

2009 Master 77

Ref:

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

Delivered: **21/12/09**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

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 pursuant to a summons dated 26 March 2007.

[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to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication.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 submitted to the Library for publication in its present form.

[3] At the hearing both parties gave sworn oral evidence. An affidavit was sworn by the wife on 22 March 2007 for the purpose of these proceedings. An affidavit was also sworn by the respondent (to whom I shall refer, for ease of reference, as “the husband”) on 19 October 2007. Both parties adopted their affidavits as their evidence. I also had the benefit of oral submissions from

Miss Houston, who appeared on behalf of the wife, and from Miss Weatherhead, who appeared on behalf of the husband.

THE ASSETS

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

- (i) The sum of approximately £531,229 which is held on joint deposit and represents the net proceeds of the sale of the former matrimonial home;
- (ii) An investment property in Belfast. The husband owns 50% of this property with the remaining 50% being owned by a business partner. The Belfast property was valued at £250,000 on behalf of the wife.
- (iii) An investment property in Carrickfergus. The Carrickfergus property was valued at £150,000 on behalf of the wife. On behalf of the husband Miss Weatherhead submitted that the equity in the two investment properties amounted to £125,000. On behalf of the wife Miss Houston submitted that the equity in the two investment properties amounted to £132,692.
- (iv) A catering business owned and operated by the husband. On behalf of the wife Miss Houston submitted that I should value this asset at £45,000. No valuation of it was offered on behalf of the husband.

[5] Therefore, using the lower valuation of the two investment properties and using the only valuation offered in respect of the business, the total net value of the assets is a minimum of £701,229.

THE HISTORY OF THE MARRIAGE

[6] The wife is aged 36 and the husband is aged 52. Both parties are originally from Iran. The parties married on 2 March 2000. It was an arranged marriage and the wife gave evidence that she had met the husband only four times prior to the marriage. A Decree Nisi was granted on 12 March 2007.

WIFE'S SUBMISSIONS

[7] The wife seeks a clean break settlement.

[8] Miss Houston in her opening submission sought 45% of the net proceeds of the matrimonial home; 45% of the equity in the Carrickfergus investment property and 25% in the Belfast investment property. By her written closing submissions she submitted that the wife should simply be awarded an amount of more than 50% of the net proceeds of the matrimonial home, i.e. more than £265,000. She argued that this was an appropriate decision in the light of the following factors :

- (i) Non-disclosure by the husband;
- (ii) The total value of the assets held by the husband;
- (iii) Litigation misconduct by the husband in terms of the way he approached the hearing; and
- (iv) A “buyout” of the husband’s future maintenance obligation;

HUSBAND’S SUBMISSIONS

[9] The husband also seeks a clean break settlement.

[10] Miss Weatherhead submitted that the wife should receive the sum of £230,000 which, on the calculations of the husband, represents some 36% of the total assets.

[11] She argued that this was an appropriate decision in the light of the following factors:

- (i) The shortness of the marriage;
- (ii) The wife’s lack of contribution; and
- (iii) The fact that there were no children of the marriage;

THE ARTICLE 27 FACTORS

Welfare of the child

[12] Article 27 of the Matrimonial Causes Order (Northern Ireland) 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. There are no children of the marriage and hence this factor does not require to be taken into account.

Income and earning capacity

[13] In respect of his catering business the husband disclosed unaudited profit and loss accounts for the years ending April 2004, 2005 and 2006 which indicated an annual net profit of between £12,000 and £15,000. The wife

submits that I should use a multiplier of 3 to give the business a net value of £45,000. The wife is currently unemployed.

Financial needs, obligations and responsibilities of the parties

[14] The husband has provided no maintenance for the wife. In the circumstances of her being unemployed and there having been no evidence called in respect of any arrangements by way of public assistance benefits which might exist in Iran, the needs of the wife will therefore be particular significance in the overall assessment of what is a fair outcome. She no longer has a home and has been living with a friend while visiting Northern Ireland for the court hearings. Other than coming to the jurisdiction to attend court, she has returned to live in Iran with her family. She gave evidence that life for a divorced woman was much easier in Northern Ireland than in Iran, stating that in this jurisdiction it was possible to get a divorce and then go on with life. Miss Weatherhead, however, submitted that that I had received no detailed evidence of need in respect of the wife.

