Neutral Citation No. (2002) NIFam 16

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

Ref: GILF3729
Delivered: 26/06/2002

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

_____

BETWEEN:

DORETHEA DONNELLY

Petitioner;

-and-

MICHAEL DONNELLY

Respondent.

_____

GILLEN J

The background to this case can be stated quite shortly. The parties were married on 31 August 1966. The petitioner issued a petition on the ground that the marriage had broken down irretrievably as evidenced by the fact that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with him and that he had committed adultery with the co-respondent. That petition was issued on 1 February 2001. The respondent issued an

answer denying these allegations but cross-petitioning on the ground that the marriage had irretrievably broken down as evidenced by the fact that the parties had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. By her reply, the wife included a formal form of paragraphs putting in issue the allegations in the answer so far as they were anything other than admissions and then she went on to deny that the marriage had irretrievably broken down due to the parties separation for five years. She sought again the relief as set out in the prayer of her Petition.

Article 3(2) of the Matrimonial Causes (Northern Ireland) Order 1978 ("the 1978 Order"), so far as material, provides:

> "(2) The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts, that is to say -
>
> (a) that, since the date of the marriage, the respondent has committed adultery;
>
> (b) that the respondent has behaved in such way that the petitioner can not reasonably be expected to live with the respondent.
>
> ……
>
> (e) that the parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition (hereinafter in this order referred to as 'five year separation')."

Sub-Article 3(5) of the 1978 Order states:

> "(5) If the Court is satisfied on the evidence of any such fact as is mentioned in paragraph (2), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to Articles 4(2) and 7, grant a decree of divorce."

Article 22 records where relevant:

> "22. If in any proceedings for divorce … the respondent alleges and proves any such fact as is mentioned in paragraph (2) …, the court may give to the respondent the relief to which he would have been entitled if he had presented a petition seeking that relief."

In the case now before me Ms O'Grady, who appears on behalf of the petitioner, submits that the petitioner should be entitled to proceed on the basis of the facts set out on her petition notwithstanding the ground set out in the respondent's answer and cross-petition.

A similar situation arose in Grenfell –v- Grenfell 1978 1 AER 561. The legislation in England is similar, with Section 20 of the Matrimonial Causes Act 1973 being similar to Article 22 of the 1978 Order. Dealing with the effect of Section 20, Ormrod LJ said at page 565 B:

> "Counsel for the wife have drawn attention to the fact the word 'may' occurs in that section (Section 20), and says that that gives the court, and is intended to give the court, a discretion. The word 'may' sometimes does give the court a discretion but sometimes it simply empowers the court to do something, and the purpose of that section, in my judgment is perfectly simple: it is designed to save the multiplication of pieces of paper in the way of pleadings and it means no more than this, that if a respondent in his answer raises sufficient matter, and establishes it, to entitle him, had he been the petitioner, to a decree, then the court may grant him one. It is a purely enabling section, designed to avoid multiplicity of pieces of paper and making amendments which add nothing to the case."

At page 566B the judge went on to say:

> "To deal with this question, which has arisen several times in the past, though I think this is the first time it has

arisen in this Court, it is necessary to remind ourselves what the Divorce Reform Act 1969 in fact did. There is one ground, and one ground only now, in which the Court has power to dissolve a marriage and that is now set out in Section 1 of the 1973 Act. The ground is that the marriage has broken down irretrievably.

Parliament then went on in Section 1(2) to prescribe five separate facts, one of which has to be established in order to prove that the marriage has broken down irretrievably. There is of course the well known five. On proof of any one of those five (and Parliament plainly chose each of those five facts as being facts which would raise in any reasonable mind a presumption that the marriage had broken down) Parliament provided that the court shall grant a decree of divorce unless it is satisfied on all the evidence that the marriage has not broken down irretrievably. In other words, on proof of any one of the five facts, there is a presumption, rebuttable it is true, of irretrievable breakdown, and the onus is quite plainly on the party who is asserting that the marriage has not irretrievably broken down to satisfy the court by evidence that the presumption should be treated as rebutted. It is not therefore an adversarial proceeding in any way comparable to the proceedings in other divisions of this court. Whichever side proves a fact under Section 1(2) proves prima facie that the marriage has irretrievably broken down, and the court is not, in my judgment, concerned with anything else.
….

There is no point, as I see it, in a case like this in conducting an enquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by one or other of the parties. To do so would be a waste of time of the court and, in any event, would be running, as I think, counter to the general policy or philosophy of the divorce legislation as it stands today. The purpose of Parliament was to ensure that where a marriage has irretrievably broken down, it shall be dissolved as quickly and as painlessly as possible under the Act, and attempts to recriminate in the manner in which the wife in this case appears to wish to do so should be, in my judgment, firmly discouraged."

