Neutral Citation No: [2023] NIMaster 6 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **2023NIMaster6** ***ICOS No:*** ***Delivered:*** **29/08/2023**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

Seales

Petitioner;

and

Seales

Respondent.

(Ancillary Relief: Murder and Coercive Control as Conduct)

Master Bell

INTRODUCTION

[1] This is an unusual ancillary relief application in which one of the primary issues which the court had to deal with was that the Respondent, (hereafter "the husband") proclaimed that he wished to challenge his murder conviction. The reason this issue arose was that the Petitioner (hereafter "the wife"), had mounted what is usually described as "a conduct case", that is to say she submitted that there had been conduct by the husband, namely the carrying out of a murder, which would not be equitable for the court to disregard and should result in an additional portion of the assets being awarded to the wife in these proceedings.

[2] The husband, having dismissed his legal team, appeared at the hearing as a personal litigant, accompanied by a number of prison officers. Miss O'Grady KC and Miss Steele appeared on behalf of the wife.

[3] 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to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the Judiciary NI website in

this form or as to whether it requires any anonymisation prior to publication. If either party wishes to make such submissions I will hear those submissions by Sightlink. If the Office is not so informed within that timescale, then this judgment will be published in its present form.

[4] At the opening of the hearing Miss O'Grady made an application that the wife be permitted to give her evidence by video-link from another location and that the husband be prevented from cross-examining her personally. Rather, counsel submitted that the husband should inform the court of each question which he wished put to her and that the question would then be put by me.

[5] The reason for the application was due to the serious allegations of domestic abuse being made by the wife against the husband. The wife was alleging that she now suffers from Post-Traumatic Stress Disorder as a consequence of what she had endured during the marriage. She was therefore a vulnerable witness. Miss O'Grady submitted that because of the inherent jurisdiction of the High Court I had jurisdiction to make such an order. The husband did not oppose this application. I agreed to adopt special measures that the hearing would be conducted on this basis and the husband conducted his cross-examination of the wife through me. As matters turned out, I eventually had to bring the husband's cross-examination of the wife to an end due to there being no more relevant questions being asked. To allow it to continue would have been an abuse of the process of the court and an abuse of the witness herself.

THE DIFFICULTIES OF SELF-REPRESENTATION

[6] These proceedings demonstrated a number of the difficulties frequently experienced by those litigants who represent themselves in High Court litigation. The difficulties experienced by self-represented litigants are a result of their entering an arena where adversarial litigation is designed to be conducted by persons with professional skills. The husband did not understand procedural rules or technical rules of evidence and had made no effort to do so.

[7] Litigants in person will not necessarily appreciate what facts are relevant to their case on the legal issues which are raised. A considerable amount of their evidence may be at best peripheral and at worst irrelevant. Personal litigants often have difficulty in distinguishing between points of some substance, points of little substance, and points which are utterly trivial. One of the consequences of this was that I occasionally had to restrain the husband from drifting into irrelevant issues by not allowing certain questions to be put to the wife. I did this reluctantly and only after having allowed him a degree of latitude to ask similar questions which ultimately proved to have no bearing on the issues under consideration.

[8] Another consequence of the husband being unacquainted with the rules of evidence was that he had material which was not admissible during his own evidence in chief but which, if it had been in the hands of a counsel who represented him, might have been used during cross examination of his wife. Unfortunately, he did not know to use it at that stage. Nevertheless, as I will indicate later in this judgment, even if the husband had used it in the cross-examination of his wife, the

effect of it would have been ineffectual or, at best, minimally effectual in the light of the other evidence used by the wife's counsel to cross examine the husband.

[9] As the Court of Appeal for England and Wales said in *Lemas & Another v Williams* [2009] EWCA Civ 360:

> "There are, however, limits to what a judge can and should do in order to assist such a litigant. It is for the litigant himself to decide what case to make and how to make it, and what evidence to adduce and how to adduce it. It is not for the judge give directions or advice on such matters. It is not his function to step into the arena on the litigant's side and to help him to make his case."

