[1999–00 Gib LR 451]

MARTINEZ v. MARTINEZ and BUSSON

SUPREME COURT (Pizzarello, A.J.): April 11th, 2000

Family Law—financial provision—pension rights—wife's equitable interest in gratuity payable under Pensions Regulations, reg. 26 to be taken into account although husband opted instead to take full pension—gratuity is money formerly under husband's control for purposes of application under Matrimonial Causes Ordinance, s.44(1)

The petitioner applied, in the context of divorce proceedings, for an order, under the Married Women Ordinance, s.10, that she was beneficially entitled to a share of her husband's pension.

The petitioner obtained a decree *nisi* of divorce on an undefended petition. The respondent was a former police officer who had left the force on medical grounds and received a pension. The Pensions Regulations allowed him to commute a part of the pension to a gratuity payable immediately, but he chose not to. The petitioner requested that the court take into account the gratuity option, as property in which she had a beneficial share, when distributing the matrimonial assets.

She submitted, *inter alia*, that (a) s.10 of the Married Women Ordinance, as extended by s.44(1) of the Matrimonial Causes Ordinance, allowed her to claim a share of the gratuity as money previously under the respondent's control that had now ceased to be so; and (b) accordingly, the gratuity was a part of the matrimonial assets to be taken into account by the court.

The respondent submitted in reply that a pension or gratuity payable under the terms of a pension was a non-assignable, non-transferable asset, under s.13 of the Pensions Ordinance, save for the purposes stated

therein, and consequently could not be taken into account as part of the matrimonial assets.

Held, making the following ruling:

(1) In calculating the financial provision to be made, the court could take into account the value of the gratuity payable under reg. 26, in which the petitioner had an equitable interest as the respondent's wife. It was settled law that moneys actually received by the pensioner could be so considered, and, for the purposes of s.44(1) of the Matrimonial Causes Ordinance, the gratuity represented money formerly within the respondent's control which had ceased to be so when he opted to take a full pension instead (paras. 16–17).

(2) In the interests of a clean break in this case, a proportion of the value of the gratuity would be credited to the petitioner and set off against the payment she would otherwise have been ordered to make to the respondent in exchange for the transfer to her of his interest in the matrimonial home and other assets. However, since the gratuity had not in fact been received, he would not be ordered to account for the balance by a cash payment (para. 20).

Case cited:

(1) *H* v. *H*, Supreme Ct., D. & M. No. 5 of 1993, unreported, followed.

Legislation construed:

Married Women Ordinance (1984 Edition), s.10(1):

> "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to the Chief Justice or . . . to the judge of the Court of First Instance, and the Chief Justice or the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit . . ."

Matrimonial Causes Ordinance (1984 Edition), s.44(1): The relevant terms of this sub-section are set out at para. 17.

Pensions Ordinance (1984 Edition), s.13: The relevant terms of this section are set out at para. 16.

Pensions Regulations (1984 Edition), reg. 26(1):

> "Any officer to whom a pension is granted under the Ordinance, other than a pension granted under regulation 5, may at his option . . . be paid in lieu of such pension a pension at the rate of not less than three-fourths of such pension together with a gratuity equal to twelve and a half times the amount by which such pension is reduced . . ."

R. Pilley for the petitioner;
E.C. Ellul for the respondent.

1 **PIZZARELLO, A.J.:** This is an application by way of summons dated December 12th, 1997, and it is made under s.10 of the Married Women's Ordinance, as extended by s.44 of the Matrimonial Causes Ordinance in relation to the matrimonial home. The matter has been adjourned on various occasions and has extended further to embrace other questions.

2 The parties were married on September 27th, 1989. There are two children of the marriage, namely, Clive Joseph Anthony Martinez, born on March 5th, 1992, and Darren Nicholas Martinez, born on September 7th, 1994. The petitioner and the children live at 14 Rose Tree Lodge, Montagu Gardens, Gibraltar—the matrimonial home. The respondent is at present outside the jurisdiction and is expected to return. On December 18th, 1997, a decree *nisi* of divorce was granted to the petitioner on the grounds of the respondent's adultery. The petition was undefended.

3 The petitioner is employed and earns the sum of £800 per month. The respondent was a police officer who has been medically boarded out and is now in receipt of a pension of £542.78 per month. The respondent's pay as a police officer was approximately £1,100 per month. He has been on half-pay since October 26th, 1997, and stopped receiving wages on April 27th, 1998. His first receipt of pension was in January or February 1999.

