

**[2003–04 Gib LR 412]****GILBERT v. GILBERT**

SUPREME COURT (Schofield, C.J.): March 15th, 2004

*Family Law—financial provision—pensions—no specific power to attach pension but as alternative may under Matrimonial Causes Ordinance, ss. 32 and 33 make deferred lump sum order out of prospective pension—not suitable if payment of pension too remote in time (not “in foreseeable future” under s.32(1)(a)) or unquantifiable at time of divorce*

*Family Law—financial provision—earning capacity—maintenance may be appropriate even if wife capable of supporting herself to ensure placed, as far as practicable, in position would have been in had marriage not broken down*

The wife brought proceedings for ancillary relief following the granting of a decree nisi.

The parties had been married for nearly 16 years when they separated, and later divorced. They had one daughter, who was 17 years of age. The husband worked for the Gibraltar Government and if he were to continue to do so up to retirement age he would receive a pension. The wife had been a housewife, but since the breakdown of the marriage had obtained employment, although she had not been able to maintain it on a regular basis allegedly for reasons of depression. The husband had a fiancée who did not live with him and gave him no financial assistance. Neither party had any capital or savings. Certain matters had already been resolved by the parties, including the decision as to the custody of their daughter, the amount of maintenance that should be paid for her (£250 per month) and the ownership of their former matrimonial home and possessions within it.

The remaining issues related to the financial provision for the wife. The husband had been paying maintenance, but believed that he no longer should be required to do so, since he alleged that the wife was living with another man who helped to support her. The wife sought an order under s.33(2) of the Matrimonial Causes Ordinance, for a deferred lump sum payment out of the husband’s pension, which he would be due to receive in 16 to 20 years’ time if he continued to work for the Government, and an order for monthly payments under s.33(3).

She submitted that (a) she was not cohabiting and lived with her daughter; (b) her only means of support was social assistance, as she could not keep regular employment because of the clinical depression

caused by the husband's behaviour; and (c) she should receive a proportion of the pension which the husband was due to receive, because it was a sum which she would lose the chance of acquiring, a consideration under s.32(1)(g) of the Matrimonial Causes Ordinance, and the court should attempt to place her in the position in which she would have been had the marriage not broken down.

The husband submitted in reply that the wife was not entitled to financial provision (a) as she was responsible for the breakdown of the marriage; (b) she was able to obtain and keep regular employment; (c) she was living with a man who was contributing to her support; and (d) the daughter was not even living with her but was living with her grandmother.

**Held**, ordering the following financial provision:

(1) The husband would be ordered to make monthly payments of £150 to the wife, in addition to the agreed payments of £250 per month for the daughter. The order was based on the premises that the wife received no financial contribution from a new partner and that the daughter resided with her, there being no evidence to support the husband's allegations that these suppositions were untrue. The order was made on the basis that the wife was now capable of obtaining and keeping regular employment and could take care of her basic needs by working, assisted by the maintenance already agreed upon for the daughter (paras. 15–19).

(2) Although the court had no express power to attach the husband's pension, it did have the power, under ss. 32 and 33 of the Matrimonial Causes Ordinance, when read together, to order a deferred lump sum payment out of a pension. It would not make such an order here, however, since the pension was not an asset he was "likely to have in the foreseeable future" within the meaning of s.32(1)(a), since it could not mature for nearly 20 years and, moreover, was unquantifiable at the present time (paras. 13–14).

**Legislation construed:**

Matrimonial Causes Ordinance (1984 Edition), s.32: The relevant terms of this section are set out at para. 12.

s.33: The relevant terms of this section are set out at para. 10.

*S. Bossino* for the petitioner;

*A. MacDonald* for the respondent.

1 **SCHOFIELD, C.J.:** The parties were married on April 19th, 1986, when the petitioner, Joseph Gilbert ("the husband") was 21 years old and the respondent, Amalia Patricia Gilbert ("the wife"), was 17 years old. Their daughter, Lianne, was born on September 4th, 1986. In November 2001, strains within the marriage resulted in the husband leaving the matrimonial home. A reconciliation was attempted in February 2002 but

this lasted only three weeks. On October 17th, 2002, the husband issued divorce proceedings claiming several indiscretions on the part of the wife which, he said, amounted to unreasonable behaviour. The wife denied these indiscretions and claimed that the split was as a result of the husband's unreasonable behaviour. The husband started a relationship with a Spanish lady in October 2002. In the event, a *decree nisi* was granted on May 15th, 2003, on the admission by both parties that they had committed adultery with a person unnamed.

