

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION

BETWEEN:

MARGARET PATTON (KNOWN AS MARGARET COOPER)

Petitioner

and

ROBERT JAMES PATTON

Respondent

SHEIL LJ

[1] The petitioner and the respondent were married on 24 November 1981. On 28 June 1993 the petitioner obtained a decree nisi of divorce on the ground of adultery by the respondent, which decree was made absolute on 25 January 1994. There were no children of the marriage.

[2] On 15 December 1993 the parties entered into a Deed of Separation which was made an order of the court on 31 January 1994. Paragraph 2.3 of that deed provided that the respondent would pay to the petitioner the weekly sum of £150 maintenance payable in advance and is subject to variation by agreement or court order. Paragraph 2.6 of that Deed of Separation further provided that the respondent would pay to the petitioner two-thirds of the net proceeds of sale of the matrimonial home less one-third of some debts due to "the Tudor Tavern" totalling £15,898.

[3] On 8 September 2004 the petitioner, pursuant to Article 33 of the Matrimonial Causes (Northern Ireland) Order 1978 sought an order of the court that the weekly sum of £150 "be varied upwards in amount, or in the alternative, that a lump sum be paid to the petitioner as capitalisation of the said periodical payments."

[4] The matter came before me by way of a discrete issue as to whether or not the court had power, on a variation application under Article 33 of the 1978 Order, to make an order for a lump sum, which was the preferred alternative of the petitioner.

[5] Miss Brown, on behalf of the respondent submitted that the court had no power to make such an order as Article 33(5) of the Matrimonial Causes (Northern Ireland) Order 1978 states:

“No order for the payment of a lump sum shall be made on an application for the variation of a periodical payments or secured periodical payments order in favour of a party to a marriage (whether made under Article 25 or under Article 29).”

She also relied on paragraph 1.4 of the Deed of Separation which reads:

“The arrangements and agreements hereinafter appearing are made expressly with the intention that the same shall be in full and final settlement of all claims that they each may have to apply to a court of competent jurisdiction for orders for financial or ancillary relief of a capital nature and whether arising now or at any time in the future in the context of the breakdown or dissolution of their marriage or otherwise howsoever ---”.

Paragraph 2.11 of the Deed of Separation further provided:

“The parties hereto each hereby irrevocably bind themselves immediately on the grant of a decree nisi of dissolution of the said marriage on the petition of the wife to procure that their respective claims to lump sum or sums and property adjustment and against one another under and by virtue of the Matrimonial Causes (NI) Order 1978 or any other statutory provision shall stand dismissed and in the case of the husband his claims against the wife to periodical payments shall stand dismissed.”

[6] In S v S [1987] 1 FLR 71 (prior to the enactment of the Family Law Act 1996) Waite J held that the embargo in Section 31(5) of the 1973 Act would be construed in such a way as to give effect to Parliament’s presumed intention to allow the courts the maximum freedom to help former spouses to pursue

independent lives liberated from the running irritant of financial interdependence and that the court had jurisdiction to terminate the wife's periodical payments on the basis of a capital offer which her husband wished to make to her. In the instant case, the respondent makes no such offer.

[7] In Peacock v Peacock [1991] 1 FLR 324 at 329 Thorpe J, having referred with approval to the decision of Waite J in S v S went on to say:

"I would also suggest that such consent orders do not breach the letter of Section 31(5), for although the parties are agreed that the applicant should receive further capital, the only order that is essential is the order that dismisses the applicant's remaining claims. It is not necessary for the court to order the payment of the consideration, for that is volunteered. When drawing the order, the payment of the capital sum, or the transfer of a property can simply be prefixed as a recital, and the order for the dismissal of the wife's claims can be expressed to have effect only after the capital sum has been received or the conveyance completed."

[8] In Cornick v Cornick [1994] 2 FLR 530 Hale J (as she then was) stated that on the facts of that case it was not a clean break case and that it was open to the wife to apply for a variation of her periodical payments and that it would be open to the parties to compromise the wife's application for an increase in her periodical payments by the payment of a lump sum. I also refer to the decision of Booth J in Boylan v Boylan [1988] 1 FLR 282.

[9] Section 31(5) of the Matrimonial Causes Act 1973 contained a similar prohibition in England and Wales to that contained in Article 33(5) of the Matrimonial Causes (NI) Order 1978. Section 31 of the 1973 Act was amended by the Family Law Act 1996 in England and Wales which inserted Section 31(7B) enabling the court to make a lump sum order on an application for a variation of periodical payments. This amendment followed criticism by the courts of the prohibition on making an order for a lump sum in such circumstances. No such amendment has been made in Northern Ireland although the same criticism of the lack of such a power can be made as was made in England.

[10] Apart altogether from paragraph 1.4 and 2.11 of the Deed of Separation in the present case, by which the parties had irrevocably bound themselves, it is clear that this court, in the absence of consent by the respondent husband, has no power to order payment of a lump sum in this application for a

variation of periodical payments, by reason of the express prohibition contained in Article 33(5) of the 1978 Order.

[11] Accordingly the petitioner's application for payment of a lump sum by way of capitalisation of the periodical payments has to be dismissed. Consideration ought to be given by the legislature to amending Section 33 of the Matrimonial Causes (NI) Order 1978 so as to incorporate into that section a section equivalent to Section 31(7B) of the Family Law Act 1996.

Hearing: 7 September 2005

Ms McConnell for Petitioner

Ms Brown for Respondent