4 In 1993 the parties bought a flat at 1 Almond Court, Montagu Gardens, and a year later exchanged this flat for the present matrimonial home at 14 Rose Tree Lodge. The purchase price was £52,080 and a mortgage was raised on it. A loan of £10,000 was obtained from Barclays Bank. An insurance policy (No. 946854) was taken out with the Norwich & Peterborough Building Society to cover the mortgage. A further mortgage in the sum of £6,500 was taken on March 12th, 1996, and this replaced the Barclays Bank loan of £10,000. At some stage, two other insurance policies were taken out. The monthly payment of the first mortgage in January 1998 was £287.39. The monthly payment of the second mortgage in January 1998 was £39.88. The monthly sum payable on the policies was £160.96 in January 1998. In early 1996, a surveyor valued the premises at £65,000.

5 The respondent separated from the petitioner in August 1996 and left the matrimonial home. He paid £515 towards maintenance of the children and half of the mortgage and endowment policy payments. The petitioner gets full tax relief on mortgage repayments. The respondent gets none, as he is not living in the home. In addition, they are both credited with tax relief on the three policies, but the petitioner only up to 50%.

6 On January 14th, 1997 the magistrates' court made an order by which the respondent was to pay £250 per month in maintenance; the respondent agreeing to continue to pay half of the payments for the mortgage and the policies. However, the respondent fell ill in May 1997 and discontinued payment of the mortgage and policy contributions. His view was that the matrimonial home should be sold, the mortgage repaid, and the balance shared between the two parties unequally with a larger portion to the petitioner. The petitioner should buy a smaller house which would reduce the amount of mortgage repayment (that she could better cope with), and he would do likewise.

7 The proposal was put to the petitioner's solicitor by the respondent's solicitor by a letter dated June 11th, 1997 and repeated on July 28th, 1997, with an increase of £50 maintenance (from £250 to £300). In this way the petitioner would be enabled, if she wished, to keep the property, and in that event, she should pay all the mortgage and policies payments out of her income of £1,110 per month (*i.e.* her income of £800 plus the £300 he proposed to pay). The calculation was that once the property was sold and the mortgage repaid, there would be approximately £25,000 to share. This position has been maintained by the respondent to date, and he makes the following points: He has paid £16,172.53 in respect of mortgage repayments, £8,577.42 in respect of the insurance payments, and £10,000 of the Barclays loan money up to December 31st, 1997. He has not paid mortgage or policy payments since about July 1997, according to the affidavit sworn on behalf of the respondent by his solicitor, Mr. Eric Ellul, on September 30th, 1998.

8 The affidavits in support of the application and reply commenced on January 30th, 1998 and the last was the fifth affidavit of the petitioner dated February 24th, 2000. The affidavits trawled through the many difficulties of their chequered marital relationship over the course of the years and after the divorce decree *nisi*. These have caused the parties to take up certain positions which, thankfully, have now been narrowed to the point where, essentially, this court is asked to decide on the distribution of the property. Both parties acknowledge that underlying the final distribution of the matrimonial assets is the principle that they should share 50/50 the matrimonial product and, in respect of the matrimonial home, both counsel are agreed that it should be taken to have a value of £69,000.

9 I should record that in the course of the hearings it has been acknowledged that it is in the interests of the children that they remain living in the matrimonial home at least until they attain the age of 21 or thereabouts, and consideration was given to the suggestion that the property should not be sold until that time. The respondent's interest in his share of the equity would be protected and he would eventually

receive a share of the sale proceeds on a basis to be agreed (which would require sophisticated and complex accounting formulae). However, it seems to me that a clean break, as far as possible, is the preferred option on both sides and I am of the opinion that that is the best in the circumstances and ought to be endorsed.

10 For the respondent, Mr. Ellul points out that at the present moment similar houses are being sold at a much higher price than that valuation, and suggests that a similar house has recently changed hands for about £100,000; that a realistic value of the property would be between £85,000 and £100,000; and that on the face of it there is a lot of equity in the home which should be distributed—some £25,000, he suggests. While he acknowledges that the property is subject to controlled increases of 7% per annum, and the parties have agreed to proceed on the basis that the matrimonial home is now worth £69,000, he argues that if the petitioner were to keep the flat, she would have an asset whose value would enhance in due course. Once the premises are no longer subject to controls she would have happy financial prospects, whilst the respondent would get nothing from this windfall.

