Master 25

03/03/2005

IN THE HIGH COURT OF JUSTICE NORTHERN IRELAND

FAMILY DIVISION (PROBATE & MATRIMONIAL)

C

Petitioner

V

C

Respondent

Master Redpath

In this application the Petitioner seeks the full range of Ancillary Relief pursuant to a summons dated 6 November 2003. The Respondent has issued a cross summons dated 11 February 2004.

A Decree Nisi was pronounced in the case on 10 April 2003 and the petition was defended by the Respondent almost to the very end when ultimately it proceeded undefended. In between however, an Answer and Cross Petition and Reply and Answer to the Cross Petition had issued.

Since the separation, the marriage and the attendant litigation has been acrimonious in the extreme. The parties and their legal representatives have been able to agree about virtually nothing and as a result the litigation has been protracted and costly. There have been, inter alia, allegations about phone tapping and burglary. Furthermore the parties have been able to agree on the value of few of the assets of the marriage. There are also ongoing Children (Northern Ireland) Order proceedings.

It is a most regrettable aspect of this case that before the case commenced a total of £150,000.00 had to that stage been spent on costs. As a result of the failure to

agree virtually anything it will be necessary for me to value every asset in the case before beginning the exercise of approaching how those assets should be distributed. Even as the case was progressing, the Respondent made further attempts to muddy the waters regarding the valuations of the various assets; in particular the matrimonial home, a caravan site which he has an interest in in the Republic of Ireland and a holiday home in the Republic of Ireland.

At the outset of the case, Mr Malcolm for the Petitioner estimated the value of the assets in the marriage at £3,115,252.00 before allowing for tax and other liabilities. Mrs Quinn for the Respondent valued the total assets at £2,741,587.00 before allowing for the various liabilities. The nett figures with deductions for the Petitioner was £2,479,376.00 and for the Respondent £2,080,524.00. The case is therefore in Northern Irish terms, a substantial one.

THE ASSETS

As I have already said, because of the acrimony in this case very little has been agreed about the value of the assets, and accordingly it is necessary for me to value each of the many assets in the marriage.

1. Capital Account Balances

Prior to the break-up of the marriage the Respondent had been involved in two businesses with his brothers. One was a property development company and the other an insurance brokerage. It was accepted that the capital account for W Properties showed a credit standing to the Respondent's account of £88,609.00. Mr Malcolm claimed this as an asset in the case. It was not however, as straightforward as that. When the brothers decided to wind up their property development company, the opportunity was also taken by the Respondent's parents and sisters, to redistribute property not only for the purposes of that winding up but also for the purposes of

Inheritance Tax planning. Accordingly, various properties which had nothing to do with the property company were introduced into what became known as "the carve up". The Respondent's accountant Mr McAreavey gave evidence that in fact when the family property was taken into account, each of the four brothers got exactly what he was entitled to, ie, property in the value of £525,000.00. Because some of the brothers got more property from the property company than others this had an effect on the capital balances that each of them held and that therefore the capital balances as reflected in the company's accounts are in fact irrelevant. I accept this evidence and the various detailed figures that were provided clearly show that each of the four brothers got precisely the same amount of money from "the carve up".

2. Goodwill in JFC & Co

As I have already stated the Respondent had worked in a business with his brothers, which his father had founded. That business continues, but the Respondent left the business some time ago. Mr Malcolm claimed that the Respondent was entitled to a sum of £25,000.00 for his interest in the goodwill in the company. He has in fact received nothing. Mr McAreavey accepted that in the normal course of events the Respondent would be entitled to this sum of money. It was however crystal clear that the Respondent left the business on very bad terms with his brothers. There is no doubt that the breakdown of the marriage had an effect on the Respondent's ability to work and his general health. It is clear from the correspondence that passed between his brothers and himself that he was not attending to business and indeed in one particularly forthright letter, his brothers accused him of dishonesty. We have to deal in this court with the realities of life and I consider it highly unlikely that the Respondent will ever see the £25,000.00 due to

him for goodwill, at least without considerable litigation. Accordingly I do not intend to ascribe any value to the goodwill in JFC & Co.

