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*(subject to editorial corrections)**

2011/143625

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

S

Petitioner;

and

S

Respondent;

and

ES

Third Party.

KEEGAN J

[1] This case involves an application for ancillary relief between the petitioner wife and the respondent husband. The petitioner also brought a claim against the respondent's mother who is the third party. That action was brought in the Chancery Division but the two claims were heard together. On the first day of the hearing, the Chancery action was settled on agreed terms the substance of which I will return to. The third party was represented by the Official Solicitor in both sets of proceedings as she is an elderly lady who is not capable of conducting her own affairs.

[2] I have anonymised this judgment as there is one minor child of the family.

[3] Mr Toner QC and Ms MacKenzie BL appeared for the petitioner, Mr Coyle BL for the respondent and Ms Kinney BL for the third party. I am grateful to all counsel for their written and oral submissions.

[4] The parties were married in 1994. There are three children of the marriage now living who are aged 20, 18 and 14 years. Sadly another child died when an infant. The parties separated in 2009 and a decree nisi was granted on the ground of the respondent's unreasonable behaviour in 2012.

[5] The petitioner wife was born in 1964 and so she is now 52 years of age. The respondent husband was born in 1963 and so he is now 53 years of age. The petitioner was born in Northern Ireland and has her roots here. The respondent was born in Ghana but retains an affinity with the Republic of Ireland.

[6] The parties met whilst at university in 1983 when both young adults. The relationship was platonic until 1993 and then the parties formed a romantic relationship for a year before marrying. When first married the petitioner was employed as a European Supply Chain Manager for an American food company. She was earning £25,000 a year. The petitioner gave undisputed evidence that she had given up this employment soon after the marriage, just before the first child was born in 1995. The agreement was that the petitioner would stay at home to look after the family. The respondent husband was a Lieutenant in the Royal Navy and he remained in that employment until in and around 1997.

[7] During the marriage the parties lived at various addresses in England and Canada. The parties returned to Northern Ireland in May 2003 at a time when the respondent was made redundant from his employment in Canada and when his father had just died. At this time both the mothers of the respondent and petitioner were in ill-health.

[8] It appears that upon return from Canada the parties lived for a short time in a property in Wicklow which was a property belonging to the respondent's father but held on trust for the respondent.

[9] Thereafter they moved to Northern Ireland after the respondent's father's death. At this stage, having some money from his father's estate, the respondent decided to buy a farm. This was with the petitioner's agreement. It is important to note that the parties to this transaction were both the petitioner and the respondent and the respondent's mother. The respondent's mother was involved in this opportunity as she was also left money after the death of her husband. There was therefore an agreement to pool resources to purchase a farm. The location of the farm that the parties decided to purchase was beside the petitioner's parent's address.

[10] The farm was purchased in January 2004, by the petitioner, respondent and the third party. Between them the petitioner and the respondent provided an amount of £370,000 towards the purchase and the third party the remainder which was some £900,000. The legal ownership of the farm was determined in line with the contributions made and so land comprising approximately 82 acres was placed in the joint names of the petitioner and the respondent. The remaining land and farmhouse was placed in the third party's name. The petitioner was responsible for formulating the division. All parties agreed with her conducting this exercise which took place at the kitchen table one evening.

[11] It appears at this time that the arrangement was suitable to all as the respondent's mother was suffering from the onset of Parkinson's disease and so the parties wanted to keep her close by and to provide care for her. Initially the third party lived in the farmhouse and the petitioner undertook a substantial amount of her care. Then it became apparent that professional care would be needed and an annex was built at the side adjoining the farmhouse to accommodate the third party. The plaintiff said in her evidence that she also contributed £30,000 towards the construction of the annex.

[12] The family survived by farming the lands. There was also the provision of some of the lands in conacre and rental to a flying club. It was stated that the conacre provided a maximum income of £15,000 per annum. The flying club rental was approximately £6,000 per annum. There was a herd of beef cattle. All of the lands were farmed by the respondent, with the assistance of the petitioner and use of a single farm payment which I was told in evidence could amount to £30,000 per year. It appears that the farm did make a profit in the early years. The respondent referred in evidence to later difficulties which centred around an employee who he paid £30,000 a year to work on the farm. It seems that the services of this employee have now been dispensed with and so the respondent accepts that the farm is back into profit as this wage is no longer being paid. The respondent now lives with a new partner and baby in the annex to the farmhouse. The respondent's partner runs a B&B from the farmhouse.