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

[15] Both parties enjoyed a reasonable standard of living prior to the breakdown of the marriage.

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

[16] As stated, the wife is aged 36 and the husband is 52. The parties disagreed as to the date of separation. The husband gave evidence that they separated in or about January or February 2005 and began to live in separate households within the matrimonial home. He stated that around that time he received correspondence from the wife's solicitor in relation to the marriage coming to an end. He stated that he moved out of the matrimonial home in or about January 2006. The wife dates the separation somewhat later. Nothing, however, turns on this point. The marriage lasted five or six years until the separation.

Any physical or mental disability by the parties of the marriage

[17] The wife submitted she suffered from depression. A letter from her General Practitioner was handed into court. She is taking anti-depressant medication. The wife was unable to attend court for a resumed hearing and submitted a letter from an Iranian hospital saying she was at that time unable to travel to this jurisdiction because of severe palpitations and intense anxiety. No oral evidence was called in relation to her medical condition but no objection was taken to the written material in respect of her health.

The contribution made by each of the parties to the welfare of the family

[18] The case was effectively made that the husband had been resident in Northern Ireland for many years and had built up his business. He had therefore made a greater contribution to the asset value.

[19] The wife stated that she worked for a short period in the husband's business. The husband states that at no stage did she do so. He maintained that she was only there on two occasions and that these were social visits. She gave evidence that she wanted to work but the husband did not want her to.

[20] The husband maintained that her only work was the training she had received to be a baggage handler at the airport. She disliked this and gave it up after a short while.

Conduct

[21] Article 27 allows the court to take into account 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. Such conduct is often divided into three categories: marital, financial and litigation. The husband submitted that the first and second categories of such conduct were present. The wife submitted that the first, second and third categories of such conduct were present. I shall deal with each in turn. For reasons that I will set out below, I had serious concerns regarding the credibility of the husband's evidence. Where there was a conflict in evidence between the parties, I was satisfied that the wife's evidence was to be preferred.

Marital Conduct by the Husband

[22] Miss Houston submitted that the husband's conduct during the marriage amounted to marital conduct. The wife alleged that the husband socially and financially controlled her. She submitted that the husband did not want her to go to classes where young people went and, in particular, did not want her to mix with men. He did enrol her in painting and English classes but not a music class because it had both men and young people. Her evidence was that the husband just wanted her to stay at home, cook and watch television. The wife gave evidence that she wanted to work and had worked for a short time in his catering business. However the husband did not like it when his driver and his customers would talk to her. As a result she left working there and went to work at Belfast International Airport. She enjoyed this but her husband was not happy when friends gave her lifts home. The wife gave evidence that the husband's controlling behaviour stretched as far as him deciding that she should have a termination of a pregnancy. In his evidence the husband, describing their life together, told of how he "allowed her to go out shopping" and "allowed her to go for walks".

The husband denied that he had been controlling in this way. He said that he encouraged her to have friends. He obtained a credit card for her and gave her “weekly pocket money”.

Litigation Conduct by the Husband

[23] Miss Houston submitted that the husband’s conduct in relation to his manner and lack of discovery amounted to litigation conduct. She raised numerous examples and effectively alleged a persistent pattern of litigation conduct. Two examples will suffice. Firstly, as Miss Houston submitted in her final written submission, the husband made discovery as “an ongoing rolling process even during the course of the running of the case right up to the last day”. In particular the husband failed to comply with an order for discovery made by Master Redpath on 15 September 2008 to provide copies of the title deeds for his two investment properties. The husband had argued that the Carrickfergus property had been purchased in 1998 prior to the marriage. When the deeds were finally produced it was apparent that the property had been bought during the marriage on 20 October 2000. Secondly, Miss Houston submitted on behalf of the wife that the husband has not been frank in terms of the disclosure of the income from his business. She argued that the mortgage in respect of the matrimonial home was well in excess of that which one would expect on the husband’s declared earnings of £15,000 per annum. The husband was asked to produce a copy of his mortgage application form. Although he agreed to do so, it was ultimately not produced. I was therefore satisfied that the husband intentionally failed to make appropriate discovery. On behalf of the husband Miss Weatherhead argued that both parties had been tardy in respect of their discovery.

