The emphasis of the proposals had been to consider the interests of the child, solely; but it was not in the child's interests that his father should be bankrupt; the respondent would have no money to entertain the child, nor any means of keeping him during access. The child had been played as a "trump card" but he was only 2½ years old. The proposals were devoid of justice to the respondent because all assets would be made available to the petitioner and there would be continuing liabilities for the respondent. Whilst it was accepted that the child should suffer the minimum disruption possible, in a few years time he probably would not always remember his original home and he would suffer no harm at all in a move. The retention of the matrimonial home would not provide security for so long as it depended on the respondent making payments he could not afford. The petitioner would be in a better position with a capital sum with which she could go back into the market place, preferably in the rental market the horrors of which were not as terrible as had been made out. The respondent was residing at the home of his sister and brother-in-law on a temporary basis; he needed a roof over his head; there were no plans for him to live with the co-respondent; he was at present relying on charity. What was desirable and what was possible for the child and the petitioner were very different.

Mr. Bailhache presented "skeleton contentions" to show, as he put it, the impossibility of retaining the matrimonial home because

any arrangement by which it would be retained would have for effect an order for maintenance in favour of the petitioner well in excess of a proper figure; would leave insufficient money for the respondent to house himself; and would be dependent upon an assumption that the respondent could find other employment at a like salary. Additionally the respondent would be left with debts; the petitioner would have the use and enjoyment of 100% of the capital assets; the parties could not repay the loan to Mr. and Mrs. C and there would be no "clean break". The respondent contended that an order should be made for the matrimonial home to be sold and the sale proceeds utilised to pay secured charges, and joint debts, to pay the respondent £13,000 and the balance to the petitioner i.e. vest the property as to 70% to the petitioner and 30% to the respondent; for the contents to be divided as to 50% to the petitioner and 50% to the respondent, with arbitration by the Judicial Greffier in the event of disagreement; for maintenance to the petitioner for the child at the rate of £30 per week until he attains the age of sixteen or ceases full-time education, whichever is the later; for the respondent to pay the child's reasonable school fees; and for all the petitioner's other claims for maintenance, lump sum and transfer of property to be dismissed. Another reason why the sale of the matrimonial home was inevitable was the repayment of the loan from Mr. and Mrs. C. The parties had agreed that it was a short-term loan and its terms should be honoured. The petitioner was not entitled to say that they should not have their money back and from any practical point of view a re-mortgaging would not be possible; the bank would look not only at the security but also the ability to re-pay. Notwithstanding the "skeleton submissions" Mr. Bailhache argued before us that on the basis of the usual starting point of two-thirds and one-third an overall fair division, even taking conduct into account, would be 50% to each of the parties. However, to effect a clean break as to maintenance, on calculations submitted by Mr. Bailhache based on assumptions as to future earnings and a multiplier to capitalise the appropriate maintenance, and dividing the contents equally, the petitioner "in the round" should receive 70% of the equity in the matrimonial home and the respondent 30%. This would enable him to pay his personal liabilities - debts of £8,000 - and have a small amount

left over for himself, consistent with the Court's judgment in O'Brien v. O'Brien (supra).

In his reply Mr. Renouf maintained that the problems were very short term, i.e. employment and the loan to Mr. and Mrs. C. A division of capital of 70% and 30% would not meet the petitioner's needs or take into account the future earning capacity of the parties. In O'Connell v. O'Connell the Court had acknowledged that it was more difficult for the wife to establish herself as an independent person. The petitioner needed the use of 100% of the capital assets for a time, not for herself but for the child.

