Ref:	**Master56**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**12/3/08**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

Anne Constance Eladhame

Petitioner;

and

Saad Alla Eladhame

Respondent.

Master Bell

[1] In this application the petitioner seeks Ancillary Relief pursuant to a summons dated 29 November 2006.

[2] At the hearing the petitioner was represented by Mr Donaghy. Affidavits were sworn by the petitioner on 29 November 2006 and 16 April 2007 for the purpose of the proceedings. The petitioner gave sworn oral evidence during which she adopted these affidavits as her evidence. Mr Donaghy also advanced his client's case by means of oral submissions.

[3] The respondent was represented at the hearing by Miss Lavery. An affidavit was sworn by the respondent on 27 February 2007 for the purpose of the proceedings. The respondent gave sworn oral evidence during which he adopted his affidavit as his evidence. Miss Lavery also advanced her client's case by means of oral submissions.

[4] The principal asset which was the subject of the proceedings was the former matrimonial home in Belfast. The agreed current valuation of the property is £150,000 with an equity of approximately £121,000. There is also

an Endowment Policy obtained as part of the parties mortgage arrangements. The most recent surrender valuation provided to me was a value of £4693.17.

[5] The issue between the parties was the appropriate proportion of the proceeds of the two assets that each should receive.

THE HISTORY OF THE MARRIAGE

[6] The petitioner wife is aged 47 and the respondent husband is aged 37. The parties married in a traditional ceremony in Egypt on 8 August 1998 having met while the petitioner had previously been there on holiday in 1996. The relationship subsequently deteriorated, the petitioner coming to the belief that the respondent had used the marriage solely as a means of obtaining British citizenship and financial gain. The parties separated in May 2004 and a Decree Nisi was granted on 31 May 2006. There are no children of the marriage.

[7] Following their marriage the parties travelled to Northern Ireland. They initially resided in a flat in Belfast which the petitioner had been renting from the Northern Ireland Housing Executive. However this flat was due to be demolished. Because the petitioner had been a Housing Executive tenant since February 1998, she was offered, and accepted, another rental property in Belfast. The parties moved into this property, the matrimonial home, in July 1999 and subsequently bought it for £18,000 in February 2000. When the property was purchased a tenancy discount of £7,800 was obtained. In order to buy the property, the parties obtained a mortgage of £25,000. Money over and above the purchase price was used to redecorate the property.

PETITIONER'S SUBMISSIONS

[8] The petitioner recognises, following financial investigations, that she will not be able to buy out the interest in the property held by the respondent. Hence the house will have to be sold.

[9] The petitioner argues that the approach of Master Redpath in the decision of *D v D* [2006] Master 24 where he applied equitable accounting principles was ill-founded. Instead she argued that I should rely on the decision of *Tee v Tee and Hillman* [1999] 2 FLR 613.

[10] The petitioner also argues that I should take account of the decision in *Evans v Hayward* [1995] 2 FLR 511 ND and attribute to her the discount gained as a result of her tenancy.

[11] The petitioner also referred me to my decision in *ED v JD* [2007] Master 48 and submitted that the instant case, like *ED v JD*, was one where the

equality principle could be departed from if one party had made a greater contribution during the marriage.

[12] The petitioner argues that the appropriate split of the equity in the property would be two-thirds to her and one-third to the respondent. She argues that this is an appropriate decision in the light of the following factors :

(i) The fact that this was a medium term childless marriage meant there was "a gravitational pull towards equality". Nevertheless there were factors which meant that equality could be departed from.
(ii) The discount granted by the Northern Ireland Housing Executive due to her previous tenancy record ;
(iii) The petitioner's contributions both during and subsequent to the separation. In respect of the latter, the respondent gave evidence that she had undertaken some cosmetic work around the house, including installing a new bathroom suite, new internal doors and retiling the kitchen.

RESPONDENT'S SUBMISSIONS

[13] The respondent submitted that this was a case of a marriage of almost six years where there were no children.