Financial Conduct by the Husband

[24] When the parties separated, the wife remained in the matrimonial home and the husband moved to the Belfast investment property. The husband then stopped paying the mortgage on the matrimonial home and put the house up for sale. In addition, the husband paid no maintenance. The wife’s counsel described the husband’s conduct during this period as the wife being “starved out of the matrimonial home” by the husband. As a result, the wife was forced to go back to Iran as she had nowhere else to live. Since separation she has been surviving on tranches of money allowed to the parties from the sale proceeds of the matrimonial home. In order to attend court she has had to incur the cost of flights to Northern Ireland from Iran. The wife gave evidence that the husband’s first wife (he had been previously married) went back to Iran and received no ancillary relief or division of matrimonial property. The wife said that the husband’s attitude is that she should similarly “disappear” and receive nothing.

[25] The wife also alleged that when the matrimonial home was bought she was told by the husband that the house was being bought in their joint names. She went with him to the solicitor’s office and signed documentation

which she understood was to effect this. The husband translated for her while they were in the solicitor's office. It transpired that the documentation was merely mortgage documentation and the property was placed in the sole name of the husband. The wife submitted that the husband took advantage of her lack of English to deceive her in relation to her financial position. The husband's evidence that whether the house should be in joint names was never discussed and that the wife had never asked for it to be in joint names.

[26] Three years after the parties married, they moved house. The wife gave evidence that the husband said he was short of money and that the wife's parents gave her a loan of £20,000 to help buy the new property. She stated that the husband has since paid back £12,000 of this amount. The wife gave evidence that this was used by her father to pay for surgery which he had needed. The husband stated in his affidavit that this was "a total fabrication" by the wife who had "concocted this story to explain away the real reason" why money was transferred to Iran. The husband's version of events in relation to why he paid this money to the wife is set out in the next paragraph.

Financial Conduct by the Wife

[27] Counsel for the husband submitted that the wife had deceived him and tricked him into paying her approximately £25,000. The husband alleged that the wife had on one occasion telephoned him from Tehran, said that she had seen a lovely property there and asked whether they could buy it. The husband named a street in Tehran where he said the house had been purchased but no documentary evidence of any kind was offered to show that this bare assertion had any substance. He testified that he transferred money to her for the purpose of buying the property and also sent out his birth certificate for the transaction. He gave evidence that the wife bought the house for approximately £23,000. He stated that house prices in Tehran were not unlike Belfast in that they varied in different parts of the city : prices in northern Tehran were expensive, but they were cheaper in the south of the city. He claimed to have seen a video recording of the property but said that the wife had the video. He said that he had assumed that the house had been purchased in the parties' joint names. The husband gave evidence that the wife had since sold the property. He claimed to have overheard a telephone conversation between his wife and her nephew in which she had said that she was glad she had sold the house. It was accepted between the parties that sums of £2,036.00, £5,100, £330, and £2282 were transferred to the wife while she was in Tehran on various dates between 17 April 2001 and 31 December 2003. The wife gave evidence that the first, third and fourth payments were for the purpose of living expenses while she was in Tehran. She said that the second payment was a part-repayment to her family for the loan. She gave evidence that the price of a one bedroom flat in Tehran was currently around £140,000 and that his story that the money was for a house purchase was therefore unbelievable. Furthermore, she noted that the husband himself

also went to Iran and so, if he had wished to buy an apartment there, he could have done so himself.

Marital Conduct by the Wife

[28] The husband alleged that the wife's reason for marrying him was simply to allow her to obtain the right to live in the United Kingdom and so amounted to conduct such that it would, in the opinion of the court, be inequitable to disregard it. He submitted that the proximity between the wife being granted a right to stay in the UK and a letter written by her solicitor seeking a divorce was evidence of this. The wife denied this. She expressed the view that life in Iran was "hard" and that it was not "using someone" to marry them. However she stated that she had married the husband because she found him to be a nice man. At the time of their marriage he was not sure that he wanted to come back and live in Northern Ireland. She said that she would have become his wife even if he had wanted to live in Iran or Afghanistan. She also testified that from 20 March 2001 she no longer needed a visa to remain here.

[29] The starting point for any consideration of marital 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."

[30] 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."

