

Neutral Citation No.: Master 66

Ref:

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

Delivered: **05/03/09**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

B

Petitioner;

and

B

Respondent.

Master Bell

[1] In this application the petitioner (to whom I shall refer, for ease of reference, as “the wife”) seeks Ancillary Relief pursuant to a summons dated 20 February 2007.

[2] At the hearing of this matter the wife was represented by Mr Toner QC instructed by Flynn & McGettrick solicitors. The wife gave oral evidence during which she adopted the contents of her affidavits, sworn on 26 November 2007 and 9 February 2007, as her evidence for the purpose of these proceedings. She similarly adopted her 27 September 2007 replies to a questionnaire and confirmed the factual accuracy of the core issues document submitted to the court on her behalf. Mr Toner also advanced his client’s case by means of oral submissions.

[3] The respondent (to whom I shall refer, for ease of reference, as “the husband”) did not appear at the hearing of this matter. The case had previously been listed for hearing in June 2008. On that day it transpired that the husband’s counsel was not available and the matter was adjourned. On the original handwritten court order in respect of the hearing on 5 September

2008 there is a note by Master Redpath that the solicitors for the husband "have come off record". The court file also contains a letter dated 9 July 2008 from Morrison and Broderick in which they state that they wish to advise the court that they had been informed by the husband that he no longer wished them to represent him. This is confirmed by a letter dated 14 August 2008 from the husband to the Matrimonial Office in which he states that he is no longer represented by Morrison and Broderick. At the next hearing on 10 October 2008 the husband, who is by profession a solicitor, appeared in person and represented himself. At this hearing matters relating to discovery were dealt with and the matter was adjourned to 28 November 2008. The court order in relation to the hearing on 10 October 2008 appears, in error, to have been sent to Morrison and Broderick who by then were no longer acting for the husband. However the husband had been present in court and therefore knew that the matter had been adjourned to 28 November 2008. At the hearing on 28 November 2008 the husband did not appear nor was he represented and the case was listed for a full hearing on 23 January 2009. Again, the court order made on 28 November 2008 appears to have been sent in error to Morrison and Broderick, the husband's former solicitors. However this did not disadvantage the husband since the wife's solicitors wrote to him by first class post on 3 December 2008, enclosing a copy of the court order made at the hearing on 28 November 2008, and informing him that the case was listed for hearing on 23 January 2009. Subsequently, on 20 January 2009, they wrote to him again by first class post reminding him of the hearing in a few days time and enclosing a copy of the core issues which had been prepared by Mr Toner. At the hearing on 23 January 2009 Mr Toner informed me that he had had the husband paged and had personally walked the three floors of the Royal Courts of Justice to see whether the husband was present. In particular, he had looked for the husband outside Master Redpath's Chambers since the previous hearing had been listed to be heard there. Mr Toner had satisfied himself that the husband had not appeared for the hearing. In the light of the history of the proceedings, I concluded that the husband was deliberately refusing to engage in the proceedings and, in the circumstances, it was appropriate to continue with the final hearing in the husband's absence. Mr Toner submitted that he was, of course, aware of the relevant professional obligations on him as a barrister and referred me to the decision of Stephens J. in *Boylan-Toomey v Boylan-Toomey* [2008] NIFam 15.

THE HISTORY OF THE MARRIAGE

[4] The parties were married on 5 July 1980. They separated in May 2003 and a Decree Nisi was granted on 15 November 2005. There are three daughters of the marriage : C aged 23 who is severely learning disabled and R aged 21, both of whom live with the wife, and V aged 16 who lives with the husband.

THE ASSETS

[5] The assets in this case are said to be follows ;

- (i) The former matrimonial home which was transferred into the sole name of the husband shortly after the parties separated.
- (ii) A house which was acquired post-separation by the wife for the sum of £140,000 and which was facilitated by a mortgage of £120,000 and a repayable loan of £10,000 from her brother. In September 2007 the property was valued at £275,000 with an equity of approximately £160,000.
- (iii) Three pension policies in the name of the husband (in respect of which there was no formal evidence called but which it was indicated in the core issues had a CETV of approximately £54,000).
- (iv) An HSS pension entitlement in the name of the wife with a CETV of £70,507.