[14] A significant factor to be taken into account was that the respondent had been paying £330 per month in terms of rent, a sum which was greater than that paid by the petitioner in respect of the mortgage and endowment for the former matrimonial home.

[15] The respondent therefore sought a principle of equality to be applied and sought a 50% - 50% split of the marital assets as being appropriate.

CONFLICTS OF EVIDENCE

[16] Counsel drew my attention to conflicts of evidence between the parties on a number of financial issues. The first of these was in relation to the respective contributions towards the outgoings. The petitioner gave evidence that, when they lived in rented accommodation, the respondent did not pay his share of the rent. He paid £20 per week towards food and promised he would pay his share. This went on for 18 months. At this point they purchased the house together. Under cross examination she explained that she bought a house with the respondent, despite this conflict over finances, because she loved him and wanted to help him. She gave evidence that, once the house had been purchased, she discharged all mortgage payments. She stated that, while the respondent initially contributed approximately half the mortgage and rates payments, he refused to increase his contribution when interest rates increased and after the initial two year discount period had

expired. The respondent's evidence was that he paid 50% of all outgoings including mortgage payments, rates, endowments and food during the course of the entire marriage.

[17] The second conflict of evidence was in respect of money used to assist the respondent's family in Egypt. In her first affidavit, the petitioner stated that in or around June 2001 an additional £5,000 mortgage was obtained. She said that the respondent pressurised her to obtain these monies so that he could send money to his family in Egypt to rebuild their family home. She stated that she was very reluctant to obtain a further mortgage as they were under severe financial pressure at the time. However she ultimately agreed as she did not want to jeopardize the marriage. The respondent's evidence was that he took out a loan in the sum of £5,000 in his sole name. It was from this money, rather than from money obtained via a mortgage, that he contributed £2,750 to his family to assist them when they had lost their home.

[18] Thirdly, there was a conflict of evidence as to money spent by the respondent on flights to Egypt. The petitioner swore in her affidavit that the respondent would undertake trips to Egypt without having regard to their cost and the impact such expenditure had upon the couple's finances. The respondent swore that he visited his family in Egypt once a year. At no time did the petitioner finance such flights. The money used was from his sole account once his 50% of joint outgoings had been discharged.

[19] Fourthly, there was a conflict of evidence on the affidavit evidence in relation to what assistance the respondent received in terms of setting up a separate household once the parties had separated. The respondent swore in his affidavit that he left the matrimonial home with simply his clothes and that all household contents were retained by the petitioner. This was denied by the petitioner in her second affidavit who swore that she had purchased various items of electrical and kitchen equipment for the respondent in his new accommodation. The petitioner maintained this view during her oral evidence. When the respondent gave oral evidence he conceded that he had brought items with him to his new accommodation. These included a television, a digibox, a CD player, pots and pans, other items of kitchen equipment and cutlery. In cross-examination he accepted that his affidavit was incorrect and that his wife's evidence on this point was true. His explanation for this at first was that he did not think these items were "worth mentioning" and subsequently, under cross examination, that he did not think his wife "would class these as 'things' ".

THE ARTICLE 27 FACTORS

Financial needs of the child

[20] There are no children to be considered in this case and hence the principle that first consideration must be given to the welfare while a minor of any child of the family who has not obtained the age of 18 does not require to be taken into account.

Income and earning capacity

[21] The petitioner works as a cleaner. The respondent works as a barman. Each earns approximately £800-£900 per month. The petitioner was questioned as to whether she had financial assistance from a Mr Burns with whom she was in a relationship. Counsel for the respondent raised with her the matter of certain credits recorded on her bank statement. She explained these on the basis that she would occasionally assist family members with purchases and that she would then be reimbursed for these. I was not satisfied that she was receiving additional funds from any third party such as Mr Burns.

Financial needs, obligations and responsibilities of the parties

[22] Since their separation in 2004 the petitioner has been responsible for paying the mortgage. The respondent has been paying some £330 per month in rent. There was no evidence placed before me of unusual financial needs in respect of the parties.

