Neutral Citation no. [2006] NIFam 15 | *Ref:* **GILC5693**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **16/11/06**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

H

Petitioner;

and

W

Respondent.

GILLEN J

In order to protect the identity of the child mentioned in this case I direct that no report of this case should reveal the name of the child or of the adult members of her family. In particular the anonymity of this child must be strictly preserved

[1] In this matter a respondent wife ("W") seeks the following relief against the petitioner husband ("H"):

(a) An Order for Maintenance Pending Suit and thereafter:

A Periodical Payments Order
A Secured Provision Order
A Lump Sum Order

(b) A Periodical Payments Order;
A Secured Provision;] for the children of the family
A Lump Sum Order

(c) A Property Adjustment Order in relation to:

(i) ("B")the property where the parties in Lurgan ;
(ii) ("O")where the parties formerly lived in Waringstown
(iii) ("E") an apartment in Portrush.

(d) An Order pursuant to Article 27B of the Matrimonial Causes (NI) Order 1978 directing the Trustees of the Petitioner's pension fund(s) to make payments for the benefit of the Respondent;

(e) An Order pursuant to Article 27C of the Matrimonial Causes (NI) Order 1978 directing the Trustees of the Petitioner's pension fund(s) to make payments for the benefit of the Respondent;

(f) An Order pursuant to the Matrimonial Causes (NI) Order 1978 (as amended) providing for Pension sharing in relation to the Petitioner's pension.

[2] H had made an application dated 4 July 2006 for a Property Adjustment Order in respect of ("K") a property in Portadown. However the parties agreed that the wife was in fact the applicant in this case.

Background

[3] Skeleton arguments had been submitted in this case by Ms Walsh QC who appeared on behalf of H with Ms Alexander and Mr Blair QC who appeared on behalf of W with Mr Donaghy. It was clear from those skeleton arguments and a number of affidavits filed in the case that both parties wished this matter to be determined on a clean-break basis. It was also clear from those documents that a number of matters were not in dispute. These included:

(i) That H is 48 years of age, born on 9 January 1958. W is 45 years of age, born 8 January 1961. They married on 9 May 2003. Both had been previously married and had children by those marriages. W's former husband had died of cancer in 1989. She had three children. One was relevant to these proceedings namely K, born on 30 May 1989 and who is now 17 years of age. The two other children are now adults. K attends a local high school. Although this child had lived with H and W throughout their relationship, it was a matter of dispute between the parties as to whether she was a child of the family;

(ii) H and W met in May 2000 and commenced to cohabit in October 2000. They married 9 May 2003. There was some dispute as to when the marriage effectively broke down, it having occurred in January 2005 according to H and in February 2005 according to W;

(iii) the parties initially lived at O in Waringstown. In 2004 they moved to B in Lurgan which was H's childhood home, his father transferring it to him in 1995 before his death.

[4] There were a number of assets at issue in this case. Happily the parties had taken steps to agree the values. They were as follows:

Assets

		Agreed Value		
O	-----	180,000		
B in Lurgan		1,100.000		
E in Portrush, Co Down		150,000		
Offices				
Portadown			225,000	
Belfast			112,500	
Other				
H Capital account		252,968		
				per draft 2005 a/cs
K in Portadown	100,000			
Bank/BS Accounts				
Bank of Ireland – current				
Northern Bank – current				3,288
- investment				146,205
- savings				4,060
Alliance & Leicester – instt access				20
				168
HL Maxi ISA				7,547
Jupiter Maxi ISA				20,517
Alliance & Leicester				2,982
Games Workshop				5,473
HBOS				19,404
Aviva				3,514
HSBC - 2100 shares				19,404

B Estates Limited(disputed value)

Standard Life Insurance Policy	18,957
Scottish Widows Insurance Policy	14,031
Pension Save and Prosper	41,253
Pension Norwich Union	227,769

[5] It was the H's case that all the properties other than K which was bought by H in the name of W, were acquired by H before he had even meet W. The parties matrimonial home from the start of the cohabitation until November 2004 was O. They had lived as husband and wife at B from November 2004 until January 2005 when according to H they began to live separate lives. Of K, in his affidavit of 5 September 2005 at para. 4, H said:

> "The applicant owns the said property. It was bought for £35,000 by me. It was put in her name and was an attempt to equalise possible estates. It was effectively 'in trust'. The applicant had previous tenants in the property and keep the income herself."

