Neutral Citation No. [2015] NIMaster 9

Ref:

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

Delivered: **11/09/2015**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

M

Petitioner;

and

M

Respondent.

Master Bell

[1] In this application the petitioner (to whom I shall refer, for ease of reference, as "the wife") seeks Ancillary Relief.

[2] The parties are requested to consider the terms of this judgment and to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be published in its present form.

[3] At the hearing both parties gave oral evidence and I also heard evidence from Ian Conlon from IWC Actuarial. Affidavits were sworn by the wife on 13 March 2013 and 6 December 2013 and she adopted these as part of her evidence. An affidavit was similarly sworn by the respondent (to whom I shall refer, for ease of reference, as "the husband") on 9 May 2013. Each counsel, Miss O'Grady QC for the wife and Mr Martin for the husband, also advanced their client's case by means of oral and written submissions.

[4] The assets which were the subject of the hearing were agreed to be :

(i) a pension which was in payment to the husband; and
(ii) the possible proceeds of a claim which the husband has for hearing loss which is currently before the courts.

[5] The issues in the application before me were :

(i) how those assets should be divided between the parties;
(ii) whether the wife ought to be ordered to make a lump sum payment in respect of an Ulster Bank loan which had been taken out in the husband's sole name; and
(iii) whether the conduct of either party ought to be taken into account in respect of costs.

THE HISTORY OF THE MARRIAGE

[6] The parties were married on 16 November 2002. They were separated in August 2012, though remained living separate lives under the same roof for a few months. A Decree Nisi was granted on 17 October 2013. There is one child of the marriage: a girl aged 17. She is not the natural daughter of the wife but was treated as such. The husband now has a new partner with whom he has two young children.

WIFE'S SUBMISSIONS

[7] The wife is a self-employed hairdresser who lives in rented accommodation.

[8] The wife seeks a Pension Sharing Order (hereafter "PSO") in respect of the husband's pension and a share of any compensation derived by the husband from his hearing loss claim which is currently being litigated in the County Court.

[9] Miss O' Grady submitted that this is a needs-based case and that the principle of need trumped all other factors. Accordingly, the husband's pension could not be ring fenced.

HUSBAND'S SUBMISSIONS

[10] The husband is a guitar tutor who lives with his partner in rented accommodation. His partner contributes to the outgoings.

[11] The husband submitted that this was not a case where it was appropriate to make a PSO. Given that the pension is in payment, any PSO

would have the impact of immediately reducing the husband's income. In such a circumstance, Mr Martin argued, the husband would be entitled to have a spousal maintenance order. (This argument was made on the basis that the husband did not accept that the wife's business figures were accurate.) The husband argued that the appropriate analysis was like a maintenance pending suit analysis, where there was an examination of the parties' current income and outgoings. He argued that the wife, despite acknowledging that this was a needs-based case, used inappropriate language of "sharing".

ACTUARIAL EVIDENCE

[12] I heard expert evidence from Ian Conlon of IWC Acturial. Mr Conlon had prepared two reports – an initial report dated 28 April 2014 and an addendum dated 13 April 2015. He adopted these as the substance of his evidence. Miss O'Grady asked him what amount of a PSO would be necessary to achieve equality of income at age 60. He had initially indicated this would require a 32% PSO but had updated that figure to 32.8%. In order however to achieve an equal division of pension benefits, a PSO of 49.7% would be required. Mr Conlon stated that he carries out an analysis which is based only on the pensions involved in a particular set of circumstances. He is not aware of what the other non-pension assets in a case are, nor can he be aware of the other non-financial factors present in a case which may affect asset division.

[13] Under cross-examination from Mr Martin, however, Mr Conlon made a number of acknowledgements. Firstly, when asked by Mr Martin why he seemed to premise everything in his reports on the matters of equality, Mr Conlon replied that his reports reflected the questions he was asked in his instructions. Secondly, Mr Conlon also acknowledged that the husband's pension was in payment and that, immediately any PSO was made, his income would drop. He agreed that the wife's state pension would be available (currently) at the age of 67 and also that she could take out a personal pension and make payments to that fund.

THE WIFE'S EVIDENCE

[14] The wife gave evidence in respect of the history of the marriage. She described her hairdressing business which she had sold because the parties were trying to start a family. They moved to Ards and she continued to work in a salon. They had a lovely family home with oak beams and a good standard of living. The husband had a jeep; she had a second-hand jeep; they went out for meals.

