
[2005–06 Gib LR 216]

GONZALEZ v. GONZALEZ

COURT OF APPEAL (Staughton, P., Stuart-Smith and Kennedy,
JJ.A.): September 15th, 2006

Family Law—financial provision—equality—general principle is equality of division of assets unless good reason to contrary—unequal contributions to welfare of family justify unequal division but unequal contributions to accumulation of wealth do not—inequality of contributions only considered if so great that would be unfair to disregard

Family Law—financial provision—means of parties—contribution to ex-wife’s means by new cohabitee not to be disregarded in context of stable relationship but weighed with all other factors in ordering financial provision from husband

The respondent wife sought an order for financial provision in the Supreme Court following divorce.

The parties had been married for 35 years and were in their late 50s. The husband was a taxi driver in Gibraltar and the wife never did any outside work but looked after the home and raised their children. After their separation she continued to live in the family home (a Government-owned flat) with a new partner, a civil servant with an annual income of over £50,000. He paid half her living expenses, leaving her to provide about £600 a month to meet her outgoings. The husband initially paid her up to £800 a month but reduced the amount and stopped making payments completely when her partner moved in with her.

Interim orders were made for the husband to pay maintenance but he did not comply with them and ultimately fell £13,100 into arrears. It was agreed that the wife should continue in possession of the home with its (allegedly expensive) furniture, fixtures and fittings, and that she should have ownership of the family car valued at £6,000.

At the full hearing for financial provision, there was disagreement as to the husband's income. The Supreme Court (Dudley, A.J.) found on the evidence that his average earnings were £1,950 a month and that he had expenses and outgoings of £1,470, leaving him with a balance of about £480 a month. It accepted that the wife's new partner had been substantially maintaining her but, taking that into account together with the other available income and the expenses, the length of the marriage, the wife's potential disadvantage should she wish to enter the employment market, and the stability of her new relationship, ordered that the husband pay her £150 a month until her death or remarriage, or until he stopped work. The husband did not make these payments.

The husband held a taxi licence which for some 10 years had been in the joint names of husband and wife. When they separated, they agreed that it should not be sold, so that he could continue to work—and although there was disagreement as to its value, the common ground placed it at £150,000. Included in the husband's outgoings was the sum of £5,200 paid to the wife as "licence hire," *i.e.* for the use of her share of the licence.

The Supreme Court held that the parties' contributions to the family unit over a lengthy marriage were of equal value and that equality should be recognized in the financial provision to be made. The wife's possession of her fully equipped and furnished, low-rental flat gave her an advantage which the court set off against the husband's maintenance arrears of £13,100. Her keeping their family car was balanced by his retention of his taxi. It concluded that since he kept the use of the taxi licence, the realistic rental value to be paid to the wife in respect of her joint share in it was £100 a week (£433.33 a month).

On appeal, the husband submitted that the Supreme Court had failed to apply properly the factors listed in the Matrimonial Causes Ordinance, s.32(1) and the current principles of the common law. On the one hand, the wife was supported by her cohabitee and her financial needs were therefore substantially being met and did not require further consideration and, on the other, the husband's nurturing of his taxi business amounted to a special contribution to the assets available for distribution which should be recognized as displacing the principle of equality. In relation to the taxi licence, he submitted that the Supreme Court was mistaken in holding that (a) the wife was a joint owner to the extent of 50%; and (b) she was entitled to a rental income of as much as £100 a week (£433.33 a month) in respect of her interest in it.

Held, affirming the division made by the Supreme Court:

(1) The Supreme Court had given proper weight to the factors listed in s.32(1) of the Matrimonial Causes Ordinance and its decision would be upheld. It had considered the parties' respective incomes, earning capacity, property and other financial resources, their financial needs and ages and the duration of the marriage. It had not given special weight to the contributions made to the wife's maintenance by her new cohabitee in

the apparently stable relationship into which they had entered but taken it into account with all the other factors. In particular, it had given detailed consideration to individual assets and liabilities of the parties and balanced them against each other, finding that in broad terms they cancelled each other out (para. 28; paras. 31–34).