I am satisfied that this property was intended for W and I have approached the matter on the basis that this is her asset. The second asset that was in dispute was B Estates Limited. H's case was that in 2005 he invested £100,000 in the purchase of shares in this property development company. A questionnaire was served on him by W seeking details of this company, and the response of H was that planning permission had been applied for. I had before me a valuation from Patterson Millar, Chartered Valuation Surveyors and Commercial Estate Agents. It concerned the development of this site of 4.2 acres which was the development site in question. The evaluation was on the basis of full planning approval already passed for the development site. In the circumstances which I will presently outline, the author of this report was neither called nor cross-examined. The report was therefore unsubjected to scrutiny but having perused it, it seemed to be to be an appropriate approach to the valuation. A number of comparables in the area were considered which broadly corroborated the approach adopted by the author of the report. The fact that the site was slightly limited in that surrounding areas were currently in industrial use and other neighbouring sites had been zoned for possible future industrial development, caused the author to reduce what he felt was the current value of development sites in Northern Ireland at £1 million per acre to £850,000 per acre in this instance. He concluded that the proposed scheme would provide a good mix of high quality family dwellings in a range of types and sizes in pleasant surroundings conveniently located close to Portadown and Craigavon but with easy access onto the M2 and via the M1. His development appraisal indicated a completed scheme value of appropriately 9.2 million, developers profit of 15% giving a total of almost 1.4 million and a current estimated site value of appropriate 3.6

million. According since H's initial purchase equated to approximately 11.45%, it was the conclusion that if the site were to be placed on the market today, the value of H's share would be in the order of £415,000. Although the content of this report was unchallenged, it did seem to me that the valuation of the site at approximately £850,000 per acre in an area where surrounding sites are currently in industrial use with other neighbouring site zones for such a possibility, may well have been a somewhat optimistic assessment. Postulating a possible 15% area of margin of error here, it seems to me that the maximum value of H's share would be not higher than £350,000. Moreover it must also be borne in mind that the evidence seems to be unequivocal that this whole venture had been embarked on by H in the period after the marriage had for all intents and purpose ended and I shall deal with the relevance of this later in this judgment

Income and Expenditure

[6] Once again in the circumstances that I will shortly outline, there was no cross-examination of the parties concerning the income and expenditure pleaded by both H and W in the course of their respective affidavits. Accordingly I have approached the case largely on the basis of the figures set out in their respective affidavits. Mr Blair QC provided a helpful summary to me which seems to broadly coincide with the figures set out by the respective parties in their affidavits. In summary the income and expenditure of the parties was as follows:

INCOME & EXPENDITURE

HUSBAND INCOME

Solicitors	**2001**	**2002**	**2003**	**2004**	**2005**	
Fees	447,318	447,345	452,922	426,699	343,926	
Gross profit	447,318	447,345	452,922	426,699	341,426	
Other income	12,822	7,705	7,755	10,112	18,825	
Expenses	(204,476)	(204,476)	(231,787)	(260,177)	(249,152)	
Net profit	255,664	248,577	228,802	166,522	111,099	
H's share	132,964	196,575	228,802	176,634	111,099	97,684
Conacre					Conacre	1,461
Interest					Interest	31,691
Divis					Divis	1,453
						132,289
TAX/NI						(47,292)
						84,997

WIFE INCOME		**WIFE EXPENDITURE**		**HUSBAND EXPENDITURE**	
Army pension – Wife	4,925.64	Rent	5,400	Rates B	967
Army pension – K	1,595.04	Shopping	3,840	Rates O	1,068
Army – widowed mother's allowance	834.60	Electricity	720	Electricity B	567
		Coal/oil	1,200	Electricity O	15
Child benefit	907.32	Telephone	600	Electricity P	190
Child tax credit	2,069.04	Clothing	2,400	Oil	2,280
		Papers/statty		Food/toiletries	750
Housing benefit	4,397.64	Life insurance	60	Clothes	750
Incapacity benefit	3,832.44	House insurance	300		
		Credit card	1,200	Insurance	1,442
Maintenance from H		Argos card	600	Contents etc insur	2,056
	2,101.68	Bank loan			
		TV licence	144	TV license/Sky	
		Car			608
		Petrol	1,920		
		Road tax	180		
		Insurance	1,464		
		Servicing	480		
		Car loan	1,440		
				Magazines	
			960	Cricket club	123
			300	Loyal order	25
			420		140
		K			
		Clothing	1,2009	Garden	
		School dinners	480	Mangt ag P	15,000
		Mobile phone	600	Church	540
		School fees			1,040
			25,908		1,525
		Church	260		**29,086**
		holidays	3,000		
		Xmas	1,000		
		B'day presents	600		
		Dentist	100	Previous wife	30,000
		Optician	50	Pension Contr'n	20,150
			30,918		

[7] I pause to observe that the expenditure of neither of the parties seem to me to be excessive and even though a there was no cross-examination of them on these issues, I would have been surprised if there had been much challenge to the nature of the expenditure incurred. Making some deductions for car loan/credit card/Argos card and overall impression I value W's expenditure at £27,500 p.a.

[8] Belatedly, in consequence of an order made by me on 16 October 2006, which was unsuccessfully appealed to the Court of Appeal on 20 October 2006, H disclosed fees of £461,086.21 for the financial year ended June 2006 with £189,500 overheads leaving a gross taxable sum of £283,670.

