Ref:	**Master44**

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

Delivered:	**3/5/07**

IN THE HIGH COURT OF JUSTICE OF NORTHREN IRELAND

FAMILY DIVISION
PROBATE & MATRIMONIAL

BETWEEN:

C

Petitioner;

and

C

Respondent.

Master Bell

[1] This matter was heard before me on 16 January 2007 and judgment was reserved.

[2] The history of the marriage was as follows. The parties were married on 16 October 1988. They were separated in December 2002 and a Decree Nisi was granted on 14 March 2006. There are two children of the marriage; a son born in August 1990 and a daughter born in July 1996.

[3] The petitioner wife is aged 42 and works as a classroom assistant. The respondent husband is aged 45 and works as an executive for a multinational company.

[4] At the hearing the petitioner gave oral evidence and, during that evidence, adopted her affidavit sworn on 16 May 2006 for the purpose of these proceedings. During his oral evidence, the respondent adopted his affidavit sworn on 5 October 2006. In addition to the oral evidence I also had the benefit of submissions by Miss O'Grady on behalf of the petitioner and Miss McBride on behalf of the respondent.

[5] The assets held by the parties are as follows:

(i) A property in Lisburn (A). The petitioner currently lives in this property. It is valued at £175,000.00. It has a mortgage of £39,168.00. The equity in the property is approximately £135,832.00.
(ii) A further property in Lisburn (B). This property is currently occupied by the respondent. It is valued at £160,000.00. It has a mortgage of £90,456.00 and an equity of approximately £69,500.00.
(iii) A property at Shaw's Road, Belfast (C). This property is valued at £179,950.00, it has a mortgage of £12,271.00 and an approximate equity of £167,000.00. I received submissions from Counsel in respect of the status of this property and I will return to it later in this ruling.
(iv) A further property in Belfast (D). The petitioner holds a one third interest in this property which is valued at £190,000.00 in total, her interest therefore amounting to £63,333.00.
(v) Respondent's pension. This has a CETV of £229,640.00.
(vi) Petitioner's pension. This has a CETV of £3779.00.
(vii) HSBC ISA with a value of £3,789.00.
(viii) BT Maxi ISA valued at £22,118.00.
(ix) BT ShareSave valued at £5,000.00.
(x) Singer and Freelander UK Fund valued at £1,004.00.
(xi) Legal and General policy number *****74 valued at £12,351.00.
(xii) Legal and General policy number *****64 valued at £13,895.00.
(xiii) Legal and General policy number *******61 valued at £13,638.00.
(xiv) Legal and General policy number ******23 valued entirely at £7,148.00.
(xv) Legal and General policy number *******75 valued at £7,312.00.
(xvi) Respondent's shares valued at £3,855.00.
(xvii) In addition there were two other policies – Legal and General Policy number *****65 valued at £1,784.00 and Legal and General ISA valued at £9,117.00. These two policies, it was agreed between the parties, were always intended to be for the parties' children and I was asked by both parties to exclude them from my judgment. I have therefore not taken them into account.

The total value of these assets, excluding the two policies which I have been asked not to take into account, was represented by both counsel to be in the region of £758,000. For the reason which will appear later in this ruling, I consider that the capital assets should be calculated as amounting to approximately £525,775.

[6] Counsels' submissions centred on three principal issues:

(i) Firstly, whether the court should order a clean break or should make a periodical payments order.
(ii) Secondly, whether two of the properties should be classified as inherited property and how much that might impact on their distribution.
(iii) Thirdly, how the court should view the matter of the parties' pensions and the possibility of their growth during the remainder of the parties' working lives.

THE CLEAN BREAK ISSUE

[7] Counsel for the petitioner described the marriage as one were there had been 'traditional roles'. The petitioner acted as 'homemaker'; the husband acted as 'breadwinner'. In the early part of the marriage the petitioner worked in the retail sector, giving up this work to care for the children when they were born. At one point during the marriage, the family moved to England to assist the respondent's career. The petitioner now works as a classroom assistant and has an NVQ Level 2. It was submitted on her behalf that a periodical payment order for 5 years would allow her time to obtain additional qualifications. Counsel for the respondent argued for a final settlement, submitting that the Court should seek a clean break if possible. Rather than periodical payments, Counsel for the respondent submitted that the maintenance should be capitalised and there should be a lump sum ordered so that the parties should be able to move on with their lives.

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

> "Plainly, a clean break would be more 'appropriate' in some cases than in others. A young, childless wife will experience a fairly rapid termination of support; an older women on the other hand, stranded careerless in her 40's after bring up a family may incur greater sympathy."

The particular facts of each individual case must therefore be considered with a view to deciding the appropriateness of a clean break.

