Master 27

21/09/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

C

Petitioner

-v-

C

Respondent

(No 3 of 2005)

Master Redpath

In this case the parties were married on the 15 October 1988 and separated on 14 January 2003. They have two daughters aged 14 and 12.

The assets in the case are as follows: -

1. The matrimonial home with an agreed value of £245,000 subject to a mortgage of £116,245 leaving an equity of £128,755.00.
2. A Friends Provident investment plan valued at £3067.00.
3. A Friends Provident investment plan valued at £4651.00.
4. A Friends Provident investment plan also valued at £4651.00
5. A Legal & General endowment policy valued at £8081.00.
6. A Standard Life endowment policy valued at £7631.00.
7. A Guardian Policy valued at £1833.00.

This gives a total of £158,689.00. All of the above assets are joint assets.

The Respondent until recently worked in a partnership, but the partnership was dissolved on 30 April 2004. As a result of the dissolution of the partnership he received £150,000.00 on the 30 April 2004 and £100,000.00 on 30 April 2005. He is

due to receive a further £75,000.00 in the Autumn. The Respondent was also unfortunately recently diagnosed with Multiple Sclerosis and Diabetes and as a result of this diagnosis he received a payment of £150,000.00 from a critical illness policy. These sums together add up to £475,000.00 in his sole name some of which has been expended. I will return to this aspect of the case later.

Each party has a small pension fund which I intend to exclude from my considerations in this case and each have a 1/8 interest in an investment property outside of Belfast.

All of these assets were built up during the life of the marriage. The Petitioner at present has a total monthly income from her employment and from Child Benefit of £1864.00 with some minor debts. The Respondent has an income from a health insurance policy and incapacity benefit of £1469.00 per month. Mr Shaw QC for the Petitioner argued that there was not sufficient money in the matrimonial pot to fund a clean break. His proposal on behalf of the Petitioner was that the assets should be divided equally and that the Petitioner be given a modest order for periodical payments in the event that the Respondent should recommence working. Prior to the dissolution of his partnership the Respondent had been earning nett fees of just under £90,000 per annum. Mr Lavery QC on the other hand argued on behalf of the Respondent that there should be a clean break. He also argued that the money received from the dissolution of the partnership and the critical illness policy constituted after acquired wealth which should be treated differently from the other assets in the case.

On the date that I was due to give judgment in the case an application was made by Mr Lavery QC on behalf of the Respondent to file further evidence. This application was resisted by Mr Shaw QC on behalf of the Petitioner. A number of

authorities were referred to me, many of which in fact related to the admission of new evidence on appeal such as Bailey –v- Cruickshank [1999] NIJB 47 and Lough Neagh Exploration Limited –v- Morrice & anor [1999] NIJB 43. Mr Shaw QC relied largely on the case of Ladd –v- Marshall [1954] 3ALER745. In that case Denning LJ (as he then was) outlined the principles to be applied when fresh evidence is sought to be introduced. He outlined three conditions to be met: -

A) it must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;

B) the evidence would probably have an important (although not decisive) influence in result of the case;

C) the evidence must be apparently credible.

I have reviewed the various authorities quoted to me, some of which, in particular Ladd –v- Marshall, are quite old. I think that I must have regard also to the Article 6 rights of the parties and their right to be given the opportunity of a fair trial by way of admitting all relevant evidence provided there is no prejudice to the other side. In particular I also must have regard to the Overriding Objective as set out in Order 1 of the Rules of the Supreme Court. I fear that if this medical evidence is not admitted then further proceedings may ensue and further expense arise. According I am minded to admit the further medical evidence.

I will start by dealing with the monies expended by the Respondent to date. Of the original £150,000 that he received, approximately £24,000 remained in the account to which the monies had been lodged. The monies had been expended as follows: -

1. Deposit for a car - £10,500.00

2. 13 payments of maintenance of £1250.00 per month to Mrs C -£16,250.00.

3. Monies paid to the Petitioner to clear a credit card debt and to go on holiday - £10,000.00.
4. Legal fees - £7,500.00.
5. Inland Revenue payments - £36,000.00.
6. Accountancy fees - £3000.00.
7. Holidays to Dubai, one taken with his children - £8,000.00.
8. TV and Hi-fi system - £6,000.00.
9. Payment to the Respondent for living expenses 9 payments of £1250.00 - £11,250.00.
10. Money spent on children's confirmation, school uniforms, school holidays - £1000.00.

A balance of £17,500 remained unexplained, but probably contained £600.00 at least for rates payments.