[31] I turn now to the particular authorities on marital conduct. In *H v H (Financial Relief : Attempted Murder As Conduct)* [2005] EWHC 2911 (Fam) Coleridge J dealt with a case where the husband had attempted to murder the wife by stabbing her :

"[44] How is the court to have regard to his conduct in a meaningful way? I agree with Ms Jacklin that the court should not be punitive or confiscatory for its own sake. I, therefore, consider that the proper way to have regard to the conduct is as a potentially magnifying factor when considering the wife's position under the other subsections and criteria. It is the glass through which the other factors are considered. It places her needs, as I judge them, as a

much higher priority to those of the husband because the situation the wife now finds herself in is, in a very real way, his fault. It is not just that she is in a precarious position, which she might be for a variety of medical reasons, but that he has created this position by his reprehensible conduct. So she must, in my judgment and in fairness, be given a greater priority in the share-out."

[45] Obviously, as well as the conduct impacting on the wife's life, it has had direct effects. It is, as I say, not only the backdrop to the s 25 exercise; some of the consequences that will impact on her life are these. First, it has very seriously affected her mental health. Who knows what the long-term will bring, or how it will affect her life in the future? Secondly, she has to move home and uproot from the area where she has lived; not only herself but her children and her parents. Thirdly, it has more or less destroyed her earning capacity, and in particular destroyed her much-loved police career. Fourthly, it may affect the children in years to come. Fifthly, she will receive no support from the husband, either financially in the next few years, or with the upbringing of the children. Sixthly, it may impact on her relationship with the man with whom she has been associating now for some 2 years. If she moves away, which she intends to do, he may not follow.

[46] Those are the ways, in my judgment, in which this conduct has impacted directly on the wife's life and it is against that that I turn now to consider the needs of the parties, and first the needs of the wife and the children. It seems to me that so far as practical she should be free from financial worry or pressure. So far as housing is concerned, by far the most important aspect of her security is a decent and secure home for herself and the children. If she feels she is in a nice, new home of her choosing that will be beneficial therapeutically to her. She seeks a three bedroom bungalow in an area well removed from the former matrimonial home, where property prices are said to be similar to the area where she now lives. Her parents, as I have indicated, will move too but will not live with her. "

[32] In *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 Burton J observed that there were "only rare cases" reported where courts had taken into account non-financial conduct. This rarity is underlined by the fact that counsel had only been able to refer him to 13 such authorities over a 27 year period. In all the cases with the exception of one Burton J found that the conduct appeared to be manifestly serious. The conduct can only be such, he noted, as Sir Roger Ormrod described in *Hall v Hall* [1984] FLR 631 as "nothing to do with the ordinary run of fighting and quarrelling in an unhappy marriage" and which the judge's "sense of justice required to be taken into account." Counsel in *S v S*, Nicholas Mostyn QC, suggested

to the court that another way of describing such exceptional conduct was that it possessed a “gasp factor”.

[33] I reject the allegation of marital conduct made by the husband against the wife. Counsel for the husband could not refer me to any previous decisions by the courts in Northern Ireland or in England and Wales which indicated that non-financial and non-violent conduct of this type had ever been taken into account by a court as conduct which it would be inequitable to disregard. I do not consider that the allegation made by the husband that the wife had married him so as to obtain residency in the United Kingdom (even if proven) was capable of amounting to conduct which would fall within the statutory criterion. However, even if this view is incorrect, I would not have found the allegation proven, having regard to my conclusions on the husband’s credibility as a witness.

[34] I reject the allegation of marital conduct made by the wife against the husband. Counsel for the wife could not refer me to any previous decisions by the courts in Northern Ireland or in England and Wales which indicated that non-financial and non-violent conduct of this type had ever been taken into account by a court as conduct which it would be inequitable to disregard. I do not consider that the allegation of controlling behaviour made by the wife was capable of amounting to conduct which would fall within the statutory criterion. It was, to adopt the language of Sir Roger Ormrod in *Hall v Hall* [1984] FLR 631, simply “the ordinary run of fighting and quarrelling in an unhappy marriage”.