[13] The petitioner left the marriage on 23 October 2009 and moved to her father's farm situated nearby the former matrimonial home. The children resided with the petitioner and appear to have developed a strained relationship with the respondent. Since the separation it is also clear that the respondent has continued to farm the land. The petitioner obtained a job working part-time as a Careers Adviser at a school earning £441.67 per month. Since the separation the respondent has also paid approximately £500 per month by way of child maintenance.

[14] It is relevant to note that since the separation, the respondent's mother has become incapable of managing her own affairs and is a patient in residential care. As I have said, she has been represented by the Official Solicitor in these proceedings. She is an elderly lady. Her last Will and Testament leaves her entire estate to the respondent. The petitioner's father also died since the separation and his estate was divided between the petitioner and her sister, with the petitioner having a 10 year right of residence in the farm where she currently resides.

[15] It was agreed by all of the parties that prior to the ancillary relief application being heard, that the Chancery case would have to be determined. In that claim, the petitioner sought declaratory relief as to her interests in all of the lands which formed the matrimonial assets and the lands of the third party. The petitioner also sought an order for sale of the lands including the dwelling house. Ultimately an agreement was reached between the parties in settlement of this claim. This was in large measure due to the efforts of the representatives of the third party, ably

represented by Ms Sarah Kinney, who provided an excellent written argument to the court and who engaged in negotiations beyond the strictures of the legal case. The agreement essentially provides for a swapping of some land between the parties but it maintains the shares between the parties as per their contribution to the purchase price. The agreement also provides for the correction of boundaries to allow the joint lands to be marketable. The aim of this agreement was achieved in that it made the joint land severable and sellable to facilitate the ancillary relief claim.

[16] In the ancillary relief case, I heard oral evidence from both the petitioner and the respondent. A valuer also gave brief evidence to confirm that the joint lands would not sell without correction of boundaries a fact that was dealt with by the Chancery agreement. The respondent's sister gave brief evidence about the care needs of her mother.

[17] The petitioner adopted her affidavits and gave largely unchallenged evidence. I consider some matters to be of particular significance. Firstly the petitioner said that she had a skilled job at the start of the marriage which she gave up to look after the children. Secondly she now has her housing needs satisfied but not indefinitely given that her right of residence is only 10 years in duration. Overall, I formed the view that the petitioner was an honest witness who did not exaggerate her claims but who sought a fair division of the joint lands and other matrimonial assets.

[18] The respondent gave evidence in a different manner. He was evasive when questioned. He described divorce as "evil". He said that he was "traumatised" by proceedings. He also submitted that the proceedings had resulted in him never seeing his children and simply costing him money. I was concerned that the respondent, having agreed a settlement in the Chancery case, appeared to want to depart from it. When asked in evidence about sale of the joint lands he stated that he "thought the farm was going to be destroyed".

[19] The respondent also stated that he was in bad health and he made a case that he might pre-decease his mother, thereby making his inheritance of her estate academic. I find that argument entirely unbelievable and without substance particularly as the respondent did not produce any medical evidence to support his claims. There was also an issue regarding the respondent's discovery. This case was not assisted by a failure by the respondent to provide updated financial documentation. The petitioner did not make a case that there were hidden assets but rather that the up to date accounts and farm income were not provided. At one point I asked whether the case should be adjourned to compel discovery however both parties wanted to proceed given the delays in the case to date.

[20] The respondent said that he had not filed tax returns for the last 2 years due to stress. He also produced single farm payment documents in the witness box which had not been provided in discovery, despite requests. These documents were copied during a break after the respondent's evidence in chief. The respondent said that his partner ran a B&B from the farmhouse but provided no financial discovery

as to that enterprise. The respondent did agree when pressed by the court that the only way of raising money to satisfy his wife's claim was through a sale of land.