Mr Shaw QC on behalf of the Petitioner argued that much of this sum had been wasted by the Respondent and that it should remain in the pot for distribution. Whilst I agree partly with this argument I cannot agree entirely with that proposition. Running down the list of payments made it is clear that the Respondent has bought himself a luxury car costing in excess of £30,000.00; but out of this pot of £150,000.00 only a deposit of £10,500.00 and a few monthly repayments have been deducted and the rest will be paid by ongoing monthly payments. I do not think it is unreasonable for Respondent to have expended the money he has so far expended on this car and the ongoing monetary repayments will be a matter for himself following the result of this case.

In relation to the holiday to Dubai, it might be argued that two holidays to Dubai costing £8,000 could be regarded as extravagance. However, we are dealing

with a situation where the Respondent not only has had the difficulties surrounding the marriage breakdown but has also been diagnosed with Multiple Sclerosis and has suffered from depression. I think in those circumstances a luxurious holiday is not perhaps open to the same amount of criticism that it might be in other circumstances. It must also be borne in mind that the second of these holidays was for the children of the family. The expenditure of £6,000 on a TV and Hi-Fi system is undoubtedly excessive.

In the case of Primavera v Primavera [1992] 1 FLR at 16 the English Court of Appeal considered whether reckless expenditure could be regarded as conduct which should not be disregarded pursuant to Section 25 (2) (g) of the Matrimonial Causes Act 1973, the equivalent of our Article 27 (1) (g) of the Matrimonial Causes (NI) Order 1978.

Butler-Sloss LJ states at page 26: -

> "In addition, it is necessary to look from s. 31(7) to the relatively new S.25, as amended by the Matrimonial and Family Proceedings Act 1984, and the Court has to have regard, in particular to the following matters, which include the conduct of each of the parties, if that conduct was such that it would, in the opinion of the Court, be inequitable to disregard it.
>
> Speaking entirely for myself, the conduct of a spouse in relation to financial matters, both those during the marriage and those taking place subsequent to the marriage, are capable of being considered conduct which comes within s.25 (2) (g)."

I propose to include £5,000 from the sum expended on the TV and Hi-Fi in the pot for distribution. A figure of £17,500 has not been accounted for and less the rates of £600 I intend to add to that £5,000 the figure of £16,900 into the pot for distribution. The remainder of the sum presently held in the account is due in tax and indeed there is a shortfall of £1762.25 which I will deduct from the figures I have

taken out of this list of expenditure. This leaves a sum of £20,137.75 to be added to the sums remaining.

It also became apparent that further sums had been expended from the £150,000 received by way of payment from the critical illness policy since the proceeds had been received 5 weeks ago. The Respondent says he owes his mother £4,000 which he had repaid; that he had repaid MBNA £5,000 in relation to a credit card bill. He has also paid a deposit on a trip to New Zealand at £3,000 from MBNA and had bought his new partner a new Audi car for £15,000. I intend to give separate consideration to the £150,000 received on foot of the critical illness policy and I will return to that issue in due course. I intend to credit the above sums to the available amount for distribution.

Duckworth states at B3 of [14Q] -

> "Certain passages in White lend weight to the suggestion that property acquired after the breakdown of the marriage whether through inheritance, windfall, or hard work, should belong to the party who acquired it and should be excluded from the pot. Actually, the speech of Lord Nicholls does not go so far as to say that expressly and the point is therefore open for development at later cases."

I have recently explored at length the issue of inherited and after acquired wealth in the Judgments of C –v- C and C –v- C No 2 of 2005 earlier this year. I have come to the clear conclusion that inherited and after acquired wealth should be treated as a contribution to the marriage in the light of the Article 27 checklist the effect of which may be muted or emphasised according to the dictates of fairness.

It was argued on the Respondent's behalf that the monies received in relation to the dissolution of the partnership was after acquired wealth which did not fall into the pot to be divided.

If we look at the reality of this situation, the £325,000 received in relation to the dissolution of the partnership is in fact the value of an asset that was built up entirely during the course of the marriage, to which both parties contributed in their own particular ways. The Petitioner in this case had supported her husband when he was at university and during the early years of his career: he himself admitted that her earnings would have been much greater than his in the early years of their marriage. The Petitioner also made her contribution as a homemaker in raising the children and running of the house and it is quite clear that she contributed fully to the building up of her husband's business. I will return to this issue in due course but it seems clear to me clear that these payments are not in the category of after acquired wealth at all.

