

Neutral Citation No.: [2009] Master 68

Ref:

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

Delivered: **20/04/09**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

C

Petitioner;

and

C

(Ancillary Relief : Conduct - Rape and Attempted Murder)

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 2008.

[2] At the hearing both parties gave oral evidence. Affidavits had been sworn by the wife on 14 February 2008 and 13 November 2008 for the purpose of these proceedings and in her oral evidence she adopted these as her evidence to the court. An affidavit was also sworn by the respondent (to whom I shall refer, for ease of reference, as “the husband”) on 19 September 2008. He likewise adopted this as his evidence to the court. Miss Robinson on behalf of the wife and Miss Mullally on behalf of the husband each furnished a copy of their FDR Core Issues document in advance of the hearing as a written opening which each counsel then supplemented with brief oral submissions. I also heard sworn evidence from Dr Bindall, the wife’s psychiatrist.

[3] The parties were married on 24 July 1974. There was a conflict of evidence as to the date of separation which I shall deal with shortly. A Decree Nisi was granted on 5 November 2007. There are four children of the marriage, all of whom are aged over 18.

[4] The principal issue in the application before me was whether a history of domestic abuse could amount to conduct which it would be inequitable to disregard.

THE ASSETS

[5] The principal assets which were the subject of the hearing were agreed to be :

- (i) The former matrimonial home (valued on behalf of the wife at approximately £225,000 and on behalf of the husband at approximately £250,000). Neither party called valuation evidence and so I concluded that the value of the property lay at a midpoint between the two valuations ;
- (ii) An investment property with an agreed valuation of £80,000 which had been bought with a loan. (The circumstances of the loan were disputed by the parties.)

WIFE'S SUBMISSIONS

[6] The wife submitted that, without taking the matter of conduct into account, this was a case where the other factors would suggest that the matrimonial property should be divided on a 50% - 50% basis.

[7] The wife, however, argues that the husband regularly physically brutalised her in an extreme manner and that this amounts to conduct which supersedes all other factors, justifying a significant departure from equality.

[8] The wife therefore seeks an order that the property be divided such that she receives the matrimonial home and the husband keeps the investment property. This amounts to a property division of approximately 75% - 25% in the wife's favour. She seeks a clean break settlement on this basis.

HUSBAND'S SUBMISSIONS

[9] The husband submitted that the alleged conduct may not be taken into account and that it is insufficient to reduce his claim for ancillary relief.

[10] The husband therefore seeks a 60% - 40% split of the matrimonial home and a 50% - 50% split of the investment property.

THE ARTICLE 27 FACTORS

Welfare of the child

[11] 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. All the children of the marriage are over 18 and this factor does not therefore apply.

Income and earning capacity

[12] The wife works as a nursing assistant earning £1,000 net per month. She also receives Working Tax Credits and has applied for Disability Living Allowance. The husband formerly worked as a tunneller but is now in receipt of benefits. In his affidavit he stated he suffers from arthritis which prevents him from working. He offered no medical evidence in respect of his condition. His discovery documentation shows he was working up until 5 July 2008. In oral evidence he stated that there was no work available and he was in receipt of Job Seeker's Allowance. The wife does not believe he is unemployed. She gave oral evidence that she had been told that he was still working. However the circumstances of the receipt of this hearsay evidence were insufficiently clear for me to be able to give it any weight.

Financial needs, obligations and responsibilities of the parties

[13] The wife currently lives in the former matrimonial home. The husband lives with his mother. 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

[14] 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

[15] The wife is aged 52 and the husband is aged 56. The wife's submitted that the parties separated in 1997. The husband's evidence was that, although his wife had put him out of the house for a nine month period in 1997 they were subsequently reconciled. He had therefore been living in the matrimonial home in 1998 at the time a grandchild had been christened and the parties only finally separated in 2002. The wife's evidence was that the husband wanted to be present at a grandchild's christening in 1998 and so returned to the matrimonial home for a period of ten days. Separation is not

to be understood as a complete parting of the ways between a couple. Particularly where the couple have had children together, there may often be contact even though they have separated. Further, in certain cases a couple may be found to have separated even though they still live under the same roof. I conclude for two reasons that the separation is more likely to have occurred in 1997. Firstly, the husband had no answer when it was put to him in cross examination that a bank statement in his name dated 2000 was addressed to him at his brother's house. Secondly, the wife obtained an Interim Exclusion Order as early as 1995 and the husband was charged with contravening that Order in 1997. I therefore find that the marriage is therefore one which lasted 23 years until separation. The reason why the issue was contested between the parties was that the investment property was purchased in 2001. The wife therefore argued that it was an after-acquired asset. The husband argued it was matrimonial property.