[21] The assets fall into different categories but may be summarised as follows;

(i) Jointly held land – agreed valuation £520,000.

(ii) Children's bonds - £75,000.

(iii) Canadian property – negligible value held in joint names.

(iv) Property at Wicklow held solely by the respondent - agreed valuation - €180,000.

(v) Wife's pension Unilever CETV -£98,325.

(vi) Wife's school pension CETV -£4,429.44.

There were also the following inheritances;

(vii) The petitioner's current inherited property, right of residence and 20 acres of land – half share of probate valuation £210,000.

(viii) The respondent's inheritance- agreed valuation - £881,500.

[22] In addition to the above identifiable assets there was an issue raised in these proceedings about an inheritance given to the children on foot of the death of the respondent's father. This amounted to a sum of approximately 100,000 Irish Punts which was to be invested for the children and to be paid to them at age 30. The trustees were stated to be the respondent and his sister. It was common case that the money was used to assist with the purchase of the joint lands. The respondent made a claim in these proceedings that the trust should be resurrected and the children's money should come out of the joint assets.

[23] Various other matters were raised by the parties. Firstly the petitioner claimed that she had contributed £30,000 to the annex. Secondly money had come from a Canadian account in the sum of approximately £50,000 and the petitioner claimed half of that. Thirdly the respondent had shares of some £57,000 which had reduced to £4,000. Both parties had some money in bank accounts. There was an issue about the respondent's income which was not vouched. There was also an uncertainty as to the level of income being generated from the B&B and whether it was solely applied to the respondent's partner.

[24] Mr Toner QC on behalf of the petitioner filed a written closing argument which he augmented with oral submissions. In essence, from both the written and

oral arguments he made the following points. Firstly he made the point that the Chancery proceedings had led to a resolution of the land issue which was of benefit to both parties. As such, he said that the costs of the respondent's mother should be borne between the two spouses. Mr Toner then submitted that a clean break is the preferred option in this case. He did not make a case for spousal maintenance and he said that if child maintenance could not be agreed that his client could apply to the Child Support Agency or she could apply for relief under Schedule 1 of the Children (Northern Ireland) Order 1995.

[25] Drawing on his written submissions, Mr Toner stated that the solution in this case was the sale of the jointly held lands in order to raise a lump sum to satisfy his client's claims. He said in answer to me that he understood there would be a tax liability from any sale but that this had not been estimated as yet. Mr Toner argued for a departure from equal division of the sale proceeds. He based his submission on a number of factors. Firstly he said the husband's inheritance was much greater than that of the wife. Secondly he said there was a disparity in present and future income. Thirdly he said there was a lack of openness about the exact state of the husband's financial affairs. Fourthly he said that the petitioner effectively gave up her job to look after the children of the family and she had assumed the major responsibility for them including financial responsibility.

[26] In terms of the division of assets, Mr Toner argued for a two-thirds/one-third split on the sale proceeds of the joint lands. He submitted that the money given by the respondent's father for the benefit of the children should not be reallocated from the sale proceeds. He asked that the children simply retain their own bonds. He submitted that the Canadian property should be left out of account on the basis that it is an asset outside the jurisdiction and the parties should be capable of selling it and dividing any proceeds. He said that I should set off the value of the husband's property in Wicklow against the wife's pensions. Mr Toner frankly accepted that the petitioner's contribution to the annex was not a stand-alone point. He did say that £25,000 of money from the Canadian joint account should be applied to the petitioner.

[27] Mr Coyle also filed written arguments in closing and he adopted those and made the following key points. At the outset Mr Coyle referred to the case of White v White [2001] AC 590 and the principle of equality. However Mr Coyle did accept that this was a case where there could be some departure from equality. In my view that was an appropriate concession to make. Mr Coyle argued for a clean break. He submitted that the 100,000 Irish Punts should be taken out of any sale proceeds prior to division.

