**Neutral Citation No. [2003] NIFam 15** | *Ref:* **GILF4064**

*Judgment: approved by the Court for handing down* | *Delivered:* **10/12/03**
*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

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**BETWEEN:**

**PM**

**Petitioner;**

**-and-**

**PM**

**Respondent.**

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**GILLEN J**

[1] In this matter the petitioner applies for financial provision under Articles 25 and 26 of the Matrimonial Causes (Northern Ireland) Order 1978 ("the 1978 Order") as amended. The application is contained in the prayer to a divorce petition issued by the petitioner and in an application for ancillary relief dated 8 September 2003. I have already heard and determined divorce proceedings between the two parties on foot of the petition issued 24 April 2003 of the petitioner and an answer and a cross-petition of the respondent which was filed with the court on Monday 24 November 2003. In that matter I dismissed the answer and cross-petition and issued a decree of dissolution of marriage on foot of the petition. For completeness I should also indicate that, on the consent of the parties, on 24 November 2003 I made and determined a residence order settling that the two children of the family should reside with the petitioner with substantial contact for both children with the respondent.

**Background**

[2] The petitioner wife is in her early forties and is employed in a professional occupation. The respondent works in the construction sector and is in his thirties. The parties met in 1994 when the petitioner was living in Belfast which she had bought in June 1989 for £32,000 with a 95% mortgage. In 1996, the petitioner suffered what was then diagnosed as a virus and was hospitalised for five months. The parties became engaged in 1998 and eventually married in 1999. Sadly, as appeared from the undisputed medical evidence, the petitioner was diagnosed with multiple sclerosis in December 2000. The symptoms which had been manifest in 1996, were now suggestive of the first symptoms of MS. In September 2000 the petitioner had sensory symptoms in her lower limbs and was re-admitted to hospital where the diagnosis was made. However there have been no further relapses since then and she was commenced on beta interferon after the birth of her second child. She remains under the care of a consultant neurologist. Although she walks with a slight limp, she has remained well over the past few years. Her multiple sclerosis is of the relapsing and remitting type i.e relapses of the illness can occur after periods of being symptom free. She has therefore been in remission since December 2000. However the course of multiple sclerosis is very unpredictable and there is a wide variation in severity among sufferers.

[3] After the parties married the respondent moved in with the petitioner in Belfast. However before the marriage, the respondent had informed the petitioner that his father, who owned a farm in mid-Ulster, had offered him a site on which to build a house as he had done with various siblings of the respondent. Planning permission was granted for the house on the site on 11 September 1998 and thereafter the respondent, with his skills and contacts in the building trade, carried out most of the work. It was common case that the petitioner in October 2000 sold her house in Belfast for £135,000 (leaving an equity of £103.467 after discharge of mortgage and legal expenses) which she contributed to the new house in mid-Ulster ("the current matrimonial home"). There was some dispute about the measure of money that she had put in thereafter to the construction of this house but it probably was somewhere in the range of another £15,000/£20,000. Equally so, the respondent made a very substantial contribution to the construction of this house with the benefit of the site which had been supplied by his father and of course the sweat of his brow in constructing the premises.

[4] Sadly, as I have found during the course of the divorce proceedings, the marriage collapsed during the period that they were living in mid-Ulster largely due to the social isolation of the petitioner and her profound unhappiness at the turn of events that left her feeling alone and unhappy in the matrimonial home. Eventually the petitioner found life intolerable and

arranged to rent alternative accommodation in another area where she intends to take up residence now with the two children.

**The accretion and disposal of the family assets**

[5] Mr Malcolm, who appeared on behalf of the petitioner and Mr Kennedy QC who appeared on behalf of the respondent, helpfully put before me an agreed list of assets and income owned by the parties in this case. I shall deal with the matrimonial home in mid-Ulster in a separate section. The other assets are as follows:

| | |
|---|---|
| **JOINT** | |
| Bank Account | £ 2.42 |
| Building Society Account | £82.00 |
| | £84.42 |
| **WIFE** | |
| Savings Account no. 1at 22/11/03 | £722.62 |
| Current Account 22/11/03 | £1526.84 |
| 185 shares @ £7.29 | £1348.65 |
| 358 shares @ £1.32 | £472.56 |
| Savings Account no. 2 | £5126.43 |
| Isa no. 1(£13,000 to C on account of costs) 22/11/03 | £319.54 |
| PEP 9 September 2003 | £855.62 |
| Isa no. 2 11 December 2002 | £745.24 |
| Isa no. 3 9 September 2003 | £1041.70 |
| Account 10/9/03 | £1116.40 |
| Isa no. 4 9 Sept 2003 | £9000.00 |
| Endowment policy (Belfast property) | £6301.36 |

| | | |
|---|---|---|
| | Capital | £28576.96 |
| Pension (occupational) CETV@ 21/8/03 | | £63939.09 |
| | Total (including Pension) | £92516.05 |