[15] The husband's daughter came to live with the parties when she was 11 years old. The wife treated her as a daughter and was desolate when, after the parties separated, the husband insisted that she return to live with her mother.

[16] The wife gave evidence that the parties separated in 2012. She said that when the husband left he said that he would pay the mortgage until the property had sold. However he did not do so. Indeed he subsequently arranged for the rates account to be transferred to her name rather than remain in his. He also cancelled the payments to her life insurance policy. In April 2013, when she could no longer afford the payments on the matrimonial home, she handed the keys back to the Building Society. The home has now been sold with a debt of £33,000 owing. There are also rates arrears which she is paying off at an amount of £20 per month. The wife said that she took nothing to do with the family finances. These were all under the control of the husband and in respect of which he was very secretive. She did not ask the husband how much the bank loan was for.

[17] She now lives in a house owned by her brother. She pays rent of £550 per month. It is a very old house which she described as having stained carpets and curtains that are falling apart. She has no furniture of her own. Her brother bought her a bed, a table and second hand furniture. She cannot afford a holiday.

[18] The wife gave evidence that she wanted a share of the husband's pension and of his hearing loss claim.

THE HUSBAND'S EVIDENCE

[19] The husband lives in a rental property with his new partner, together with their two sons aged 2 years and 8 months respectively and with his 17 year old daughter. (After he left the former matrimonial home his daughter went initially to live with her mother but a year ago came to live with him.) His new partner owns a property in Ballybeen which is rented out and the rent from which covers the mortgage. The husband gave evidence that during the marriage the parties took out a £25,000 loan from the Ulster bank. The loan was obtained in his sole name. He stated that the loan was used to fit out and finish the matrimonial home. He continues to pay the repayments on the loan and there is a balance of just over £11,000 owing.

[20] Counsel for the wife cross examined the husband on the basis that he had failed to make proper discovery**.** For example he failed to reveal the existence of two Dankse Bank accounts until the third day of the hearing. He failed to state that his income included child benefit for his eldest daughter. He said that he did not produce Ulster Bank account statements because he

did not think that they were important. He said at one point in his evidence that it did not occur to him that the court would want to know what his income was. At times he appeared to give the first convenient answer that came to mind, regardless of its accuracy.

[21] The husband conceded in cross-examination that he was no longer prepared "to bust a gut" in terms of working. It was a lifestyle choice to work less and spend more time with his young children. He could be doing more tuition lessons. He acknowledged that he did not advertise his services. He conceded that he could therefore increase his tuition income which would make him less dependent on his pension income.

THE ARTICLE 27 FACTORS

Welfare of the child

[22] Article 27 of the Matrimonial Causes (Northern Ireland) Order 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. The child who was treated as a child of the family now resides with the husband and is aged 17.

Income, earning capacity and other financial resources

[23] The wife works as a self-employed hairdresser and has an income of approximately £1200.00 per month. She has a small pension which she started many years ago. She gave evidence that there were six barber shops in the area where her premises were located and it was therefore difficult to get customers. The business was run as a partnership with another woman but each partner had separate clients and operated their own accounts.

[24] The husband works as a guitar tutor. This happens in both a school context and in terms of providing tuition in his own home. The school-based work has declined and he had had to reduce his fees. He gave evidence that drumming had become more fashionable than guitar. This had had a considerable impact on his net income. His partner works as a midwife but is currently receiving maternity pay.

Financial needs, obligations and responsibilities of the parties

[25] As indicated the former matrimonial home has now been sold with a debt owing of £33,000. The wife is paying off the rates arrears at an amount of £20 per month. There are no other unusual financial needs or responsibilities.

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

[26] Both parties enjoyed a pleasant standard of living prior to the breakdown of the marriage.

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

[27] The wife is aged 44 and the husband is 43. The marriage lasted 10 years until the parties separated.

Any physical or mental disability by the parties of the marriage

[28] 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

[29] The evidence before me was that the contribution made by each of the parties to the welfare of the family was equal.

Conduct

[30] Both parties invite me to take into account conduct by the other party.