(2) The court's general obligation was to apply the principle of equality of division and depart from it only if and to the extent that there was good reason for doing so. Before reaching a firm conclusion and making an order along these lines, the Supreme Court had properly checked its tentative views against the yardstick of equality of division and had articulated its reasons for not departing from equality. It had duly considered the contributions of each party to the welfare of the family, bearing in mind that the contributions need not specifically relate to the accumulation of wealth. Only if there had been such a disparity in the scale of their contributions that it would have been unfair to disregard it, should it have upset the general balance of equality—or if, as might have been the case, the husband had improved his business after their separation and his special financial contribution had not been related to the marriage or the family welfare (paras. 29 para. 39).

(3) The taxi licence had in law been a family asset for 30 years and the Supreme Court was entitled to treat it as jointly owned in equal shares. That the husband should pay his wife for the use of her share of the licence was therefore proper and the value that had been placed on it had been carefully assessed. Likewise, his own income from the use of the licence had been assessed in detail, bearing in mind that he was getting older and was less able to work long hours, the taxi business was subject to seasonal fluctuations, and there were the expected risks inherent in self-employment (paras. 35–37). Indeed, if changed circumstances reduced his income and affected his ability to pay his wife the full licence rental, he would be able to return to court and seek a reduction in the amount he had been ordered to pay (*per* Stuart-Smith, J.A., at paras. 46–47).

Cases cited:

- (1) *Atkinson v. Atkinson*, [1988] 2 FLR 353; [1988] F.C.R. 356, referred to.
- (2) *Cowan v. Cowan*, [2002] Fam. 97; [2001] 2 FLR 192; [2001] 2 F.C.R. 331; [2001] EWCA Civ. 179, referred to.
- (3) *Fleming v. Fleming*, [2004] 1 FLR 667; [2003] EWCA Civ. 1841, *dicta* of Thorpe, L.J. applied.
- (4) *Miller v. Miller*, [2006] 2 A.C. 618; [2006] 3 All E.R. 1; [2006] 1 FLR 1186; [2006] 2 F.C.R. 213; [2006] UKHL 24, *dicta* of Baroness Hale applied.
- (5) *White v. White*, [2001] 1 A.C. 596; [2001] 1 All E.R. 1; [2000] 2 FLR 981; [2000] 3 F.C.R. 555, *dicta* of Lord Nicholls applied.

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Legislation construed:

Matrimonial Causes Ordinance, s.32(1): The relevant terms of this subsection are set out at para. 25.

Ms. A. Balestrino for the appellant;
A. McDonald for the respondent.

1 **KENNEDY, J.A.:** This is a husband's appeal against an order made by Dudley, A.J. on March 17th, 2006 in relation to the disposal of family assets following a divorce. The appellant, who is 58 years of age, is and has been for about 30 years, a taxi driver in Gibraltar. In order to work as a taxi driver, he has to hold a taxi licence, which is a tradable asset with a significant value.

2 The parties were married on November 13th, 1970. They had three children, two of whom are now adults, living independent lives, and not dependent on their parents. The third child died as a result of injuries sustained in a road accident. She had given birth to a child, but that child lives with, and is maintained by, his father, so his needs are not a relevant factor in these proceedings.

3 The respondent wife did not have any gainful employment during the marriage. Prior to the marriage she worked in a shop. She kept the home and looked after the family and thus enabled the appellant to work long hours, which he did.

4 The family home was, at any rate in later years, at 14 Royal Sovereign House, Varyl Begg Estate, Gibraltar, a Government-owned flat. And in about September 1998, the relationship between husband and wife was such that they began to lead separate lives. In July 2002 the husband moved out and in January 2004, the wife petitioned for divorce. A decree nisi was granted on June 24th, 2004 and there were then discussions as to how to deal with financial matters.

