Ref:	**Master 53**
Delivered:	**10/12/2007**

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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

F

Petitioner;

and

F

Respondent.

MASTER REDPATH

In this case the parties were married in 1990 and separated in July 2002 with the Decree Nisi being pronounced in June 2005 on the grounds of two years separation with consent. The Petitioner is 42 years of age and the Respondent is 41 years of age. There are two minor children aged 12 and 14. The younger child suffers from cerebral palsy but fortunately is well enough to attend the local secondary school. The assets in the case are as follows:

JOINT ASSETS

Matrimonial home - net equity £316,300.00;

Standard Life Endowment Policy – value £9,423.00;

Legal & General Endowment Policy - value £10,084.00;

Scottish Equitable Investment Bond – value £14,153.00

SOLE ASSETS WIFE

Norwich Union ISA – value £9,736.00.

The wife also holds a further policy but it was accepted by the parties that it was for the benefit of the second child of the family. The wife's total income, comprised of benefits maintenance and CSA is £1,527.00 per month.

SOLE ASSETS HUSBAND

Two pensions CTV £151,985.00.

Skandia Maxi ISA - £10,456.00;

3,000 British Gas Shares - £27,390.00

203 National Grid Shares - £1,592.00. His income is in the range of £1,800.00 per month.

This gives a total of cash assets of just under £400,000.00 not taking into account the policy held for the benefit of the younger child of the family. There is also, as I have already stated, two pensions with a combined CETV of £151,985.00. It was also accepted by the husband that 1,030 British Gas Shares and 109 National Grid Shares have been sold post separation, worth at the date of trial £10,258.46, which I will add into the figure to be considered.

An unusual aspect of the case was that the parties had entered into a full and final settlement agreement in October 2005. The effect of the agreement was to transfer the matrimonial home, which at that stage had an agreed value of £185,000.00 subject to mortgage of £52,000.00, to the wife with the parties being jointly responsible for re-payments for a loan of £12,000.00 from the Ulster Bank. The agreement also provided that the husband would transfer within six weeks all his legal equitable and beneficial interest in the Standard Life and Legal and General policies with the wife paying the husband a lump sum of £5,000.00 as soon as was

practicable thereafter. The wife also agreed that she would transfer the Scottish Equitable Bond to the husband with the husband retaining the shares and other assets in his own name and the wife retaining her Norwich Union ISA.

Both parties signed the agreement but the wife refused to proceed with it on the basis that she said she had been misled as to the value of her husband's pension fund, and it would appear that the valuation that was given in October 2005 did not accurately reflect the value of that fund. Accordingly this agreement broke down. It should be noted that this would have given the wife approximately £242,000.00 worth of assets given the then valuation of the matrimonial home. I have no historical figures for the investments, but on the basis of the up-to-date figures, once the husband was paid his £5,000.00 he would have had assets in the region of £58,590.00 giving a percentage split of approximately just under 25% of the non pension assets to the husband.

The case was opened on behalf of the Petitioner that she wished to remain in the house and have it in her sole name. It was indicated to the court that the Building Society were prepared to transfer the mortgage into her sole name and advance her a further £30,000.00. She sought an 80-20 divide of the matrimonial home in her favour. She also made the case that she had serviced the two endowment policies since 2002 and that they should be split two-thirds/one-third in her favour with the Scottish Equitable Investment Bond to be divided equally.

It was opened on behalf of the wife that this would give the Respondent a cash total of just over £63,000.00 once the money realised from the sale of the shares had been added in.

This would have left the wife with a figure of £316,000.00 being the equity in the house, her share of the policies and the Investment Bond and her ISA of £9,736.00

giving total cash assets of just under £346,000.00, giving a percentage split of the cash assets of just over 18% to the husband and 82% to the wife. In order to make up any shortfall in the husband's entitlement it was put to the court that the husband's pension should be offset against any further cash benefits he might be entitled to. In consideration of this, the Petitioner would give up any rights to the husband's pension fund.

The case was opened on behalf of the husband on a basis that it was accepted it was a needs driven case, and that is certainly correct. The husband's proposal was that the matrimonial home should be sold and the proceeds divided one-third to him and two-thirds to the Petitioner which would give the Respondent a figure in the region of £105,000.00. His suggestion was that the joint investments be split 50-50 which would have given each party a figure in the region of £16,500.00 with each party to keep their respective ISA's with the Respondent to retain his solely owned assets. This would have left the Petitioner with cash assets in the value of £237,500.00 and the Respondent with cash assets of £161,000.00 giving a roughly two-thirds one-third share of the cash assets in favour of the wife together with a pension share. If one adds in the shares sold to the Respondent's total the percentage split would then become 59%/41% in favour of the Petitioner.