3. The Matrimonial Home

The matrimonial home was valued by an agreed valuer in the sum of £550,000.00. Despite this agreed valuation the Respondent endeavoured to introduce further evidence to show it was in fact worth £650,000.00. It was the hope, at the start of the case at least, that the Petitioner would remain in the matrimonial home and the querying of the agreed valuation is clearly an attempt on the Respondent's part to inflate the value of an asset which at the commencement of the case it had been considered the Petitioner would keep. This was typical of the approach taken by the Respondent and I should observe that throughout his evidence, which was given in a most unsatisfactory manner, the Respondent inflated or reduced the value of assets in the marriage in order to suit his case.

4. The Investment Property

This property, which is adjacent to the matrimonial home, is converted into a number of flats and provides an income of between £2,000.00 and £3,000.00 per month depending on how many flats are occupied. The mid point of the parties' valuation of this asset was £800,000.00. There may however be Capital Gains Tax implications if this property is to be sold or transferred but will I will return to that subject later. The Respondent endeavoured to make the case that he would be liable to any Capital Gains Tax payable by his sisters who transferred this property to the Petitioner and the Respondent during "the carve up". No evidence of this was produced nor figures given. Furthermore if the Respondent were to be responsible for any Capital Gains Tax on this property it would reduce his nett benefit from "the

carve up" and could mean that his brothers owed him money. Accordingly I will disregard this assertion as unproven.

5. House and Site in County Louth

This again was the subject of much dispute. The Respondent had originally got a valuation of €289,000.00 for this property but then submitted another valuation from different valuers, valuing the property at €225,000.00. He explained this by saying the market had dropped. It was put to him that the agents who had originally valued this property now had a similar property on the market for €305,000.00. At that point the Respondent was prepared to accept the valuation of €280,000.00. Having considered the matter and taken into the account the vagaries of the holiday chalet market, I accept the value of €280,000.00 which at 70p to the Euro comes out at £196,000.00. It was put to me during the course of the accountant's evidence that if sold, this property would be subject to Capital Gains Tax in the Republic of Ireland at 20% and be taxed if the money was brought back into Northern Ireland at a rate of 20% making a total of 40%. However the Respondent made it clear that he intends to remain in the South of Ireland where he is now living with his new partner and I have no doubt that he intends to keep this holiday property as a holiday property and does not intend to sell it. I intend to order that the Petitioner transfer her interest in this jointly owned property to the Respondent. This will produce a Capital Gains Tax Bill of £13,125 for which the Petitioner will be liable.

6. Respondent's Home

The Respondent maintains a home in South Belfast. This property is jointly owned. This is one of the few valuations that was agreed; the agreed valuation being £165,000.00. The evidence of the Respondent's accountant was that the sale of this property would not attract Capital Gains Tax as it could be argued that it was his principal residence.

7. Property at Castle Espie

This property has been agreed for sale in the figure of £125,000.00 but there is a difficulty regarding the right of way to the septic tank for which the adjoining land owners are seeking a payment of £30,000.00 to rectify. Accordingly I take the view that the Castle Espie property is worth £95,000.00. There will be tax implications on that sale once the difficulties have been overcome. This generates a gain on the parties figures of £50,000.00 which will lead to a Capital Gains Tax bill of somewhere in the region of £20,000 giving this property a nett value of £75,000.00.

8. Land at Caleystown, County Louth

These lands were valued for the Petitioner at €850,000.00 and initially for the Respondent at €655,000.00. An attempt was later made by the respondent to reduce the valuation to €400,000.00 by producing a letter from agents in Drogheda pointing out that recent directives issued by Louth County Council about sewer treatment had reduced the valuation of the property. The Petitioner's valuers did not agree and a mid point between the two original valuations gives a value of €762,500.00 or £533,750.00. The Respondent is a quarter owner in this property and therefore his interest comes somewhere in the region of £133,437. This would of course be subject to Capital Gains Tax in the Republic of Ireland at 20% but the evidence of the Respondent's accountant was that it could be the subject of rollover relief if re-invested. It is clearly the Respondent's intention to remain in the property development business and I am in no doubt that in due course he will claim such relief.