The amount of £150,000 paid on foot of the critical illness policy could be argued however to fall into a different category. This is a sum of money paid in relation to the Respondent's illness which was paid after the separation, albeit that the policy was taken out before the separation.

In the case of N –v- N (Financial provision; Sale of Company) 2001 2 FLR 69 over 13 years had lapsed since the parties separation during which the husband's company underwent a huge increase in value.

Coleridge J. States at page 77: -

> "Mr Raynor also urges me to take into account the huge increase in turnover of the X group since the separation. He says that the real increase in the value of X has only occurred since that date and so in relation to any share the wife notionally would have in that asset it should be discounted. He says from a half to third to reflect the fact that she made no contribution to it after separation.
>
> Again, I think there is intrinsically some merit in this argument in this particular case but it needs to be approached with very great caution….
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> Mr Mostyn urges me to reject this argument completely because, as he rightly points out, traditionally these

> applications have always been approached on the basis of the values existing at the date when the hearing takes place.
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> I am quite sure that even now in most cases that is the correct date when the valuation should be applied. But I think the court must have an eye to the valuation at the date of separation where there has been a very significant change accounted for by more that just inflation or deflation….."

The learned Judge concluded that the company should be valued as at the date of the hearing, not some earlier date and that the husband's contribution, post separation should be viewed as a discretionary factor reducing the wife's entitlement. On that basis he awarded the wife 40%.

Accordingly in my view this issue of after acquired wealth goes to contribution, but I have to say that in the light of the fact that this payment was made in relation to the Respondent's serious illness, it is possible to depart from the principle of equality in relation to this particular payment.

The Respondent is presently not working. Dr C in a report following his most recent assessment of the Respondent on 25 October 2004 states: -

> "The neurological findings on examination, taken in the context of the previous history of right optic neuritis and the MRI findings would, in my opinion, secure a diagnosis of Multiple Sclerosis."
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> The date of diagnosis could be taken as 25 October 2004.
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> In regard to [the Respondent's] likely prognosis it is impossible to predict this at this stage. At present while he has reduced vision in his right eye and subtle neurological abnormalities on examination, his level of disability would be considered mild. As part of his ongoing treatment I plan to refer him for assessment for disease modifying therapies."

The Respondent's GP in a report dated 10 May 2005 states : -

> "Regarding the long term prognosis of his MS, it is difficult to predict with the condition, how radical it will progress. In his letter to you, Dr C states that it is not possible to predict the likely prognosis at this stage. The frequency of relapses, severity of permanent sequelae of these relapses is very variable from patient to patient with MS. Realistically I do not expect the vision to recover and I expect the symptoms of lethargy, tiredness and numbness to persist long term. Regarding his diabetes, I am optimistic that in the short term he will become asymptompic from this condition but the progress/prognosis will depend very much on the degree of control which he is able to obtain. This will depend on his ability to adapt to a healthier lifestyle. Unfortunately he is at higher risk of developing the various complications associated with diabetes. In the short term I do not see any realistic possibility of [the Respondent] returning to either part time or full time work. In the medium term it is possible to be optimistic and perhaps hope to return to part time work. I think it is unlikely that he will return to permanent full time work."

Dr C's updated report dated 19 May 2005 states:

> "At present he is able to undertake all activities of daily living but with regard to his ability to work, in my opinion, it is his mental state that is having a negative impact on him returning to his previous occupation."

The GP's report of course, has to be seen in the light of the Consultant's report.

Additional evidence was submitted in the form of reports from Dr E Saddler, Consultant Psychiatrist and an updated report from Dr Craig. Dr Saddler states in his conclusions: -

> "Mr C is currently undergoing a divorce settlement. He has active symptoms arising from his diabetes and Multiple Sclerosis. Now he has the added complication of a reactive depression. I advised him about seeking therapeutic intervention for the latter. He is suffering the neurological symptoms of Multiple Sclerosis, the physical symptoms of diabetes and the psychiatric symptoms which I have outlined. As a result it is my opinion that in the short and medium term he is not fit to engage in work or to be in any part of the work force.

> The Multiple Sclerosis is progressive and deterioration is virtually inevitable. As a result it is reasonable to say that he will not return to work in the long term. He will never be capable of starting his own business. It is highly unlikely that with his disabilities that a firm of solicitors would employ him. He finds it very difficult to cope with the chronic anxiety and stress and is hopeful for closure to move on with his life."