[9] A number of preliminary matters require determination from me before approaching the appropriate determination of the relief to be given:

(A) Bias

At the commencement of the hearing on 25 October 2006, Ms Walsh submitted that I should recuse myself from hearing this case. The basis of her submission was that some 12 years ago I had acted as senior counsel on behalf of Channel 4, a television channel, in defence of a claim issued by H for libel. Ms Walsh submitted that the allegations made again H by Channel 4 had been extremely serious involving allegations of involvement in terrorism and murder. The action had been settled for £75,000 in H's favour plus costs. Counsel submitted that although the instant case involved assessment of his personal finances, his personality and credibility would be called into account and that, given the principle of apparent bias, it would be therefore inappropriate that I should hear this case. Ms Walsh drew my attention to Her Majesty's Attorney General v Pelling [2006] 1 FLR 93("Pelling'scase") for the general principles to be adopted in considering this application.

Ms Walsh further submitted that this was an instance of apparent bias and that the law on this topic has been formulated so that the test to be applied was whether there was a "real danger" (or possibility) of bias in this case .

[10] I refused to recuse myself for the following reasons:

(i) I respectfully accept the approach adopted by the court in Pelling's case where at para. 5 Laws LJ said:

> "There is no doubt (as we are acutely aware) that for any judge to have to decide whether he or she is actually or apparently biased in proceedings before him or her is an uncomfortable and unsatisfactory state of affairs. But to adjourn the case for another judge to decide the question is likely to be much more injurious to the doing of justice and, so far as we know, has never been the practice. If it were the practice, it would mean that proceedings would be liable to

> adjournment, and thus delay, in every case where an application for a judge's recusal was made, save no doubt where the judge indicated that he would indeed recuse himself. In particular, the court's process would be open to manipulation and contrived delay at the hands of disaffected litigants. It is, of course, elementary where an application for a judge's recusal is refused but should have been allowed, the party complaining, if ultimately he loses the case, may appeal or seek permission to appeal on the ground of bias by the judge."

Ms Walsh accepted the strength of this pronouncement and conceded that I should therefore take the decision myself.

(ii) It was not without significance that this application was made only on the day of this hearing. Mr Blair indicated that he was taken by surprise by the application and had not been notified of it prior to the hearing. The application was mounted at this late stage notwithstanding that I had already presided over two interlocutory hearings for discovery in this matter without objection on 18 September 2006 (which had been adjourned) and on 16 October 2006. No suggestion that I should have recused myself had been made on either of those occasions(or on the appeal) notwithstanding that there was a full hearing on the discovery issue. Moreover even though it must have been palpably clear that there was every chance that I, as one of only two Family Division judges in this small jurisdiction, would hear the case, no attempt was made to rise this application in the interim until the morning of hearing. Whilst this state of affairs was not determinative in my final decision, I remained unconvinced that H harboured any genuine concern of bias on my part.

(iii) As I made clear to counsel at the time when the application was made, I had no recollection of the detail which she outlined to me concerning this case which had occurred apparently over 12 years ago. For bias to operate, the danger must be operative and it is relevant to ask whether the decision maker is aware of the matter relied on as appearing to undermine his impartiality. (See Locabial (UK) Limited v Bayfield Properties Limited [2000] QB 451 at para. 18).

(iv) Notwithstanding point (iii) above, I approached this matter on the basis that I may well have been counsel in a case on behalf of a party defending a claim of libel brought by the plaintiff in the circumstances outlined by counsel. It is my view that any judge who had advised on or been engaged in a case before appointment to the Bench and who then has that same case brought before him for determination, should as a matter of practice decline to adjudicate upon it. (See Thellusson v Rendlesham [1859] 7 HL CAS 429 at 430; Phillips v Headlam [1831] 2 B AD 380 at 385; Lewis v Branthwait [1830] 2B AD 437 at 445; Di Sori v Phillips [1863] 33 LJ CH 129). Such a position does not obtain in this instance. Many judges prior to appointment to the Bench will have had busy professional practices at the Bar involving appearances in several thousands of cases most of which may have involved instructions to impugn the credibility of the party

against whom they were acting or witnesses in the case. In a small jurisdiction such as Northern Ireland, not only prominent solicitors such as the respondent but a host of other professionals may be known to a great number of judges and lawyers involved in the litigation process. The administration of justice would be in danger of facing grave impediments if a judge was disqualified from presiding over cases where in the past he had been engaged in litigation which involved one or other of the instant parties in the absence of very clear and convincing grounds that bias operated. That applied particularly in the present case which essentially concerned the financial position of the relevant parties and has no connection whatsoever with the litigation adverted to by Ms Walsh some 12 years ago which in any event apparently was successfully prosecuted by H therefore establishing his innocence of any allegations mounted against him.

[11] As I will shortly indicate in this case, the conduct of the parties was irrelevant to these proceedings and in so far as I was right to come to this conclusion, it is yet another indication of the irrelevance of the historical litigation.

[12] Although Ms Walsh had couched the test in terms of whether or not there was a real danger or real possibility of bias in this case, I consider that the court should be guided by the test applied in Porter and Another v Magill [2002] 1 AER 465("Porter's case") which refined the test formulated by the House of Lords in R v Gough [1993] 2 AER 724. In Porter's case Lord Hope LL said at p.507 para. 103:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"

[13] The House of Lords returned to the issue again in Lawal v Northern Spirit Limited [2004] 1 AER 187 and applied the principle set out in Porter's case. Lord Steyn said at p.193 E:

> "…there is now no difference between the common law test of bias and the requirements under art.6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in Porter's case has at its core the need for the confidence which must be inspired by the courts in a democratic society…. Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach."

