Ref:	**Master48**

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

Delivered:	**6/6/07**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

E D

Petitioner;

and

J D

Respondent.

Master Bell

[1] In this application the petitioner seeks Ancillary Relief pursuant to a summons dated 13 October 2006.

[2] At the hearing neither party gave oral evidence. An affidavit was sworn by the petitioner on 13 October 2006 for the purpose of these proceedings. An affidavit was sworn by the respondent on 5 February 2007. Each counsel advanced her client's case by means of oral submissions and relied upon the affidavits of the parties and the written statements of core issues submitted for the Financial Dispute Resolution Hearing before Master McCorry, following which, unfortunately, there had been no resolution between the parties. I also had the benefit of submissions by Miss Creighton on behalf of the petitioner and Miss Brown on behalf of the respondent.

[3] The only asset which was the subject of the hearing was the matrimonial home. Although the parties each held pensions, the amounts represented by these were small and of equal value. It was agreed by the parties that these cancelled each other out.

[4] There was a clear difference of approach between the parties as to the appropriate outcome of the proceedings. The petitioner sought the transfer of the matrimonial home to her in return for the payment of a sum of money. The respondent sought a *Mesher* order, postponing the sale of the matrimonial home and division of the net sale proceeds until the youngest child of the family reached a certain age.

THE HISTORY OF THE MARRIAGE

[5] The petitioner wife is aged 43 and the respondent husband is aged 40. The parties met at work and subsequently married on 6 April 1990. They were separated in January 2003 and a Decree Nisi was granted on 12 December 2003. There are two children of the marriage: a son aged 16 and a son aged 12, both of whom live with the petitioner.

[6] The parties purchased a home together in 1990. It was subject to 100% finance in that the Co-ownership Housing Association hold a 37% interest in the property and there is a mortgage in favour of Halifax plc. In 1991 both parties were made redundant and since that time the mortgage payments and Co-Ownership instalments have been paid by the DHSS and Housing Benefit respectively. While there was a factual dispute as to how each party's redundancy payments had been spent, this was not an issue between them for the purpose of this application.

[7] The case was opened to me on the basis that it was agreed between the parties that the property was valued at £155,000; that the amount required to redeem the mortgage was £20,075 and that the equity available to be divided between them was £76,800.

PETITIONER'S SUBMISSIONS

[8] The petitioner seeks to remain in the former matrimonial home. She argues that the needs of the children have priority and that it is inappropriate to sell the house at this stage in their lives.

[9] The petitioner argues that she has maintained the matrimonial home since the parties separated four years and four months ago. In this regard she has painted and carpeted the home which has enhanced its value. She submitted that, since their January 2003 separation, the respondent has contributed nothing towards her or the home. She argued that, in addition to the mortgage payments made by the DHSS, she has herself paid £65 per month towards the mortgage and that I should have regard to this. There was no evidence of such payments before me at the hearing and I directed that that her discovery be updated to prove whether this was the position. Subsequent to the hearing her discovery was updated by means of the submission of a

letter from Halifax plc which showed activity on the mortgage account over the past year. It indicated regular cash lodgements in addition to the bank credits. While in May 2006 these were £35 per lodgement, they increased in July 2006 to £60 per lodgement and then in September 2006 to £65 per lodgement. I am therefore satisfied that she has been making regular mortgage payments.

[10] The petitioner seeks a clean break settlement and that the home be transferred to her. She has sought, and now obtained, the permission of Halifax plc to have the house transferred into her sole name.

[11] In terms of financial borrowing capacity, she has approached her Credit Union who have agreed to lend her a maximum of £10,000. In addition, she has been able to borrow an additional £2,000 from family members.

[12] The petitioner argues that the decision of the court should be that the house is transferred to her on payment of £12,000. She argues that this is an appropriate decision in the light of the following factors :

(i) Her responsibility for the children of the marriage;
(ii) Her monthly payments to the Halifax plc;
(iii) Her contribution to the upkeep of the property; and
(iv) The increase in property prices which has prejudiced her ability to obtain a replacement property.

