

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN FAMILY DIVISION

SUIT NO. F W135 of 1997

BETWEEN	ARLEEN TOYLOY-WILMOT	PLAINTIFF
A N D	DONOVAN FITZGERALD WILMOT	DEFENDANT

Charles Piper instructed by Piper
and Samuda for Plaintiff.

Miss Nancy Anderson instructed by
Crafton Miller & Co. for defendant.

Heard: November 19 and December 1, 1997

HARRIS, J.

JUDGMENT

By an originating summons issued on the 3rd November,
1997 the plaintiff sought the following relief:-

1. The Defendant, DONOVAN FITZGERALD WILMOT,
be restrained from striking or otherwise
abusing the Plaintiff and from entering
or remaining at the matrimonial home,
being premises known as Lot #1, Inswood
Drive, Kingston 9 in the parish of Saint
Andrew.
2. The Defendant, DONOVAN FITZGERALD WILMOT,
be restrained from selling, transferring
or otherwise dealing with the legal estate
in premises known as Lot #1, Inswood Drive,
Kingston 9 in the parish of Saint Andrew
being the All that parcel of land registred
at Volume 1156 Folio 128 of the Register
Book of Titles until the youngest of the
children of the marriage shall have attained
the age of twenty-one (21) years or, if any
of them pursue teritary education, until
they cease to pursue such studies.

The parties were married on the 28th March, 1990. There are three relevant children, ranging in ages 12 to 7 years. They reside in a 3 bedroom house at Lot 1 Innswood Drive, St. Andrew registered at Volume 1156 Folio 128, bought by the defendant in 1979, There is no controversy that the parties are satisfied that their marriage has broken down irretrievably and there is no hope of reconciliation.

It is the evidence of the plaintiff that the relationship between the defendant and herself began to deteriorate in or about May 1995 as he frequently smoked marijuana, has been aggressive and physically abusive towards her, threatened to harm her, has given the children unsavoury reports about her and his behaviour towards her has negatively affected the children.

She further stated that in July 1997 the defendant requested that they resolve their differences. Thereafter they lived harmoniously until October 1997 when he requested her to collect him from the airport and while they were travelling home an argument developed between them over a caveat she had placed on the property. He struck her across the face and jumped from the car. She lost control of car but quickly regained her composure, drove to a friend's house where she received assistance.

Subsequent to this, he removed her possessions from the matrimonial bedroom, locked the door and left the house. On two occasions he left the house unsecured, as he failed to close a padlock to a gate to which entrance to the house is gained.

The defendant refuted that he had ever been physically abusive to the plaintiff or had ever threatened to do her harm. He stated that she is boisterous, she resorts to use of expletives, and gives negative reports to the children

about him. He admitted that they often quarrelled.

He denied striking her during the incident which took place on their journey back from the airport. He admitted that discussions took place between them when she used indecent language to him. He placed his hand over her mouth with a view to restraining her from the continued use of the expletives and told her to stop the car. She obeyed and he continued his journey home on foot.

I will first address the relief sought by the plaintiff under the paragraph 1 of the summons. In the present case, the questions as to whether restraint should be imposed on the defendant from abusing the plaintiff and whether he should be permitted to remain in the matrimonial home are not inextricably bound together but for convenience, consideration will be given to both simultaneously.

In considering whether a spouse should be expelled from the matrimonial home, it is eminently desirable that reference be made to the approach by adopted by Cummings Bruce, J in *Bassett v. Bassett* [1975] 1 All ER 520 when he declared:-

"In my view, the approach of the court to these cases of application to expel a spouse from the matrimonial home should be strictly practical, having regard to the realities of family life. Where a mother is looking after a child or children, it is necessary to examine with the utmost care whether it is really practicable for the husband and wife to continue in the matrimonial home."

In *Walker v Walker* [1978] 3 ALL ER 143, Geoffrey Lane L. J used the following approach, when he stated:

"What seems to me to be the question which the court has to decide is this: what is, in all the circumstances of the case, fair, just and reasonable and, if it is fair, just and reasonable that the husband should be excluded from the matrimonial home, then that is what must happen. Before one can come to a conclusion, all the circumstances have to be regarded. First of all, the behaviour of the husband, the behaviour of the wife, the effect on the children if the husband stays there, the effect on the children if he does not, the husband's own personal

circumstances, the likelihood of injury to the wife or to the husband, their health, either physical or mental. All these things must be taken into account."

It is the contention of the wife that her husband had been physically abusive and aggressive towards her, had threatened to do her harm, whereby on occasions she had to make reports to the police. The husband admitted that the police had been often called by her but only to make trivial reports. He had repeatedly stated that he wanted the children and herself out of the house. She also averred that he often smokes marijuana, which has not been refuted by him. Marijuana is a prohibited drug. Judicial notice can be taken of the fact that some medical authority has established that habitual use of the drug may lead to erratic, irrational and violent behaviour.