This concept was succinctly expressed on a previous occasion in Johnston v Johnston (2000) 201 CLR 488 at 509 (para 53), by Kirby J when he stated that:

> "A reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

I recognise the need for public confidence in the decisions of courts that bias, including unconscious bias, has not played a part in a court's determination. I am satisfied that in this case an objective fair minded observer would be completely satisfied that there was no apparent bias on my part either conscious or unconscious and in the circumstances. I therefore refuse the application.

[14] I pause to observe at this stage that upon my having made that determination, Ms Walsh, clearly acting on instructions which had been given to prior to the application, asked for some time to consult with her client. I granted that time. Shortly thereafter she returned to inform me that the instructions of herself, her junior counsel and her solicitor had now been withdrawn. I acceded to her request to therefore remove herself from the case. Thereafter I invited H to consider whether he wished to apply for an adjournment to re-engage alternative counsel, to consider appealing my decision or to continue conducting the case on his own behalf. He indicated he did not wish to avail of any of these steps at this stage and withdrew from the court. The case therefore progressed in his absence. H is an experienced solicitor and an officer of the Supreme Court. I was satisfied that he had made a considered decision, however ill advised, to conduct himself in this manner and I therefore saw no impediment to continuing to hear this case in his absence. It is important that courts deal with cases justly and this includes ensuring that costs are not wasted, expenses are saved and that litigation is dealt with expeditiously and fairly. This case had been fixed for hearing on this date for some time and all the parties had assembled on that basis. The behaviour of H on this occasion therefore could not be permitted to deny the petitioner a hearing of her application.

Conduct

[15] It was H's case that conduct was relevant in this case in that it would be inequitable to disregard the fact that allegedly W had caused articles to be printed in Northern Ireland newspapers which contained allegations about H and their private lives, thereby causing a detrimental impact upon his practice and his professional and personal reputation. Since the petitioner chose to remove himself from the proceedings I heard absolutely no evidence about this aspect of the case from him personally but his affidavits made copious reference to this point. In para. 18 of his affidavit of 15 September 2005 H indicated that he was concerned about the detrimental impact on his practice and professional and personal reputation caused by the articles. However I saw nothing in the up to date figures from his office which would have lent any substance to that proposition.

[16] More importantly however, the question of the extent to which conduct can come within a court's consideration in cases of ancillary relief has been determined recently by

the House of Lords in Miller v Miller [2006] 1 FLR 151 handed down on 24 May 2006("Miller's case"). The following principles can be stated:

(i) Article 27(1)(g) of the Matrimonial Causes (Northern Ireland) Order 1978 indicates that the court must have regard to:

> "The conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it."

I am satisfied that this is the extent to which conduct can be invoked and that authorities prior to Miller which departed from the criterion so laid down by Parliament are now erroneous.

(ii) The position is summarised by Lord Nicholls at para. 65 of Miller's case where he stated:

> "Parliament has drawn the line. It is not for the courts to re-draw the line elsewhere under the guise of having regard to all the circumstances of the case. It is not as though the statutory boundary gives rise to injustice. In most cases fairness does not require consideration of the parties' conduct. This is because in most cases misconduct is not relevant to the basis on which financial ancillary relief is ordered today. Where, exceptionally, the position is otherwise, so that it would be inequitable to disregard one party's conduct, the statute permits that conduct to be taken into account."

(iii) At para. 145 in Miller's case Baroness Hale said:

> "But once the assets are seen as a pool, and the couple as equal partners, then it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in Wachtel v Wachtel [1973] FAM. 72 at p.80, the conduct had been 'both obvious and gross'. This approach is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was more to blame for what went wrong, save in the most obvious and gross cases. Yet in Miller v Miller both Singer J and the Court of Appeal took in to account the parties' conduct, even though it fell far short of this. In my view they were wrong to do so."

[17] I have no doubt in this case that the conduct alleged by H against W falls far short of that test and this is most certainly not the "obvious and gross" misconduct necessary to invoke the principle . I therefore have not taken conduct into account in this case and I consider that it was improper and an unnecessary impediment to the cause of resolution to introduce it.

Child of the Family

[18] It was H's case, that K was never treated as a child of the family and therefore did not come within the definition of "child of the family" set out in Article 2(2) of the 1978 Order. It was his case that W's averments to the contrary since the parties separated were simply a device to try to increase the finances coming into the household. In his affidavit of 5 September 2005 at para. 5 he said:

> "I never treated the applicant's children as my own."

At para. 15 he said:

> "The applicant's three children have nothing to do with me. Two of them are 19 year old adults who get their own income, live in their own house and are on their own bail conditions. There was never any special relationship between me and K. We never had outings together. I never gave her pocket money or an allowance. I never went shopping with her save on two Christmases when on one Saturday morning she helped me choose presents for her mother. We did not do cinema outings, beach outings etc. At Christmas she never got extra or special presents. Anything signed from me was signed 'Richard'. When she was at …….. Junior High School, I brought her to school in the mornings as I was driving to the office in Portadown anyway. Since then she relies on her mother or the bus. I never attended any school parents' night, plays, sports day etc."