11 It appears, Mr. Ellul suggests, that a favourite method to keep up a value is to enhance the value of fixtures, fittings and furniture. So one of the proposals which may still be considered is to sell the property and, of the net proceeds, the petitioner would receive 60%; the extra 10% above a 50/50 share to include arrears of maintenance which are due and have not been paid. In this way, the petitioner can buy a more modest house at a lesser cost and the respondent can buy a small flat where he could receive his children during access periods. The disadvantage of this proposal is that the children's occupation of the home would be disrupted.

12 A second proposal deals with the three endowment policies of which the surrender value is £12,000. The petitioner would surrender them to the respondent and she would remain with the matrimonial home. The disadvantage to her is that she would have to take out a new policy to safeguard the mortgage, but she would be the beneficial owner of the home. To her advantage is the fact that the respondent will pay arrears of maintenance and maintenance commensurate with his income.

13 Mr. Ellul submits that only the respondent's income should be taken into account when considering the whole matter. The suggestion that notional account should be taken of a possible gratuity Mr. Martinez could have received had he taken a reduced pension with a gratuity on retirement ought not to be entertained. What the court should consider are the actual events and, the respondent not having received a gratuity, it does not come into the equation. Mr. Ellul makes several points with regard to the petitioner's claims in her fifth affidavit, and I will deal with these later.

14 The important matter is the question of the gratuity which I have calculated, pursuant to reg. 26 of the Pensions Regulations, to be worth £20,224.50. Mr. Pilley argues forcefully that the actions of the respondent have been such that it is clear that he took the decision not to commute a part of his pension to a gratuity in order to keep this amount out of the reckoning. He never disclosed the option that he had for a gratuity and, Mr. Pilley points out, he took advice only from the Establishment Officer and never considered opting for a gratuity so as to pay his maintenance arrears or to take advice on that. The respondent looked after his own interests at all times.

15 Mr. Pilley points out that the respondent has never kept his word and his word is therefore not to be trusted. All along he denied his adultery until the last moment. He said he had no money and rushed off abroad with his lady friend. He said he would pay maintenance and has paid no maintenance to speak of. As a basis to assess his maintenance, the respondent at first suggested that his pension would be £100, then it went up to £400, and finally it was discovered by the petitioner that he was receiving over £540. Mr. Pilley submitted that the gratuity should be taken into account because what the respondent has done could be likened to a fraud on creditors by ensuring that the petitioner's equitable right to the gratuity would be defeated.

16 On the matter of the gratuity, I have to remember that the right emanates from the provisions of the Pensions Ordinance, and it is a commutation of a pension. A pension, by virtue of s.13 of the Pensions Ordinance, "shall not be assignable or transferable . . . and shall not be liable to be attached, sequestered or levied upon . . ." Does this consideration debar me from taking it notionally into account? I have no doubt that I may take into account any moneys *received* as a gratuity as forming part of the matrimonial assets, and I have done so before in the past (see, *e.g. H* v. *H* (1)), so why not when looking at the matrimonial assets in the round? I consider that the petitioner has an equitable interest such as to have entitled her to a beneficial share in the gratuity had the respondent opted for it.

17 Section 44(1) reads:

> ". . . [S]hall include the right to make such an application where it is claimed by the wife that her husband has had . . . under his control—
>
> (*a*) money to which, or a share of which, she was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, she was beneficially entitled, or for any other reason) . . .
>
> and that . . . that money . . . has ceased to be . . . under his control . . ."

It seems to me that these provisions amply cover the situation concerning the gratuity. I am of the opinion that the gratuity can properly be considered to be money which the respondent had in his control and which ceased to be under his control as soon as he made the decision to take a full pension, and it can therefore be taken into account when considering the distribution of the matrimonial assets.

18 I accept the basis of the petitioner's calculation of the matrimonial assets as follows:

Value of matrimonial home	£69,000
Surrender value of policies	£12,000
Less mortgage due	£54,000
Equity	£27,000

There is, in my view, no justification for adding anything more to that figure in respect of furniture, fixtures and fittings. The respondent claims the sum of £5,000 for furniture. There is a dispute among the parties as to the value of the furniture but, in my view, whatever furniture there is can only be of nominal value. I will give no value, even though I do not forget that the respondent left the matrimonial home in August 1996 and so the petitioner, together with the children and the person with whom she now shares the flat, has had the use of this. As to fixtures and fittings, these, in my view, are subsumed into the value of the property and cannot be accounted for in any separate manner.

