Neutral Citation no. [2002] NIFam 23 | *Ref:* **NICC3765**

Judgment: approved by the Court for handing down | *Delivered:* **24/09/2002**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

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BETWEEN

GARY PETER ANDERSON

Petitioner

and

EIMEAR NI MHATHUNA

Respondent

_____

NICHOLSON LJ

JUDGMENT

[1] This undefended Petition for Divorce was heard by me on Wednesday 6 February 2002. It was a husband's petition grounded on the irretrievable breakdown of the marriage as evidenced by the fact that the parties to the marriage had lived apart for a continuous period of two years immediately preceding the presentation of the petition and the respondent consented to a decree being granted.

[2] The parties were married almost sixteen years ago and there were two children of the marriage. The parties last lived together on 20 October 1997.

[3] The petitioner was stated to be an unemployed social worker and the respondent was stated to be a teacher. The Prayer to the Petition was (1) that the marriage be dissolved (2) "that the respondent be ordered to pay the costs of the suit …".

[4] In response to question (9) on the Form of Acknowledgement of Service issued by the Rules Office, namely: Even if you do not intend to defend the case, do you object to pay the cost of these proceedings? The respondent answered no.

[5] I granted a decree nisi. Counsel for the petitioner asked for an order for half the costs of the proceedings and for an order for taxation of the petitioner's costs as he was legally aided.

[6] I asked why an application was not made for full costs and was told that it was the practice to ask for half costs in cases of this kind. I indicated that I would speak to the family judge about this practice as I did not see why the taxpayer should pay half the costs of the proceedings when the respondent, a teacher, had indicated that she had no objection to paying the costs. I was told that the practice stemmed from the decision of the Court of Appeal in Brown v Brown [1991] NIJB Vol 11 p49.

[7] Divorce practitioners appear to be unaware of what that case decided. It was an appeal from an order of a District Judge in an undefended petition for divorce on the ground that the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent had consented to a divorce being granted.

[8] The District Judge made an order condemning the respondent to half the costs incurred on behalf of the petitioner. The acknowledgement of service was in the customary form. Question 6 was: Do you consent to a decree being granted? The reply was: Yes, provided no claim is made against me for costs. That this was a conditional consent was confirmed, if that at all was necessary by the respondent's reply to question 9 "… My consent is conditional in no claim for costs."

[9] The court stated that it was at a loss to know why the District Judge acted as he did. If he believed that a conditional consent of this nature had no legal validity, then he was mistaken and cited Beales v Beales [1972] Fam 210 per Sir George Baller P at p219.

[10] The court stated that it seemed unjust that the costs fall to be borne by the Legal Aid fund when the respondent is well able to pay the costs of the petitioner. This injustice was discussed in Beales v Beales but Parliament has not seen fit to legislate in connection with this injustice.

[11] The court added that Higgins J, the family judge, had drawn to its attention that the Legal Aid Committee considered that all legally aided petitioners should include in the petition a claim for costs, save in those cases where the petition alleges two years' separation and consent by the respondent to the granting of a decree and such consent has only been given on condition that the respondent should not be required to pay costs, and also in cases where a divorce is sought on the grounds of five years' separation.

[12] Somehow or other it seems that this judgment has been misconstrued and a practice has grown up, of which the Family Judges do not approve, of

seeking half costs. Where the respondent has given unconditional consent to the granting of a decree, costs should be sought. Only if consent is conditional on paying half costs should half costs be sought. Usually the petitioner, if female, would succeed in obtaining an order for costs, had she pursued her petition on other grounds. Legal advisers should be slow to drop claims for full costs; all the more reason for claiming full costs if the petitioner is not pursuing a petition grounded also on unreasonable behaviour or adultery.

[13] I have spoken to Gillen J, the family judge, who agrees that full costs should be sought.

[14] In this particular case a decree absolute has not been granted. In view of the evidence of the respondent that she intended to make her consent conditional on not paying costs and as she has borne the costs of the upkeep of the two children I order that the costs be borne by the Legal Aid fund and order taxation under the relevant Legal Aid Order, having given leave to the respondent to amend her acknowledgment of service. This is a most exceptional case and the normal practice should be as outlined above.