[28] Mr Coyle effectively agreed with Mr Toner regarding the Canadian property. He resisted any argument that the Chancery costs should be split because he said that the Chancery proceedings were not necessary as the issue could have been dealt with within the ancillary relief. Mr Coyle formally applied for costs against the petitioner wife in the Chancery proceedings but he sensibly suggested that no order

inter parties may be attractive to the court. Mr Coyle also faithfully represented his client's view that a sale of the farm would be detrimental to him and his business but he accepted that there was no other way to raise a lump sum should that be a resolution which found favour with the court. Mr Coyle submitted that I should not take into account the monies from Canada or the annex contributions.

[29] I should also say something about the chronology of these ancillary relief proceedings. This has been helpfully set out in a paper provided by the petitioner entitled `a history of proceedings'. I asked Mr Coyle whether or not this was an agreed document and he indicated that there was nothing in particular that he took issue with although it was a document generated by the petitioner's counsel. This document presents an interesting view of the conduct of proceedings which does not reflect particularly well upon the respondent. I do note that he was a personal litigant during parts of proceedings, but it appears to me that the respondent has for whatever reason delayed in dealing with these proceedings before the court.

[30] It seems to me that the respondent has for a considerable period of time failed to apply his mind to the real issues. I note that this case could not proceed to a Financial Dispute Resolution (FDR) hearing. I think that is regrettable in the overall context of a case such as this where substantial costs have been run up. The FDR process is designed to identify issues at an early stage, to save costs, and to facilitate resolution in cases such as this.

[31] I accept that separation and divorce is undoubtedly an emotional experience and a traumatic event for many people. However that does not absolve former spouses from their obligations in ancillary relief to provide full and frank disclosure and to address the issues at an early stage to facilitate the smooth running of proceedings. Unfortunately the respondent has not complied with this and as a result proceedings have been unnecessarily protracted.

[32] In deciding an ancillary relief application such as this I start by considering the terms of the Matrimonial Causes Order (Northern Ireland) 1978 and in particular the factors in Article 27. I remind myself that the statute is the primary authority. My approach is to apply the Article 27 factors with fairness and non-discrimination in mind. In so doing the principles of needs, sharing and compensation should be considered. Finally, the exercise must be compared with what would be an equal division if the final result is not so, the court must explain a departure.

[33] The current law has been summarised most recently in this jurisdiction by Maguire J and affirmed by Gillen LJ in a recent case of H & H [2015] NICA 77. In the Court of Appeal decision at paragraph 19, adopting Maguire J's analysis at first instance the court sets out the following:

> "The following from the case law appear to be of general application:

1. There is in operation what might be described as a non-discrimination principle as between the roles performed by husband and wife. The object rather is to achieve a fair outcome as between the parties.

2. Equality of division is a useful yardstick it should only be departed from if there is good reason for doing so. This however does not mean that there is a presumption in favour of equal division.

3. In seeking to achieve fairness between the parties the court will keep in mind the needs of the parties; the fact that compensation may be required to address any significant prospective economic disparity due to the manner in which the marriage was conducted; and the idea of marriage is a partnership of equals.

4. To a greater or lesser extent, all of the above, together with all other relevant factors, will need to be considered in the particular case the court is dealing with."

[34] I adopt this analysis and I bear it in mind when making my ruling. I have also considered the Article 27(2) factors which are as follows;

(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, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(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;

(g) 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;

(h) in the case of proceedings for divorce of nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

[35] I begin my consideration by accepting the submissions of both parties that there should be a clean break in this case.

[36] I do not have jurisdiction over issues of child maintenance unless by agreement. I do note that the respondent currently pays £500 per month for the child of the family who is a minor. She will undoubtedly have costs associated with education and so there is an ongoing liability on the part of the respondent. I sincerely hope that the respondent will meet this obligation. In the absence of agreement there is a remedy as Mr Toner QC, has pointed out.

[37] In terms of the division of assets, the main asset that can be divided is the joint lands. That represents a limited value compared to the value of the entire land holding. It seems to me that a sale of these lands is the only way to determine this application. I understand the respondent's concern about splitting the farm however there is no other option. There was no real case made about the farm being passed down to future generations. The Chancery settlement also allows for a viable split and sale of the jointly held lands. The issue really is as to how the proceeds of sale should be divided.