[35] In the light of my conclusion that, even if proven at their height, the allegations of marital conduct made by the husband and the wife were incapable of falling within the statutory criterion as it has been interpreted by the courts in recent years, it is important to observe that Counsel should only raise conduct issues in ancillary relief proceedings which are capable, if factually proven, of falling within the narrow statutory criterion which the 1978 Order imposes. Every hearing which takes longer than it reasonably should is wasteful of limited resources. It also results in delays for cases waiting to be heard, adding to the tension being experienced by the parties concerned. While a litigant is entitled to their “day in court”, they are not entitled to someone else’s day. Therefore, even where counsel’s client wishes such a conduct issue to be raised, counsel’s duty to the court overrides their duty to their client. As Mason C.J. described in *Giannarelli v. Wraith* [1988] 165 C.L.R. 543, 556 in the High Court of Australia, a statement quoted with approval by Lord Hope of Craighead in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, counsel’s duty regarding the management of the running of a case is as follows :

“In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-

examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.”

[36] I accept the allegation of litigation conduct made by the wife against the husband. However I reject Miss Houston’s submission that the litigation conduct should have consequences in respect of the financial award. In *Tavoulareas v Tavoulareas* [1998] 2 FLR 418 Thorpe LJ considered that it was questionable whether litigation misconduct within the ancillary relief proceedings, and long after the separation of the parties, should go to diminish the quantum of the financial award. Taking a similar view in *P v P (Financial Relief: Non-Disclosure)* [1994] 2 FLR 381 Thorpe LJ said :

“It seems to me that in that case such price as is to be paid by the dishonest litigant is a price in costs, not in reduction of the appropriate share of the available assets.”

I therefore decline to allow the finding that the husband has failed in his duty of discovery to have any impact on the division of assets.

[37] I reject the allegation of financial conduct by the husband against the wife. I have little doubt that the husband lied in respect of this. The husband throughout the hearing presented as a man who was very controlling in respect of the couple’s finances. He brought plastic bags full of receipts and financial paperwork with him to court. He gave evidence of how he had bought the matrimonial home without giving the wife an opportunity to view the house or express an opinion even though she had by that stage been married to him and living in Northern Ireland for approximately two years. Miss Houston submitted that the husband’s account of the purchase of property in Iran was absurd. I agree. I found it inherently improbable that he would allow his wife to buy a house in Tehran on their joint behalf without his being in control of the entire decision making process. I also found it utterly improbable that the sums of £2,036.00, £5,100, £330, and £2282 which were sent over a period of 2 years and 8 months were for the purpose of a house purchase.

[38] In the light of my conclusions regarding the husband’s credibility, which I outline below, I accept the various allegations of financial conduct made by the wife against the husband. Firstly, I am satisfied that he deliberately ensured that she was forced out of the matrimonial home. Secondly, I am satisfied that he deliberately deceived her as to the fact that he had placed the matrimonial home in his sole name.

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

[39] There were no submissions in relation to this matter.

Other matters taken into account

[40] Article 27 of 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. It was submitted on behalf of the husband that I take account of the wife's right under Iranian law to a compensation payment for a divorced wife known as the *Mahr*. This a sum of approximately £30,000 which was represented to me as "the Iranian way of protecting the wife. " The provision to pay the *Mahr* was part of the marriage contract entered into by the husband and the wife. The husband submitted that the wife could make a claim in respect of the *Mahr* against him in Iran. He submitted that as both parties married in Iran and continue to return to Iran, the wife could make a claim for the *Mahr* and the husband would be liable to pay it. The husband therefore asked that the court factor the impact of a £30,000 *Mahr* payment into the ancillary relief award as it was likely that the wife would make such a claim in Iran and that an Iranian court may not consider itself bound by any order previously made by the courts in Northern Ireland in satisfaction of the wife's rights.

[41] I decline to take the possibility of a *Mahr* payment into account for the following reasons. Firstly, issues of foreign law are a matter of fact for the court and are usually to be proved by means of affidavit evidence from expert witnesses. Neither party called formal evidence as to foreign law. The only evidence before me as to the *Mahr* was from the parties themselves. Neither witness held themselves out as an expert. Furthermore, there was no evidence before me as to whether or not the husband had any assets within the Iranian jurisdiction against which any *Mahr* award by an Iranian court could be enforced or whether, in the event of the wife obtaining a court order in an Iranian court in respect of any *Mahr* entitlement, such an order could be enforced against the husband's assets in Northern Ireland. In the absence of cogent and credible evidence in relation to the *Mahr*, it would not be safe to reach a view as to the rights and obligations of the parties under Iranian law.