5 The respondent was living in the family home with a new partner, whom she had known for many years, and who was and is a relatively senior civil servant earning in excess of £50,000 per annum. He paid half of her weekly expenses which she claimed amounted to £277.28 a week; a figure which the judge found to be perfectly reasonable. Her unpaid share of the expenses therefore amounted to a £138.50 per week or about £600 per month.

6 After the separation and indeed at times before that, the husband had paid his wife £200 a week, but he reduced that amount to £100 when the grandson left the family home and ceased paying altogether when the wife's new partner moved in.

7 In these family proceedings, interim orders were made requiring the husband to pay maintenance, first £200 per week, then at £150 per week.

Those orders were not complied with and before Dudley, A.J. it was agreed that on January 30th, 2006 the arrears amounted to £13,100. It was also agreed that the respondent wife should continue to have possession of the former matrimonial home with its furniture, fixtures and fittings.

8 According to the appellant husband, that included some very expensive furniture and it was common ground that because the flat is Government owned, the rent is less than would have had to be paid for equivalent premises in the open market.

9 Finally, it was agreed that the respondent should have possession and ownership of the family car which the husband valued at £6,000. In fact it seems that she passed that vehicle on to one of their grown-up sons, but that was her choice.

10 There were two live issues which remained for consideration when the matter came before the judge. First, the level of maintenance to be paid by the appellant husband, and secondly, how to deal with the taxi licence, which for over a decade had been in the joint names of both parties and which it was agreed should not be sold, but retained in order to enable the appellant husband to ply his trade in his taxi van which he retained.

11 The judge was asked and agreed to deal with the matter on the basis of the written material placed in front of him. No oral evidence was called. The parties were not agreed as to the value of the taxi licence. On behalf of the respondent wife, it was contended that its value was £150,000 to £180,000. For the appellant husband, it was contended that its value was to £100,000 to £150,000. But it was agreed that evidence would not assist and the judge ascribed to the licence the common ground figure of £150,000. Plainly that conclusion cannot be challenged in this court.

12 The respondent wife contended that as a taxi driver the appellant earned £600–£800 per week. The appellant in his affidavit denied that he earned as much as that, but, as the judge noted, he put forward no alternative figure, save that in his tax return for the fiscal year ended June 30th, 2003, he showed a gross income of £13,500 and a net income of £6,340, after allowing for expenses (including £5,200 “licence hire,” which can only have been the amount said to have been paid to the respondent for the use of her share of the licence).

13 The judge refused to accept that the appellant husband’s income was as low as £13,500 per annum gross. As he pointed out, that figure was not compatible with the value ascribed to the taxi licence by both parties. The judge’s conclusion was that, allowing for lesser hours worked by the appellant because of his age, his average weekly income was £450 or £1,950 per month.

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14 The appellant husband claimed that his expenses amounted to £1,037 per month. The judge considered some items claimed to be generous, including in particular the running costs of the taxi claimed at £209 per month. But in the end the judge did not in any way decide that the husband's figure was other than reasonable for him. Indeed for the purposes of his judgment, he accepted that figure of £1,037 which includes the rent of the husband's flat at La Linea in Spain.

15 Having made the necessary findings of fact, the judge concluded, reasonably, that the contribution of each party to the family unit, over a lengthy marriage was of equal value and that had to be reflected in the financial arrangements following the divorce. The low rental of the flat which the respondent wife retained with its contents, gave her an advantage which could be set off against the outstanding arrears of £13,100 in terms of unpaid maintenance.

16 The family car passed to the respondent wife, which was balanced by the taxi van retained by the appellant husband. That left for consideration the taxi licence and the question of maintenance. The judge chose to deal first with the taxi licence. Counsel for the appellant husband contended that its rental value was £100 to £150 per week. The judge did not accept that. He pointed out that it was inconsistent with the figure of £5,200 for licence hire which appeared on the tax return.

17 The appellant could not hire the half of the licence he owned so, in that income and expenditure account, he was ascribing to the licence an overall rental value of £10,400 or £200 per week, assuming that the licence was owned in equal shares.