[19] In her affidavit of 4 October 2005 W asserted at para. 3:

> "I re-assert that the respondent treated my children as children of the family as reflected by his behaviour and actions during the course of our relationship and marriage. Examples of the respondent's actions are:
>
> (i) The respondent initiated and encouraged K, D and S to become members of the Junior Orange. In relation to K, the respondent attended her installation in the role of

stepfather. He was involved in the transfer of S and D to 'a lodge';

(ii) the reason the children did not use comments such as 'daddy' or 'dad' was due to the respondent's own requests not to use such comments as if his ex-wife discovered this fact she would 'go mental';

(iii) the respondent paid K £5.00 per week for assisting me in cleaning the respondent's office;

(iv) on one occasion K asked the respondent if she could use his surname to which the respondent replied that he did not mind but that his ex-wife would take issue with the fact;

(v) the respondent and K went to the beach on occasions and in particular on 18 April 2003 the respondent and K played around and interacted as if they were 'father and daughter';

(vi) the respondent purchased a doll's house for K which cost in and around £300."

[20] In evidence before me, which of course was unchallenged given the absence of H from the trial, W made the following additional points:

> "(i) during the period when they lived together, she described the relationship between H and K as a father/daughter relationship. They had pet names for each other. They often played jokes on each other, as W described 'winding each other up'. She recalled an incident in the April before they were married when the two of them were at the beach together making sandcastles. So far as her school was concerned, K mentioned to other people that H was her stepfather and he introduced her as his stepdaughter on various instances . On occasions he took her to court and introduced her to other adults as his stepdaughter."

In determining this issue I invoke the following principles:

(i) It is appropriate to state that where there is a dispute whether a child is or is not a child of the family, and a court has to decide that question, the jurisdiction should be exercised with the greatest caution (see S v S [1965] 1 WLR 21). I did consider whether or not it would have been appropriate to have granted separate representation to the child of my own motion or indeed to appoint the Official Solicitor to take part in the

proceedings on behalf of the child. However it seemed to me that the evidence in this case was so clear that it was unnecessary to do so but it is an approach that should be considered carefully by courts in similar instances in the future.

(ii) Under the provisions of the 1978 Act, a child of the family is defined in Article 2(2). In deciding whether a child has been treated as a child of the family, the court should look at the question broadly, avoiding the fine points of analysis (see M v M [1980] 2 FLR 39). I am satisfied that this child was treated as a child of the family by both parties. She lived in the same household as both parties during the entire five years of their relationship and I am satisfied from the evidence of the wife that the behaviour of H towards this child clearly constituted the fact that he was treating her as a child of the family. I accept her evidence on this matter and, in the absence of any oral evidence of the contrary, I find no reason to disbelieve her account. Accordingly I find that H is under an obligation to make financial provision for her. The child is scheduled to take her 'A' levels next year and wishes thereafter to embark on a fashion and design course for two years. Thereafter it is proposed that she will seek a diploma in fashion and design at a university of her choice. Under Article 27(1) of the 1978 Order children's welfare is the first consideration. However given the age of this child (approaching 18) I felt there was sense in the suggestion of Mr Blair that rather than make a periodical payment to this child, the child's welfare would be well protected by the court making some provision for her by way of capital in the clean break settlement for the mother. The child's welfare will be protected by ensuring that there is appropriate shelter and provision together with sufficient money for her mother to assist her in her educational needs.

[21] **Duration of the Marriage and the effect on property disposal**

(i) I am satisfied that the period that the parties co-habited prior to the marriage ie between October 2000 and May 2003 moved seamlessly into marriage. I believe the practical effect is to make the length of the marriage to which I should pay attention a total of 51 months or thereabouts. This approach accords with a number of recent cases including M v M [2005] 2 FLR 533, CO v CO [2004] 1 FLR 1095 and Miller's case.

(ii) The 1978 Order enjoins the court to have regard inter alia to:

> "The age of each party to the marriage and the duration of the marriage."

Put simply, I am satisfied that the result of this is that in short marriage cases the wife will recover less than in longer marriages. Whilst it is all a question of degree, I have no doubt that this case should be treated as constituting a short marriage. Short marriages throw into sharper relief the duty of the court to consider implementing a clean break and it is one of the reasons why I am certain both parties in this case approached the case on the basis of a clean break.

(iii) I consider that Duckworth "Matrimonial Property and Finance" at C(2), has captured the modern approach to short marriages in the wake of Miller's case when the author records:

> "Miller provides an improved methodology for assessing quantum in short marriage cases. Instead of focusing on contributions (and less helpfully conduct) each of which can lead to erroneous thinking, the emphasis has now shifted to property: not in the sense of strict property rights, but of a broad demarcation line between marital and non-marital assets. Essentially, if an item of property is 'matrimonial', or the product of a business relationship between the couple, then the yard stick of equality applies, subject of course to discretionary departures; whereas if it is non-matrimonial, the asset belongs to the party who brought it to the marriage unless there is some rational for intervention."