[13] The petitioner argues that a *Mesher* Order is not appropriate in this case because :

(i) There is too long a period between the current age of the younger child and the trigger event which will cause the division of the net proceeds. The younger child was currently aged 12. It would be a minimum of six years, and possibly as many as nine years or more if he went into tertiary level education, before the sale and division was triggered;
(ii) Such an order would be inequitable in circumstances where the respondent has not been contributing to the upkeep of the house;
(iii) The sale of the property at some point in the future would not provide enough finance to set up two new households; and
(iv) An order transferring the respondent's interest to the petitioner in return for a payment of £12,000 (which represents 15.5% of the equity) is a fair result and hence there is no need for a *Mesher* Order.

RESPONDENT'S SUBMISSIONS

[14] The respondent submitted that the house had been maintained since 1991 by public benefits rather than by the petitioner and it was only since the separation in 2003 that there had not been a contribution by him. The respondent had not been in a position to contribute due to his unemployment.

[15] While it was accepted that the petitioner had maintained the home since the date of separation, she had also had the benefit of occupation.

[16] Counsel submitted that the valuation of the property should be that at the date of hearing and referred to *D v D*, a decision of Master Redpath in January 2006 as authority for that proposition. The valuation obtained by the petitioner was dated January 2007 and common sense showed that this had increased. Accordingly, as property prices were increasingly, £12,000 would, as time elapsed, progressively represent less than 15.5%.

[17] The respondent therefore sought a *Mesher* Order because :

(i) It was inappropriate to seek the sale of the house at the present time. The respondent accepted that the first priority was the housing needs of the children and therefore did not seek the immediate sale of the home;
(ii) An equitable division of the equity in the marital home would be on a 60% - 40% split., giving the respondent £30,720;
(iii) Since the respondent could apparently manage a borrowing capacity of no more than £12,000 the only realistic alternative was a *Mesher* Order;
(iv) The period before the *Mesher* trigger operated was not unusual. By way of example was offered the decision in *Dorney-Kingdom v Dorney-Kingdom* [2000] 2 FLR 855 where the Court of Appeal granted a *Mesher* order where the youngest child was then aged 9;
(v) The need for housing for the petitioner and the children did not take away the respondent's long term need for capital (*Sawden v Sawden* [2004] 1 FCR 776); and
(vi) It was important not to deprive the respondent of capital or its ultimate enjoyment where he lacks secure accommodation or the means of acquiring any (*Elliott v Elliott* [2001] FCR 477.)

THE ARTICLE 27 FACTORS

Financial needs of the child

[18] Article 27 of the Matrimonial Causes Order (Northern Ireland) 1978 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.

Income and earning capacity

[19] Both parties have been recipients of state benefits since they were made redundant in 1991.

Financial needs, obligations and responsibilities of the parties

[20] There was no evidence placed before me of unusual financial needs in respect of the parties. The respondent makes no financial contribution towards the children. He lives in privately rented accommodation with a male friend.

The standard of living enjoyed by the family before the breakdown of the marriage

[21] Both parties enjoyed a modest standard of living prior to the breakdown of the marriage.

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

[22] As stated previously, the petitioner is aged 43 and the respondent is 40. The marriage was of significant duration, having lasted 13 years until the parties separated and 16 years until the Decree Nisi was granted.

Any physical or mental disability by the parties of the marriage

[23] 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

[24] The evidence before me was that the contribution made by each of the parties to the welfare of the family was unequal. Welfare must be understood in a broad sense. In *G v G (Financial Provision: Separation Agreement)* [2000] 2 FLR 18 Connell J spoke of the "emotional contribution" to the welfare of a family. Welfare clearly also involves social support as children confront the educational and social challenges involved in adolescence. The petitioner has effectively cared for and brought up both children on her own since the parties separated. The respondent admits in his affidavit that he has not had contact with the children since the marriage broke down. He also deposes that an order was made in 2006 for indirect contact with his younger child pursuant to the child's wishes as expressed to a social worker. However a submission was made on behalf of the petitioner that no such contact has

been made. While, given his unemployment, there would be clear limitations on the respondent's ability to contribute financially to the upbringing of his children, it appears that he has not in recent times contributed to their welfare in the broad sense of that term either. Thus, to use the terminology adopted by Lord Nicholls in *White v White* [2001] 1 AC 596, while neither party has been able to perform the role of money-earner, it is only the petitioner who has performed the role of home-maker and child-carer.