9. Caravan Park

This was the subject of a great deal of contention. The caravan park which is situated in the Republic of Ireland is owned by a limited company that has issued only two shares. These two shares are owned by two of the Respondent's brothers, but it was recognised by him that he had a quarter share in this company. In paragraph 45 of his affidavit the Respondent states –

> "I do not have any employment or business activities in the Republic of Ireland".

In his evidence he tried to explain this untrue averment by saying that he had no shareholding in the company that owned the caravan site. This explanation is at best disingenuous and it is simply a further example of his unreliability as a witness. In August 2004 it was planned that one of the brothers would purchase this caravan site from the other three for €2,000,000.00 and would pay the stamp duty on the purchase. I have no doubt that this transaction will still proceed. Evidence was given by Mr McAreavey that the brother in question was having problems raising the €2 million because the bank would not lend on the security of the limited company and accordingly the limited company was going to have to transfer the property into the names of the four brothers before the bank would lend. This would have tax implications. Yet again the Respondent endeavoured to devalue this company by producing a late valuation from the same agents who referred to the sewer problems in regard to the other lands at Caleystown. This valuation valued the caravan site at €1.4 million. I do not accept this valuation. For the purposes of this case I value the caravan site at €2 million that the brother had agreed to pay. The Capital Gains Tax payable in the Republic of Ireland on this transfer would be €349,412.00 leaving a net figure of €1,650,588.00. From that must be deducted a bank overdraft of €119,444.00 leaving a figure of €1,541,493.00. There is a bank loan outstanding on

this property of €320,000.00 which will have to be repaid leaving a final figure for distribution of €1,221,394.00 which divided by four comes to a share for the Respondent of €305,373.00 which equate to £213,743.00.

10 Parents House

As part of the overall Inheritance Tax planning exercise carried out in recent years, the Respondent's parents have transferred their property in Dublin to the Respondent and his six siblings. A valuation was produced for this of €950,000.00 which has not been challenged by the Petitioner. The one seventh interest the Respondent had in this property therefore equates to €135,714.00 equating to £94,999.00. Again in the event of this property being sold there will be a 20% Capital Gains Tax bill, but again I take the view that it is highly likely he Respondent will roll that over into his next investment. The argument was raised that the Respondent's interest in this and other jointly owned properties had to be severely discounted because he was a tenant in common. I do not accept this argument but will return to it later.

11. Property in Puerta Banus

This property was valued by the Respondent at €930,000.00. Although the Petitioner cast some doubt on this valuation it was not seriously challenged. The Respondent is a quarter share owner of this property with his three brothers and its sterling value is £651,000.00. Against this there is a loan of £51,000.00 leaving a net valuation of £600,000.00 giving a valuation for the Respondent's share of £150,000.00. I received no evidence about the tax situation in Spain in the event of this property being sold. However I take the view that there is no present intention to sell the property and accordingly there are no tax implications as things presently stand.

In addition to the property assets in the case, cash of £502,500.00 is held resulting from the sale of a jointly owned investment property. It was thought that some VAT may be owing on this sale but no figure was given. I was advised that there are no Capital Gains Tax implications from that sale.

12. Snowland Ltd

The Respondent is a creditor in the sum of £50,000 of the above company. It was accepted that this sum was irrecoverable. Attempts were made on the Petitioner's behalf to draw into the equation the investment made by the Respondent which investment was made without the Petitioner's knowledge. Had this investment been profitable the Petitioner would undoubtedly have claimed a share of the profit and accordingly I disregard this argument.

Other Assets

There were a number of other small assets including a pension with a CETV of £17,685, including a number of policies for which valuations totalling £26,460 for two only were provided.

There are however, a number of significant liabilities: -

1. £227,000.00 due to the Anglo Irish Bank secured on the matrimonial home and the investment property.
2. £191,082.00 due in Income Tax and VAT. I think there will be some reduction in this figure as proper returns have not been done. Some of the penalties and interest will be reduced when that happens but as it seems to affect each party equally I will make no reduction for that.
3. £26,000.00 overdraft in the husband's bank account which I do not intend to take into account as it seems to have arisen post separation.