However, Dr Craig who is of course the authority on the Multiple Sclerosis aspect of the case states in his conclusions: -

> "Based on Mr C's course, it would appear that he has secondary progressive Multiple Sclerosis which is likely to deteriorate over time. At present he is able to undertake all activities of daily living but with regards his ability to work, in my opinion, it is his mental state that is having a negative impact in him returning to his previous occupation…With regards his long term prognosis to returning to employment, his physical condition will undoubtedly deteriorate over time, although it is impossible to give accurate times as to when specific disabilities might be expected."

Having heard evidence from the Respondent I think that it is possible that he may return to work in due course, for some period at least. As might be expected he presently suffers from depression and he is still in the early stages of coming to grips with his diagnosis. It is clear however that if he does so he will be returning to work at a salary much less than he was used to. It was also clear from his evidence that he will find it difficult to return to work as an assistant when previously he was a partner. However, I think it is possible based on Dr Craig's report that within a reasonable period of time he could return to work earning in the region of £25,000 to £30,000 per annum.

Article 27 (5) of the 1978 Order requires the court in deciding how to arrive at decisions in cases such as this to have regard to any mental or physical disability of the parties. Duckworth states at B3 [42]: -

> "Poor health on the part of one spouse may create a need for a greater capital, for example to adapt the home or to finance nursing care. However, the court must always perform a balancing exercise but the point may be reached in some cases were it is not reasonable to expect the other spouse the underwrite the health care of the first."

There is remarkably little authority on Article 27(2)(5) of the Matrimonial Causes (NI) Order 1978 and the Court must decide in the particular circumstances of the case what constitutes fairness.

This is what might be described in this jurisdiction as a middle money case. At B3 [13] Duckworth teases out 9 principles emerging from White –v- White: -

(1) Although the Matrimonial Causes Act 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 objective 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, there can be no discrimination between husband and wife and their respective roles.

(4) The mere fact that one spouse stays at home while the other goes out to work (whilst any other division of labours agreed upon) is immaterial.

(5) Fairness generally implies equal division, although not invariably so. There will be many situations where having carried out the Section 25 exercise, the Judge's decision means that one party will receive a bigger share of the assets.

(6) There is however no presumption of equality as there is the Scottish system.

(7) Moreover, there is no warrant on the statute for elevating needs above resources in so far as earlier authorities limited a wife's claim to the ceiling of her reasonable requirements, they were wrong to do so.

(8) There is no rule of law that a party's wish to leave property to the next generation is irrelevant under Section 25. On the contrary the court should respect the wishes of both parties in this regard.

(9) It follows that the Duxsbury calculation (which amortises a wife's income needs over her assumed life expectancy) has limited relevance in the family division, other than to capitalise an income stream where that is strictly required.

In dealing with the payment of the critical illness policy, in the particular circumstances of this case, I intend to put £100,000 of the £150,000 into the sum to be divided. Mr C will retain the £50,000 less the sums he has expended from it lists on page 6 of this judgment. I intend to divide all other assets in the case equally. As already stated, the jointly owned assets are £158,669. I add to this £100,000 from the critical illness policy, the £100,000 received recently and the £75,000 still to be received from the dissolution of the partnership and the sum recklessly referred to earlier expended of £20,137.75. This leaves a total of assets to be divided of £454,689; leaving the Petitioner with assets valued at £227,000 and the Respondent with assets of £261,000, once the sums he has recklessly expended from the original payment of £150,000 received on foot of the critical illness policy are taken into account.

Accordingly I intend to order that the Petitioner receives the house and policies giving a total of £158,669. In addition to this, I intend to order that the

Respondent transfer to her £74,000 to make the sum up to £227,000. This should allow the Petitioner to virtually clear the mortgage on the matrimonial home.

I intend to leave the one-eighth share in the development lands at Purdysburn in the respective names of the parties as they represent an investment which may prove valuable in due course. This also avoids any potential liability for Capital Gains Tax. It is important in all of these cases that the court when forced to making a decision minimises the exposure of the parties to unnecessary taxation.

The Respondent wished to approach this case on the basis of a clean break. I do not think it is possible to do so. Even periodical payment of £5000 per annum to the Petitioner at her age given the Duxsbury calculations leaves a capital figure of £97,000.00. There is simply not enough money in this case to support such a capital payment whilst leaving the Respondent with sufficient capital and accordingly I intend to order ongoing periodical payments at a nominal rate, with of course liberty to apply should the Respondent's financial position improve, or his medical condition deteriorate. The Respondent of course remains responsible for the maintenance of his children and I intend to allow time for discussion to take place to see if agreement can be reached as to a suitable sum which can be incorporated by consent into my order, thus avoiding the need for the intervention of the Child Support Agency.

I will now hear argument as to costs.