[9] In reaching a decision as to whether or not to order a clean break, the discretion of the court is not left at large. Article 27A(2) makes it clear that the Court should, in particular, consider whether it would be appropriate to require a periodical payment or a secured periodical payments order to be made or secured only for such term as would in the opinion in the Court be sufficient to enable the party in whose favour the order is made to adjust without undue hardship to the termination of his or her financial dependence on the other party. Hardship is a question of fact. During her oral evidence, the petitioner stated that at the time the parties married she was working in the retail business. When their first child was born she gave up work. She now works as a classroom assistant. She has an NVQ Level 2 qualification. She considers that her employment will never be well paid. She stated that she would prefer maintenance over a period of years to allow her to get more qualifications. She envisaged seeking an NVQ Level 3. This she felt would enable her to get 'back on her feet again'. The NVQ Level 3 would be a part time course over 2 years. She considered therefore that by the time she was 46 she could work full time, depending on where her daughter goes to school. The petitioner stated that she did not want a lump sum. She would prefer to know that there was 'something coming in every month'. In his evidence the respondent stated that he wished a clean break rather than 5 years interdependence.

[10] The oral evidence of the petitioner was not therefore expressed in terms of hardship which might occur if a periodical payments order was not made. It was expressed as a preference for one kind of order over another. I must however, have regard to the full factual circumstances of the case. The petitioner earns £488.00 per month as a classroom assistant. She is still making a transition from a role as a wife of a well paid executive to that of one in which the ongoing resources of the respondent's salary, approximately £4472 per month, are not available. In that factual context where the income disparity is so significant, and giving first consideration of the welfare of the children of the marriage, I consider that it is appropriate to make a periodical payments order. I consider that after the period of 5 years the petitioner can `adjust without undue hardship'. I therefore intend to make a periodical payments order in the amount of £1,250.00 per month for 5 years.

THE INHERITED PROPERTY ISSUE

[11] Counsel made submissions in respect of two specific properties. The first property was that at Shaw's Road, Belfast (C). It was purchased in 1984 (4 years before the marriage) in the joint names of the respondent and his father. The respondent's father then died in 2005 whereupon the respondent became the sole owner of the property. The respondent's mother currently

lives in the property. Miss O'Grady on behalf of the petitioner argued that the Shaw's Road property (C) should be viewed as a matrimonial asset. Miss McBride on behalf of the respondent argued that, while it should be treated as inherited property, her client nonetheless was offering the petitioner one third of the value of the property.

[12] The second property in respect of which inheritance submissions were made was the further property in Belfast (D). It was originally a Northern Ireland Housing Executive property occupied by the petitioner's parents. The property was then purchased from the Housing Executive in the name of the petitioner and two other persons. Upon the death of the petitioner's father, the petitioner now has a one third interest in the property. The original purchase was funded by £10,000 mortgage raised on the respondent's father's home at Shaw's Road (C).

[13] The issue of inheritance in Ancillary Relief has been regularly analysed in recent cases by the courts both in Northern Ireland and in England and Wales. In the well known case of *White –v- White* [2001] 1AC 596, Lord Nicholls states at page 610: -

> "Property acquired before marriage and inherited property during marriage comes 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.
>
> Plainly, 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 circumstances in which the property was acquired are among the relevant matters to be considered."

Duckworths Matrimonial Law on 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."

[14] In the Northern Irish case of *M -v- M (financial provision; evaluation of assets)* (2002) 32 Fam Law 509, McLaughlin J deducted a figure of £400,000 from the total assets to reflect the value of the husband's inheritance. The Learned Judge however also says at pages 38 and 39 of the full judgment: -

> "It appears to me that the proper approach is firstly, to determine the assets available to the parties; secondly, to take account of the principles set out in statute and matters which bear on the fairness of the divisions of 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 stand back and test the potential result against the yard stick of equality."

[15] It is against that background that any deduction has to be made regarding inherited wealth which a husband or wife brings to a marriage. In the Northern Irish case of *G –v- G & J* [2003] NI Fam 19 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 the Learned Judge does not seem to have ascribed any particular importance to the inheritance aspect of 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 objection of fairness. The courts have chosen to measure fairness of outcome by the adherence to the principle of equality unless there is good reason for variation such as wholly exceptional contributions by one party of family welfare."

[16] In the case of *GW –v- RW* [2003] 2FLR 108, Nicholas Moston QC sitting as Deputy Judge of 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 value."

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

> "Applying the words of the statue 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 as a beneficiary under a trust. Thus, what comes in by statue 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 reason. In my judgment, merely because inherited property has not been touched or does 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 comments 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 express 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."

[18] I therefore intend not to exclude inherited property from this particular case but to regard it as one of the factors to be taken into consideration in applying the Article 27 checklist.

THE PENSIONS ISSUE

[19] Miss McBride on behalf of the respondent invited the court to look at the nature of the assets and how they had been acquired. In particular, she asked the court to note that the respondent had worked for his company for 30 years. The marriage had existed for 14 years. Miss McBride submitted that the petitioner's proposals failed to take into account the different nature of pensions from other types of property.