The standard of living enjoyed by the family before the breakdown of the marriage

[23] Both parties enjoyed a modest standard of living prior to the breakdown of the marriage.

The age of each party to the marriage and the duration of the marriage

[24] As stated previously, the petitioner is aged 47 and the respondent is 37. The marriage lasted almost 6 years until the separation.

Any physical or mental disability by the parties of the marriage

[25] There was no evidence that either party suffered from any such disability.

The contribution made by each of the parties to the welfare of the family

[26] The evidence before me was that the contribution made by each of the parties to the welfare of the family was equal.

Conduct

[27] Counsel for both parties agreed that the issue of conduct did not arise for consideration in this case.

Value of any benefit which by reason of dissolution of the marriage a party will lose

[28] This factor also does not arise for consideration in this case.

Other matters taken into account

[29] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which do not fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. In this case, the petitioner invited me to take into account the fact that the Northern Ireland Housing Executive had allowed a discount on the purchase price of the matrimonial home based, she argued, on her previous tenancy. *Evans v Hayward* was a decision which occurred following the breakdown of a relationship between an unmarried couple and concerned the beneficial interest in the proceeds of sale of the property in which they had lived. The property had been owned by the council but purchased by the parties under a "right to buy" scheme. In that case the trial judge held that the plaintiff was credited with the discount on the price which was attributed to her previous occupation of the property. The respondent's appeal was dismissed by the Court of Appeal which held that the court was correct to take the discount into account when considering the respective financial contributions. I am persuaded on the authority of *Evans* (though I would have reached the same conclusion as a result of considering the matter from first principles) that a party who obtains a discount on the purchase of a property because of a previous tenancy in their name may be credited in ancillary relief proceedings with contributing a financial sum equal to the amount of the discount to the purchase of the property.

[30] In this case the petitioner had been a tenant of the Northern Ireland Housing Executive from February 1998 until February 2000 at which point she and the respondent jointly purchased the matrimonial home. (Although the parties were married in August 1998, the tenancy was not transferred into their joint names.) The purchase price was £18,000 after a discount of £7,800 had been allowed. This effectively represents a discount of 30% on the total price of the property.

[31] Mr Donaghy submitted that, in *D v D*, Master Redpath adopts an approach which utilises equitable accounting and constructive trust principles. He submitted that this was ill-founded and offered *Tee v Tee and Hellman* [1999] 2 FLR 612 as authority for his argument. In *Tee* the Court emphasised that the only pertinent statutory provisions were those contained in the Matrimonial Causes legislation and that they imposed a duty on the court to redistribute or divide capital in such a way as to reflect the statutory criteria and all the circumstances of the case. They thus overrode other statutory provisions or rules of law which had the very different objective of determining propriety interests generally between non-spouses or in spousal cases, where a third party to the marriage claims a propriety interest jointly with one or both of the spouses. However it is important to bear in mind Lord Steyn's much quoted remark in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 that "In law context is everything." In *Tee* the Court of Appeal was criticising a County Court judge for a "diversionary excursion" into the Trusts and Land Act. In *D v D* Master Redpath clearly observes that equitable accounting principles do not apply to property adjustment issues which come before the court in ancillary relief applications. He merely finds them helpful, but not determinative, in deciding how the shares of one or other parties to an application should be credited or discounted in the circumstances where one of the parties has continued to pay the mortgage on the matrimonial home and claims that this should result an entitlement to a greater share of the sale proceeds than would otherwise be the case. I therefore see no basis in *Tee* for concluding that the approach adopted by Master Redpath in *D v D* was incorrect.