This authority has not been rejected or distinguished in any subsequent case so far as I am aware. The most recent addition of Rayden and Jackson on Divorce and Family Matters, 17th Edition, at paragraph 7.7 relies on the propositions put forward in Grenfell and at paragraph 7.7 states:

> "Where on the face of the pleadings there are facts sufficient to enable the court to grant a decree of dissolution, the Court of Appeal has firmly declared that it is in general wrong to permit a party to have other allegations investigated. In particular, where in the face of the pleadings five years separation is alleged by a respondent and admitted by the petitioner who has alleged behaviour in the petition, there is no point in conducting an enquiry into behaviour merely to satisfy feelings, however genuinely and sincerely held by the petitioner."

Ms O'Grady urged on me that I should not follow the principle set out in Grenfell for a number of reasons which included the following:

1. She attempted to distinguish the facts between the present case and Grenfell's on the basis that the Petitioner in the present case did not accept "as a specified fact" that the breakdown of the marriage was caused by the fact that the parties were living apart for five years. I think that this confuses the philosophy behind the Northern Ireland legislation. The Order sets out five ways in which the party who wishes to bring divorce proceedings can satisfy the Court that this has happened. Evidence of any one of them can be given to establish that the marriage has irretrievably broken down. It is not a question of cause or blame.

2. Counsel then sought to distinguish the Northern Ireland legislation from the legislation in England and Wales. There certainly are some substantive differences between the 1978 Order and the Matrimonial Causes Act 1973 for England and

Wales. For example, the adultery fact in Northern Ireland is adultery simpliciter whereas under the 1973 Act the petitioner must prove that the respondent has committed adultery and that the petitioner finds it intolerable to live with him. A further contrast, reflecting a perceived attitudinal difference between the jurisdictions, has been the retention of the oral hearing in all divorce cases in Northern Ireland. The "special procedure", colloquially referred to as "divorce by post", was introduced in England and Wales in 1977 to obviate the necessity for undefended divorces to have a court hearing. Clearly most divorces in England are processed on paper without either party attending court. However the Grenfell situation, where the divorce was contested, was one of the instances where an oral hearing was available. Although a provision allowing the special procedure to be introduced has been on the Northern Ireland Statute books since 1993, it has never been brought into operation. There are also certain procedural differences between the two jurisdictions. I find nothing whatsoever in these differences that persuades me that a different attitude should be adopted in Northern Ireland from that adopted in England and Wales pursuant to the Grenfell case. The underlying philosophy is the same in both jurisdictions. It was argued that the duty to enquire into the facts alleged by the petitioner is stronger in Northern Ireland than in England and Wales. The suggestion was that by virtue of the special procedure the obligation to enquire has somehow been diluted in that jurisdiction and not in the Northern Ireland jurisdiction. I find absolutely no basis for such a suggestion. In Grenfell's case the court specifically dealt with the same obligation to enquire under

the 1973 Act as that which is provided under Article 3(3) of the 1978 Order. At page 566G Ormrod LJ said:

> "Counsel for the wife has sought to rely on s1(3) of the 1973 Act which provides:
>
> > 'On a petition for divorce it shall be the duty of the court to enquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent'.
>
> He says that that requires the court, imposes a statutory duty on the court, to conduct an enquiry into the facts alleged by the petitioner and respondent. The first comment to make on that is this: when the court is proceeding on the husband's Prayer for a dissolution of marriage on the ground of five years separation, he, to all intents and purposes, is the petitioner and the court's duty is to enquire into any relevant fact relating to his allegations. The wife, in her turn, is the effective respondent for the purposes of s1(3) and it is the duty of the court to enquire into any relevant facts alleged by her. But, in the nature of things, on the facts in this case, there are no other relevant facts, other than the fact that the parties have been apart for five years and that the wife herself has asked for a decree and has herself admitted that the marriage has irretrievably broken down".

I see no reason whatsoever to conclude that the duties on the court in Northern Ireland are any different from the duties imposed on the court in England and Wales. There is no greater duty for the Northern Ireland court to enquire into these facts than there is on the courts in England and Wales. Once again I find no reason to distinguish between the Grenfell situation and that which obtains in this case. At this point I should indicate that I have read the decision of the Court of Appeal in Northern Ireland in the matter of an application by the next of kin of Gerard Donaghy (Deceased) for Judicial Review and In the Matter of a Decision of

the Bloody Sunday Enquiry dated 7 February 2002, unreported, reference NICC3690 delivered 8 May 2002. The court adopted the practice outlined by Lord Lowry in Re: McKernan's Application (1995) NI385 where he said at 389:

> "Although decisions in dicta of the Court of Appeal in England do not bind the courts in this jurisdiction, they traditionally, and very rightly, are accorded the greatest respect, particularly where the same or identically worded statutes fall to be construed. Therefore, that I may account scrupulously for the decision I have reached in this judgment, it becomes one to deal faithfully with the relevant English authorities".

