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Judgment: approved by the Court for handing down | *Delivered:* **28.11.2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

MATRIMONIAL AND PROBATE

BETWEEN

O'H

Petitioner/Respondent

and

O'H

Respondent/Appellant

WEIR J

The Nature of the Proceedings

[1] The respondent appeals from the Order of Master Redpath made in Ancillary Relief proceedings brought by the petitioner.

The Background

[2] The parties were married on 1 August 1986 and separated in June 2002. They were at the latter date both in their forties with two children, a boy born in 1994 and a daughter born in 1996. Following their separation they subjected their unfortunate children to a lengthy and acrimonious dispute about a myriad of matters related to the arrangements for their residence and contact. They also turned their attention to a protracted squabble about their modest matrimonial assets, accruing in the process yet more acrimony and considerable and quite disproportionate expense as will later appear.

[3] It is agreed between the parties that throughout the marriage the wife ("W") was the major breadwinner. She is a graduate who has worked for more than 20 years in a local industrial company. By contrast, the husband ("H") has over the

years been self-employed as an insurance salesman with spasmodic modest success. In 2003, after the marriage had failed, the appellant H became a trainee police officer but was suspended during his training, did not graduate and ultimately his contract was terminated in 2006. Since then he has existed on state benefits. Initially the children both lived with W although more recently the daughter has spent part of each week with each parent. The main burden of supporting the family throughout the marriage until separation was borne by W and similarly it has been so thereafter due to the husband's continuing unemployment and consequent impecuniosity.

[4] The assets of the parties are as I have said modest. They consist of:

(i) A dwelling house held in joint names subject to a mortgage debt of £78,000.

(ii) An Aviva insurance policy in joint names.

(iii) The wife's occupational pension fund.

(iv) A second pension fund of the wife with Aviva.

(v) An AVC of the wife with Zurich.

(vi) A pension fund of the husband with Aviva.

(vii) The husband's police pension fund.

<u>The Master's Determination</u>

[5] When the matter was decided by the Master in March 2009 the value of the jointly owned residential property was fixed by him at £247,000 on the basis that the only valuation evidence available was as at December 2006 and, doing the best he could to evaluate firstly the increases and secondly the decreases in the market since that date, he concluded that the overall effect was neutral and accordingly fixed the value at the date of the hearing at that figure of £247,000. From that fell to be subtracted the mortgage of £78,000 leaving equity of £169,000 to be apportioned between the parties.

[6] The value of W's occupational pension was derived by taking the CETV provided by her employer, a figure of £30,747. The wife's other two small policies he valued at a total of £11,687 producing a total value for her sole assets of £51,860. He calculated the value of H's pensions on the figures available to him as £13,448 in total.

[7] The Master, applying the Article 27 Checklist, concluded that because at that time the two minor children resided for the greater part of each week with W rather than with H, because W had made a greater contribution to the marriage and

because of what he described as "all the circumstances of the case", there was in his view a strong argument for a departure from equality. He therefore awarded H 35% of the net equity in the home, a share which he calculated as being approximately £59,000, and ordered that in return H should transfer his interest in the house to W. He further awarded H 25% of W's occupational pension which, as indicated above, had been valued using its CETV. Finally, he awarded him £3,350 being half of the then value of the policy in joint names. He further ordered that all the other assets be retained by those in whose names they were.

[8] So far as I can see the net effect of this was to transfer from W to H £62,350 together with a 25% share in W's occupational pension worth £7,500 and to leave him with his own police pension fund and a small Aviva pension, in all a total share valued at approximately £100,000.

The proceedings in this court

[9] Objective observers might have thought that this award by the Master was a not unreasonable attempt to achieve the fair distribution of these modest assets in all the circumstances. Unsurprisingly, given the acrimonious and protracted course of dealings between H and W since their separation H (at least) did not agree. Whilst he has apparently been unable to undertake any gainful employment since being dismissed from the police he has evinced boundless energy and dogged persistence in the pursuit of what he considers to be his entitlements both regarding the children and the matrimonial assets. He accordingly appealed against the decision of the Master, his main complaints being that the matrimonial home had been undervalued, that W's occupational pension had been undervalued by using an incorrect method and, later, that one of the two children had moved to live principally with him so that their care was now more or less evenly divided between each parent.

[10] So began a long and depressing odyssey before me. H initially represented himself as he had had prior difficulties with the legal aid authorities but eventually and fortunately he made his peace with them and then instructed solicitors who deserve much credit as does H's counsel, Mr Donaghy, for seeking to formulate and present H's case in a coherent fashion. W was legally represented throughout but because of her continuing employment was not entitled to legal aid and has accrued very substantial legal costs, quite disproportionate to the amount and issues at stake. I shall return to this factor later.