It is not necessary for us to review the evidence in detail. Much of it is irrelevant to the principal matters we have to decide. Both parties are quite adult and undeserving of too much sympathy. They co-habited in Hong-Kong for a year before marriage. It is clear that they lived extravagantly during their five years abroad. We accept that the petitioner worked as hard as she could, both modelling and teaching, throughout the five years abroad but the respondent's earnings as a Policeman exceeded those of the petitioner. They returned to Jersey for a holiday every year, had a holiday in Canada in 1986, and in 1987 spent some four months travelling extensively in Australia, New Zealand, Hawaii and California. Had they saved their earnings during that time they could have afforded a home in Jersey on their return and, no doubt, we would not face the present difficulties. Instead, they returned in 1988 when the petitioner was pregnant and lived with Mr. and Mrs. C for a period of time until they purchased the matrimonial home on the 30th September, 1988, for £81,000. They contributed only some £16,000 towards the purchase, comprising the respondent's gratuity and the loan of £7,000 from Mr. and Mrs. C. They purchased a car at the same time, an indication of their extravagant attitude. We are satisfied that the petitioner and members of her family worked very hard on making the matrimonial home habitable and comfortable. For a time prior to that, they lived solely on the petitioner's earnings. Subsequently, however, the earnings of the respondent were greater, perhaps some 2½ times greater, than those of

the petitioner. If we were not to have regard to the respondent's conduct and the interests of the child, an equal division of the nett proceeds of the matrimonial home, with a clean break, would do justice to both parties. But that is not the situation with which we have to grapple. The mortgage has to be paid. The loan from Mr. and Mrs. C has to be repaid; the petitioner in evidence accepted that it has to be repaid now and that she did not know how it was to be repaid. As we have said both parties are quite adult. The respondent has a continuing relationship with the co-respondent but wants an independent roof over his head, in particular to exercise staying access to the child and in which to study. He is not "emotionally ready" to live with the co-respondent. The petitioner had to file a discretion statement in her divorce proceedings but the adultery was committed a long time after the respondent left the matrimonial home; the relationship is not a "solid one" but it is a "nice relationship" and they see each other "occasionally". Thus both parties seek comfort and solace elsewhere but neither has an alternative home.

It is quite impossible for us to reconcile all the various decisions in the cases cited to us and the principles to be drawn from them. At the end of the day we have, as the Court said in O'Brien v. O'Brien, to face up to the reality of the situation. We have struggled with the principles involved and, in the words used in Hanlon v. Hanlon it is not unfair to say that we are almost in despair of solving the problem. We have to 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 (Faiers v. Faiers).

Sadly and reluctantly, we find it impossible to give full weight to "the very large emphasis that is to be placed by the courts on the provision of homes". Nor can we satisfy the "one consideration which is more than emphatic and might be said to be paramount ... the need to consider .... the overriding requirements of dependent children" (Rakusen & Hunt, cited in O'Connell v. O'Connell). In our judgment this is not a case where we can apply the Mesher v. Mesher

principle of a delayed sale. Nor can we reasonably order the respondent to transfer his interest to the petitioner, giving the respondent a charge on the house to be paid on the death of the wife or on the sale of the property or on the child reaching sixteen (Hector v. Hector). Nor can we apply Chamberlain v. Chamberlain because the petitioner would be unable to pay the mortgage arrears and current payments. Nor can we apply Smith v. Smith where the husband was ordered to transfer his interest to the wife, in which event he would be relieved of any obligation to pay rates, repairs or mortgage. Our approach must be flexible and we must suit our decision and order to the particular facts of the particular case (per Latey J in Smith v. Smith). In the words of Purchas J. in Harvey v. Harvey "the problem is one of what is practical and what is reasonable". Sadly, this leads us to a different conclusion that the availability of a house as a home for the wife and child cannot be ensured while the child is being educated. As Latey J. said: "It is a sad fact of life that, where there are children, both husband and wife suffer on marriage breakdown, but it is the wife who usually suffers more". But, in our discretion, we should not go so far as the court did in Smith v. Smith and order the husband to transfer the whole of his interest to his wife because in that case the dependent daughter was in fragile health, having suffered from serious kidney trouble since infancy - which was a particular fact of the particular case - and cannot do so because the petitioner would be incapable of relieving the respondent of his obligation to pay the mortgage.