Just as a football referee would not therefore assist a particular player by suggesting the best way in which to take a free kick, it was not for me to assist the husband by suggesting what witnesses to call or which evidence to use at different points during the hearing and I did not do so.

[10] It was notable that the on first day of this three day hearing, when the husband raised the issue of how he could get witnesses to come to court, I explained to him that any witnesses who came to court voluntarily would be heard, and I then also explained how to go about issuing subpoenas to bring to court witnesses who would not come voluntarily. There was then a gap of some five months until the second day of the hearing chosen by the parties. During this five-month gap, the husband did not take the opportunity to arrange for subpoenas to be served on any witnesses to come to court so that they could give evidence on his behalf. Nor did he ask the court for an adjournment of the hearing in order to serve subpoenas. The husband, being a serving prisoner, merely indicated to the court that it was difficult for him to contact people. Miss O'Grady put to him in cross-examination, however, a letter from the Prison Service in which a Governor had confirmed to his solicitors that the husband was permitted to communicate with the outside world by several methods including telephone, video link, Zoom, letters, emails and in-person visits. The husband denied the truth of the letter.

[11] I have absolutely no doubt that it is more difficult for a litigant who is in prison to manage his litigation than it is for a citizen who has their freedom. However, the husband did not demonstrate that he had made any effort whatsoever to use any of the facilities afforded to him under the prison regime to progress his case through the calling of witnesses. A more cynical person might have succumbed to the notion that the object of the hearing from his perspective was simply to get out of prison for a number of hours on each of the days the court heard his case.

[12] At the end of the hearing of this matter, both parties asked to make their closing submissions in writing rather than orally. I agreed and asked for the parties' submission by a certain date. I received the wife's submissions on 17 May 2023. The husband has completely failed to make any submissions whatsoever, despite a considerable extension of the time originally allowed.

THE ASSETS

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

(i) The sum of £186,581 held by solicitors

(ii) A property at Derryboye valued in the region of £435,000

(iii) A property at Raffrey Road valued in the region of £375,000

It was suggested to me therefore that the total value of the assets is in the region of approximately £1 million.

HUSBAND'S POSITION

[14] The husband submitted that, given the length of the marriage, the appropriate outcome of this case was that the assets referred to above ought to be divided on a 50/50 basis.

[15] The husband considered that, firstly, I ought not to take into account his criminal conviction for murder and the consequences that the wife alleged flowed from it. Secondly, the husband also denied any domestic abuse of his wife. He also submitted, thirdly, that I ought to take into account the conduct of the wife who, he alleged, had sold significant amounts of machinery and other property belonging to the husband without his permission while he was in prison.

WIFE'S POSITION

[16] The wife submitted through her counsel that the proper outcome of the proceedings should be a 75/25 split in the favour of the wife.

[17] The wife argued that I should take into account various aspects of the husband's conduct. These included the commission of the murder of Philip Strickland by her husband, the convictions of her two sons for involvement in the murder, and domestic abuse towards her in terms of coercive and controlling behaviour during the marriage.

THE ARTICLE 27 FACTORS

Welfare of the child

[18] 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. None of the parties' children are minors.

Income, earning capacity, property and other financial resources

[19] The husband is a serving prisoner detained at Maghaberry Prison. The wife resides in the matrimonial home and gave evidence that she is unable to work. She is only able to leave the house infrequently.

Financial needs, obligations and responsibilities of the parties

[20] There was no evidence placed before me of unusual financial needs in respect of the parties, save for the wife's inability to work in gainful employment on health grounds which I will discuss shortly.

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

[21] Both parties enjoyed a comfortable standard of living prior to the breakdown of the marriage.

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

[22] The wife is aged 56 and the husband is aged 66. The marriage was of significant duration, having lasted some 19 years until the separation.