18 Furthermore, the figures contended for were, the judge pointed out, inconsistent with the capital value of the licence. They would not produce a realistic return on capital, so the judge concluded that a realistic rental value for the licence was £200 per week and that the respondent wife was therefore entitled to derive a rental income of £100 per week or £433.33 per month from her interest in the licence.

19 It is worth noting that £200 per week as the rental value for the licence is now a figure which is accepted by the appellant husband's counsel in putting forward figures as to the assets which this couple would have had on retirement if the marriage had survived.

20 The judge then turned to the question of maintenance. If the appellant, as the judge found, earned £1,950 per month and his expenses were as he claimed, £1,037 per month, even after paying £433.33 by way of taxi licence rental to his wife, he would be left with £479. His counsel argued that there should be no order for maintenance. The judge accepted that the respondent's cohabitee had been maintaining her, but, as he said, that did not extinguish the right to maintenance. It was a circumstance to

be taken into consideration together with the available income, the expenses, the length of the marriage, the respondent wife's disadvantage in the labour market, were she to have to enter it, and the apparent stability of her new relationship.

21 Against that background, the judge ordered that the appellant pay £150 per month to the respondent until her death or re-marriage, or until he ceased to be in gainful employment, at which point the sale of the taxi licence would have to be considered. We are told today that the order for payment of maintenance made by the judge has not been complied with.

22 So the formal order dealt in para. 1 with the transfer of the matrimonial home and in para. 2 with maintenance. Paragraph 3 is declaratory of the equal ownership of the taxi licence which the judge found to exist. It requires the appellant to do what is necessary to give effect to that and to prevent sale without the consent of the respondent wife. Paragraph 4 deals with the payment of taxi licence rental. Paragraph 5 deals with what is to happen when the licence is sold and the remaining paragraphs deal with matters not germane for the purposes of this appeal.

23 In the notice of appeal dated March 17th, 2006, the appellant husband appeals against such part of the decision as decides that the respondent is entitled to a 50% interest in the taxi licence. That is perhaps a somewhat surprising stand to take because as I have indicated it seems to have been common ground below that the respondent had been a joint owner of the taxi licence for a decade. In his grounds of appeal, the parts of the decision challenged are said to be (a) that the interest of the parties in the taxi licence is of 50% each; and (b) that the petitioner is entitled to derive a rental income of £100 per week, that is £433.33 per month, in respect of her interest in the licence.

24 It is said that the judge should have reduced the respondent's interest in the taxi licence had he properly applied s.32(1) of the Matrimonial Causes Ordinance and current principles of common law. Noticeably, there is no challenge to the order for maintenance and there is no respondent's notice.

25 As to the law, Ms. Balestrino, on behalf of the appellant, invites our attention to a number of matters. First there is criticism of the judge for not, it is said, properly applying s.32(1). It is therefore worth setting out the material parts of that provision. They read as follows:

“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 . . . and, if so, in what manner, to have regard to all the circumstances of the case, including the following matters, that is to say—

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- (a) the income, earning capacity, property and other financial resources which each of the parties of 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 break down 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 would lose the chance of acquiring—

and so to exercise those powers as to place the parties, so far as is practicable and, having a 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.”

26 As to the application of the principles there set out, our attention has been invited to *White v. White* (5), where the available assets far exceeded the wife’s needs. In that case, Lord Nicholls said ([2001] 1 All E.R. at 9):

“Sometimes, having carried out the statutory exercise, the judge’s conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge’s decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if and to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the Court to focus on the need to ensure the absence of discrimination.”

27 The decision in *White* was applied by the Court of Appeal in *Cowan*

v. *Cowan* (2) ([2001] 2 FLR 331), which was, like *White*, a big money case, and, for present purposes, I do not find it necessary to cite from the judgment of Thorpe, L.J. in that case.

