Neutral Citation: [2017] NIFam 8 | *Ref:* **OHA10126**

Judgment: approved by the Court for handing down | *Delivered:* **10/02/2017**
(subject to editorial corrections)*

04/046288/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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Between

JANICE DOROTHY FLOYD

Petitioner/Appellant

and

KENNETH DAVID FLOYD

Respondent

_____

O'HARA J

[1] This case involves an appeal from a decision of Master Sweeney dated 20 May 2016. She refused an application by the petitioner for ancillary relief and held that there was no basis for setting aside or interfering with any part of the matrimonial agreement entered into by the parties on 19 September 2002. That agreement includes a provision for the division of the public service pension to which the respondent became entitled on his retirement. It is the wording of that provision which has brought about the present application.

[2] The parties married on 2 June 1973 and separated on 5 December 2001. The petitioner then issued a partition suit which led to negotiations on all aspects of the matrimonial assets. These concluded in the matrimonial agreement. A petition for divorce was issued on 7 January 2004 by the petitioner with a decree nisi being granted on 10 May 2004. Time was abridged from six weeks to two weeks for the decree absolute which was issued on 28 May 2004 so that the petitioner could remarry, as she did on 10 July 2004. (The respondent subsequently remarried also.)

[3] The matrimonial agreement was not referred to at all in the divorce petition which contained a prayer including a standard claim for ancillary relief. However,

in an earlier letter dated 13 February 2004 the petitioner's then solicitor (not her current solicitor) advised the solicitors for the respondent as follows:

> "We can confirm there will be no application for property adjustment or any other ancillary relief nature (sic) save that the appropriate pension sharing application will be dealt with in accordance with the terms of the agreement. We also will apply to have the agreement made an order of court and will complete matters only in accordance with the terms of the agreement entered into between the parties."

[4] This letter followed on from the respondent's acknowledgement of service dated 9 February 2004 in which he confirmed that he did not intend to apply to the court for it to consider his financial position after divorce because of the "agreement made on 19/9/02 at the High Court with counsel".

[5] In fact, contrary to the terms of the letter of 13 February 2004, no application was made at the hearing on 10 May 2004 to have the matrimonial agreement made a rule of court. Of course that step is not essential because save in limited circumstances the agreement is binding whether it is made a rule of court of not.

[6] The terms of the September 2002 agreement are not in dispute in this application and with the exception of the pension element they have been implemented long since. The debate arises from Clause 4 which reads as follows:

> "The parties agree that the issue of the wife's pension entitlement shall be dealt with by an order after divorce on terms that the husband agrees that the wife shall receive 30% of his lump sum and 30% of his annual income by way of earmarking subject to any issues raised by the pension trustees in which eventuality the parties may revisit the issue to give effect to the intention of the parties as expressed herein."

[7] For the record the pension trustees have not raised any issue to trigger the revisiting of the agreement.

[8] The difficulty for the petitioner arises from the fact that she remarried in July 2004. It was known in May 2004 (at the very latest) that she intended to remarry soon. That is why time for the decree absolute was abridged. Unfortunately for her the fact of her remarriage means that while she retained her entitlement to 30% of the pension lump sum she lost her entitlement to 30% of the respondent's annual pension income because it was specifically "by way of ear marking". There was no dispute between Mr B Devlin, counsel for the petitioner and Ms L Moran, counsel for the respondent, on that issue. The question was what, if anything, flowed from

that loss to the petitioner. Mr Devlin clarified that the petitioner was not seeking to reopen the entire matrimonial agreement, "only the aspect in respect of the respondent's pension on the basis that at no time was she advised that this ear marking arrangement would not survive her remarriage". His submission was to the following effect:

(i) The petitioner was at no time advised that the earmarking arrangement would not survive her remarriage.

(ii) The petitioner was already in a new relationship with a prospect of remarriage in September 2002 and would not have agreed to ear marking if she had received the correct advice.

(iii) It is inequitable to allow the respondent to escape his agreement to pay 30% of his annual pension income because the petitioner remarried.

(iv) There is no prejudice to the respondent in reopening the annual pension income aspect of the agreement.

[9] For the respondent Ms Moran submitted as follows:

(i) It was open to the parties to deal with the pension issue by attachment/ear marking, pension sharing or offsetting.

(ii) Each party had the benefit of legal advice before entering into the agreement.

(iii) It is a matter between the petitioner and her former legal advisers as to how they explored her circumstances and intentions and what advice she then received.

(iv) The respondent conducted his financial affairs and in particular the timing of his retirement in reliance on the agreement. In particular he was advised in or about 2013 that the petitioner's remarriage did not affect her entitlement to 30% of his lump sum but it did affect her entitlement to 30% of his annual pension income.

(v) Accordingly, the respondent would be prejudiced if any part of the agreement was re-opened. If the petitioner has any recourse it is against her former legal advisers, not him.

[10] It became possible to make sharing orders in Northern Ireland in December 2000. Until then only attachment or ear marking orders could be made. They had the significant disadvantage that they ceased to have effect if the wife remarried or the husband died. That was generally understood by matrimonial lawyers at the time. Quite why the petitioner was advised to enter into the September 2002 agreement is not for me to speculate about. The fact is that she did so and I see no

reason why any element of the agreement should be reopened just because her remarriage, which was entirely foreseeable, has reduced her entitlements. I am satisfied that the respondent chose his date of retirement taking into account the advice he received as to the status of the agreement after the petitioner's remarriage. Accordingly, contrary to the submission on behalf of the petitioner, the respondent would be prejudiced if the agreement was reopened.

[11] Mr Devlin suggested in the course of his submissions that on one interpretation of the respondent's affidavit he had failed to appreciate the true meaning of the agreement. If that was so, Mr Devlin continued, then neither party should be held to the agreement and that limited aspect of it should be reopened. I reject that submission because it over analyses the respondent's affidavit. In truth there was a clear agreement here but with one element which jeopardised the future income of the petitioner if she remarried. It may be a matter between the petitioner and her former advisers as to what was explained to her at the time but there is no basis for reopening the agreement and letting the petitioner apply for ancillary relief. In these circumstances I dismiss the appeal and affirm the order of the Master.