Any physical or mental disability by the parties of the marriage

[16] Dr Bindal gave evidence that the wife suffers from chronic depressive illness with agoraphobic syndrome and panic attacks. Her overall incapacity is moderate to severe in degree and her resultant quality of life is very poor regarding all of her daily activities. The wife struggles to remain in work given her health difficulties. The long term prognosis is extremely guarded and she is unlikely to recover completely. In addition, since bypass surgery, her work has seemed to her to be very heavy.

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

[17] The evidence in relation to the contributions of the parties to the welfare of the family fell into four categories : firstly, the contributions of the parties to the purchase of the matrimonial home; secondly, the contributions of the parties to the general family finances; thirdly, the contributions of the parties to the purchase of the investment property; and fourthly the contributions of the parties to the raising of the children.

[18] The wife's evidence was, in essence, that the contribution made by the husband to the welfare of the family was limited. She acknowledged, however, that he had made a significant contribution to the purchase of the matrimonial home, using £30,000 of £50,000 which he had received as compensation for accident injuries he had suffered. Her evidence was that he had drunk and gambled away the remainder.

[19] In respect of the general family finances, the wife's evidence was that during the marriage the husband had generally spent his money selfishly, squandering it on both drinking and gambling. He spent his money in a way the family could ill afford, gambling every day. The wife said she was "lucky to get housekeeping" and that, if the husband had had a bad day at the

bookmakers she “knew not to ask for housekeeping”. The wife stated that the husband stayed away from home for long periods of time and neither sent money home nor gave her money on his return. The wife also gave evidence that the husband had paid the mortgage payments for a few months but then defaulted on them. She then changed the account from which the mortgage payments were made and thereafter made the payments from her wages to ensure that they were being paid.

[20] In respect of the purchase of the investment property, the wife’s evidence was that she had sought a loan from the Halifax plc as the parties already had a mortgage from the same institution. However the Halifax required the loan to be in joint names. She gave evidence that, because she needed his signature, and since the parties had by this time separated, she met the husband at the Halifax plc in Omagh. She gave evidence that, in order to be able to continue repaying the loan on the investment property, she suspended the contributions to her Health Service pension fund. She intended that the property would essentially serve as her pension.

[21] In terms of contribution to the welfare of the family in the wider sense, the wife stated that the husband had made no contribution to the bringing up of the children. On the other hand she had looked after the children, and at various times had had employment as a mushroom picker and a support worker.

[22] The husband gave evidence that he made a significant contribution to the family finances. He stated he was involved in a car accident in which he had broken his neck and was awarded compensation of £60,000. He stated that he had used £30,000 of this to purchase the matrimonial home. The husband said he had used the remainder of the compensation monies on planting a lawn and shrubs and making a driveway.

[23] The husband’s evidence was that he had frequently worked on contracts in England and Ireland but had made a significant contribution towards the family expenses and household bills. He said he had given her this as cash and therefore had no documentary evidence to show he had financially supported her and the children. In oral evidence he said he would drink “fairly often” but then changed this to “not that often”. He said he would gamble occasionally. When counsel put it to the husband that his bank statements showed multiple cash withdrawals and asked him about his spending patterns, he said he could not say where his money had gone.

[24] In respect of the purchase of the investment property, the husband’s evidence was that the parties were still living together when an extension to the mortgage was sought by the parties. He stated that he had signed a “blank document from the Halifax”. Subsequently, after returning from working in Longford, he returned to the matrimonial home and opened a letter he had

found waiting, only to discover a cheque for £23,000 which exceeded the £17,500 he knew to be the purchase price of the property. This, he claimed, was a source of friction between the parties. I found the husband's evidence about signing a blank document implausible. His evidence appeared to be contradicted by the inclusion in the wife's discovery bundle of a personal loan agreement which contains his signature but which also contains typed details of the loan amount, rate of interest and monthly repayments. I considered it unlikely that the Halifax would have issued a blank personal loan agreement which the husband signed and the wife then returned to the Halifax for that institution then to insert the financial details which had hitherto been unknown to the husband at the time of signing.