Conduct

[25] The petitioner's divorce petition made allegations of violence and threats of violence during the marriage. Although the respondent sought in his written core issues to challenge the proposition that there was conduct which ought to be taken into account as an Article 27 factor, counsel for the petitioner submitted during the hearing that no point would be made to the effect that any conduct during the marriage 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

[26] Other than the pension arrangements previously mentioned which cancel each other out, there were no such matters.

Other matters taken into account

[27] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which do 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 I consider that I should take into account the fact that the petitioner has, since the time of separation of the parties, maintained the matrimonial home and made progress towards repaying the mortgage.

CONCLUSION

[28] 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.

[29] The first issue which requires to be determined is to decide how the equity in the matrimonial home should be shared between the parties. The starting point is that after a marriage of some duration, each party can reasonably expect to receive a half share. However a party's share may be increased up or down, but only on a strict application of the Article 27 criteria. On the facts presented to me, and in particular :

(i) that the petitioner has contributed towards the maintenance of the matrimonial home since the separation of the parties whereas the respondent has not;
(ii) that the petitioner has made payments towards the repayment of the mortgage on the matrimonial home since the separation of the parties whereas the respondent has not;
(iii) that the petitioner has contributed to the welfare of the family since the separation of the parties whereas the respondent has not ; and
(iv) that this case is not what is often referred to, somewhat inelegantly, as a "big money" case and is therefore more needs-driven

I conclude that it is appropriate to divide the £76,800 equity in the matrimonial home in terms of £56,800 to the petitioner and £20,000 to the respondent. Instead therefore of the 84.5% - 15.5% split sought by the petitioner or the 60% - 40% split sought by the respondent, the order made by the court splits the equity on the basis of 73.95% to the petitioner wife and 26.04% to the respondent husband.

[30] 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 divisions 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."

[31] Applying the reverse check commended by McLaughlin J., I consider this to be a fair division of the assets in the light of a consideration of the Article 27 factors despite the departure from equality.

[32] I therefore order that the petitioner may buy out the respondent's interest in the matrimonial home by paying the respondent the sum of £20,000 within three months.

[33] This case was, however, opened to me on the basis that the maximum borrowing capacity which the petitioner could achieve was £12,000. It may therefore not be possible for her to obtain the sum of £20,000. The issue therefore arises as to what should occur if the petitioner is not able to buy out the respondent's interest.

[34] I agree with the parties that, in the event that the petitioner cannot raise the funds to purchase the respondent's interest in the former matrimonial home, that the home should not be sold immediately. A *Mesher* order is a more appropriate alternative. Such an order, which derives its name from the decision in *Mesher v Mesher*, [1980] 1 All ER 126, typically allows the parent with whom the children of the marriage are living in the former matrimonial to remain there until the youngest child turns 18 or completes full-time education, whereupon the property is be sold and the proceeds in a particular proportion between the parties.

[35] The respondent's written statement of core issues stated that the respondent was willing to wait until his younger son reached the age of 18 until his interest in the property was realised. At the hearing I asked counsel what were the respondent's views on the terms of a *Mesher* Order in the event that the younger son went on to tertiary level education. Counsel agreed that the terms of any *Mesher* Order might be made such that the sale of the

property and division of the net proceeds occurred upon the point at which the younger son reached the age of 18, or completed his full time education, which occurred later.

[36] There are many ancillary relief cases where there is no perfect financial solution to the problems caused by marriage breakdown. This is one of those cases. If therefore the petitioner has not given effect to the property adjustment order by purchasing the respondent's interest in the matrimonial home within three months, I give the respondent liberty to apply.