**INCOME**

P60 5 April 2003 gross £27,686.76
Less income tax £4250.34 and NIC of £2086.08 £21079.58

D.L.A. £39.95 per 4 weeks * 13 = £519.35

Motability £159.80 per month

**HUSBAND**

| | |
|---|---|
| Bank Account 16/9/03 | £1117.48 |
| Shares @ £5.39 | £529.00 |
| Assurance Policy | £8612.17 |

**PENSION**

| | |
|---|---|
| Pension | £2560.06 |
| AMP | £779.56 |
| | £13069.27 |

**INCOME**

| | |
|---|---|
| To year ending 5/4/03 | £529.00 |
| (including pension) | £13598.27 |

Taxable profit
£10682.00

Capital exclusive of pension
£10258.65

[6] Before turning to the question of the matrimonial home, I should indicate that had these been the only assets, I would have concluded there was little to vary in the disposition. This was a short marriage of only four years duration and most of the assets included in this list were accrued before the marriage existed and will continue to grow after the marriage is terminated. In particular the CETV value of the occupational pension of the

wife at £63,939 is the product of accrual largely long before the marriage and in any event will not crystallise for a number of years notwithstanding the ill health of the petitioner. It seems to me at most approximately 5% of the CETV value of that pension would have been appropriate to be included in the overall matrimonial assets.

**The matrimonial home**

[7] This was the essential asset which is the subject of dispute. Each side produced a professional valuer. Mr Neil Templeton of Templeton Robinson a well known firm of estate agents put a value of £215,000 or thereabouts on the property. He arrived at this figure by in the first instance looking at certain comparables in the area but these were of limited assistance because the figures on them were the product of sale brochures and he did not have the actual sales of any of them. The figures were therefore purely indicative. He approached costing essentially on a build cost approach. He broke this down as follows:

(a) The acreage of amenity land (which, I was subsequently told, he wrongly assumed was seven acres) valued at approximately £4,000 per acre. Seven acres gave him £28,000 as a total and the correct figure of 5.5 acres would have given a figure of £22,500.

(b) He valued the build cost of the house at £45 per square foot for approximately 3,000 square feet ie £135,000.

(c) He valued the site costs with planning permission as £52,000.

These totals (including the incorrect £28,000 for the seven acres of amenity land) came to £215,000 and if one adjusts this for the reduced acreage of the amenity land, the figure comes to £209,500.

[8] Mr Tohill was called on behalf of the respondent. He had the advantage of being a local estate agent having worked with a firm of estate agents in the area for ten years before branching out on his own for the last three years. In essence his approach was that he would not have taken a great deal of issue with Mr Templeton had it not been for what he described as the very difficult access to the property. In effect he said that his valuation would have been somewhere in the range of £190,000/£195,000 without the access difficulty.

[9] There then emerged what became a point of dispute in the case. Mr Tohill's argument was that the approach to the house currently being used by the parties (and coloured orange, map 18A in bundle 3A and map 6 in bundle 6A) would not be available in the event of an open market sale. The case made by the respondent, on information given to him by his brother, was that

he and the petitioner had only use of this path by way of a licence from the respondent's family and that the approved route was that coloured in black on the said maps I have referred to. The latter included the need to access through two gates, which require to be opened and closed and therefore seemed altogether a more inconvenient method of approach. Mr Tohill also felt that the access to the seven amenity fields was also problematical in terms of a right of way. Mr Tohill also approached the valuation on a build cost manner. Making allowance for the access problems, he valued the property in this way:

(a) Building costs per square foot (to include the building plot) he valued at £42. (He subsequently told me that the plot alone with poor access would be worth £20,000/£25,000 and valuation of building costs on its own would be approximately £35/£40 per square foot.) He had allowed for 2850 square feet giving a figure of £119,700 ie 42 x 2850.

(b) He told me in evidence that he had valued the seven acres of amenity land (he had also made the same mistake in the size of this) at £2,500 per acre. This gave a grand total of £137,200. Mr Tohill's approach to the matter was somewhat diluted by two matters:

(i) In earlier conversations with Mr Templeton, at a time he claimed he did not have the file before him, he had initially valued the building costs at £30 per square foot (which he subsequently changed to £42 per square foot) and the seven acres he had originally valued at £5,000 to £6,000 per acre which he then altered to £2,500 per acre.