[31] The husband asks me to take into account that, after he left the matrimonial home, the wife sold various items including a stove, burners and light fittings from the home with the effect that the home became much less marketable. The wife acknowledged that she had sold items. For example she had sold a trailer in order to be in a position to buy oil so as to heat the house. She could not remember how much she received for each item she sold but disputed Mr Martin's figure of £5,500. She said this was the cost of replacement with new items rather than the amount she received in selling them. However when the husband left the home he also took items with him and sold them. In total he received £7290 for the items he sold. He used this money to pay off his overdraft and pay some of his legal fees. Although the photographs of the matrimonial home contained in the Reeds Rains brochure, taken after the wife had sold various items, show a much less attractive home to would-be purchasers, I do not consider that it is a tenable argument that I should take the wife's conduct into account. Each party took items from the home and sold them to try and meet their financial needs.

[32] The wife asked me to take into account that after the parties separated in 2012, although the husband had told her that he would pay the mortgage on the matrimonial home until the house sold, he did not do so. Other behaviour she complains of is that the husband contacted the Rates Office

and arranged for his name to be taken off the rates account and for her name to be substituted. Furthermore he cancelled the wife's life insurance policy which he had been paying.

[33] The starting point for any consideration of conduct must be Lord Nicholl's observations in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 :

> "[59] …. The relevance of the parties' conduct in financial ancillary relief cases is still a vexed issue. For many years now divorce has been based on the neutral fact that the marriage has broken down irretrievably. Some elements of the old concept of fault have been retained but essentially only as evidence of irretrievable break down. As already noted, parties are now free to end their marriage and then re-marry.
>
> [60] Despite this freedom, there remains a widespread feeling in this country that when making orders for financial ancillary relief the judge should know who was to blame for the breakdown of the marriage. The judge should take this into account. If a wife walks out on her wealthy husband after a short marriage it is not 'fair' this should be ignored. Similarly if a rich husband leaves his wife for a younger woman.
>
> [61] At one level this view is readily understandable. But the difficulties confronting judges if they seek to unravel mutual recriminations about happenings within the marriage, and the undesirability of their attempting to do so, have been rehearsed many times. In *Wachtel v Wachtel* [1973] Fam 72, 90, Lord Denning MR led the way by confining relevant misconduct to those cases where the conduct was 'obvious and gross'….
>
> [64]… there are signs that some highly experienced judges are beginning to depart from the criterion laid down by Parliament. In *G v G (Financial Provision: Separation Agreement)* [2004] 1 FLR 1011, 1017, para 34, Thorpe LJ said the judge 'must be free to include within [his discretionary review of all the circumstances] the factors which compelled the wife to terminate the marriage as she did'. This approach was followed by both courts below in the present case. Both the judge and the Court of Appeal had regard to the husband's conduct when, as the judge found, that conduct did not meet the statutory criterion. The husband's conduct did not rank as conduct it would be inequitable to disregard.
>
> [65] This approach, I have to say, is erroneous. 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 line 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 bases 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."

[34] Baroness Hale similarly commented in *Miller*:

"[145] … But once the assets are seen as a pool, and the couple are seen 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 80 the conduct had been 'both obvious and gross'. This approach is not only just, it is the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

[35] I conclude that none of the conduct referred to in paragraphs 31 and 32 of this judgment reaches the high standard that the legislation and relevant caselaw provides that it must reach to be taken into account, namely conduct that it would be inequitable to disregard.

Value of any benefit which by reason of dissolution of the marriage a party will lose

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

Other matters taken into account

[37] Article 27 of the Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which not do fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. In this case there were no such matters.

CONCLUSION

[38] A needs-based analysis will always focus on income and outgoings. It will also assess whether the outgoings are reasonable. In some cases the credibility of the parties will also be an issue and this was such a case. During his oral evidence the husband lied about how the mortgage ceased to be paid by him and, when challenged, admitted this. In addition, I found that he was at times an evasive witness. At times under cross-examination he seemed

simply to be reaching for the most convenient answer rather than replying truthfully. However at other times he was clearly answering honestly even if it was to his detriment. For example, he frankly conceded that he could earn more as a music tutor if he wanted to. There are also credibility matters which need to be taken into account in terms of the wife's evidence. She admitted to a dishonest business practice which took place a number of years ago. In respect of both husband and wife therefore I concluded that I must be cautious about accepting at face value any figures which they submitted as to income and expenditure.