CONCLUSION

[32] Article 27A of the Matrimonial Causes (NI) Order 1978 requires the court to consider whether it would be appropriate to exercise the powers afforded by Articles 25 and 26 in such a way that the financial obligations of each party towards the other would be terminated as soon after the grant of the Decree Nisi as the Court considers just and reasonable – the 'clean break' approach. In the words of Waite J. in *Tandy v Tandy* (unreported) 24 October 1986 'the legislative purpose… is to enable the parties to a failed marriage, whenever fairness allows, to go their separate ways without the running irritant of financial interdependence or dispute.' The use of the word 'appropriate' in Article 27A clearly grants the court a discretion as to whether or not or order a clean break. Duckworth expresses the view at paragraph B3[58] of 'Matrimonial Property Finance': -

> "Plainly, a clean break would be more 'appropriate' in some cases than in others. A young, childless wife will experience a fairly rapid termination of support; an older women on the

> other hand, stranded careerless in her 40's after bring up a family may incur greater sympathy."

The particular facts of each individual case must therefore be considered with a view to deciding the appropriateness of a clean break. In this case the parties are agreed that a clean break is appropriate.

[33] I turn now to the conflicts in evidence between the parties. In *Beddow v Cayzer* [2006] EWHC 557 (QB) Tugendhat J dealt with the issue of how conflicts of evidence between witnesses should be addressed. He did so by reference to the guidance given in the extra-judicial writing of Lord Bingham of Cornhill in a paper headed "The Judge as Juror: The Judicial Determination of Factual Issues" published in "The Business of Judging", Oxford 2000, where it was reprinted from Current Legal Problems, vol 38, 1985 p 1-27. Tugendhat J quoted the following extracts from Lord Bingham's paper :

> ". . . Faced with a conflict of evidence on an issue substantially effecting the outcome of an action, often knowing that a decision this way or that will have momentous consequences on the parties' lives or fortunes, how can and should the judge set about his task of resolving it ? How is he to resolve which witness is honest and which dishonest, which reliable and which unreliable? . . .
>
> The normal first step in resolving issues of primary fact is, I feel sure, to add to what is common ground between the parties (which the pleadings in the action should have identified, but often do not) such facts as are shown to be incontrovertible. In many cases, letters or minutes written well before there was any breath of dispute between the parties may throw a very clear light on their knowledge and intentions at a particular time. In other cases, evidence of tyre marks, debris or where vehicles ended up may be crucial. To attach importance to matters such as these, which are independent of human recollection, is so obvious and standard a practice, and in some cases so inevitable, that no prolonged discussion is called for. It is nonetheless worth bearing in mind, when vexatious conflicts of oral testimony arise, that these fall to be judged against the background not only of what the parties agree to have happened but also of what plainly did happen, even though the parties do not agree.
>
> The most compendious statement known to me of the judicial process involved in assessing the credibility of an oral witness is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at p 431. In this he touches on so many of the matters which I wish to mention that I may perhaps be forgiven for citing the relevant passage in full:
>
> > ''Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to

> be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'

Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue . . . . more often dishonest evidence is likely to be prompted by the hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties. The main tests needed to determine whether a witness is lying or not are, I think, the following, although their relative importance will vary widely form case to case:

(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;

(2) the internal consistency of the witness's evidence;

(3) consistency with what the witness has said or deposed on other occasions;

(4) the credit of the witness in relation to matters not germane to the litigation;

(5) the demeanour of the witness.

The first three of these tests may in general be regarded as giving a useful pointer to where the truth lies. If a witness's evidence conflicts with what is clearly shown to have occurred, or is internally self-contradictory, or conflicts with what the witness has previously said, it may usually be regarded as suspect. It may only be unreliable, and not dishonest, but the nature of the case may effectively rule out that possibility.

The fourth test is perhaps more arguable. . . ."

[34] In the instant case counsel urged me to assess the respective credibility of the parties in relation to the various areas where their evidence differed on financial matters. In respect of matters over which there were conflicts of evidence between the parties, I have reached the following conclusions. In relation to the amount of money spent by the respondent on flights to Egypt and in relation to in respect of money used to assist the respondent's family in Egypt, I conclude that it is not necessary to take account of this issue in the ancillary relief determination.