CONCLUSION

[42] The credibility of the parties in giving their evidence was a central issue during the hearing in that it affected what conclusion I would reach in respect of some of the conduct allegations which were made. There was, for example, a clear conflict of evidence over sums of money which were transmitted by the husband to the wife while she was in Tehran. The wife stated that these were in repayment for a loan of £20,000 which the husband had borrowed from her family. The husband claimed they were made to the

wife to purchase property on their joint behalf in Tehran. As stated above I found the husband's version of events in relation to the purpose for the transmission of money to Iran utterly improbable.

[43] My overall view on the credibility of the parties also derived from evidence given regarding whether the wife had worked in the husband's catering business. In her evidence she had testified that she had worked in the husband's business, albeit for a short period. The husband was referred by Miss Houston during cross-examination to the annual business accounts which the husband had disclosed. In each he had accounted for sums of money which he had paid to his wife as wages for working in the business. At one point in his evidence, however, the husband was questioned about the issue of his wife working in his business and he stated that she had not even worked one day in his shop and did not even know where it was located. This was clearly contrary to the documentary evidence. On the face of it there were two principal possibilities. Either his accounts manifested dishonesty in that he had deliberately reduced his operating profit by accounting for wages for non-existent work by his wife or he had lied in his sworn oral evidence. Although I was inclined to believe that the latter was true, I considered it necessary to warn the husband in relation to his right not to incriminate himself. The evidence in the case was brought to an abrupt and premature end as Miss Houston decided at this point to cease her cross-examination and Miss Weatherhead declined to ask any questions in re-examination. I concluded that the answer given by the husband indicated dishonesty on his part either in terms of the accounts or his evidence to the court. It is not necessary in an ancillary relief context for me to attempt to reach a conclusion as to which of the two possibilities is the more likely. I was simply satisfied that the husband had shown himself unworthy of belief. Where there was a conflict of evidence between the husband and the wife, it was therefore the wife's evidence which I preferred.

[44] 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 to 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.

[45] The starting point for the division of matrimonial assets is that after a marriage of some duration, each party can reasonably expect to receive a half share. However a party's share may be increased up or down, but only on a strict application of the Article 27 criteria. On the facts presented to me, and taking into account the following factors :

- (i) The incomes and earning capacities of the parties;
- (ii) The current and future needs of the wife to establish herself either in Iran or in Northern Ireland ;
- (iii) The short duration of the marriage which, as Baroness Hale observed in *Miller v Miller, McFarland v McFarland* [2006] 3 All E R 1, may justify a departure from the yardstick of equality of division in cases where (as in this case) the assets are not assets generated by joint efforts of the parties ; and
- (iv) The financial conduct of the husband ;

I conclude that it is appropriate to award the wife £328,000 from the assets (which includes a sum of £8,000 with which to repay the remainder of the loan made by her parents). From this amount I am deducting the sum of £10,000 which was released to her as an emergency need payment on the final day of the hearing. The net award to her is therefore £318,000.

[46] 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 division 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.”

[47] 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.

[48] I now turn to the issue of costs.

[49] Miss Houston argued that I should order that the husband pay the full amount of the wife's costs. Essentially she based her position on the grounds that the husband had failed to make discovery; had caused an increase in the costs incurred by the wife in returning for hearings from Iran; and had used surprise tactics during the hearing by suddenly identifying a street in Tehran where he alleged the wife had purchased a house.

[50] Miss Weatherhead pointed to defects in the wife's discovery, noting that it was counsel for the husband who had received the largest bundle of documents during the hearing. She observed that the husband's conduct in this regard could not be described as gross. In particular lack of discovery by the husband's side of bank statements was due to an unfortunate error in the husband's solicitor's office. Miss Weatherhead argued that the appropriate order for costs was that each side should bear its own costs.

[51] I have considered the submissions made by both counsel in regard to what order I should make in relation to costs. There will frequently be ancillary relief cases where discovery is less than perfect due to difficulties in locating documentation. Having regard however to the following factors :

- (i) that the husband failed to make proper discovery in respect of his assets;
- (ii) that his failures in discovery were deliberate and wide-ranging; and
- (iii) that the husband's conduct in relation to discovery increased the length of time which it took to hear the case

I conclude that the appropriate order is that the husband shall pay 50% of the wife's legal costs.