2 In these proceedings for ancillary relief, certain matters have been resolved by the parties. Fortunately, the issues relating to Lianne have been agreed. It is agreed that the husband and wife will have joint custody and that the wife will have care and control of their daughter. Maintenance has been paid for Lianne at the rate of £220 per month, but it is now agreed that the figure should be increased to £250 per month. I assume that the parties agree that such maintenance be paid on the usual terms: that it continues until Lianne attains the age of 18 or ceases full-time education, whichever is the later. For the avoidance of doubt, I include that term in my order. It has also been agreed between the parties that the former matrimonial home, a Government flat at 48 Schomberg, South Barrack Road, be transferred into the wife's name. I understand that the transfer may have already been effected. In addition to the flat, the wife has kept its contents.

3 The issues relate to financial provision for the wife. The husband's position is:

- (a) his wife was responsible for the break up of their 16-year marriage;
- (b) she now lives in the former matrimonial home with the man with whom she admitted committing adultery and she is receiving undisclosed sums of maintenance from that man;
- (c) Lianne does not live with her, but stays with her grandmother;
- (d) whilst the wife claims to be unemployed, she has been working and is fully able to work and keep herself; and
- (e) he has paid maintenance for his wife for several months out of recognition of their 16-year marriage, but it is now time she stood on her own feet.

4 The wife, on the other hand, claims that she ought to receive maintenance, since she has no other means of support except for social assistance. She also applies for an order that she receives a proportion of the pension/gratuity the husband will receive when he retires from his employment.

5 The husband paid nothing towards his wife's maintenance until my order of March 13th, 2003, when, in anticipation of an April hearing of

the ancillary relief application, I ordered him to make one payment of £100. For some reason, the matter stretched into May 2003, when I made a further order that the husband pay the wife maintenance of £150 per month, pending further orders. I am uncertain about whether this order is being fulfilled, but in an affidavit of November 12th, 2003, the wife stated that the husband was in arrears to the extent of two months' maintenance.

6 The husband works for the Gibraltar Government and has done so from the age of 17. He has no capital or savings but on retirement he will receive a pension or gratuity. He is 39 years of age and, as a non-industrial worker, can opt to stay in employment until the age of 60. In any event, he cannot retire and receive his full benefits until he attains the age of 55. The husband's evidence is that his basic net wage is £1,484.92 per month but with overtime, which is not guaranteed, he can expect to earn £1,708.46 per month. The figures he gave in his affidavit show a deficit of £140 per month, although he did accept that in some months he has a surplus of between £100 and £250 which he says he spends on leisure and on attempting to rebuild his life with his new lady friend. In addition to the maintenance for Lianne, he pays rent on a flat in La Linea, which includes water and electricity, of £360 per month. Of note in these expenses is the total of £102.50 per month for his daughter's birthday, her pocket money and his outings with her when he has access. He also lists the repayment of £100 off a loan of £500 from his mother. The husband's affidavit of means was sworn on March 12th, 2003, so this loan must now be repaid. The husband says he requires £100 per month for clothing as he left the marital home without his clothes and needs to restore his wardrobe. By now he should have gone a long way to restoring his clothing requirements. The husband is in a new relationship and intends to re-marry. He does not live with his fiancée. She looks after her invalid mother and he receives no financial benefit from the relationship.

7 The wife's evidence is that she is unemployed and receives, in addition to the maintenance for her daughter, supplementary benefit of £108.00 per fortnight. However, it has been ascertained that the wife receives £108.60 per fortnight for herself and she did not declare to the Social Security Department that she was receiving maintenance for Lianne. Her affidavit is false, in that she has been receiving £54 per fortnight for Lianne on top of the £108.60. Her weekly expenses come to £153.89, so with maintenance for Lianne of £220 per month, the weekly deficit is £22.60 and not the £54 she deposed to. It will be remembered that maintenance for Lianne is now increased by £30 per month. In her first affidavit, dated February 14th, 2003, the wife stated that she had been working as a shop assistant until October 31st, 2002, when she had to leave her job because she could not keep up regular attendance. She says she has suffered from clinical depression as a result of her matrimonial difficulties and a letter from her former employer speaks to constant and