[6] Assets which the parties previously owned included :

- (i) A boat which realised the sum of £11,000
- (ii) An endowment policy with a surrender value of £11,255.

WIFE'S SUBMISSIONS

[7] The wife declines to seek an order which would have the effect of forcing a sale of the former matrimonial property and therefore put V out of her home. The wife also declines to seek another often utilised alternative, namely a Mesher Order. Such an order would require the husband to sell the matrimonial home once V had left full time education. The wife rejected this approach, again because of its possible impact on V.

[8] The order which the wife does seek is an order that a 33.3% portion of the proceeds of any future sale of the matrimonial home would go the wife for the purpose of the care of C.

HUSBAND'S SUBMISSIONS

[9] In the light of the husband's non-attendance there were no submissions made on his behalf. The wife's evidence on all points, including her allegations as to his conduct, was therefore uncontested by the husband, as were the arguments advanced by the wife's counsel.

THE ARTICLE 27 FACTORS

Financial needs of the child

[10] Article 27 of the Matrimonial Causes Order (Northern Ireland) 1978 provides 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. V is the only child of the marriage currently under 18. Clearly, she has the need of a stable home and the wife was most insistent that she did not wish to the court to do anything which might have the effect of creating instability for V. She emphasised during her oral evidence that it had always been her intention to provide for her three daughters equally and, even though V did not live with her, she still wanted to treat her in exactly the same way as she did her other two daughters. She intended upon her eventual death to leave her property equally to all three children. Although the case was opened to me by Mr Toner that the wife did not currently have contact with V, the wife immediately sought to correct him that some degree of contact had recently been restored between her and V. It was obvious that the wife was extremely pleased about this restoration of the relationship.

Income and earning capacity

[11] Both the husband and the wife are qualified solicitors. The wife worked in the private sector until 1992 and since then has been employed in the public sector. She works part-time due to the demands of looking after C. The husband was a 40% equity partner in a successful firm of solicitors. After a period of convalescence following health problems, he returned to the firm. He resigned from the partnership in 2005 and received a lump sum of £171,000 in respect of the dissolution of the partnership. £51,000 of that sum was paid to Her Majesty's Revenue and Customs leaving the husband with £120,000. The wife gave oral evidence that he had previously enjoyed his work as a partner in the firm and had a good client base. The wife gave oral evidence that the husband had often told her that he was not going to pay her anything by way of ancillary relief and she considered that the breakup of their marriage had impacted on his employment decisions. In her affidavits the wife swore that she was at a loss to understand his motivation to end his role as a partner other than as an attempt to frustrate and diminish her application for ancillary relief. Since early 2007 the husband has held a series of positions as an employed solicitor in private practice.

Financial needs, obligations and responsibilities of the parties

[12] Each of the parties has a need for accommodation. The husband cares for V. The wife cares for C and R. Mr Toner said that it was his perception that the husband had at one stage during the proceedings intended to pursue a claim that a pension sharing order should be made in respect of the wife's

pension. Mr Toner argued that this was inappropriate given that C will never be able to live independently and that the burden of caring for her will fall on the wife alone. The wife stated in her second affidavit that the husband has not seen C since October or November 2006. Although the wife can retire at 50, she gave oral evidence that she will have to work until aged 60 in order to support C.

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

[13] Both parties enjoyed a reasonable standard of living prior to the breakdown of the marriage.

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

[14] The wife is aged 50 and the husband is 56. The marriage was of significant duration, having lasted 21 years until the separation and 25 years until the Decree Nisi was granted.

Any physical or mental disability by the parties of the marriage

[15] No submissions were made that this factor applied in this case. The wife's evidence was that the husband's health is stable. (The husband's affidavit stated that he had heart surgery in April 2005 and that a recent attendance with his cardiologist revealed that his condition is stable. The husband further stated that his heart condition had placed his capacity to engage in fulltime professional practice in jeopardy and had reduced his life expectancy. In the absence of the husband attending to give oral evidence, adopting the affidavit as his evidence and making himself available for cross-examination, I am, however, unable to give any evidential weight to this.)

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

[16] The evidence before me was that the contribution made by each of the parties to the welfare of the family was equal. During the marriage the wife was employed continuously, save for extended periods of maternity leave, as a solicitor. She contributed to the welfare of the family both economically and in terms of her role as a housekeeper and mother. During the marriage the husband was employed continuously as a solicitor and contributed in his role as a father.