[22] In Miller's case, Lord Nicholls said at para. 22 et seq:

> "22…the statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.
>
> 23. The matter stands differently regarding property ("non-matrimonial property") the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant….
>
> 24. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally

have less call upon each other on the breakdown of a short marriage."

[23] It is right to say that in this case all the properties other than K which was bought by H in the name of W, were acquired by the husband before he had even met W. The parties' matrimonial home from the start of their cohabitation until November 2004 was O. They lived at B as husband and wife from November 2004 until January 2005/February 2005 when they began to lead separate lives. This latter property had of course been originally the property of H's father.

[24] **The Appropriate Approach in this Case**

(i) I am satisfied that the parties were correct to submit that this ought to be a clean-break case. Article 27A of the 1978 Order is a strong incentive to adopt such an approach in a case such as this. Moreover I consider that provision for the child of the family should be embraced within the capital figure awarded to the mother given the fact that she is approaching 18.

(ii) I take into account the standard of living enjoyed by H and W before the breakdown of their short marriage. They had lived in a house currently valued at £180,000 in Warringstown until moving to the more luxurious home of H's father after his death in 2004 (a house valued at £1.1 million). In addition they had the benefit of a holiday apartment in Portrush. H had initially given W £250 per month. She commenced to do some work for his firm and was thereafter paid £460 per month which was increased to £1,432 per month upon marriage. She was responsible for payment of certain of the outgoings including telephone, coal, electricity, groceries, life insurance, clothes for herself and K. I reject entirely the proposition by H that W was always financially independent of him. H earns a very substantial income and I find no evidence to sustain his suggestion that there has been a marked down turn in his income given the recent figures for the year 2005/2006. In essence I consider that Mr Blair has captured the standard of living during this marriage when he describes it as "very good, but not luxurious; and with the expectation of improvement." It is with that description in mind that I approach this case.

(iii) I believe there is good reason for departing substantially from equality in this case with regard to non-matrimonial property. Not only is it a fact that most of the wealth was brought into this marriage by H, but H has made virtually the entire financial contribution. The House of Lords in Miller's case did consider the concept of legitimate expectation seemingly introduced by Singer J and found by Thorpe LJ in the Court of Appeal to be the decisive factor in Singer J's decision. Lord Nicholls stressed that standard of living was simply one of the matters to which a court should have regard on the statutory checklist. At para. 58 Lord Nicholls said:

> "Claims for expectation losses do not fit altogether comfortably with the notion that each party is free to end the marriage. Indeed, to make an award by reference to the parties' future expectations would come close to restoring the "tail piece" which was originally part of Section 25. By the tail piece the court was required to place the parties, so far as practical and, having regard to their conduct, just to do so, in the same financial position as they would have been had the marriage not broken down. It would be a mistake indirectly to reintroduce the effect of that discredited provision."

He said that if Singer J had intended to go further than emphasising the importance of the standard of living enjoyed by Mr and Mrs Miller during their marriage, then he had gone too far.

[25] Baroness Hale picked up the same thread in the Miller case at para. 158 when she said:

> "Even without the former statutory objective, the court has to take some account of the standard of living enjoyed during the marriage; see Section 25(2)(c). The provision should enable a gentle transition from that standard to the standard that she could expect as a self sufficient woman. But she is also entitled to some share in the assets. The couple had two homes and there is no reason at all why she should not have a share in their combined value together with other assets obviously acquired for the benefit of the family. She is also entitled to some share in the considerable increase of the husband's wealth during the marriage. Had the yard stick of equality being applied to all the assets which accrued during the marriage, she would have got much more than she did. In my view the judge was wrong to take account of the reasons for the break-up of the marriage, but there was a reason to depart from the yard stick of equality because these were business assets generated solely by the husband during a short marriage. Whether one puts this as a result of the contacts and capacities he brought to the marriage or as a result of the nature and source of the assets generated … it comes to much the same thing."

I therefore make it clear that in so far as W declared in an affidavit "When I married the petitioner I did so in the reasonable expectation of a considerably improved lifestyle and of long term financial security", I reject the implied proposition of legitimate expectation save in so far as it reflects the strict approach adopted by Lord Nicholls and Baroness

Hale. Legitimate expectation is not therefore a principle or yardstick or an appropriate basis on which to assess financial needs. It must not go beyond an examination or a consideration of the standard of living the parties enjoyed during the marriage.