(ii) Revealingly, a note on his file, which he described as "scribblings" recorded £185,000 (which I concluded referred to the overall cost of the building including the plot), £28,000 (which I concluded referred to seven acres at £4,000 per acre), giving a total of £213,000 from which he had deducted £37,000 (from which I deduced he had deducted 20% of the overall building costs of £185,000), giving a grand total of £176,000. I came to the conclusion having heard Mr Tohill's evidence that his considered valuation was more likely to be closer to £176,000 than the figure of £137,000 that he put before me.

[10] The solicitor on behalf of the petitioner industriously investigated this whole question of access which clearly was a material issue in the site valuation. She produced bundles 6A and 3A which revealed a close analysis of the historical disposition of the property by the parents of the respondent to the family. It emerged that there was clearly a plausible argument to the effect that the orange route, which the petitioner said she had always used, and the amenity lands, may not have been burdened by the rights of way argued for by the respondent's brother, either at all or to the extent alleged. The issue itself had only surfaced after the petitioner had indicated that she

wished the matrimonial home to be sold through her solicitor in correspondence of 25 July 2002. In the course of a response thereto by solicitors acting on behalf of the respondent's brother on 23 August 2002, the licence argument was raised for the first time, said the petitioner. Mr Malcolm suggested therefore that this was all a ruse to try and influence the disposal of the property. The fruits of the plaintiff's solicitor's enquiries pointed, he said, to the conclusion that the laneway, which the respondent's solicitors claimed belonged to the respondent's brother, in fact was owned as follows:

(i) Top right half of the road belonged to the respondent's brother.

(ii) Top left half of the road belonged to neighbour A.

(iii) The bottom right half of the road belonged to neighbour B.

(iv) The bottom left half of the road belonged to neighbour A.

[11] Mr Malcolm further relied upon the rule in Wheeldon v Burrows (1879) 12 Chancery Division AD 1 which establishes the principle inter alia that where an owner disposes of part of his land and retains other land, the law has evolved a specific mechanism (based on the principle that a grantor may not derogate from his grant) which recognises the concept of a "quasi-easement" which may be implied in favour of a grantee over the land retained by the grantor. It would thus be implied into a conveyance that any quasi-easement is converted into an actual legal easement enforceable against the land retained by the grantor.

[12] Mr Kennedy QC argued on behalf of the respondent that there was merit in a very late affidavit filed by the respondent's brother which argued that Wheeldon v Burrows could be distinguished in this instance on the issue as to whether any such easement was necessary to the reasonable enjoyment of the property granted and in any event that the respondent had established adverse possession of the laneway.

[13] In coming to a conclusion as to the value of this property, I must be mindful of the admonition of Thorpe LJ in Para v Para (2003) 1 FLR 942 at page 949 para 22:

> "… the outcome of ancillary relief cases depends on the exercise of a singularly broad judgment that obviates the need for the investigation of minute detail and equally the need to make findings on minor issues and disputes. The judicial task is very different from the task of the judge on the civil justice system whose obligation is to make findings in all

> issues and dispute relevant to outcome. The quasi-inquisitorial rule of the judge in ancillary relief litigation obliges him to investigate issues he considers relevant to outcome .. But this independence must be matched by an obligation to eschew over elaboration and to endeavour to paint the canvas of his judgment with a broad brush rather than with a fine sable. Judgments in this field need to be simple … in structure and simply explained."

[14] Whilst it seems to me that Mr Malcolm's arguments on the validity of the respondent's claims as to the difficulties of this access may have greater weight, nonetheless I must recognise that in a local country area, any purchaser is going to be put off by the prospect of litigation no matter how strongly he may be urged that the law will eventually be determined in his favour. I cannot but conclude that this would have some impact on the valuation of this property particularly when it is counted in the context of a purchaser litigating against the neighbours that he will have to live beside. Looking at this with a broad brush, I have concluded that the appropriate valuation of this property, making due allowance for the small reduction in the amenity lands from the position which the valuers wrongfully assumed, amounts to £185,000.