During the course of the case, I was presented with a number of constantly

evolving statements of assets. In one of them, references are made to joint liabilities to sundry creditors of £37,202.00 and an overdraft in a joint bank account of £15,009.00. I received no evidence in relation to liabilities and again take the view that as they are joint liabilities they need not necessarily be taken into account in calculating the available pot for distribution. There were also a number of small investments which I will deal with later.

What then is the approach taken by the courts to cases of this type?

Mrs Quinn for the Respondent argued that the wife's share in the available pot should be reduced for a number of reasons: -

1. That the valuations of some of the properties had to be discounted because the Respondent could never raise the value ascribed to him in a forced sale.
2. Most of the assets in the marriage had come to the marriage through inter vivos gifts to the Respondent by his family in the context of Inheritance Tax planning.
3. This was a medium term marriage.

In relation to the discount point, this matter has been considered by the courts recently. In the case of G v G (Financial Provisions: Equal Division) 2002 [2FLR 1143] the case involved the valuation of the husband's shareholding in a private limited company. At page 1151 Coleridge J states:-

> "I cannot seriously envisage a situation where the husband in this case would be forced to sell his interest in this company on the open market in circumstances in which a discount would be forced upon him. It is just conceivable that he may sell to a friendly purchaser but in those circumstances I am sure he would get full value. Accordingly I think it is artificial to apply any discount to the husbands shares in this company or for that matter the wife's and I shall not do so".

I do not believe that the Respondent in this case will be forced to sell any of these properties and according I will not apply any discount.

The issue of inheritance and the effect it has on Ancillary Relief is a constantly evolving one. In the well known case of White v White [2001] AC596 Lord Nicholls states at page 610: -

> "Property acquired before marriage and inherited property during marriage come from a source wholly external to the marriage. In fairness where this property still exists the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.
>
> Clearly, when present this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, the time when, and the circumstance in which this property was acquired, are among the relevant matters to be considered"

Duckworth's Matrimonial Law and Property states at C [25]: -

> "For the time being, however, as Lord Nicholls indicates the inheritance factor is best seen as an aspect of contribution where its importance may be emphasised or muted according to the circumstances."

In the Northern Irish case of M v M (Financial Provision: Valuation of Assets) [2000] Fam Law 509 McLaughlin J deducted a figure of £400,000.00 from the total assets to reflect the value of the husbands inheritance. The learned Judge also says however at page 38 and 39 of the Judgement: -

> "It appears to me that the proper approach is firstly, to determine the value of the assets available to the parties; secondly, to take account of the principles set out in the statute, and matters which bear on the fairness of the division of the assets and thirdly, to set about the task of achieving fairness by dividing the value of those assets in such a way as to attain it. Once

> that has been done the Judge should then stand back and test the potential result against the yardstick of equality."

It is against that background that the deduction was made having taken into account the inherited wealth that the husband had brought to the marriage. In a recent Northern Irish case of G v G & J there was a large estate of which a significant amount had been acquired by the parties through inheritance. This was a very lengthy marriage and because of the length of the marriage the learned judge does not seem to have ascribed any particular importance to the inheritance aspect to the case. Gillen J states at paragraph 48 of the judgment: -

> "In summary therefore these authorities make it clear that the court has a very broad discretion to make financial awards under Article 25 and has, in big money cases, increasingly chosen to guide the exercise of this discretion by the overarching objective of fairness. The Courts have chosen to measure fairness of outcome by adherence to the principle of equality unless there is good reason for variation such as wholly exceptional contributions by one party to family welfare."

In the recent case of G W v R W [2003] 2FLR 108 Nicholas Moston QC sitting as a Deputy Judge at the High Court states at page 120: -

> "The case of White v White has emphasised that the law in this is not moribund but must move to reflect social values."

