

*Judgment Book*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FAMILY DIVISION

SUIT NO. F.2001/R-055

BETWEEN CAROL FAY REID PETITIONER

A N D CLINTON REXFORD REID RESPONDENT

Mrs. Pamela Benka-Coker, Q.C. instructed by Mrs. Debra McDonald for the Petitioner

Mr. Gordon Steer instructed by Chambers, Bunny and Steer for the Respondent

**Heard: 9<sup>th</sup>, 23<sup>rd</sup> October & 14<sup>th</sup> November 2003**

**Mangatal J. (Ag.)**

1. Carol Reid and Clinton Reid, married nearly twenty-three (23) years ago. They have two (2) daughters, both of whom are students. The elder, a 23 year old is at University and the younger, a 17 year old, attends High School. The marriage deteriorated and on 3<sup>rd</sup> October 2002, the wife's petition for Dissolution of Marriage was granted. The Decree Nisi has not yet been made absolute. The wife now applies for an order restraining the husband from entering or remaining in the wife's place of residence at number 24 Lejune Avenue, Keystone, Spanish Town, in the Parish of Saint Catherine.

2. The wife lives in the home with the two daughters. The premises, which was the matrimonial home, is registered in the names of the husband and wife as joint tenants.

3. The Court's jurisdiction to grant the order sought is set out in Section 10 of the Matrimonial Causes Act. That section so far as is material reads:

“(1) Without prejudice to any other powers of the Court, the Court may, upon application made by either party to the marriage whether or not an application has been made by either party for any other relief under this Act, grant an injunction or other order, as the case maybe:

(a) for the personal protection of a party to the marriage or of any relevant child;

(b) restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides, or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or which is the location of the premises in which the other party to the marriage resides;

(c) restraining a party to the marriage from entering the place of work of the other party to the marriage or restraining a party to the marriage from entering the place of work or the place of education of any relevant child;

(d) in relation to the property of a party to the marriage;

(e) relating to the use or occupancy of the matrimonial home.

(2) In exercising its powers under subsection (1), the Court may make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights.”

4. The section does not provide much guidance as to the basis on which orders such as the order sought here, should be granted and is silent as to the criteria necessary to qualify for the grant of relief. The order which the wife seeks is, however, commonly referred to as an ouster order and the case law suggests that the court's jurisdiction must be exercised with great care.

5. I must therefore examine the section and the authorities to see what principles can be extracted to guide the Court in dealing with this case.

6. Counsel for the wife cited the cases of **Phillips v. Phillips** [1973] 2 ALLER 423, & **Bassett v. Bassett** [1975] 1 ALLER 513, while Counsel for the husband cited the cases of **Richards v. Richards** [1983] 2 ALL ER 807, and **Wiseman v. Simpson** [1988] 1 W.L.R 35. These cases turn on the interpretation of English Statutes and provisions. The wording of some of the provisions discussed differs from our Section 10.
7. The following principles can be gleaned from the authorities:-
- (a) The Court should make such order as is just and reasonable.
  - (b) The Court should have regard to the conduct of the spouses in relation to each other and otherwise.
  - (c) The Court should have regard to the spouses' respective needs and financial resources,
  - (d) The Court should have regard to the needs of any children and to all the circumstances of the case.
  - (e) The question of the needs of the children, unlike the situation involving the legal custody or upbringing of the minor is not the first and paramount consideration, but it is a factor to be taken into account and may prevail in any given case where it is just and reasonable that it should.

- (f) The Court should consider the balance of hardship likely to be caused by the making of such an order against the hardship likely to be caused by refusing it.
- (g) The Court's duty is to weigh all the conflicting interests and to have regard to the needs of all who are affected.
- (h) The Court should exercise great care when making ouster orders, particularly where the party sought to be excluded is lawfully entitled to be at the home and should only make such an order, where it is imperative and necessary. This would include the fact that the conditions in the home may have become intolerable for the wife and any children of the marriage to continue to share the accommodation with the husband. An order will be granted where it is necessary for the protection of the health, physical or mental of the wife or child.

8. One of the main issues in this case is whether or not the husband does live in the premises at 24 Lejune Avenue. The wife says that the husband no longer lives there; the husband says that he continues to live there.

9. There is also an issue whether the husband shouts at the wife, verbally abuses her or threatens her. The wife says he has a bad temper and

has threatened her and she fears physical abuse. She says that the husband is the holder of a licensed firearm. The husband on the other hand says that he does not become angry and shout at the wife or verbally abuse her. She and the children are not threatened by him and he does not have a dreadful temper. He says that in fact it is the wife who is abusive and hostile.