I intend to adopt that practice in this case and follow the rule in Grenfell.

3. Ms O'Grady took me through an extremely comprehensive historical analysis of the 1978 Order and its background. She drew my attention to the Third Royal Commission on Marriage and Divorce (the Morton Commission) which reported in 1956, the Archbishop of Canterbury's Group "Putting Asunder: A Divorce Law for Contemporary Society" 1966, the subsequent Law Commission Report "Reform of Grounds of Divorce – The Field of Choice" which supported the principle of no fault divorce, and finally the mixed fault/no fault system which was introduced in the Matrimonial Causes Act 1969 and consolidated in the Matrimonial Causes Act 1973. She reminded me again of the special procedure which operates in England. The Booth Committee Report in 1985 sparked a renewed interest in the relevance of the ground for divorce. Following the Booth Committee Report, the Law Commission considered the ground and procedure for divorce in a discussion paper and report of 1988 and 1990 respectively. This led finally to the Family Law Act 1996. Counsel then submitted that in Northern Ireland there had traditionally been opposition to a no fault concept from a number of the churches and it is

significant that the Northern Ireland jurisdiction did not implement the special procedure. Counsel opened to me the nature and extent of opposition to no fault divorce in Northern Ireland, as evidenced by research by the Office of Law Reform and contained in a report to the Office of Law Reform "Divorce in Northern Ireland Unravelling the System" 1999, a consultation paper issued by the Office of Law Reform and entitled "Divorce in Northern Ireland" together with the Office of Law Reform, Department of Finance and Personnel document headed "Divorce - the New Law in Northern Ireland" and the "Quality Impact Assessment of the Matrimonial Proceedings and Family Law Bill 2002".

While undoubtedly this material was of historical interest, I must remind myself that I am bound by the content of the legislation. As Lord Nicholls of Birkenhead recently said in Re: S (minors) (Care Order: Implementation of Care Planning); Re: W (minors) (Care Order: Adequacy of Care Planning) (2002) 1 FLR 815:

> "For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the Court is not equipped to evaluate".

I find nothing in this Northern Ireland legislation which is materially different from the English legislation other than the differences I have outlined above. Those differences do not persuade me that this court should adopt a different interpretation of the 1978 Order than the interpretation by Grenfell of the 1973 Act. I therefore reject these arguments by Ms O'Grady.

(4) Miss O'Hara argued that under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) the petitioner was entitled to a fair trial and that a minimum standard of due process required the hearing of the facts. Whilst the Grenfell judgment was given before the implementation of the Human Rights Act 1998, I find nothing whatsoever in its principles that would offend the provisions of Article 6 and I am satisfied that the approach adopted affords both the Petitioner and the Respondent a fair trial.

(5) It was argued on behalf of the petitioner that by virtue of the fact she was legally aided, the State would have to bear the costs of a divorce on a five year separation basis whereas if she was permitted to proceed on the basis of her own petition, and was successful, the respondent would have to bear the costs. Clearly where the court decides to dissolve a marriage on the ground of five years separation it should not, in the ordinary way, grant costs to either side, the object being to prevent the parties insisting on the Court conducting an enquiry as to why the parties have been living apart for five years i.e. having a contested suit simply for the purpose of deciding who should pay the costs. I consider that approach should be adopted in this case and the unnecessary expenditure on costs, whoever should bear them, should not be embarked on. It is necessary to recall that the overriding objective of the Rules of the Supreme Court (Northern Ireland) 1980 as outlined at Rule 1A is to deal with a case justly so far as practicable, inter alia, saving expense and ensuring that it is dealt with expeditiously and fairly. Such an approach in my view underlines the philosophy behind the 1978 Order.

Conclusions

My conclusions are as follows:

1. Where a respondent to a petition founded on adultery or behaviour or desertion alleges five years separation which the petitioner admits (which I consider is factually admitted in this case), the court should first determine whether the five year separation is established and, if so, grant a decree on that fact.

2. The principles set out in the Court of Appeal in Grenfell –v- Grenfell (1978) 1 AER 561 should govern cases in Northern Ireland under the 1978 Order. Accordingly if I conclude that the respondent has established that the parties have been separated for five years, then it would be entirely wrong for the petitioner to be permitted to go on with her petition given that there were sufficient facts before the court for it to grant a decree.

Accordingly, since in this case it is not disputed that the parties have lived apart for five years, I intend to permit the respondent to give evidence in this case in order to determine whether the five year separation is established and if he does establish that, I then intend to grant a decree on that fact. I intend to reserve the costs of this matter until I have determined the issue of the dissolution of this marriage on a full hearing.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

FAMILY DIVISION

_____

BETWEEN:

DORETHEA DONNELLY

Petitioner;

-and-

MICHAEL DONNELLY

Respondent.

_____

J U D G M E N T

O F

GILLEN J

_____