Any physical or mental disability by the parties of the marriage

[23] The wife relied on reports written by her GP in respect of her health and this evidence was not challenged by the husband. Her GP's evidence was that the wife has suffered from long term anxiety and depression. She has many symptoms in keeping with Post Traumatic Stress Disorder. She has chronic sleep difficulties, negative effects on her appetite, inappropriate anger outbursts, low mood, and flashbacks of previous abuse. She also has frequent suicidal ideation. She is on long term antidepressant medication. Her doctor's evidence was that there was no doubt that the wife had been psychologically scarred from her many years of living in an abusive relationship. She remains terrified of her husband and of the fact that he could persuade others to physically harm her.

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

[24] I note that in *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 Lord Nicholls made it quite clear that in most cases fairness did not require considerations of the parties' different contributions:

> "Apparently, in this post-White era there is a growing tendency for parties and their advisers to enter into the minute detail of the parties' married life, with a view to lauding their own contribution and denigrating that of the other party. In the words of Thorpe LJ, the excesses formerly seen in the litigation concerning the claimant's reasonable requirements have now been 'transposed into disputed, and often futile, evaluations of the contributions of both of the parties': *Lambert v Lambert* [2002] EWCA Civ 1685; [2003] Fam 103, 117, para 27.
>
> On this I echo the powerful observations of Coleridge J in *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam); [2002] 2

> FLR 1143, 1154-1155, paras 33-34. Parties should not seek to promote a case of 'special contribution' unless the contribution is so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life. "

In the same decision of the court Lord Mance stated that :

> "…section 25(2)(g) recognises the difficulty and undesirability, except in egregious cases, of any attempt at assessing and weighing marital conduct. I now recognise the same difficulty in respect of marital contributions - conduct and contributions are in large measure opposite sides of a coin: see e.g. *G v. G (Financial Provision: Equal Division)* [2002] 2 FLR 1143, per Coleridge J at paragraph 34."

The issue of special contribution was subsequently addressed in *Charman v Charman* [2007] 1 FLR 1246 in the judgment of Sir Mark Potter:

> "The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice, and for a self-evident reason, the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party's success in business during the marriage. The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue."

[25] I heard no evidence that the contribution made by either of the parties to the welfare of the family merited being taken into account under Article 27(2)(f). In the light of this I am led therefore to the conclusion that the contribution made by each of the parties to the welfare of the family was equal.

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

[26] Other than the pension arrangements which cancel each other out, there were no such matters.

Other matters taken into account

[27] 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. In this case there were no such matters.

Conduct

[28] I now turn to the issue of conduct which was the principal issue raised by the wife and contested by the husband during the proceedings. I shall begin by setting out the law in relation to taking account of conduct in ancillary relief litigation.

[29] Article 27 gives the court a discretion to take into account the conduct of a party, if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Such conduct is sometimes divided by practitioners and textbook writers into three categories, namely those of matrimonial, financial and litigation conduct. While this classification may represent the types of conduct most often encountered by practitioners, it is not, of course, a classification created by the legislation and hence cannot be considered as limiting the nature of conduct which may be taken into account. The legislature has left it at the discretion of the court as to the nature of conduct which should be taken into account but has imposed a standard as to seriousness, namely it must be such that it would in the opinion of the court be inequitable to disregard it.

[30] The starting point for any consideration of 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."

[31] 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."

[32] In *OG v AG* [2020] EWFC 52 Mostyn J summarised that conduct rears its head in financial remedy cases in four distinct scenarios:

> First, there is gross and obvious personal misconduct meted out by one party against the other, normally, but not necessarily, during the marriage. The conduct under this head, can extend, obviously, to economic misconduct. If one party economically oppresses the other for selfish or malicious reasons then, provided the high standard of "inequitable to disregard" is met, it may be reflected in the substantive award.
>
> Second, there is the "add-back" jurisprudence. This arises where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property. Again, it will only be in a clear and obvious, and therefore rare, case that this principle is applied. In *M v M* [1995] 2 FCR 321 Thorpe J found that the husband had dissipated his capital by his obsessive approach to the litigation, which had included starting completely

unnecessary proceedings in the Chancery Division. That dissipation was reflected in the substantive award. Properly analysed, that decision can be seen as a harbinger of the add-back doctrine rather than a sanction reflecting a moral judicial condemnation.