[25] I was satisfied that the husband did make a significant contribution to the purchase of the matrimonial home. However I accept the wife's evidence that there was otherwise a lack of financial and other types of contribution to the welfare of the family. The factor of contribution therefore justifies a departure from equality in favour of the wife.

Conduct

[26] Article 27 allows the court to take into account the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Such conduct is often divided into three categories: marital, financial and litigation. The wife submitted that the first and second categories of such conduct were present and I shall deal with each in turn.

Marital Conduct

[27] Miss Robinson submitted that this case involved spousal abuse which should properly be taken into account as marital conduct. The wife adopted the contents of her divorce petition in terms of setting out the conduct which she relied upon. The conduct set out in that petition includes the following :

- (i) Throughout the marriage the husband was violent towards the wife. The assaults started after they had been married for two years.
- (ii) In 1993 the husband regularly beat the wife and threatened to kill her.
- (iii) On two occasions the husband held the wife down forcefully and pushed tablets down her throat in an attempt to kill her. On both occasions the wife was admitted to hospital to have the drugs pumped from her stomach.
- (iv) The wife regularly had to barricade herself in her house to avoid the husband's violence.
- (v) On one occasion the husband told the wife and the children that he would burn them and the house to the ground and he then armed himself with a can of petrol.

- (vi) The husband would make the couple's children stand in the corner for hours just to demonstrate his control. If the wife attempted to intervene the husband gave her a beating and had the children watch this.
- (vii) On several occasions the husband used a chainsaw to cut down doors in the family home to go after the wife when she hid from him.
- (viii) The husband would regularly lock the wife in the house and take the keys so that she could not go anywhere.
- (ix) Approximately 15 years ago the husband raped the wife while they were in England.
- (x) The husband regularly attempted to kill the wife by strangling her.
- (xi) The husband inflicted various physical injuries on the wife including black eyes, cuts and bruises and a broken nose.
- (xii) The husband poured bleach over the wife's car when drunk and came after her with a knife.
- (xiii) The husband regularly told the wife that he would kill her and then himself.
- (xiv) The husband regularly raped the wife in the family home. While the couple's eldest son was undergoing counselling, he raised memories of hearing these incidents with his mother, causing her great distress.
- (xv) The husband armed himself with concrete blocks and began throwing them at the wife through the window of the family home.

[28] The wife gave evidence in general terms about the history of the marriage. She did not deal with any of the incidents in detail. She stated that the marriage broke up because of the husband's excess drinking and violence. Various court orders and correspondence from her then solicitors documented, to some degree, the troubled nature of the marriage. In 1995 she obtained an Interim Personal Protection Order and an Interim Exclusion Order. These were unable to be served on the husband as he was outside the jurisdiction. In 1997 the husband was charged with contravening these Orders, with threatening to kill the wife and with threatening to damage the matrimonial home. In 1999 the wife decided that enough was enough. She obtained a Non-Molestation Order on 1 June 1999. The evidence placed before the Magistrates' Court in seeking this Order was that on 30 May 1999 the husband had tried to strangle her after he had returned home drunk. On the following day he telephoned her on approximately ten occasions threatening to kill her. The husband gave oral evidence that he had been arrested for breach of that Order and had been held in custody for three months before he obtained bail. He was not aware of how those proceedings concluded. In February 2002 the wife obtained a further Non-Molestation Order together with an Occupation Order. Under

cross examination the wife's evidence did not vary as to the violent history of the marriage.

[29] Dr Bindall, consultant psychiatrist, gave evidence that the wife had been referred to him in November 2003 by her General Practitioner. The reason for the referral was that she had been off work due to illness and required a report from a consultant in order to make a claim under a mortgage protection policy. He gave evidence that he had concluded that the wife had suffered from mental health problems for nearly 15 years. He concluded she was "a battered wife" who suffered from chronic depressive illness with agoraphobic syndrome and panic attacks. She was being treated with anti-depressants for her condition. Dr Bindall concluded that her psychiatric incapacity "was mainly caused by life-long physical and mental abuse from her husband".