In Clarke v. Clarke the Court found that it could not ensure that the parties should each have a roof over his or her head. Each case had to stand on its own merits. In that case the home had been sold but the court decided that the best way that the principle could be achieved was to divide the net amount realised in unequal proportions to "go a long way towards providing each of the two parties with a secure home". That is the most that we can hope to achieve in the present case.

For the same reasons we find ourselves unable to apply Martin v. Martin. There the Court held that it would be contrary to public

policy to order the sale of the matrimonial home in reliance upon the rehousing of the wife in council accommodation. There the proceeds of sale, if a sale were to be ordered, were described as representing "an uncovenanted bonus arising out of the breakdown of the marriage from which both parties might benefit. The matrimonial home was not to be regarded as a liquid asset. We do not propose here to provide the respondent with an uncovenanted profit but merely to relieve him of part or the whole of his debts in order that he may be able, by his own subsequent efforts, to provide a roof over his head. Certainly, the petitioner will not receive any kind of "bonus" but will have funds to go a long way towards providing herself and the child with a secure home. We might add that if she were forced, by reason of inflated property prices in this Island, to have resort to the States' Housing Committee for accommodation, we would not regard her as doing anything contrary to public policy and the income which she would receive from the capital allocated to her would result in her paying more than the minimum and perhaps the full market rent. There is nothing shameful in a single mother having resort to the Housing Department to find accommodation and accommodation provided by the States today is such that no mother and child need feel inferior or deprived in having to occupy it.

Again, we cannot apply the decision in Browne (formerly Pritchard) v. Pritchard where the sale was delayed. We cannot, with respect, go as far as Ormrod L.J. went in that case when he said that it is idle to talk about renting accommodation in these days. We prefer his dicta in Martin v. Martin to the effect that the Court should preserve the utmost elasticity to deal with each case on its own facts, that decisions of the Court of Appeal can never be better than guidelines and that they are not precedents in the strict sense of the word.

We agree with Mr. Bailhache that Bashforth, née Whitwham, v. Bashforth is of some interest and help. Indeed, there are remarkable similarities between that case and the present one. The divorce was pronounced on the ground of the husband's adultery. Other than the fact of the husband's sudden departure from the matrimonial home, no

allegations of conduct were raised in relation to the proceedings for ancillary relief. The former matrimonial home was the only matrimonial asset of any substance. There was a TSB mortgage and a joint home improvement loan in addition. The wife sought a transfer into her sole name. She was working part-time with the possibility of full-time employment. The prospect of securing maintenance from the husband was slim. A transfer would mean that the husband would be totally deprived of any interest in the sole matrimonial asset, a course which could only conceivably be followed if conduct of a gross and obvious nature had been found proved against the husband. This was not the case. Neither party was in a position to pay any lump sum to the other in order to buy out the other's interest.

Apart from the proportions of the nett proceeds awarded to the parties, which no doubt suited the particular circumstances of the particular case, we adopt the whole of the reasoning of the Judicial Greffier Substitute in that case.

As in the case of O'Brien née du Val v. O'Brien, the respondent should not be completely deprived of any share in the capital asset. In the present case there is no exceptional circumstance which would make it repugnant to justice for the respondent to receive anything. As the Court of Appeal said in O'Connor v. O'Connor this is not a penal jurisdiction; our discretion is to achieve the best possible result in equity. On the other hand the petitioner will lose her home. She will have the added complication of finding accommodation, almost certainly to rent, both for herself and for the child. There is no doubt that it will fall very hard on her. The greatest benefit to the husband will be his freedom from mortgage and loan liabilities. He shall have the greater earning capacity and should thus be in a position not only to free himself from any residual debts but also to take a tenancy of a one bedroom flat. Hardship on the respondent will thus be alleviated whilst doing the best we can for the petitioner whose needs are by far the greater in that she is, unfortunately, the one who is going to suffer most from the sale of the property. The parties were agreed in the valuation of the property at £125,000. Mr. Bailhache deducted