[20] It is clear that pensions should be treated differently from other types of property. Although not referred to by counsel, the decision in *Martin-Dye –v- Martin-Dye* [2006] 2 FLR 901 is an example of how a failure to treat pensions as different in kind from the other assets in the case can lead to unfairness.

[21] There may often be facts and circumstances in an individual case which the court should take into account in determining any division of the pension entitlements accrued by the parties. During his oral evidence the respondent stated that he was now aged 47 and could only contribute for 10 more years to the pension fund until his contributions reached their maximum level. On the other hand he stated that his wife had 17 years left of her working life. He nonetheless conceded during cross-examination that he would be able to continue to develop his earning capacity.

[22] Having regard to all the circumstances in this case, and in particular to the fact that the respondent's pension entitlement has been generated from 30 years employment, in the context of a 14 year marriage, I have concluded that it is appropriate to depart to some degree from the principle of equality in respect of the respondent's pension. I have concluded that it is appropriate to make a pension sharing order in favour of the petitioner in respect of 25% of the respondent's pension. I have calculated this on the basis that approximately 50% of the pension entitlement was accumulated prior to the marriage and hence the petitioner will receive a 50% share of the remainder.

THE ARTICLE 27 FACTORS

Financial needs of the child

[23] Article 27 of the Order 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. There are two such children, both of whom reside with the petitioner. They have regular contact with their father who gave evidence that he saw them some two to three days per week. The parental aspirations were that both would in due course attend university.

Income and earning capacity

[24] The petitioner earns £488.00 per month, the respondent gave evidence that his nett income was £4452.00 per month. This was a reduction from last year when his company reorganised and the balance between basic salary and commission payments changed. His new post involved very stretching targets which had not been met. He was not therefore eligible to receive certain bonus payments. Nevertheless it is clear that there is a very great difference in earning capacity between the parties. This disparity is likely to continue, in the language of Article 27, "in the foreseeable future". Each of the parties have a home. These were purchased following the separation of the parties when the matrimonial home was sold.

Financial needs, obligations and responsibilities of the parties

[25] 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

[26] Both parties enjoyed a good standard of living prior to the breakdown of the marriage.

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

[27] As stated previously, the petitioner is aged 42 and the respondent is 45. The marriage was of substantial duration, having lasted 14 years. Miss McBride submitted that I should view the marriage as a medium term one and not a long term one and that I could therefore depart from the 50/50 principle of division.

Any physical or mental disability by the parties of the marriage

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

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

[29] I view the contribution made by each party as equal. As Lord Nicholls said in *White v White* [2000] 2 FLR 981: -

> "If, in their different spheres each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer."

Conduct

[30] No evidence was offered of any conduct which was such that it would be inequitable to disregard it.

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

[31] Other than pension arrangements, there were no such matters.

Other matters taken into account

[32] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which not fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. In these proceedings there were no such matters which fell to be considered.

DIVISION OF THE ASSETS

[33] Accordingly, having taken all the facts and circumstances of this case into account, I intend to divide the capital assets as follows. The petitioner wife will have transferred to her (or will retain):

(i) The property in Lisburn (A) with a equity of approximately £135,832;
(ii) The BT Maxi ISA valued at £22,118;
(iii) HSBC ISA valued at £3,789;
(iv) Legal and General policy number *****74 valued at £12,351;
(v) Legal and General policy number *****64 valued at £13,895;
(vi) Legal and General policy number *******61 valued at £13,638;
(vii) Legal and General policy number *******75 valued at £7,312;
(viii) Legal and General policy number ******23 valued at £7,148;
(ix) Her interest in the further property in Belfast (D) valued at £63,333.

[34] The respondent husband will retain:

(i) The further property in Lisburn (B) with an equity of approximately £69,500;
(ii) The property at Shaw's Road (C) with an equity of approximately £167,000;
(iii) BT Share Save valued at £5,000;
(iv) Singer and Freelander fund valued at £1,004;
(v) Shares valued at £3,855;

[35] In respect of the two pensions, the petitioner wife will retain her own and, as previously indicated, I make a pension sharing order in her favour in respect of 25% of the respondent's pension. I direct counsel for the respondent to draft a pension sharing order and to seek the agreement of the trustees of the draft order within six weeks.

[36] 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 prospective 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."

[37] The split of the capital assets of £525,775 is therefore in terms of £279,416 to the petitioner wife and £246,359 to the respondent husband. This represents approximately 53% to the petitioner wife and 47% to the respondent husband. In addition, the petitioner wife retains her own pension and receives a pension sharing order of 25% of the respondent husband's pension. Taken together with my decision on periodical payments, I regard this, in all the circumstances, as a equitable division of the assets whereby, in the words of Baroness Hale in *Miller v Miller ; McFarlane v McFarlane* [2006] 1 FLR 1186, "the ultimate objective is to give each party an equal start on the road to independent living".

[38] I will now hear argument as to costs.