19 So, the starting figure is that each moiety is valued at £13,500. What, from this figure, ought to be deducted from the respondent's share because he is indebted to the petitioner? The petitioner sets them out in detail in her affidavit of February 24th, 2000:

(a) *Maintenance arrears*. She claims £2,605. I will take her figures as correct and add a further £160 to bring this up to date. I do not recall having sight of the order of November 8th, 1997 on which this claim is made, but it seems that the parties are agreed that this is the prevailing order which was made, reducing the maintenance payable under a previous order, dated September 24th, 1997, from £175 to £160 per month in respect of both children. From the documentation I have read, it seems that this order also provided for the payment of a further sum of £20 per month in respect of arrears. That order has not been varied and I will not remit any sum other than those which are not claimed by the petitioner. I am not satisfied that the respondent's pension is his only source of income, and any variation should be left until such time as the court has had an opportunity to examine the respondent in person. I have dismissed the idea of remitting them back to the magistrates' court which made the original orders, but will hear counsel on this point if necessary.

(b) *Mortgage and ancillary policies*. I do not understand why the respondent should be debited in respect of the mortgage and ancillary policies after the decree *nisi*, even if it is correct that the person with whom the petitioner now shares the matrimonial home was not living with her until September, 1998. It is true that this results in a larger share for the respondent in a division but I note that in an affidavit sworn by the petitioner on September 19th, 1997, *i.e.* before the decree *nisi*, she said she had been "going out with Charles as a permanent relationship for approximately two months." One does not necessarily draw the inference that Charles was living with her at that stage, but that is an inference which may be drawn and is in fact alleged by the respondent and by Mr. Ellul in his affidavit of September 30th, 1998 on behalf of the respondent. As was pointed out in the respondent's affidavit of November 22nd, 1999, she stated in her affidavit of March 11th, 1998 that Charles was living with her at the time and that goes counter to her affirmation in her affidavit of November 11th, 1999 that Charles went to live with her on the anniversary of her birthday in September, 1998. So that is not a valid deduction except up to the date of the decree *nisi*. The respondent, in his affidavit of November 22nd, 1999, says he paid up to October 1997, but this does not coincide with his affidavit of January 20th, 1998, nor with his solicitor's affidavit to which I have referred. The petitioner says that he has not paid since May 1997. Taking the date he gives, *i.e.* July, that means five months to the date of decree *nisi* and his share would amount to £1,218. But I am not persuaded that I should take even this amount into the equation. I see no reason why in the circumstances of this case, the respondent should need pay any further moneys in respect of the mortgage or policies.

(c) *Fifty per cent of the Christmas kitty*. I accept the petitioner's assessment of £1,000—the respondent not producing accurate figures (as he might have done) to support his contention that it was less. In any event, his affidavit is quite vague on this.

(d) *Fifty per cent of the Norwich Union Insurance shares*. This amounts to £550. The respondent does not deny this, he merely says he spent them because he was in dire need. In my view he should account for this.

(e) *Unpaid costs of the divorce*. These amount to £500, and the claim to them seems to me to be justifiable, the order for costs being against the respondent in favour of the petitioner.

(f) *Lost tax relief*. I do not consider that this is a matter for which the respondent is accountable.

20 Thus, the overall payment which is due from the respondent to the petitioner, which should be set off against his share of the equity (apart

from the gratuity), is therefore £4,815. That is to say that for a clean break the order that should follow is for the petitioner to pay to the respondent £8,685 and for the respondent to transfer his interests in the property and the policies to the petitioner's sole name. Taking into account the notional value of the gratuity, I will not order the petitioner to account for anything to the respondent. Also taking into account that the gratuity has in fact not been paid, I think it would be unfair to order the respondent to account for the balance in terms of a cash payment for the difference.

21 I stand back for a moment from the detailed assessment and consider the general fairness of the matter in the light of the provisions of s.32 of the Matrimonial Causes Ordinance, and it seems to me that an order in those terms is not unjust. I therefore order the respondent to transfer his interest in 14 Rose Tree Lodge, Montagu Gardens and the policies No. A12373986, VB 6113945 and A11346949 to the petitioner, execution of which should take place within a reasonable period to be agreed between the parties. I do not fix a date, since the respondent will need some time to arrange this, he being abroad. But if the parties have not agreed a date within 14 days the matter may be referred to me at short notice and I shall fix a date.

22 Finally, I note that the court has not yet made absolute the decree *nisi*. The questions of custody, care and control and access are matters which are the subject of an order made in the magistrates' court of January 14th, 1997 and they stand. As for maintenance, there is liberty to apply. In these circumstances, I am satisfied that the arrangements for the welfare of the children of the marriage are the best that can be devised in the circumstances and a decree absolute may issue.

Order accordingly.