**Legal principles**

[15] The court clearly has a broad discretion in awarding ancillary relief under Articles 25 and 26 of the 1978 Order. The underlying principle in according such a broad judicial discretion is to enable the court to tailor financial solutions to the need for specific individual parties. It is significant that there is no over-arching statutory principle as to how that discretion should be exercised except for the provisos specifically set out. A court must give first consideration to the welfare of minor children. This is clearly an important factor in this case since a residence order has now been made in favour of the petitioner and she will have most of the day to day care and responsibility for these children. The check list referred to in Article 27 details the matters to which the court is to have regard in deciding how to exercise its powers under Article 25 and 26. Regard must be had to all the circumstances of the case including the following matters:

(a) The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future. In this case one has to bear in mind that the petitioner earns a net salary of £21,079.58 and the respondent, who is self-employed, earned in the year ended 5 April 2003 a taxable profit of £10,682. On the other hand one must bear in mind that the respondent is a young man in his thirties

and whereas the wife's earning capacity may well decrease with the impact of multiple sclerosis, his may well increase.

(b) The financial needs, obligations and responsibilities which each of the parties have or is likely to have in the foreseeable future is also an important factor. The petitioner will obviously need to have a roof over her head for herself and the two children which simulates as closely as possible the conditions under which the children lived prior to the break up of the marriage. Equally so of course the husband must also have a place to live.

(c) The standard of living enjoyed by the family before the breakdown of the marriage was obviously good. The house was obviously in first class condition and I strongly suspect that the value of the property in its particular setting does not reflect the benefits and real value which this house bestowed on the family.

(d) I must bear in mind that the wife is in her forties and the respondent in his thirties. The duration of the marriage was very short being only four years. This is particularly relevant to the issues of the pension which I have mentioned above.

(e) Any physical or mental disability of either of the parties to the marriage. I must bear in mind therefore the condition of multiple sclerosis from which the petitioner suffers.

(f) The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family including any contribution by looking after the home or caring for the family. As I have already indicated, the wife made a very strong financial contribution towards this house of between £120,000 and £130,000. On the other hand the husband did provide the plot for the land and also the industry in building the house.

(g) I do not consider that conduct is relevant in this case.

[16] The recent authorities of White v White (2001) 1 AC 596 and Lambert v Lambert (2003) 1 FLR 139 have already been reviewed in a number of cases including by myself in G and G and J (unreported GILA4193). At paragraph 48 in that case I said:

> "In summary therefore these authorities make it clear that the court has a very broad discretion to make financial awards under Article 25 and has, in big money cases, increasingly chosen to guide the exercise of this discretion by the overarching objective of fairness. The courts have chosen to measure fairness of outcome by adherence to the principle of

> equality unless there is good reason for variation such as wholly exceptional contributions by one party to family welfare."

[17] Although this is a short marriage, I do not think that an equal division of the value of this house would be appropriate or fair given the responsibilities which the petitioner has and the contributions which she already made. I have come to the conclusion, that with the exception of the matrimonial home, the other assets should remain as they presently are. The joint accounts should be divided equally ie. £42.21 each. The various accounts/income which each has and which I have set out earlier in this judgment should remain as therein outlined. I consider that the matrimonial home should be valued at £185,000. Given the family discord that is clearly in evidence in this case with the respondent and his immediate family lining up together potentially against the petitioner, I do not think that it would be appropriate to allow the market to determine the value of this house before making a distribution of its value. My fear is that the danger of the sale being adversely influenced could subvert the justice of the case. Mr Malcolm, understandably, has indicated to me that the possibility of the wife and children remaining in the house is not realistic given the circumstances of the family background. Accordingly it seems to me that the equitable thing to do is for me to fix a value of the house which is realistic and which will at least serve to ensure that if the house is sold, the best price possible will be obtained without any local or family influence being brought to bear. Accordingly it is my view that the wife in this case should receive 60% of the sum of £185,000 namely £111,000 and that this should be paid by the respondent to her. I note from the assets which he has available that £10,000 or thereabouts can be paid immediately and, in evidence, it was indicated that he could raise a mortgage of £70,000 on the property. Accordingly it is my view that £80,000 should be paid within six weeks of this order by the respondent to the petitioner. The balance of £31,000 should be paid within twelve weeks of the date of this judgment and that any sum outstanding thereafter will attract interest at judgment rate. I consider that this time will allow him either to raise the cash or alternatively to sell the property and raise the cash in this manner. I should add by way of separate statement, that I have taken into account the fact that the petitioner in this case will have to bear her own costs in this matter since the respondent is legally aided and accordingly any order that I would make for costs would be largely academic. Accordingly I order that the petitioner bear her own costs and the respondent shall have his costs taxed under the appropriate schedule of the Legal Aid Order.