28 In the present case, there are two particular features which are relied upon by the appellant husband. First, that the respondent wife is supported by her cohabitee and, secondly, that the appellant husband has nurtured his taxi business to such an extent as to amount to a special contribution to the available assets. Some help in relation to those two particular features can be derived from two authorities. In *Fleming v. Fleming* (3), Thorpe, L.J. referred to the earlier case of *Atkinson v. Atkinson* (1), dealing with the impact of cohabitation, and said ([2004] 1 FLR 667, at para. 9):

“The judgment of Mr. Justice Waterhouse on the point of principle is broadly expressed. His conclusion that cohabitation is not to be equated with marriage remains the same today as it was then. Equally it seems to me that the direction that the court, in assessing the impact of cohabitation, should have regard to the overall circumstances, including financial consequences, remains the proper course to be followed.”

29 In *Miller v. Miller* (4), Baroness Hale dealt with the issue of contributions and said ([2006] 3 All E.R. 1, at para. 146): “In my view the question of contributions should be approached in much the same way as conduct,” and a little later she said (*ibid.*):

“Section 25(2)(f) of the 1973 Act [which mirrors the provision of the Gibraltar Ordinance] does *not* refer to the contributions which each has made to the parties’ *accumulated wealth*, but to the contribution that they have made (and will continue to make) to the *welfare of the family*. Each should be seen as doing their best in their own sphere. Only if there is such a disparity in their respective contributions to the *welfare of the family* that it would be inequitable to disregard it, should this be taken into account in determining their shares.”

30 In her skeleton argument, Ms. Balestrino accepts that the object of the court must be to achieve fairness and for my part I agree. In this case, the principles to be applied are not really in issue. What is in issue is the way in which the judge dealt with the facts and applied those principles to the known facts.

31 As to the family assets other than the taxi licence, it is said that the judge failed to recognize, or recognize sufficiently, first, that the respondent wife kept the family car. But he did recognize that, and set against it the vehicle retained by the appellant husband. Secondly, it is said that the respondent wife was able to retain the family home with its

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advantageous rental and its contents, whereas the appellant had to pay the rent of a flat in La Linea and travel backwards and forwards to work. But again the judge recognized the rental advantage and used that particular advantage to eliminate the £13,100 owed by the appellant husband for arrears of maintenance.

32 Furthermore, the appellant's own rental was properly reflected in his claim for expenses, for which the judge made allowance. In fact it appears that in time the appellant might himself be able to get a Gibraltar Government tenancy if he were to apply for one. That appears as part of the argument in his counsel's skeleton.

33 Next, it is said that the judge failed to take into account the money inherited by the respondent's wife from her mother. The appellant husband claimed originally that she inherited £15,000. It seems that the judge was told that she had not inherited anything, but it is now conceded that in fact there was at the time of the hearing a total of £7,000 in two accounts, one in the form of a bond, and the other in the form of a current account. Both accounts were in the names of the respondent wife and her mother. And in so far as there was originally some extra money in those accounts at the time of the mother's death, the wife says that she spent that money on funeral expenses, and on other expenses which she had to pay, but which she was not in a position to pay because the appellant husband had not been complying with the order for maintenance.

34 She also points out that the husband did retain a sum of £9,000 at the time of the separation. We are told today that that was a sum of money which he had been paid as a result of a personal injuries action, and that he used £6,000 to discharge the money owing on the car which was passed to the respondent wife at the time of separation. That left him with a balance of £3,000, which he retained. It seems to me that at the end of the day, those financial matters could be said to have broadly cancelled each other out, and even if the judge had known as much as we now know, it would not have disturbed the conclusion at which he arrived.

35 I turn therefore to the taxi licence. It was a family asset which had been in joint names since 1996 and the judge was plainly, as it seems to me, entitled to treat it as jointly owned. That was a presumption to be derived from what was known about it and which was supported to some extent by the information given by the husband to the Inland Revenue.

36 As to the appellant husband's earnings, it is said that the judge failed to recognize that the taxi earnings fluctuate with the seasons; that taxies face competition from buses, that because Nature Reserve fees have increased tourists are less willing to pay, that periodically the taxi operators have to work the less profitable city service, and that the number of taxi stands is limited.