As I have already said it was opened on behalf of the Respondent that this was a needs given case and that his needs had to be taken into account. He was presently, on his evidence, living with his parents and slept on the floor until they built a conservatory. The Petitioner on the other hand felt that she needed to retain the house, not only because the children were settled in school but also because of the medical condition of the younger child, and for these two reasons she did not wish to have the upheaval of having to move house.

The issues that arise in the case are the issues of the pension offset (if any); the increase in the value of the house since the date of separation and how that should be treated, and the medical condition of the youngest child of the family and the effect that that will have on the case.

It is regularly put to this court that a pension fund can be valued in a similar way to a cash asset. This is not in fact the case. As Counsel for the Respondent put it to the court, one is an apple, and the other is an orange. A pension is of course a valuable asset but one that can be quite difficult to value, particularly in the context of a case where neither party will probably be able to claim any benefit in this pension for some twenty years. To deprive one party of a cash asset in anticipation of receiving a pension in twenty years time, particularly when that party requires capital to re-house themselves, cannot be regarded as fair.

The matter was considered in detail by the Court of Appeal of England and Wales in the case of Martin-Dye v Martin-Dye [2006] EWCA Civ 261. In that case the court concluded that there is an essential difference between saleable property and in that case an income stream derived from an inalienable pension payment, for in the Martin-Dye case the pension was already in payment. Dyson LJ states at paragraph 86:-

> "In the present case, the value of the husband's pension (if included as part of his assets) represented approximately 35% of his assets. The value of the wife's pension if included as part of her assets represented approximately 3% of her assets. Moreover, the husband's pension was approximately ten times more valuable than the wife's pension. In these circumstances, it seems to me that a failure to treat the pensions as different in kind from the other assets, without at any rate making a significant adjustment to reflect the difference, was bound to lead to unfairness. The proportion of the husband's assets that would vanish on his death was far greater than the proportion of the wife's assets that would vanish on hers. That in

> itself was a factor which meant it was unfair to treat the pensions as having the same character as the other assets".

As I have already said the Martin-Dye case referred to a pension already in payment.

However the English and Welsh Court of Appeal have also considered this question in relation to the more usual case where the court is dealing with a CETV rather than a CEB although it should be noted that in Martin-Dye the parties erroneously gave a CETV valuation rather than a CEB valuation, but after the figures were compared, they were roughly similar.

In the case of Maskell v Maskell [2003] 1FLR at 1138 Lord Justice Thorpe states at para. [6]:-

> "That passage seems to be fundamentally flawed, for the judge is making the seemingly somewhat elementary mistake of confusing present capital with a right to financial benefits on retirement, only 25% of which maximum could be taken in capital terms, the other 75% being taken as an annuity stream. He simply failed to compare like with like".

Accordingly I am of the view that where there is a fairly substantial pension fund, as there is in this case, it may not be the proper course of action to offset a large part of a pension fund against a party's right to a cash sum or equivalent thereof. I am further of the view, except in the most exceptional cases, that where there is a substantial pension fund the proper course of action for the court to adopt is to make a pension sharing order.

The second aspect of the case is the claim that was made on behalf of the Petitioner that she was being penalised for an increase in the value of the house since the date of separation and that because she had maintained the house since the date of separation, she was in some respect entitled to a much greater share of the increase of

its price than the Respondent. This is a matter that I have considered in other cases. It is often the case (although not in this one) that one party is forced to leave the matrimonial home for one reason or another and on occasions that reason can be domestic violence. The party that leaves has to make their own arrangements for continued housing and the party that remains has the benefit of the occupation of the matrimonial home, sometimes with the children and sometimes not. The court should approach this issue as it does all matters in ancillary relief from the view to finding a fair result.

In this case, as I have already stated, the Petitioner has had the benefit of the use of the matrimonial home since the date of separation. She has been paying a mortgage since that date of £244.36 monthly which appears throughout the relevant period, or at least for most of it, to have been funded by her benefits. The Respondent on the other hand, on his evidence, was that he has been living with his parents and for a substantial period of that time sleeping either on the floor or in the parent's conservatory. I can see no grounds, in those circumstances, for allowing the Petitioner to retain the benefit of the majority of the increase in the value of the matrimonial home.