[11] I was obliged to review the appeal on no less than 14 occasions before it could be first brought to hearing. The first year of this, largely wasted, court time was spent in encouraging H to obtain his papers from his former solicitors with whom he had fallen out and to resolve his legal aid difficulties. Thereafter, once solicitors were once again on board for H, the matter began to take shape. However, much further time was spent at H's insistence in seeking to secure the services of what H considered to be the essential evidence of an actuary to value W's pension. He

further insisted that such actuary be sought from England as no actuary on the island of Ireland would in his view be competent to attend to the matter. Eventually, the services of a Mr Bradshaw FIA of Manchester were secured and he duly set to work to value the modest matrimonial assets other than the dwelling house. The house was the subject of two valuations but, as a result of the passage of time since the Master's decision, the competing valuations placed the current value at £180,000 and £200,000 respectively due to the fall in the market which had supervened.

[12] The hearing extended over several days. Mr Bradshaw gave evidence in which he agreed with H that the use of CETV was not appropriate to arrive at a valuation of W's occupational pension for ancillary relief purposes. His valuation, using actuarial principles and which I accept both as to the approach and the amount, valued W's occupational pension at £120,000 of which £70,000 was accrued during the marriage and the remainder since it ended. He further advised that this pension ought not to be shared, if possible, because it would cause a significant diminution in its value. He valued W's Aviva pension at £8,000 in respect of the proportion of value accrued during the marriage and her Zurich AVA at £13,000. H's Aviva pension he valued similarly, arriving at £5,000, and the police pension he valued at £22,000. I accept all those valuations as the best possible estimate of the actual value of the various pensions and policies adjusted where appropriate to represent accruals attributable to the period of the marriage.

[13] As to the value of the jointly held matrimonial home, I concluded that £200,000 was unduly optimistic in the depressed state of the market and that £180,000 probably represented a more achievable figure. The equity, allowing for the mortgage debt of £78,000, I therefore take as £102,000. The other jointly owned asset, a policy, had a value of £7,324.

[14] Having regard to the considerations set out in the Article 27 Checklist and to the fact that this was a marriage of medium duration and taking account of the fact that the care of the children was somewhat more equally divided when the matter came before me and that W is accepted to have made a significantly greater and more consistent contribution to the matrimonial assets than did H, I have concluded that the appropriate apportionment of the matrimonial assets is 60% to W and 40% to H. In view of the different approach to the valuation of W's occupational policy to that employed before the Master I also allow H 40% of the value of that part of the fund accrued during the marriage. The effect of that approach produces the following initial calculation:

<u>Jointly-held Assets</u>

(i)	Equity in matrimonial home	£102,000
(ii)	Value of policy	£ 7,324

<u>Wife's Sole Assets</u>

(iii)	Occupational pension fund	£ 70,000
(iv)	Aviva fund	£ 8,000
(v)	Zurich AVA	£ 13,000

Husband's Sole Assets

(vi)	Police pension	£ 22,000
(vii)	Aviva pension fund	£ 5,000
	Total value of assets:	**£227,324**

The effect of costs liabilities

[15] But for the disparity in the respective costs liabilities of H and W, the above total value of assets, apportioned as indicated above, would leave H with £91,000 and W with £136,000 in round figures. However, the consequence of this lengthy, over elaborate and, in the final outcome, practically pointless appeal from either party's point of view has been to leave W with legal costs of about £50,000, a sum which, while not agreed, H's solicitor regards as being "in the right parish". H on the other hand has accrued costs that are not legally aided of about £8,000. It is acknowledged that legal aid will therefore meet most of his costs and that he will not be liable to a statutory charge. H's counsel acknowledged that this disparity, if not taken account of in the award, would result in unfairness but submitted that I ought not to make an adjustment on account of it as he could find no authority for such a course but nor, as he frankly acknowledged, could he find any statutory or other restriction on my doing so. Miss O'Grady for W submitted that I was entitled to take account of the fact that W will have substantial costs to pay whereas H will have most of his costs met from public funds. She relied upon Duckworth - Matrimonial Property and Finance at B1 [154] and the authorities there referred to in support of her submission. She further maintained that the conduct of H in pursuing this litigation both before the Master and this court amounted to litigation misconduct.