[30] Miss Mullally cross-examined Dr Bindall in relation to the history which had been given to him by the wife and its impact on his conclusions. She also cross-examined him in relation to whether other life circumstances could have had an impact on the wife's mental health. Dr Bindall conceded that mental health could be impacted by a number of factors in combination but gave evidence that in this case spousal abuse was the predominant factor and the influence of other factors was relatively minor.

[31] In his evidence in chief the husband denied his wife's allegations. When specific allegations were put to him his response was generally that they were "total lies". When asked why he did not contest the divorce petition he stated that he did not wish to "insult" his wife. He said he had not been aware his wife was taking anti-depressants. He conveyed that they had had a happy marriage up until the time when she tried to deceive him regarding the amount for the loan. I concluded, in the light of the fact that his wife had sought Protection Orders and Exclusion Orders in connection with which he had spent three months in custody, that his evidence that they had had a happy marriage was not credible. Under cross examination he appeared somewhat amused by the allegations being put to him. He had no answer for the question why his wife might make up untruthful allegations. When asked why the police regularly visited the matrimonial home if the wife's allegations were untrue, the husband replied that it was because the wife was "a police informer". When asked in what sense, he replied that she had been informing on him. I found his evidence entirely unconvincing.

[32] On the balance of probabilities I therefore found as a fact that the wife had been the victim of violent spousal abuse over a sustained period of years and that the incidents which she alleged in her evidence had occurred. This conduct had had a severe impact on her mental health. The issue thus arose as to whether I should take this conduct into account as conduct which it would be inequitable of the court to disregard in the Article 27 exercise.

[33] The starting point for any consideration of marital conduct must be Lord Nicholl's observations in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 :

"[59] The relevance of the parties' conduct in financial ancillary relief cases is still a vexed issue. For many years now divorce has been based on the neutral fact that the marriage has broken down irretrievably. Some elements of the old concept of fault have been retained but essentially only as evidence of irretrievable break down. As already noted, parties are now free to end their marriage and then re-marry.

[60] Despite this freedom, there remains a widespread feeling in this country that when making orders for financial ancillary relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not 'fair' this should be ignored. Similarly if a rich husband leaves his wife for a younger woman.

[61] At one level this view is readily understandable. But the difficulties confronting judges if they seek to unravel mutual recriminations about happenings within the marriage, and the undesirability of their attempting to do so, have been rehearsed many times. In *Wachtel v Wachtel* [1973] Fam 72, 90, Lord Denning MR led the way by confining relevant misconduct to those cases where the conduct was 'obvious and gross'....

[64]... there are signs that some highly experienced judges are beginning to depart from the criterion laid down by Parliament. In *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011, 1017, para 34, Thorpe LJ said the judge 'must be free to include within [his discretionary review of all the circumstances] the factors which compelled the wife to terminate the marriage as she did'. This approach was followed by both courts below in the present case. Both the judge and the Court of Appeal had regard to the husband's conduct when, as the judge found, that conduct did not meet the statutory criterion. The husband's conduct did not rank as conduct it would be inequitable to disregard.

[65] This approach, I have to say, is erroneous. Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case. It is not as though the statutory boundary line gives rise to injustice. 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."

[34] Baroness Hale similarly commented in *Miller*:

"[145] ... But once the assets are seen as a pool, and the couple are seen as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other : in the famous words of Ormrod J in *Wachtel v Wachtel* [1973] Fam 72 at 80 the conduct had been 'both obvious and gross'. This approach is not only just, it is the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

[35] I turn now to the particular authorities on marital conduct. In *H v H (Financial Relief: Attempted Murder As Conduct)* [2005] EWHC 2911 (Fam) Coleridge J dealt with a case where the husband had attempted to murder the wife by stabbing her :

"[44] How is the court to have regard to his conduct in a meaningful way? I agree with Ms Jacklin that the court should not be punitive or confiscatory for its own sake. I, therefore, consider that the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered. It places her needs, as I judge them, as a much higher priority to those of the husband because the situation the wife now finds herself in is, in a very real way, his fault. It is not just that she is in a precarious position, which she might be for a variety of medical reasons, but that he has created this position by his reprehensible conduct. So she must, in my judgment and in fairness, be given a greater priority in the share-out."