It is also clear that the Petitioner had been maintaining the two endowment policies at a rate of somewhere in the region of £100.00 per month, again out of her benefits. I feel it would be right to make some allowance to the Petitioner for having done so. The court was not however provided with any historical valuations for these policies and was therefore not in a position to state with certainty how much they had increased in value since the date of the separation. Accordingly only a notional figure can be allowed for that and I will deal with it in the context of the overall percentage split.

The issue also arises in this case of the disability of a child of the family. Although happily that disability does not appear to be as serious as other children suffering from the same type of condition, it is not something the court can ignore. Article 27 (1) of the Matrimonial Causes Order (Northern Ireland) 1978 as amended states:-

> "(1) It shall be the duty of the court in deciding whether to exercise its powers under [Article 25, or Article 26 or Article 26A] and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen".

In this case the Petitioner will have an ongoing commitment, and perhaps a lifelong commitment, to the welfare of the younger child of the family given his disability. For that reason the court is unlikely to countenance the immediate sale of the house. One most also bear in mind however, that in a case where there are special circumstances, the Respondent, pursuant to Article 15 and Schedule 1 of the Children (Northern Ireland) Order 1995 may well himself have a continuing financial responsibility for the second child of the family. In the case of C v F (Disabled Child: Maintenance Orders) [1998] 2FLR1 the English and Welsh Court of Appeal decided that an unmarried father was liable to pay maintenance beyond the period of time when a child of the relationship was in full-time education because of his disability. The court held that such disability that may well put the case within the ambit of the English equivalent of Article 15 and Schedule 1 of the Children (Northern Ireland) Order 1995, which provides that an ongoing duty to maintain may apply in cases where special circumstances apply.

Accordingly if one runs through the Article 27 checklist after taking into consideration the welfare of the children of the family one finds as follows:-

(a) The income earning capacity property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.

The income of the parties in this particular case is not that different and any order made for a periodical payments would in all likelihood achieve little for the wife as she is on income support.

(b) The financial needs obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future

It is quite clear that the needs, obligations and responsibilities of the Petitioner in this case are greater than those of the Respondent as she has to look after the minor children, house them and educate them.

(c) The standard of living enjoyed by the family before the breakdown of their marriage

This is not an issue in this case.

(d) The age of each party in the marriage and duration of the marriage

The parties are roughly similar in age and the marriage is of medium duration. However the vast bulk of the assets were acquired during the marriage and as a result of that the duration of the marriage is not really an issue.

(e) Any physical or mental disability of either of the parties to the marriage

This has no relevance in this case.

(f) The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family

The contribution of each of the parties to this case either as a breadwinner or a homemaker can be regarded as equal.

(g) The conduct of each of the parties

Conduct is not an issue in this case.

Accordingly taking all relevant matters into account I am of the view that this case can best be dealt with by way of a split of the capital assets and a pension sharing order.

Taking into account the disability of one of the children of the family and the contribution made by the Petitioner to the endowment policies I am of the view that an appropriate split of the capital assets would be 65%/35% in favour of the Petitioner. Bearing in mind the cross check recommended by McLaughlin J in the case of M -v- M (Financial Provision: A Valuation of Assets) (2002) 33FAM law 509 this leaves a situation where the Petitioner is receiving almost twice the capital assets that the Respondent is. If the cash assets in this case are added together they come, as I have already said, to a figure in the region of £400,000.00 to which should be added the shares that the Respondent has sold which total £10,124.00 giving the Respondent a share of total assets of £410,000.00, leaving his entitlement at a capital sum in the region of £143,500.00, from which I will deduct the £10,124.00 which he has already received which leaves an entitlement of £133,376.00.

I intend to order that he should retain the assets in his sole name which total £39,438.00 which reduces that sum to £93,938.00. I also intend to order that the Petitioner transfers to the Respondent her interest in the two endowment policies totalling £19,507.00 and the Scottish Equitable Bond valued at £14,153.00 which then leaves a figure outstanding in the region of £60,000.00 due to the Respondent. Once these transfers have been completed, I will direct that upon payment of £60,000.00 by the Petitioner to the Respondent, he will transfer any interest he has in the matrimonial home to the Petitioner. I also direct that the Petitioner retain her interest in her Norwich Union ISA.

I will allow three months for the Petitioner to endeavour to raise this sum of money and in the event that it cannot be raised I will order a “mesher” order in favour of the husband of 20%. In the event that the Petitioner is able to raise a sum of money to reduce the £60,000.00 owing to the Respondent I will order the “mesher” order for such figure as equates to the remainder outstanding.

I intended now to adjourn the matter until 4 February 2008 to allow a pension sharing annexe to be drafted and approved. At that point I will issue the final order and consider the issue of costs and extending the time for appeal.