distressing telephone calls from the husband which affected her work. I am uncertain for how long the wife had been working at that job, but her employer's letter indicated that it was for over a year. No indication has been given as to whether she worked prior to the split with her husband, although the arguments of her counsel seem to suggest that she was a housewife whose ability to command adequate employment has been affected by her being the carer in the home and having little or no outside work experience. Nor was any indication given of how much the wife received by way of remuneration in her job as a shop assistant. In the husband's affidavit of means, he stated that his wife had secured further employment and, indeed, in her second affidavit of November 12th, 2003, the wife acknowledged that she had been working at her cousin's shop but stated that she had to give up her work around May 2003, again because of depression for which she said she was being treated. Again, the wife gave no date on which she commenced such employment, nor any figures of her remuneration. The wife denies that she lives with any man and states that Lianne lives with her.

8 The husband seems to rely, at least to a certain extent, on the wife's misconduct to maintain his claim that she is not entitled to any maintenance for herself. For his contention of misconduct the only independent support comes from the wife's admission of adultery. The husband claims that the wife went off the rails and took the marriage with her. The wife, on the other hand, claims that the husband has treated her badly, being extremely possessive, jealous and violent towards her and that it is his behaviour which took the marriage off the rails. For that assertion we find some support in the letter from the wife's former employer, which talks of constant and distressing telephone calls from the husband. To start going into questions of the conduct of the parties would, in my view, be a totally unprofitable exercise and would lead us to a trawl of the parties' behaviour during the course of a long marriage. We have here a pattern all too familiar to the courts of this jurisdiction: parties marrying at a very young age and finding over the course of years that they were unable to hold the marriage together. In my judgment, I am not prepared to condemn either party on the material before me and I do not think that it would serve any purpose for this court to try to determine whether it was the wife or the husband, both of them, or factors which the parties had no ability to control, which took this marriage off the rails.

9 The husband claims that the wife is living with another man in the former matrimonial home. Of course it would be very relevant to any application by the wife if such were the case, for any contribution the cohabitee makes to the household expenses must be taken into consideration. However, the only evidence I have that the wife is cohabiting is the bare assertion by the husband, an assertion which is denied by the wife. Although I must treat the wife's evidence with caution, it would not

be too difficult for the husband to find supportive evidence of his assertion. None has been forthcoming. In the circumstances, I make my order on the basis that the wife lives alone. By the same token, I accept the husband's evidence that his fiancée does not contribute to his household expenses.

10 Sub-sections (2) and (3) of s.33 of the Matrimonial Causes Ordinance set out the powers the wife is asking me to exercise in this case as follows:

“(2) Subject to the provisions of section 35, on pronouncing a decree nisi for divorce or nullity or at any time thereafter, whether before or after the decree has been made absolute, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable.

(3) Subject to the provisions of section 35, on pronouncing a decree nisi for divorce or nullity or at any time thereafter, whether before or after the decree has been made absolute the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under subsection (2) of this section.”

Section 35 has no relevance to these applications.

11 The wife seeks an order for a deferred lump sum payment out of the husband's pension or gratuity under s.33(2) and an order for monthly maintenance under s.33(3).

12 Section 32 of the Matrimonial Causes Ordinance sets out the matters to which I should have regard when making such orders. It reads:

“(1) It shall be the duty of the court in deciding whether to exercise its powers under this Part in respect of a decree of divorce, nullity or judicial separation, and under sections 47(2) and 48 (insofar as it relates to section 47(2)), in relation to a party to the marriage and, if so, in what manner, 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 contributions 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; and
- (g) in the case of proceedings for divorce or nullity, the value to either of the parties to the marriage of any benefit 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.”

13 There is no specific power in our Matrimonial Causes Ordinance, such as exists under the equivalent legislation in England, to attach a party’s pension or gratuity. Be that as it may, I consider that ss. 32 and 33, when read together, do give this court the power to make a deferred lump sum order. It is clear that s.32(1)(a) and (g) in particular invite the court to look to what a party is likely to receive in the future or will lose the chance of acquiring. This, to my mind, would enable the court to make an order for the payment of a lump sum out of money which a husband does not have in hand but which he is anticipating he will receive, whether by way of pension, gratuity or otherwise. However, in the present case, payment to the husband of a pension or gratuity a minimum of 16 years from now cannot be money which he is likely to receive “in the foreseeable future,” so as to bring an order within s.32(1)(a). Mr. MacDonald has argued that the pension or gratuity is a sum which the wife will lose the chance of acquiring (see s.32(1)(g)), and that the court must attempt to put her in the financial position she would be in if the marriage had not broken down.