[39] Where a court is tasked with dividing the assets owned by a couple after they have divorced, the Matrimonial Causes (Northern Ireland) Order 1978 gives only limited guidance on how the courts should exercise its statutory powers. Implicitly the court must exercise its powers so as to achieve an outcome which is fair between the parties. It has been well recognised in the field of ancillary relief since *Millar v Millar; McFarland v McFarlane* [2006] 2 AC 618 that there are three approaches to dealing with fairness in ancillary relief cases : needs, compensation and sharing. However as Lord Nicholls said in *Millar* :

> "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's 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. Needs arising from age or disability are instances of the latter.
>
> In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient 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."

[40] Both counsel acknowledge that this is a needs-based case. However the wife's thinking is dominated not by what she needs but by what she has lost. After investing 10 years of her life in the marriage she has now lost her husband, her home, her standard of living and some of the relationship she had with her husband's daughter, for whom she cares deeply. The wife now wants a share of what the husband has. Mr Martin submitted that, though this is a needs-based application, the language of both of the wife's witnesses, and sometimes of the wife's counsel, often strayed into language which is appropriate to a sharing application rather than a needs-based application.

[41] In his evidence Mr Conlon spoke of the "equalisation of income" and the "equalisation of benefits". This is the language of sharing. It is not the language of a needs-based division. When cross-examined on this point by Mr Martin, Mr Conlon was quite candid that the type of report he wrote depended on his instructions and his instructions frequently directed him towards sharing the fruits of a pension.

[42] Mr Conlon, called as an expert witness on behalf of the wife, acknowledged that he had no understanding of what the wife's needs were and no understanding of what the husband's needs were. Likewise, he had no understanding of what amount of a PSO I would have to make in order to meet the needs of the parties. (This is of course no criticism of him, merely an observation on the information with which he has been furnished.) Nevertheless this means that the evidence which he was able to give was of no assistance to me in what was acknowledged by both parties to be a needs-based case.

[43] Mr Martin forthrightly submitted that I should not conduct a sharing exercise and dress it up as a needs-based analysis. He argued that this was not a needs-based case. A PSO would not at this point in time make any contribution to the wife's day to day needs. The wife has 21 years left to work up a pension provision. It is therefore too far in the future to start to predict what her needs will be at that time. This is a compelling argument and I agree with it. I therefore decline to make a PSO.

[44] However I do consider that a share of any hearing loss claim would have an impact in meeting the wife's day to day needs and I consider that she should receive 25% of any figure that the husband receives as a result of that claim. In making such an order, and not having had sight of any of the expert evidence in respect of that claim, I cannot be certain either that the claim will be successful or that, if it does succeed what the amount of the award is likely to be. Given that the litigation is being pursued in the County Court and having regard to the average level of damages awarded in hearing loss claims it is unlikely however to be a considerable amount.

[45] In respect of the loan, there was no evidence before me that the loan was not used on the matrimonial home. I have of course no power to order the wife to pay a loan which is in the husband's name. If there had been significant assets to divide between the parties I could award the husband a bigger portion so that these could be used to repay the loan. In this case there are no such assets. Nor does the wife have any means of paying a lump sum award to the husband which might be used to pay the loan. I am therefore unable to make any order to compensate his having to repay the loan on his own. The position is somewhat offset however by the fact that the wife is paying off the arrears of rates on the former matrimonial home and by the

fact that I am only awarding her a 25% share of any compensation he recovers in respect of his hearing loss claim.

[46] 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. The particular facts of each individual case must therefore be considered with a view to deciding the appropriateness of a clean break. I have concluded that a clean break in this case is both possible and desirable.

[47] 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 perspective 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."

[48] 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.

[49] In summary, therefore, I order that :

(i) There shall be no Pension Sharing Order made in respect of the husband's pension;

(ii) The husband shall pay 25% of any monies received in respect of his hearing loss claim to the wife;

(iii) I make no order in respect of the loan in the husband's name.

[50] I will now hear counsel on the subject of costs. While I have indicated that I consider it inappropriate to take into account the conduct referred to in paragraphs 31 and 32 of this judgment in respect of costs, I wish to be further addressed on whether I should take into account the husband's failure to make full and frank discovery during these proceedings.