10. Having reviewed the four Affidavits filed and the cross-examination of the wife and husband, I make the following findings:-

(a) The husband is not living in the home and has not been living in the home from sometime in the year 2000. Whilst there are some discrepancies in the wife's evidence, and with her evidence and that of the elder daughter in respect of the date from which the husband ceased residing at the home, I accept that the husband no longer resides at the home and has not done so for sometime. The fact that he washes his clothes at his veterinary clinic at 92 Brunswick Avenue, Spanish Town, dresses at the clinic sometimes, and does not eat at 24 Lejune Avenue tend to support the wife's case that he does not live there. The wife says that he moved all his clothes out of the home in October 2000. The

husband concedes that he moved some out, but, he says, he did not remove all.

(b) The husband has other accommodation available to him at least at the clinic at 92 Brunswick Avenue, which seems to have sufficient room and is set up in such a way that the husband would not be substantially discommoded by living there. The husband has not in any event said that he cannot afford alternative accommodation over and above the accommodation at the clinic.

(c) It is clear that the relationship between the parties is very bad. It is not an amicable one where the parties readily continue to live together until the complete dissolution of the marriage and division of property interests take place. I accept that they fight and argue. During the cross-examination, I had the opportunity of observing and seeing the wife and husband in the close quarters that hearings in chambers yield. The husband's demeanor, countenance and body language in my view suggested some amount of hostility towards the wife. I accept the elder daughter's evidence that it is stressful when her father visits and that there is hostility emanating from him towards her as well.

(d) The husband has not denied that he is the holder of a licensed firearm. Whilst it is true that the wife has not, as Mr. Steer submits, given details of the threats of physical violence, I find it quite credible that the husband has threatened her. It would appear that the husband's odd comings and goings, and as described in paragraph 4 of the wife's supplemental Affidavit, the husband's "inappropriate visits" has been going on for some time, at least a year. However, I find it reasonable that the wife should fear an escalation of such visits and intolerable behaviour and apprehend violence if she should, as she has indicated in paragraph 10 of her Affidavit that she intends to do, revive the law suit regarding the matrimonial property.

(e) Orders can be made irrespective of the ownership of the property. However, whereas in England, the Courts have the power to alter interests between husband and wife, in Jamaica, the Courts have the power only to declare the respective interests. Although the parties are registered as joint tenants, the husband claims that he purchased 24 Lejune Avenue alone and had the wife's name placed on the Certificate of Title. The question of the ultimate beneficial

ownership of the property does not affect the Court's power to make the order now, prior to a determination of those issues.

(f) I accept that 24 Lejune Avenue is the place where the two (2) daughters make their home with the wife. Whilst I appreciate that the welfare of the children, one of whom is under 18, is not the paramount consideration in respect of an application such as this, it is a consideration to be looked at along with all the other circumstances of the case.

(g) I accept that the husband's behaviour when taken as a whole is stressful, intolerable and would be a source of severe mental strain to the wife and children. For example, the husband's unpredictable and irregular visits at odd hours, his shouting of obscenities at the Claimant in the presence of the daughters, his videotaping of the contents of the house and his threats of physical violence are matters which must impact on the Court's decision.

11. Mr. Steer submitted to me that uncomfortableness, invasion of privacy and tension are not enough to properly ground this type of application. It seems to me that it will often be a question of degree. In any event, I disagree that factually, this is such a case of mere uncomfortableness, invasion of privacy or tension. I also accept the

words of Lloyd L. J. in **Burke v. Burke** (unreported), 24 November 1986; a decision of the English Court of Appeal, referred to at page 48 of **Wiseman v. Simpson** where it was stated "It (the ouster order) must not be allowed to become a routine stepping stone on the road to divorce on the ground that the marriage has already broken down and that the atmosphere in the matrimonial home is one of tension."

12. In this case, it is the totality of the circumstances which has persuaded me that this is a fit and proper case for making the order sought. Given my finding that the husband does not in fact live at 24 Lejune Avenue, and that there is no evidence that he cannot find or afford alternative accommodation, I am also of the view that less hardship would be caused by the making of the order than by its refusal. The fact that the husband no longer resides at the matrimonial home is a special feature of this case.
13. It is ordered that the Respondent be restrained from entering or remaining in the wife's place of residence at number 24 Lejune Avenue, Keystone, Spanish Town, in the parish of Saint Catherine until further order. The wife is to file a relisted application in the matrimonial property matter, Suit No. E 290 of 2002 by the 8<sup>th</sup> December 2003.