Conduct

[17] It was submitted by Mr Toner that there were a number of incidents of conduct which it would be inequitable to disregard. Firstly, the wife's evidence was that shortly after their separation the husband pressurised her

into transferring the matrimonial home into his sole name. He told her that he had arranged to remortgage the property with the First Trust Bank in order to make available cash to discharge their debts but that the bank would not agree to a joint mortgage. He assured her that he recognised her entitlement to an equal share of any remaining equity. The wife asserts that she was emotionally vulnerable at the time, trying to cope with the distress caused by the marital breakdown and was not thinking logically. The husband then remortgaged the matrimonial home thus reducing the equity. Secondly, the wife's evidence was that the husband agreed that the Bayliner 180 boat which was owned by the parties would be sold and the proceeds given to the wife to assist her with the purchase of a house for her and the children. The boat was sold for the sum of £11,000. However, despite being asked on a number of occasions to release the proceeds to her, the husband ignored her requests. Thirdly, Mr Toner described the way the husband had behaved with regard to his finances as a "scorched earth policy". He submitted that the husband's drawings from the partnership were £122,000 in the year ending 2005 whereas they had been £20,000 - £30,000 in previous years. Furthermore, the wife gave oral evidence that she was not aware of any significant assets of value which had been bought by the husband out of the £120,000 net he had received upon dissolution of the partnership. There was no evidence that the money had been siphoned off to another account. Mr Toner submitted it had been dissipated as income and "frittered away". One of the effects of the husband's absence at the hearing was that these allegations in respect of his conduct were unchallenged.

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

[18] Other than the potential pension benefits previously mentioned, there were no such matters referred to.

Other matters taken into account

[19] 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 category the condition of C falls to be taken account of. C suffers from Sotos Syndrome and is severely learning disabled. The wife gave evidence that C attends a day centre four days a week. She cannot be left on her own and cannot live independently. She will remain that way. The wife gave oral evidence that, though the husband had given C occasional presents, for example a coat or a jumper, he had not provided any regular financial support and she did not think he was likely to. The wife anticipated that C would live with her until the wife predeceased her. Mr Toner submitted that it could be argued that the husband ought to be making payments to support C and there was at least a moral obligation to do so.

CONCLUSION

[20] 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 to 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 woman 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.

[21] The first issue which requires to be determined is to decide how the equity in the matrimonial home 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 evidence presented to me, and in particular :

- (i) The financial needs of V, a minor,
- (ii) The duration of the marriage;
- (iii) The contribution of the parties;
- (iv) The financial conduct of the husband; and
- (v) The financial needs of C

I conclude that it is appropriate to divide matrimonial assets in terms of 55% to the wife and 45% to the husband.

[22] 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."

[23] 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.

[24] Given the age of V and the fact that she lives with the husband, I would not in the normal course of events consider an immediate sale of the matrimonial home. The usual approach would be either to consider whether the husband could arrange finance to buy out his wife's interest in the matrimonial home or, failing that, to make a Mescher order which would take effect after V had left full time education.

[25] However this is an unusual case. Firstly, the wife seeks an order granting her an interest which is less than that which, on the evidence adduced before me and the application of ancillary relief principles to it, would normally be awarded to her. Secondly, she seeks that interest to be realisable only in the event of any future sale of the matrimonial home and hence in the form of an order which might allow the husband to frustrate it if he chose to do so.

[26] Mr Toner acknowledged that circumstances might arise whereby a future sale of the matrimonial home was forced following repossession proceedings initiated by the mortgage company and that this might leave the wife with little or nothing in real terms (depending on whether the husband had acted in such a way as to reduce the equity remaining in the property). He said that his client accepted that the order sought by the wife could not produce money where there was none. The wife's objective in seeking the order she does was simply to obtain some provision for C but she deliberately makes her situation vulnerable so as to protect the position of her daughter V.

[27] I therefore order that 33.3% of the net proceeds of any future sale of the property be awarded to the wife.

[28] In the light of the fact that the husband did not attend the hearing, I extend the time for appeal to three weeks from the date of delivery of this judgment.