14 Whilst I accept that this court has the power to make a deferred lump sum order, I do not consider that this is an appropriate case in which to do so. The anticipated pension or gratuity is far too remote in time. So much can happen in the next 16 to 20 years that it would be unjust to burden the husband with a millstone around his retirement years. Furthermore, the amount of pension or gratuity is unquantified, and probably unquan-

tifiable, at this point of time. The parties, who are both under 40 years of age, should be looking towards a clean break situation and, whilst that is impossible at this moment in time because of the need for some maintenance payments to be made to the wife, with which I shall shortly deal, a future situation is foreseeable where the parties will be able to make their own lives completely independently of each other.

15 Turning now to the question of maintenance, as I say, I must make my orders on the basis that the wife is not cohabiting and has the day-to-day care of Lianne. She has lost the support of a husband who has been a constant financial provider and, putting it at its highest, the wife's working life has been fragmented. This is not to say that the wife has not contributed to the family, and the authorities show that she must be given full credit for being the carer in the home. What is clear is that her family life has prevented her from so far taking up a career with all that means in terms of structure of earnings and pension rights. Be that as it may, it is equally clear that the wife is capable of obtaining employment as a shop assistant. Lianne is now 17 and does not require the care which would prevent the wife from working full-time. What she says she has been incapable of doing thus far is holding a job down for a sustained period. The wife says this is because of her depression caused by her husband's behaviour. On this I would make three points. First, I must approach the wife's evidence with some circumspection. It is only when prompted by her husband's affidavit that the wife accepted that she had the job referred to in her second affidavit and she has given no information there as to dates of employment or how much she earned. She also falsely stated the amount of social security benefits she has been receiving. Secondly, there is no expert evidence as to her medical condition. Thirdly, we are now two years beyond the marital split and the alleged cause of the wife's depression is becoming remote.

16 There is, to my mind, no reason why the wife cannot work full-time and I base the maintenance I order on her potential earnings. The minimum wage for a shop assistant is £4.08 per hour. Even if the wife works only 30 hours per week, she will be able to earn a minimum net wage, after paying tax and social security, of £420 per month, and she may well be in a position to earn more. She will, I am told, lose her right to social security payments on the basis of Lianne's maintenance and if I order maintenance for the wife above the rate of £81.30 per week. Presumably she will also lose those benefits if she earns the amount she is capable of earning.

17 The wife lists her expenses at £153.89 per week, or £666.86 per month, which I am unable to take issue with. The husband has quibbled about her claim of £11.54 per week for clothes for herself and Lianne, but I must say I am unimpressed with this quibble. There is certainly no



margin in her stated expenses for luxuries such as leisure or holidays and she makes no provision for such things as birthdays and outings. It is clear that the wife's expenses are much lower than the husband's. For example, she pays a total of £26 per week (or £113 per month) for rent and utilities as against the husband's £396 per month. The wife has also been left with an established home, whereas the husband has had to create a new home. I consider the husband's claim for "work expenses—food" plus "food" of £402 per month anomalous when set against his wife's food expenses, for herself and Lianne, of £80 per week, or just under £350 per month. I also shed doubt upon his monthly expenses of £102.50 on Lianne. Even if that is a true figure, he could better put that money into providing his wife with the means to create a more comfortable home life for Lianne.

18 The wife, therefore, can take care of her basic needs by working and receiving maintenance for Lianne. However, that is not an end to the matter, for the wife must be put in the same financial position, so far as practicable, as if the parties had not divorced. Furthermore, the interests of Lianne are best served by the wife being able to provide a comfortable home environment for her. The husband's contribution to Lianne's maintenance does not provide the roof over her head and all that goes with it.

19 In all the circumstances, I consider that the husband should pay as maintenance for the wife the sum of £150 per month, in addition to the maintenance for Lianne of £250 per month. I stress that this order is made on the basis that the wife receives no financial contribution from a new partner.

20 The wife is legally aided and the husband is not. In the event, I make no order for costs.

21 Interim maintenance was ordered at the rate of £150. If this has not been paid, the husband will have to make an offer of payment of the arrears.

*Order accordingly.*