[26] I make particular reference to the £350,000 figure which I have valued for B Estates Limited. I believe that in considering such assets, there is much virtue in the approach adopted by Lord Mance in Miller's case. At para. 174 he said:

> "If account is taken of the increase and the value of the parties' assets during the marriage (the matrimonial aquest), a question may arise about the date up to which one should measure it. Should this be up to the date when the parties cease effectively to live as married partners…? Or should it be up to a later date such as the date of trial, or even, in a case were an appellant thinks it right to exercise the discretion up to the date of the appealed decision… The matters to which the court must have regard under Section 25 include several which exist or appear likely as at the date the court has to regard them (see F Section 25(2)(a), (b), (f) and (h)). Others of the listed matters require the court to look at the past (eg Section 25(2) (c), (f) and (g))) .To the extent that the focus is on the matrimonial acquest, the period during which the parties were making their different mutual contribution to the marriage has obvious relevance……Assuming that the focus is on assets acquired during the marriage, rather than on the husband's overall means, it seems to me therefore natural in this case to look at the period until separation."

[27] Whilst I recognise that the date of valuation of acquest will depend on the circumstances and the nature of the acquest and the valuation date will differ from case to case as a consequence, nonetheless in my view I consider it appropriate in this case to adopt the approach of Lord Mance and to recognise that B Estates Limited was acquired after the date of separation and therefore its valuation should have a minimum impact on the overall value of the assets to be assessed in this case.

[28] I approach this case on the basis that fairness remains the ultimate objective and the court should try to give each party an equal start on the road to independent living. Lord Nicholls in Miller's case said at para. 16:

> "Marriage, it is often said, is a partnership of equals….The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase:'

> unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid not a rule. As I have already indicated, I have no doubt that given the shortness of this marriage and the source of the assets, there is ample reason for departing from equality certainly with regard to the non-matrimonial property."

[29] What then does fairness require in this case? I believe that the appropriate approach is that advocated by Baroness Hale in Millar's case at para. 138 when she said:

> "The most common rationale is that the relationship has generated needs which it is right that the other parties should meet. In the great majority of cases, the court is trying to ensure that each party and their children have enough to supply their needs, set at a level as close as possible to the standard of living which they enjoyed during the marriage (note that the House did not adopt a restrictive view of needs in White: (see pp.608g to 609a). This is a perfectly sound rationale where the needs are the consequence of the parties relationship as they usually are."

[30] This echoed the view expressed by Lord Nicholls at para. 10 of the same case when he said:

> "What then, in principal, are these requirements? (*of fairness).* The statute provides that first consideration shall be given to the welfare of the children. In the present context nothing further need be said about this primary consideration. Beyond this, several elements or strands, are readily discernable. The first is financial need. This is one of the matters listed in Section 25(2) (b); 'the financial needs, obligations and responsibilities which each of the parties in the marriage has or is likely to have in the foreseeable future.'
>
> 11. This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of inter-dependence. The parties share the roles of money earner, home maker and child carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties ages, their future earning capacity, the family standard of living and any disability of either party. Most of these needs

> will have been generated by the marriage, but not all of them.
>
> 12. In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are sufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs."

[31] How then does one build into this concept of need, the fact that most of the wealth was brought into the marriage and that H has made almost all of the financial contribution? I find great merit in the submission by Mr Blair that when it comes to needs, a fortiori basic needs trump contribution when the competing relevance of the two factors come to be assessed. I agree with him that that principle is underlined in the words of Lord Nicholls in White v White [2000] 2 FLR 981 at para. 610 C–G:

> "(The) distinction is a recognition of the view, widely but not universally held, the property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may loosely be called matrimonial property. According to this view, on a breakdown of marriage these two classes of property should not necessarily be treated in the same way…..Plainly when present this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant factors to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case were the claimant's needs cannot be met without resource to this property."

[32] Adopting these principles and applying them to this case, I have come to the following conclusions:

(i) Appropriate provision must be made for accommodation for W and the child of the family. Mr Blair suggested, and the evidence of W purported to assert, that she wanted to live in Portadown and that a four bedroomed house with a garage would cost somewhere between £220,000 - £260,000. She does not wish to live in the property at K because in the first instance she had never agreed to live there and secondly she described it as a very rough area. W has now only one child at home and I believe that a four bedroomed house is unnecessary. I question her proposition that three bedroomed

houses are only in unsuitable areas. It seems to me that an appropriate touchstone for valuing the cost of property which she should obtain suitable for her needs is that set by the agreed value of O at £180,000.For the purpose of arriving at a figure to reflect her housing need I increase that bracket to £200000 to give her some flexibility in choice. She already has in her own name K which is an agreed value in the region of £100,000. I am told that that was bought for £30,000 and has increased in value to £100,000. Obviously if this sold, it will attract capital gains tax because it is not the primary residential home. She will therefore be left with something in the range of £75,000. In order to purchase a property somewhere in the range of £180,000/£200,000 she will therefore require an additional figure of up to £125,000.

(ii) Counsel on behalf of W argued that in addition to a figure for housing, she was entitled to some figure for ancillary expenditure. I recognise that there will be additional costs for stamp duty and some small figure for removal costs. I do not accept that there is a substantial figure for inevitable alteration to the extent suggested. Most purchasers nowadays make do with what they have obtained . It seems to me that a total figure of £3,500 would be sufficient.