On page 124 he quotes Bennett J in the case of Norris v Norris [2003] 1FLR 1142: -

> "Applying the words of the statute, in my judgment, the court is required to take into account all property of each party. That must include property acquired during the marriage by gift, or succession , or as a beneficiary under a trust. Thus, what comes in by statute through the front door ought not, in my judgment, be put out through the back door and thus not remain in the courts discretionary exercise without very good reasons. In my judgment, merely because inherited property has not been touched, or has not become part of the

> matrimonial pot, is not necessarily, without more, a reason for excluding it from the courts discretionary exercise."

The learned Deputy Judge continues at page 125: -

> "This analysis cannot be challenged. I therefore propose to treat all the arguments advanced by Mr Marks on his second point as impacting on the question of contributions. It must be artifice and contrary to the expressed words of section 25(2)(a) of the Matrimonial Causes Act 1973 as Bennett J has pointed out, to exclude the non-marital assets from the pool of assets to be divided."

I therefore intend, in the circumstances of this case, not to exclude inherited wealth from the case but to regard it as one factor to be taken into consideration in applying the Article 27 checklist.

I come now to the question of the length of the marriage: this was a 15 year marriage with one child. In G W v R W Nicholas Moston QC in discussing the issue of the length of the marriage states at page 121: -

> "I do not shrink from saying that this is a difficult issue. The logic deployed by Mr Pointer has obvious force. But on the other hand it seems to me that to adopt it requires me to put a blue pencil straight through the statutory criterion of the duration of the marriage. The failure of the judge in L v L (Financial Provisions: contributions) [2002] 1FLR 1642 to give sufficient weight to this factor was specifically criticized by the Court of Appeal. It seems to be that the assumption of equal value of contribution is obvious when the marriage is over 20 years. For shorter periods the assumption seems to me to be more problematic."

Duckworth states at B 3 paragraph 13 in summarising the propositions that emerged from White v White: -

> "(1) Although MCA 1973 Section 25 is couched in terms of the widest discretion, guidelines are needed to ensure consistency of judicial decision making and to limit peoples exposure to costs.

> (2) The implicit objection of Section 25 is to achieve a fair outcome, giving first consideration to the welfare of any children.
>
> (3) Fairness is a flexible concept that can move with the times. But in current conditions, it means at the very least that there can be no discrimination between husband and wife role.
>
> (4) The mere fact that one spouse stays at home while the other goes out to work (or that any other division of labour is agreed upon) is immaterial.
>
> (5) Fairness generally implies equal division, though not invariably so. There will be situations where, having carried out the Section 25 exercise, the Judge's decision will be that one party will receive a bigger share of the assets."

He then quotes Lord Nicholls in White v White where Lord Nicholls states at page 605: -

> "Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yard stick of equality of division. As a general guide, equality should be departed from only to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the courts to focus on the need to ensure the absence of discrimination."

In this particular case the Respondent has good reason for asking the court to depart from the principles of equality; based principally on the fact that a good deal of the wealth that the parties have is inherited wealth acquired recently and to a much lesser extent the fact that this was a 15 year marriage. On the other hand I must consider the needs of the child of the family, M. The Respondent has made it clear that he intends to live permanently in the Republic of Ireland and will be outside the jurisdiction of the Child Support Agency. As I understand it, he has paid no maintenance for M since the break-up of the marriage, and I am firmly of the view

that it is unlikely, given the background of this case, that he will come to any agreement with his wife about making contributions in the future. Even if I were to make an order for periodical payments for M it might be very difficult to enforce. Accordingly, that is a matter which I must also take into account in going though the Article 27 checklist.

Clearly the needs of the parties in this case are different. The Petitioner requires a reasonable standard of accommodation given the wealth of the parties and an income. Both parties want a clean break. The Respondent is presently living with his new partner in the Republic of Ireland and has accommodation but his requirement is for capital to fund his business in property development.

On page 39 of his Judgment in M v M, McLaughlin J states: -

> "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, 66.6 – 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 portion gets 50% more than the other and if 55 – 45, one portion is 25% approximately larger than the other. Viewed in this way from the perspective of the partner left with the smaller portion - the wife in the vast majority of cases - some of these divisions may be the antithesis of fairness and I commend practitioners to look at any proposed split in this way as a useful double check."

