

Master 24

17/01/2006

IN THE HIGH COURT OF JUSTICE NORTHERN IRELAND

FAMILY DIVISION

Between

D

Petitioner

And

D

Respondent

Master Redpath

In this case the Petitioner seeks the full range of Ancillary Relief available to her under the Matrimonial Causes (Northern Ireland) Order 1978.

The assets in the case are modest and very often this can make cases of this type significantly more difficult to deal with. One particular issue arose in the case which arises on a regular basis and I feel it would be helpful if I were to set out my reasons in writing.

The assets in the case were as follows: -

1. Former matrimonial home, equity £65,000;
2. Policies, £22,165.00;
3. Shares, £12,595.00;
4. Respondent's Pension CETV, £128,828.00;
5. Petitioner's Pension in payment at £47.93 per month with a lump sum of £1501.00 already having been paid;

6. The respective incomes of the parties are for the Respondent £1800 per month and for the Petitioner approximately £600.00 per month.

One of the main issues raised in the case was that the parties had been separated since 1999 and that for the last 6 years the Respondent had been paying the mortgage, maintaining the house and servicing the policies. It is commonplace in cases before me for evidence to be called concerning the fact that one or other of the parties has maintained the matrimonial home and paid the mortgage since the date of separation and is therefore entitled to a much greater proportion of the proceeds of the house than would otherwise be the case. Historical evaluations are regularly produced to show what the value was at the date of separation and claims are made for any increase (and that increase can be substantial) in the value of the house since the date of separation by the party who has paid the mortgage since the separation. Such a claim is made in this instant case.

What this approach overlooks is the fact that the party in occupation has enjoyed the occupation of the premises whereas the party not in occupation has had to make other arrangements and pay for them. By way of example, the Petitioner in this case was paying rent of £400.00 per month and receiving no capital benefit whereas, even after increasing the mortgage recently, the Respondent was only paying £280.00 per month. I also have to bear in mind that very often (but not necessarily in this case) the party leaving the matrimonial home has had to do so as a result of matrimonial violence or other abuse and has no option of making any contribution to the mortgage or otherwise maintaining the property. To deprive that person of any benefit of the increase in the value of the property would in my view be quite unfair in many sets of circumstances.

How then is this problem best approached? The traditional way of dealing with the distribution of shares between co-owners is by way of equitable accounting. The principals of which are set out in length in the case of Official Receiver for Northern Ireland –v- Robert Kearney, Patricia Kearney and Columba Christopher Eastwood. In that judgment, Girvan J sets out the various principles involved. These principles do not of course apply to property adjustment issues, but are helpful, although not necessarily definitive, in deciding how the shares of one or the other parties to an application such as this should be credited or discounted in the set of circumstances such as I face in this case.

A number of principles are set out in the judgement: -

1. A party can only take from a fund that which he has contributed to a fund.
2. The one party who discharges another secured obligation in whole or in part is entitled to be repaid out of the security the amount of the sum or sums paid by him or her. The learned Judge however made it clear that where the parties are spouses the discharge of mortgage instalments by one party or the other may not be intended to give rise to any right of subrogation to the party making the payments see Coucher – v- Coucher [1972] 1AER943. I think you can take it that in most cases where the parties are separated, and one party is paying the mortgage solely, that party doesn't intend the other party to get the benefit of those payments.
3. In a particular suit or order for sale, adjustments can be made between co-owners, the grounding principle being that neither party should be entitled to take the benefit of any increase in the value of the property without making allowance for what was expended to bring about that increased value. This clearly envisages a situation where a party has paid for an extension or other significant improvement to

the house and would clearly be entitled to any increase in the value of the house as a result of that expenditure.

The general guiding principle in equitable accounting is that allowance should be made for expenditure for one of the co-owners which results in an increased value of the property held by them at the time of the partition suit or order for sale. That will generally include allowances as I have already said for capital funding for extensions etc but also credit for the increase in the value of the equity of redemption resulting from the capital element of any mortgage payments. Set against all of this however has to be the benefit of the use and occupation of the premises which again in this case is a significant factor.

I have only set out the very basic principles of equitable accounting and it can be an overly complicated way to approach cases such as this. In my view however, it is a good guide and a good starting point.

The Kearney case was a case relating to the valuation of co-owners where one of the co-owners had gone bankrupt. Whilst it is of assistance in calculating the benefits that should accrue to a party who has continued to maintain property it is not definitive. Chadwick LJ in Oxley –v- Hiscock [2004] 2FLR669 state at 706: -

“In a case where there is no evidence of any discussion between the [parties] as to the amount of the share which each was to have....each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property and, in that context, ‘the whole course of dealing between them in relation to the property’ includes the arrangements which they make from time to time in order to meet the outgoings (for example mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.”

Accordingly, it is quite clear that there is no rule of law that the person who maintains the mortgage on a property and maintains the property itself is entitled to

any increase in the value of the property is from the date of separation to the date of hearing.

As I have already pointed out in this case the wife has in fact had to pay more by way of rent than the husband has in mortgage repayments and fairness seems to me to dictate that if there is to be a reduction in her interest in the matrimonial home it should only be a modest one. The mortgage is an interest only one and accordingly has not reduced as a result of the Respondent's efforts. The maintenance of the policies is a somewhat different matter. I think as the Respondent will receive no direct benefit from the policies during the course of the separation I will also reduce the Petitioner's interest in those policies by the amount they have increased from the date of the separation to date, a figure of £8,000.

Accordingly, if I take a figure of £32,500.00 for the Petitioner's interests in the house and £11,080.00 for her interest in the policies, her interest in these two items come to £43,580.00. In relation to the shares valued at £12,595.00 owned by Mr Dobbin, it was argued that these only came into his possession during the course of the last year of the marriage. It would appear however, that these shares were in fact in respect of employment during the course of the marriage and in my view the Petitioner is entitled to £6,250.00 from the value of those shares. This leaves her with a figure in the region of £50,000 to meet her entitlement in the case together with the issue of pension sharing. I also however, have to take into account the fact that the Respondent has contributed to the education of the child to the family, Colin, who appears to have lived with them after the breakdown of the marriage. In these small cases that is always a significant feature.

Accordingly, I intend to order that the Respondent pays to the Petitioner a lump sum of £40,000 within 3 months. In relation to the pension Mr Dobbin has

accrued a significant portion of his pension following the separation and accordingly I intend to order a pension share in favour of the Petitioner of 40%. Lastly I order that the Petitioner transfer her interest in the three jointly owned CIS policies to the R. I further intend to order that there be no order as to costs save legal aid taxation of the Petitioners costs.