(iii) It was argued that there should be some extra capital in terms of a nest egg to deal with repair, redecoration internally and externally of her home. I consider the £35,000 suggested to be excessive but some such provision must be made. In all the circumstances I am satisfied that a total figure for housing i.e. to include the value of K, the additional figure for housing, ancillary expenditure and the extra capital should provide a total figure of £250,000

[33] Counsel submitted that W is currently driving a six year old vehicle and needs to purchase a new year and illustrated this with the cost of a Suzuki Liana 1.6L at a cost of £9,400. Again I consider this to be excessive and I see no reason why a second hand vehicle at approximately £4,000 should not be sufficient.

[34] Counsel then suggested that in addition there should be a lump sum figure, based on a Duxbury calculation predicated on the difference between her current expenditure and her current needs. The Duxbury calculation traditionally used has been the subject of criticism and indeed even abandonment in light of the approach now adopted by the courts in White v White. A wife's award is no longer governed by what she "needs" and a fair distribution of capital between the parties implies that each party should have the right, in appropriate circumstances, to leave capital to the next generation. Nonetheless such a calculation may have a residual value where e.g. the entire wealth has come from the husband's family, so that "fairness" can be achieved by meeting the wife's reasonable needs rather than according her a proportionate share (see Dart v Dart [1996] 2 FLR 286 and also Duckworth (Matrimonial Property and Finance) at C 24.) There is no doubt that there are certain drawbacks to a Duxbury approach. It makes no provision for the prospects of re-marriage or cohabitation and, more importantly in the context of this case, there is no recognised method of discounting for a short marriage. The calculation throws up unacceptable high multipliers for younger wives and penalises older wives.

Historically the Duxbury tables set an industry standard of 4.25% deriving from common law assumptions that by investing in the spread of equities and guilts, the prudent plaintiff could expect a real rate of return of between 4 and 5%. Alternative tables have now emerged with the 2005/2006 "At a Glance" court tables for ancillary relief presenting on a basis of 3.75%. A gathering trend can also be discerned in cases such as Tavoularies [1998] 2 FLT 418 and Fournier v Fournier [1998] 2FLR 1990 where the courts selected multipliers related to the length of the marriage. In Tavoularies the case for the length of the marriage was 5 ½ years. A multiplier of 7 to 8 was selected. In Fournier's case, where the marriage was 5 years long, a multiplier of 8 to 9 was selected. The author of Duckworth "Matrimonial Property and Finance" at C38 draws attention to the fact that these multipliers are difficult to reconcile with the discount rates used. M v M (Pre-nuptial Agreement) [2002] 1 FLR 654 where a 5 year marriage resulted in a 5 year multiplier being utilised is instanced. It is not without significance however that in all three of these cases to which I have just adverted, the ages of the wife were 32, 37 and 33 respectfully. It must be borne in mind that W is appreciably older and this may influence the prospects of re-marriage to some extent. In essence the Duxbury model is no more than a tool to effect a rational re-distribution of assets in cases of substantial wealth but it must be discounted to take into account a judge's broad discretion having regard to future uncertainty and matters such as a short marriage. In this case, I have calculated that the needs of this wife are somewhere in the range of £27,500 per annum. K will be 18 in May 2007 and at that stage I anticipate that the wife will receive solely the Army pension and the widowed mother's allowance amounting to a total of £5,759. Ms Walsh submitted in her skeleton argument that the wife had an earning capacity of £16,800 based on the income which she was receiving from her husband after the marriage i.e. in excess of £1,400 per month. Since she had been paid £460 per month for presumably the same work prior to the marriage, I do not accept that this later figure reflects the real value of her earning capacity particularly in light of the work that she had describes she was doing. Nonetheless I believe that she now has experience of working in a solicitor's office which should arm her effectively to seek full time employment now that her daughter is reaching 18 years of age and I consider that the likelihood is that she has an earning capacity of something in the range of net £11,000 per annum which together with her pensions gives her an income capacity of £16,759. This is approximately £11,000 short of the needs which she requires. Applying the Duxbury formula, for a woman of 45 years of age, this throws up a figure of just under £200,000. I think that that is too high and makes insufficient provision for the fact that this is a short marriage, that the expenditure figures include provision for the daughter which will only be necessary for the next few years when she is in full time education Exercising my discretion in this regard I make a 25% reduction in the Duxbury calculation i.e. £150000.

[35] All in all therefore I have come to the conclusion that overall W should have an award of £404,000 inclusive of the property at K. For the removal of doubt given the Capital Gains Tax reduction on a sale of K there shall be a lump sum award of £329,000 in addition to W retaining the property of K.

[36] As a check on this as an appropriate figure, I have looked at the overall assets of H which are probably something in the range of £2.75 million. An award of £400,000 is just

short of 15% which I think is an appropriate percentage of the assets given all the other factors which I have outlined earlier in this judgment that need to be taken into account.

One other matter is outstanding. W during the hearing put before the court a list of furniture items which she claims are the property of herself and her daughter. She seeks a return of these items. Since H has had no notice of these items I intend to afford him two weeks from the date of this judgment to make any submissions about this list before I make a determination. The list is appended to this judgment .

[37] **Costs**

I invite submissions on this aspect .