I accept the wife's evidence that there has been a history of physical abuse since May 1995 which culminated in an incident in October of this year when he struck her in her face while she was driving him home from the airport. The report of this incident has clearly been corroborated by the evidence of Marlene Daley who stated that on 18th October, 1997 the plaintiff came to her house in a distressed condition with obvious signs of being struck in the face and spoke to her. The defendant arrived shortly after the plaintiff and when she spoke to him about his abusive behaviour towards his wife he told her he had acted on the spur of the moment. It is reasonable to assume that this reprehensible act of striking the plaintiff while she was driving, could have caused the car to crash, resulting in death or serious injury to her.

The conduct of the defendant must give rise to great anxiety on the part of the plaintiff as to her safety, not only from the threats of violence or violence inflicted on her by the possibility of violence from intruders invading

her home when it is left insecured. On two occasions he left the padlock to the house unlocked thus endangering the lives of all members of the family.

There is cogent evidence that there has been constant friction between the parties. The husband admitted that frequent quarrels occurred. He says his wife is boisterous and uses indecent language to him frequently. This, coupled with the fact that he repeatedly strikes her and issues threats to her in the presence of the children must certainly have a traumatic effect on these children. The children are of tender years. Their experience of perpetual discord and disharmony between the parents does not augur well for their well being. There is evidence that whenever the defendants embarks on course of aggressiveness and violent behaviour the children are affected and in particular the youngest child becomes very distraught. Continued exposure of the children to this unhealthy atmosphere in the home could not be in their best interest.

The defendant declares that he loves the children and expresses a wish to be with them. He asserts that they are not being properly supervised or cared by the plaintiff and indicates a desire to be involved in their general care and development and in particular; stated that it is necessary for him to assist one child who is due to sit common entrance examination early next year with homework and preparations for the examination.

The foregoing statements of the defendant, in my opinion lack sincerity. There is evidence which I accept, that the defendant is often absent from home and at times for extended periods. He is often late in getting home and fails to spend time with his family. He had often expressed the desire that they leave the house. This clearly demonstrates that this is not a man who genuinely seeks to remain with his family.

The house occupied by the parties comprises three bedrooms, an open plan living, dining and television room; a kitchen, a wash area and a bathroom between two rooms which are used by the children; the other bedroom is shared by the plaintiff and defendant. The defendant states that the television room is enclosed and could be utilised as an additional bedroom. The plaintiff has however stated that the room is not fully enclosed and her experience has shown that it cannot provide adequate accommodation as a bedroom. By an interim order of this court made on the 5th November, 1997 the defendant has been living away from the matrimonial home. He declared that he has since been living at his office and this has proved embarrassing and inconvenient to him. There is evidence however, that he resides in an apartment and not at his office. It is clear that there would be no hardship on his part to obtain alternate accommodation and will therefore not be made homeless if order of restraint is made.

However, assuming that I acceded to his request to allow him to remain in the matrimonial home, the stark reality of this situation is that the design of the house does not lend itself to the parties living within the confines of the house without coming into direct contact with each other. In light of the history of the relationship and in all the circumstances, the close proximity within which they would have to live and operate renders it imprudent to permit the defendant to remain in the matrimonial home.

The matters complained of by the plaintiff are serious. The conduct of the defendant extends beyond that which a wife and children ought reasonably, in all the circumstances to be expected to tolerate and endure. There is a distinct possibility that if the defendant remains unrestrained serious injury to the plaintiff will result. Further, the behaviour and conduct of the defendant has had a negative impact on the children. Taking all the factors into consideration the practicality of the situation warrants the defendant

expulsion from the matrimonial home.

I will now refer to the relief contained in second paragraph of the summons. The plaintiff, by virtue of an Originating summons issued in this suit has claimed an interest in the matrimonial home by way of certain contributions purportedly made by her. The house was purchased by the defendant in 1979, several years before the parties married. He denies she had made any contributions as she has alleged.

The plaintiff stated that the defendant brought a real estate agent to view the house and had stated an intention to sell it. The husband's explanation for the presence of the real estate agent at the house was to obtain an informal valuation with a view to his exploring the possibility of obtaining a mortgage to assist his wife and himself financially.

I do not accept that the object of the real estate agents's visit was for the purpose of getting an informal valuation for the reason pronounced by him. Taking in account the fact that the parties have acknowledged that there has been a breakdown in their marriage and the general conduct of the defendant, the inference is that it is likely that he proposes to sell the house and is in fact making arrangements to do so.

Although a caveat has been registered against the property the legal estate in it is therein vested in the defendant alone. He is in possession of the document of title. He can create a legal interest in the property notwithstanding the existence of the caveat. It follows therefore, that if the property, the subject matter of the suit is transferred, or otherwise disposed of by him, before trial, then this would prove disadvantageous to the plaintiff. In view of this, the status quo ought to be preserved until trial and defendant ought to be restrained from taking any steps with regard to the disposition of the property before the matter is tried.

It is ordered that the defendant be restrained from striking or abusing or otherwise molesting the plaintiff and from entering or remaining at the matrimonial home being premises known as Lot 1 Innswood Drive in the parish of Saint Andrew, until the trial of this action.

It is further ordered that the defendant be restrained from selling, transferring or otherwise dealing with the legal estate in the premises known as Lot 1 Innswood Drive, in the parish of Saint Andrew registered at Volume 1156 Folio 126 until trial of this action.

Costs to the plaintiff to be agreed or taxed.