37 Also it is pointed out that the appellant is getting older and there is evidence, in the form of a brief medical report, that he suffers from a bad back. It is his contention that he can only earn £200 per week at the present time, but, as it seems to me, the judge had good reason not to accept that level of earnings. For the reason he gave, which related to the capital value of the licence, the judge concluded that the appellant, even with reduced hours, had an average weekly earned income, and therefore one which reflected seasonal variations, of £450 or £1,950 per month. That conclusion is still to my mind unassailable.

38 Turning now to the appellant's expenses, the judge, it is said, failed to have regard to the need to pay Social Insurance Contributions and tax. We are told that the Social Insurance Contribution is £22.98 per week, and as to tax we have no evidence that any tax was ever in fact paid. The fact is that the judge gave full weight to the actual expenses claimed by the appellant husband at the time he appeared before him.

39 It is also said that the judge made no provision for the need that the husband had to provide for his pension (but he will obtain a state pension in due course), and will have his share of the sale or rental value of the taxi licence when he ceases to operate it himself. He may of course take time off and he may have to do so because of illness or because his vehicle needs attention. But the inherent riskiness of the business is all, of necessity, a part of the assessment the judge had to make when arriving at the average earnings of the appellant husband. If he has improved his taxi business since the parties have separated, that cannot be treated as a special contribution, for the reasons explained by Baroness Hale in *Miller v. Miller* (4) in the passages which I have quoted.

40 The judge considered the detail of the expenses given by the respondent and he found them, as I have said, to be reasonable. She lives with a cohabitee who has a good salary and has the prospect of a lump sum of £113,000 on retirement. Forty per cent of that sum will go, by order of the Supreme Court, to his ex-wife. The judge made full allowance for that. The cohabitee pays half of the expenses and enables the respondent wife to enjoy benefits she would not otherwise be able to enjoy.

41 There is always some uncertainty about whether that type of relationship will last, although it appears at the moment to be entirely stable. Before us, counsel on behalf of the appellant husband drew attention to the residual earning capacity of the respondent wife. There must be some nominal residual earning capacity, but she is 54 years of age and has not worked since she was married, some 36 years ago.

42 On the information before him, it seems to me that the judge was plainly entitled to deal with the matter as he did. As the respondent wife

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points out, the matter can be tested by approaching it in a completely different way. If the appellant husband had been left to exploit the taxi licence without paying any rental fee, the judge would have been bound to take a different approach to the question of maintenance. Starting with the earnings of the husband of £1,950 per month, he would have perhaps deducted the husband's claimed expenses of £1,037, although he considered that sum to be high. That would have left the husband with a total of £913. Out of that sum, the respondent wife would be entitled to expect that the husband would provide for the 50% share of her expenses not paid by her cohabitee, namely, £600. That would leave £313 spare and no doubt the respondent wife would seek a share of that. Plainly, she would get by way of maintenance, as I see it, at least £583.33 per month, which is the total which she is now entitled to receive from a combination of the licence fee and the maintenance.

43 I would therefore dismiss the appeal.

44 **STAUGHTON, P.** concurred.

45 **STUART-SMITH, J.A.:** I agree and I only have a few words to add on one matter.

46 Ms. Balestrino on behalf of the appellant has urged that the value of the taxi licence is subject to the risk, to which my Lord has drawn attention, of increased competition, further taxis coming into use on the Rock and matters of that sort, together with the increasing age of the husband, to the possibility of his increasing ill-health and inability to work for long hours, as he has previously done.

47 If that risk materializes, then it may well be that his ability to pay the £400 plus a month as rental for the hire of the taxi licence from his wife, will be reduced. Should that occur, the husband can come back to the court in the light of the changed circumstances; but, if he were to do so, it would plainly be necessary for him to establish with a great deal of more accuracy what his earnings are and to demonstrate that they have deteriorated from the figure which the learned judge took.

48 That is all I wish to add, otherwise I entirely agree with the judgment of my Lord.

Appeal dismissed.