Had it not been for the existence for the child of the family, it is likely that there might have been a significant departure from the principle of equality in this case. However, because the Petitioner is likely to bear the lion's share of the cost of raising M, I intend to split the assets in the case 45% to the Petitioner and 55% to the Respondent.

It was indicated to me on the Petitioner's behalf that she wished to retain the matrimonial home and have the investment property next door. Those two properties taken together are worth £1.35 million. The Petitioner was prepared to raise a loan of £100,000.00 to pay to the Respondent. This would leave her a net figure of £1.25million. Not only does this exceed what I have found to be her entitlement in the case, but it would also leave her with no cash to pay her various tax bills and other creditors. She said in her evidence that she did not wish the investment property to be transfered into the Respondent's name as she could not bear to live beside a property that he was running as a business. Her clear evidence was that if anything was to be sold it should be the investment property. This would attract a Capital Gains Tax bill of £140,000.00, whereas on the evidence of Mr McAreevey the sale of the two principal residences of the parties would attract no Capital Gains Tax. I do not think therefore that any such course of action could be contemplated. I am acutely aware that the Petitioner is attached to the matrimonial home; although she herself said in her evidence that she would consider at some stage in the future downsizing, and I cannot see if she is to retain the investment property, and to pay her tax and other creditors, how sale of the matrimonial home can be avoided.

Accordingly I intend to order as follows: -

1. The sale of the matrimonial property and the husbands flat. This should raise a total of £715,000.00. After clearance of the charge due to the Anglo Irish Bank that should leave approximately £488,000.00. I propose that from this figure the Petitioner should receive £300,000.00. If she then mortgages the investment property for the £100,000.00 she will have a figure of £400,000.00 to purchase a property and to pay her legal costs in the event that she has to do so. This will involve a considerable amount of downsizing, but it is inevitable that in an exercise such as this

unfortunate compromises have to be made. The Respondent will receive the remainder of that figure, after deduction of expenses leaving him with approximately £188,000.

2. I will order that the Petitioner transfer her interest in the holiday home in County Louth to the Respondent. This leaves the Respondent with an asset worth £196,000.

3. The Respondent will receive the nett proceeds of sale of the Castle Espie property after payment of the Capital Gains Tax giving him cash of £75,000.00. He shall also retain his join interests in the other properties in the South of Ireland and in Spain. These assets total £667,179 nett of Capital Gains Tax.

4. I also direct that the Respondent should receive £311,000.00 from the cash held on joint deposit receipt; the remaining £190,000.00 should remain on joint deposit receipt pending the finalisation of the parties tax affairs, other than Capital Gains Tax, and be used to pay their respective liabilities. In the event that their tax is less than that presently estimated, any balance should be split 45% to the Petitioner and 55% to the Respondent once their affairs are brought up to date.

5. I also direct that the Respondent receive the benefit of the two policies for which valuations were provided.

6. Finally I direct that the other unquantified policies other than the Respondent's small pension policy be divided 45% to the Petitioner and 55% to the Respondent.

This leaves the Petitioner with assets with a net valuation of £1.10 million which after allowance for the Capital Gains Tax on the holiday home reduces to £1,086,875. The Respondent will receive assets with a valuation of £1.388 million of which approximately £813,000 will be cash (following the sale of the caravan site)

with which he can continue his property development business. He will remain responsible for his own overdraft which seems to have accrued after separation and for the Capital Gains Tax bill of £70,000 which will be payable on the transfer of the investment property leaving the Respondent with nett assets of £1,318,000.

In the event that the matrimonial home and apartment are sold for a figure in excess of their present valuations the excess should be split 45% to the Petitioner and 55% to the Respondent.

This has been a most difficult case made much more difficult by the attitude adopted by the parties to this litigation. As a result virtually every issue in the case has had to be decided by myself. Issues such as valuations and estimated tax liabilities also add an element of uncertainty to any decisions that are taken. According, I intend to give liberty to apply for the purposes of implementation in the event that unforeseen matters regarding the valuations and tax implications arise with the caveat that the overall split of the assets should remain 45% to the petitioner and 55% to the Respondent. I also extend the time for appeal of this Order to 21 days from the date of the Order and will now hear argument as to costs.