from that amount the TSB Bank mortgage of £67,000, the loan from Mr. and Mrs. C of £7,000, the loan from Mr. and Mrs. T of £2,500 and the TSB joint Bank account overdraft of £3,500, leaving a net equity of £45,000. Mr. Renouf deducted only the TSB Bank mortgage and the loan from Mr. and Mrs. C, leaving a nett equity of £51,000. We incline to the middle view that the mortgage and both loans should be deducted, leaving an equity of £48,500.

In our view this is not a case for expressing the respective shares in percentages rather than fixed sums because we wish to provide maximum protection to the petitioner and if either share is to be eroded it must be that of the respondent. It may be that with the delay which has elapsed since the hearing the property will fetch a sum in excess of £125,000 but that further arrears of mortgage payments will have accrued. We propose to order, therefore, that the petitioner will receive the sum of £40,000 out of the proceeds of sale, the balance after deduction of all liabilities to accrue to the respondent.

We also have to deal with all other ancillary matters, some of which, custody, care and control, and access were agreed. It is unnecessary for us to give reasoned decisions on those items not agreed. On the question of maintenance for the petitioner, whilst a clean break between the parties is the ideal, we propose to make a nominal order only of £1.00 per annum, thus leaving the door ajar in the event of the petitioner encountering severe financial difficulties in the future.

Our order is as follows:-

1. That custody of the child of the marriage, namely M , will vest in the respondent and petitioner jointly.

2. That the petitioner shall have the care and control of the said child of the marriage.

3. That the respondent shall be allowed generous access to the said child of the marriage, including staying access, by prior arrangement with the petitioner, with leave to apply to the Judicial Greffier in the event of disagreement.

4. That the respondent do pay or cause to be paid, to the petitioner during their joint lives, or until further order, the sum of one pound (£1.00) per annum towards the support of the petitioner.

5. That the respondent do pay, or cause to be paid, to the petitioner for the support of the said child of the marriage until he attains the age of sixteen years or completes full-time education, whichever shall be the later, or until further order, the sum of thirty-six pounds (£36.00) per week.

6. That, until further order, the respondent shall pay reasonable school fees in respect of the said child of the marriage.

7. That the former matrimonial home , be sold as soon as possible and in any event within three months of the date of this order; that out of the proceeds of sale there shall be paid firstly the mortgage secured on the property in favour of the TSB Bank, including all accrued interest thereon to the date of repayment, secondly the loan due by the parties to Mr and Mrs C in the sum of £7,000, together with all accrued interest thereon to the date of repayment, thirdly the loan due by the parties to Mr. and Mrs. T in the sum of £2,500, fourthly any estate agent's commission and/or other costs incidental to the sale of the said property; and fifthly the sum of £40,000 to the petitioner; and that the respondent shall be entitled to the balance of the proceeds of sale.

8. That the respondent shall be solely responsible for the payment of the overdraft on a joint account with the TSB Bank and for the payment of any outstanding accounts in respect of rates (including water), insurances (including mortgage protection), telephone rental, electricity and repairs in respect of the said property as at the date of the sale thereof.

9. That the contents of the matrimonial home, (other than the carpets, curtains and light fittings which shall be included in the sale unless there is mutual agreement to the contrary) shall be divided equally between the petitioner and the respondent. In the event of a failure to agree on a fair division or on a joint sale, the matter will be referred to the Judicial Greffier as "Greffier Arbitre".

10. That the claims of the ~~respondent~~ petitioner to any other lump sum payment and/or secured provision are dismissed.

11. That the issue of costs of and incidental to ancillary matters is deferred for further argument; the costs of and incidental to the divorce shall, in any event, be paid by the respondent on a taxation basis.

Authorities

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