[16] I have concluded, though not without some considerable hesitation, that this is not a case in which H should be found to have been guilty of litigation misconduct. Having said that, the elaborate and attenuated manner in which he conducted the appeal was productive of very considerable legal expense which, for the most part, H escaped while W (and the public purse) did not. In view of the very small total amount of assets available for division in this case this was an expensive undertaking that could and should have been avoided by taking a sensible approach. If H had accepted the Master's award when it was made his share would have been at least as high as under the present award before any adjustment. This appeal has left neither party better off than if the Order of Master Redpath, who is widely acknowledged to have very great knowledge and experience of these matters, had simply been accepted or, better still, if the matter had been settled at an

early stage so as to preserve the few resources owned by these parties and allow them to obtain what little was available for them and promptly go their separate ways.

[17] In order to ensure that the available assets are in fact shared as nearly as possible in the proportion of 60% to 40% as I have decided they ought to be I consider it is necessary in this situation where one party has been obliged to incur vastly more costs than the other to make an appropriate deduction from H's share to be added back to W's share. I fully appreciate that the effect of this approach will be that H will be partially subsidising W's legal costs but I am satisfied that such is necessary to achieve a fair outcome as between the parties. I have been fortified in my view by my discovery of a decision of Master Redpath in S v S where he took an approach to similar effect. See i*bid* at para 12.

[18] I have therefore concluded that the excess of approximately £40,000 that W has incurred in costs over those of H should be allocated to the parties in the same proportion as I have applied to the assets.

[19] Applying that adjustment to the figures in para [14] above means that H will give credit for £16,000, reducing his share to a net £75,000 and W's share will be augmented by that amount of £16,000 giving her a net £152,000. Once she has then paid her costs of about £50,000 she will be left with approximately £100,000 and H, once having paid his costs of about £10,000, will be left with approximately £65,000. The effect of this adjustment will be to approximately preserve the division of 60% to 40% of the net assets available after costs.

[20] I was impressed by the evidence of Mr Bradshaw that pension sharing ought to be avoided unless inevitable because of its depleting effect on the modest fund and similarly that sale or the transfer of assets between the parties should be avoided to save the not insignificant costs of such sale or transfer. I therefore determine that H should retain his own pensions worth £27,000 which will leave a balance of £48,000 due to him by W.

[21] The two jointly owned assets ought, if desired (and if possible), to be preserved in specie. If W wishes to retain the matrimonial home and preserve her pension funds she will plainly have to raise capital by borrowing so as to satisfy the balancing amount of £48,000 due to H. I am prepared to allow 6 months from the date of the final Order for W to pay that sum to H. If she signifies within that time that she is prepared and able to do so then the payment shall be made in exchange for H executing all such documents as may be required to vest his interest in the matrimonial home in W. If he neglects to or delays in doing so then and in that event I order that such documents be executed by the Master. If, on the other hand, W is unwilling or unable to pay the sum due to H within the stipulated period then the matrimonial home will have to be sold to raise H's share.

[22] Similarly, with regard to the jointly held policy, W may at her election retain the policy if she is able to pay the total sum due to H within the 6 month period. If however, she chooses not to retain the policy then it shall be encashed and the proceeds held and applied by W's solicitors in part satisfaction of the respective entitlements of the parties. H shall as soon as called upon to do so execute all such documents as are requisite either to vest the policy in the sole name of W or, as the case may be, to procure its sale or surrender. Again, in case of default the Master should act in his place.

[23] All pensions or policies in the sole name of either party shall be retained by that party.

[24] Upon the carrying into effect of the foregoing provisions neither H nor W shall have any past, ongoing or future liability for the maintenance of the other nor any claim upon the property of the other during or after their respective lifetimes.

[25] There will be no Order as to the costs of either party as against the other. The costs of H are to be taxed as those of an assisted person with Counsel.

Postscript

[26] If an example were to be sought as to how arrangements between parties upon the breakdown of their marriage ought not to be handled this case would provide a paradigm. In my view such matters should be resolved quickly, quietly and respectfully – rather like a family funeral. Such an approach minimises the hurt that one or both parties is naturally likely to feel, reduces the adverse effect upon any children of the family, maximises what are often scarce resources needed for the future use of the parties instead of dissipating them in costly litigation and shortens the period needed before the parties can move on to live their lives independently of each other. None of these advantages has accrued to the parties in this case. Rather has there been a long and bruising battle over the children and the modest matrimonial assets that has left everyone concerned wounded, impoverished and unable to move on. It has been my unhappy task to have been engaged in umpiring both these battles and I have found it a most dispiriting experience. Let me therefore express the fervent hope that a line may at last be drawn under this unhappy period in the life of this family and that something resembling peace may be allowed at last to reign. The principal and innocent victims, the children, deserve nothing less.