[45] Obviously, as well as the conduct impacting on the wife's life, it has had direct effects. It is, as I say, not only the backdrop to the s 25 exercise; some of the consequences that will impact on her life are these. First, it has very seriously affected her mental health. Who knows what the long-term will bring, or how it will affect her life in the future? Secondly, she has to move home and uproot from the area where she has lived; not only herself but her children and her parents. Thirdly, it has more or less destroyed her earning capacity, and in particular destroyed her much-loved police career. Fourthly, it may affect the children in years to come. Fifthly, she will receive no support from the husband, either financially in the next few

years, or with the upbringing of the children. Sixthly, it may impact on her relationship with the man with whom she has been associating now for some 2 years. If she moves away, which she intends to do, he may not follow.

[46] Those are the ways, in my judgment, in which this conduct has impacted directly on the wife's life and it is against that that I turn now to consider the needs of the parties, and first the needs of the wife and the children. It seems to me that so far as practical she should be free from financial worry or pressure. So far as housing is concerned, by far the most important aspect of her security is a decent and secure home for herself and the children. If she feels she is in a nice, new home of her choosing that will be beneficial therapeutically to her. She seeks a three bedroom bungalow in an area well removed from the former matrimonial home, where property prices are said to be similar to the area where she now lives. Her parents, as I have indicated, will move too but will not live with her. "

[36] In *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 Burton J observed that there were "only rare cases" reported where courts had taken into account non-financial conduct. This rarity is underlined by the fact that counsel had only been able to refer him to 13 such authorities over a 27 year period. In all the cases with the exception of one Burton J found that the conduct appeared to be manifestly serious. The conduct can only be such, he noted, as Sir Roger Ormrod described in *Hall v Hall* [1984] FLR 631 as "nothing to do with the ordinary run of fighting and quarrelling in an unhappy marriage" and which the judge's "sense of justice required to be taken into account." Counsel in *S v S*, Nicholas Mostyn QC, suggested to the court that another way of describing such exceptional conduct was that it possessed a "gasp factor".

[37] Miss Mullally submitted on behalf of the husband that in order to amount to conduct, the conduct must occur as specific instances rather than a course of behaviour. I do not accept that argument. If individual incidents of violence which have caused injury can be taken into account as marital conduct, then a court can also take into account a pattern of conduct which has led to a much greater form of injury.

[38] Miss Mullally also argued that the behaviour alleged by the wife did not amount to "the gasp factor". I cannot accept this. The behaviour alleged by the wife includes rape and attempted murder. It clearly possesses what was described in *S v S* as "the gasp factor". Parliament has clearly laid down a high standard for the consideration of conduct. It is only exceptional conduct which can be taken into account, hence the statutory test of conduct "such that it would in the opinion of the court be inequitable to disregard it". I am satisfied that the conduct in this case meets this standard. It therefore

justifies a further departure from equality in the division of the assets in the favour of the wife.

Financial Conduct

[39] I take the view that it is inappropriate to take the husband's financial behaviour into account as conduct as I have already taken it into account in assessing the factor of contribution.

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

[40] There are no such matters to be considered which fall under this heading.

Other matters taken into account

[41] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which not do fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. Neither party sought to have any additional circumstances considered under this heading.

CONCLUSION

[42] 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 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. I have concluded

that the circumstances of the case make a clean break both possible and desirable.

[43] On the facts presented to me, and in particular:

- (i) The contribution of the parties;
- (ii) The health of the wife;
- (iii) The conduct of the husband ; and
- (iv) The finding that the investment property was an after-acquired asset

I conclude that it is appropriate to order the transfer to the wife of the husband's interest in the matrimonial home and to order the transfer to the husband of the wife's interest in the investment property. This represents a division of the assets on the basis of approximately 75% to the wife and 25% to the husband.

[44] 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 divisions 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.”

[45] Applying the reverse check commended by McLaughlin J., I consider this to be a fair division of the assets.