[35] Firstly, it is not relevant for the purpose of Article 27(2)(f) of the Matrimonial Causes (Northern Ireland) Order 1978. Duckworth's "Matrimonial Property and Finance" is clear at paragraph B3[44] that the equivalent provision in England and Wales is designed to allow the court to take into account a non-financial contribution by one party (more often a wife) and balance it against a financial contribution by the other (more often a husband). It is a matter of common experience that financial decisions are often the cause of marital conflict and there may well have been conflict during the marriage over these two matters. Article 27(2)(f) does not, however, provide a mechanism whereby any conflict on financial matters which was unresolved during the marriage may subsequently be resurrected as a new battleground.

[36] Secondly, it not appropriate to consider these two matters in the context of Article 27(2)(g) as conduct which is such that it would be inequitable to disregard it. (Indeed both counsel submitted that no such conduct was present.) In *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 Lord Nicholls observed that it was implicit in this provision that conduct outside this description was not conduct which should be taken into account. He had detected signs that courts were beginning to depart from the criterion

laid down by Parliament for the taking into account of conduct. He therefore emphasised the limited circumstances in which conduct should be taken into account in ancillary relief decisions :

> "In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the bases on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account."

[37] In relation to what assistance the respondent received in setting up a separate household once the parties had separated, I accept that the evidence given by the petitioner was true. The content of the affidavit sworn by the respondent on this matter was accepted by him as incorrect during his oral evidence. I did not find his explanations for the inaccuracy (that he did not think these items were "worth mentioning" and that he did not think his wife "would class these as 'things' ") persuasive. I have concluded that the respondent exaggerated his experience so as to place the petitioner in a bad light and deposed in his affidavit to a matter which he knew to be untrue. In reaching this conclusion I have been careful to take into account of the fact that English is not the respondent's mother tongue and any possibility that there may have been confusion in the respondent's mind caused by language difficulties.

[38] In respect of the conflict of evidence regarding the parties respective financial contributions towards the outgoings, I have applied the approach on resolving issues of fact and determining credibility set out in *Beddow v Cayzer*. I have in particular had regard to the fact that I have concluded that the respondent was untruthful in respect of the assistance he received setting up a new home. I have concluded that, on the balance of probabilities, it is the petitioner who is telling the truth regarding the parties respective financial contributions towards the outgoings.

[39] The principal issue which requires to be determined is in what proportion the proceeds of the two matrimonial assets should be shared between the parties. The starting point is that after a marriage of some duration, each party can reasonably expect to receive a half share. However a party's share may be increased up or down, but only on a strict application of the Article 27 criteria. On the facts presented to me, and in particular :

(i) The contribution by the petitioner of her tenancy discount ;
(ii) The fact that, during the period when the parties were residing together in the matrimonial home, the petitioner made a greater financial contribution to its acquisition ; and

(iii) The improvements she has made to the property since the respondent moved out

I conclude that it is appropriate to divide matrimonial assets in terms of 65% to the petitioner and 35% to the respondent.

[40] In *M v M* (Financial Provision: Evaluation of Assets) (2002) 33 Fam Law 509, McLaughlin J stated:

> "Where the division is not equal there should be clearly articulated reasons to justify it. That division will ultimately represent a percentage split of the assets and care should be exercised at that stage to carry out what I call a 'reverse check' for fairness. If the split is, for example, 66.66/33.3 it means that one party gets two thirds of the assets but double what the other party will receive. Likewise, if a 60/40 split occurs, the party with the larger portions gets 50% more than the other and at 55/45 one portion is 22% approximately larger than the other. Viewed in this perspective of the partner left with the smaller portion – the wife in the vast majority of cases – some of these division may be seen as the antithesis of fairness and I commend practitioners to look at any proposed split in this way as a useful double check."

[41] Applying the reverse check commended by McLaughlin J., I consider this to be a fair division of the assets in the light of a consideration of the Article 27 factors despite the departure from equality.

[42] I therefore order that the net proceeds of the sale of the matrimonial home and of the associated endowment policy be divided on the basis of 65% to the petitioner and 35% to the respondent.