[38] In deciding on the appropriate division of the joint lands I take into account all of the relevant issues in this particular case. I take into account that Article 27(1) of the Matrimonial Causes (Northern Ireland) Order 1978 requires that first consideration is given to the welfare of any child under 18 and that there is one minor child of this family. I have considered the needs of both parties.

[39] On the basis of the evidence available I consider that there is a disparity in income between the petitioner and the respondent. This is relevant under Article 27(2) (a) and (b). The respondent is in a stronger financial position. I consider that the petitioner has taken on the main child care responsibility and will continue to do so for the minor child of the family applying Article 27 (b) and (f). I accept the fact that both parties have their housing needs met at present however the petitioner's position is less secure. I take into account the fact that the wife has contributed to the farm which she shared with the husband applying Article 27(f). I do not consider that applying Articles 27(c) (d) (e) (h) results in any adjustment to either party. It was not argued that there is conduct in this case to the extent that it should be taken into account in relation to the ancillary relief award.

[40] Both counsel accepted that the inheritances could be taken into account in the particular circumstances of this case. The petitioner has received an inheritance which comprises her current residence and a small acreage of land. However, it is shared with her sister and her right of residence is only for 10 years in the property. By comparison, it seems clear to me that the respondent has much more financial security. Indeed both counsel agreed with me that the respondent's position is strengthened in terms of inheritance in that his mother is a patient. She has made a will which leaves her estate to her son and he is currently benefiting from the land because he is farming it.

[41] This is not a case where there is speculation as to the inheritance. I accept that the inheritances are not matrimonial assets to be divided in the same way as the joint lands. However, I consider that the inheritances are relevant in terms of the income, resources and future financial security of the parties. Indeed in evidence the respondent described this land as his pension. I also consider that the respondent already derives benefit from his inheritance in that he farms the land and his partner runs a B&B from the farmhouse.

[42] I have considered all of the above in reaching an outcome that I consider fair to both parties in this case. The asset which I can divide is the joint lands and I consider that there should be a departure from equality in relation to that. I consider that there are good reasons for doing this on the basis of the needs of the parties. The respondent has greater income, resources and financial security. I also consider that the petitioner has greater child care obligations and that she is now at a disadvantage in the work place due to her child care responsibilities. I consider that the division of nett proceeds of the joint lands should be two thirds to the petitioner wife and one third to the respondent husband.

[43] In relation to the Canadian property, I consider that the parties should agree a sale of this property and a division between them. I have no jurisdiction over property such as this. In any event it seems to me that there is a will within both parties to resolve this issue. The respondent should retain his property in Wicklow and this can be balanced against the petitioner's pensions.

[44] I do not make any order in relation to the children's claim under the trust that was constructed at the date of the respondent's father's death. If there is to be any action taken in relation to this it will have to be by the children themselves two of whom are now adults. I therefore make no allowance for this in the ancillary relief case.

[45] I make no other adjustments regarding monies from Canada, shares, contribution to the annex. I have taken into account all of these issues in relation to the division of the joint lands that I have determined. The children will retain their own bonds.

[46] Finally, I have decided that the costs of the third party in the Chancery proceedings should be borne equally between the petitioner and the respondent. I say this because the agreement reached was to the mutual benefit of both spouses, as it enables the joint lands to be sold. The petitioner, while she may have presented the Chancery claim in wide terms, was entitled to bring the issue of land division to a court for resolution. It seems clear to me that the respondent could have dealt with this matter at an earlier stage. There was ample opportunity to do so throughout the proceedings when the issue of correcting boundaries and making the joint lands sellable was raised. I have decided that there should be no order as to costs between the petitioner and the respondent in the Chancery proceedings.

[47] In relation to the ancillary relief proceedings, the third party was released by consent at an early stage of the hearing in order to save costs. Ms Kinney realistically accepted that in the ancillary relief the third party should bear her own costs and I agreed with that position. I will hear counsel as to any issues they wish to raise in relation to costs between the parties in the ancillary relief.

[48] I will also hear counsel in relation to directions that need to be made in relation to the sale of the joint lands that I have ordered. In particular the parties will need to direct their minds to who should conduct the sale, the terms and conditions, whether there should be a reserve, and other matters in relation to the logistics of sale.