Third, there is litigation misconduct. Where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition.

Fourth, there is the evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure. The taking of account of such conduct is part of the process of computation rather than distribution. I endeavoured to summarise the relevant principles in *NG v SG (Appeal: Non-Disclosure)* [2012] 1 FLR 1211, which was generally upheld by the Court of Appeal in *Moher v Moher* [2019] EWCA Civ 1482. In that latter case Moylan LJ confirmed that while the court should strive to quantify the scale of undisclosed assets it is not obliged to pluck a figure from the air where even a ballpark figure is in fact evidentially impossible to establish. Plainly, it will only be in a very rare case that the court would be unable even to hazard a ballpark figure for the scale of undisclosed assets. Normally, the court would be able to make the necessary assessment of the approximate scale of the non-visible assets, which is, of course, an indispensable datum when computing the matrimonial property and applying to it the equal sharing principle."

[33] I turn now to particular instances where the courts have taken conduct into account. 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. "

[34] 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".

[35] Another of the cases cited by Burton J in *S v S (Non-Matimonial Property: Conduct*) also supports the proposition that conduct aimed at a child of the family might amount to conduct such that it would in the opinion of the court be inequitable to disregard it. In *Al-Khatib v Masry* [2002] EWHC 108 (Fam) [2002] 1 FLR 1053 the court took into account the misconduct of the husband in abducting the children of the marriage. In that case Munby J agreed that conduct under the legislative provisions did not have to have a financial consequence for it to be taken

into account and that "the husband's conduct in abducting the children and depriving … them and the wife of that most basic human right, their mutual society, falls squarely within the class of case contemplated by Parliament" when enacting the ancillary relief provisions.

[36] In recent times conduct has been taken into account in *FRB v DCA (No. 2)* [2020] EWHC 754 (Fam) where it was argued that conceiving "a child by another man and keeping that secret (thus inducing the husband to commit both financially and emotionally to another man's child) was misconduct". Cohen J concluded in his judgment that the wife's actions were conduct so egregious that it would be inequitable to disregard it.

The Husband's Conduct as alleged by the wife

[37] Having examined the principles to be applied, I now turn to the parties' allegations in the case before me. Counsel submitted that the husband's conduct fell into each of the categories of matrimonial, litigation and financial conduct.

Matrimonial Conduct

[38] The matrimonial conduct alleged by the wife essentially falls into two separate categories. Firstly, there is coercive control. Secondly, there is the impact of the convictions in relation to the murder of Philip Strickland. Each issue requires to be considered separately.

[39] In respect of the coercive control issue, the wife gave evidence that she had been subjected to significant domestic violence. She was frequently beaten. She once had to attend hospital A&E due to the husband's conduct. She testified that there was considerable coercive control exercised over her by the husband. In particular the husband controlled the family finances and she had no say over how money was spent. The husband in his evidence denied that he had beaten his wife during the marriage and that he had been extremely violent. He described her testimony as "absolute lies".

[40] The wife's counsel submitted that, as a result of the coercive control, the wife had suffered grave psychological distress and enduring injury. I am satisfied from the evidence I have heard that on the balance of probabilities the wife was subject to coercive control by her husband over many years and that her counsel was correct in the assessment of the effects of that control.

[41] Domestic abuse, in the form of what is often termed coercive control, has been a criminal offence, punishable by up to 14 year's imprisonment since the coming into force of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 as read in conjunction with the Statutory Guidance issued under section 30 of the Act. However, the implications of criminalising coercive control (which has been described by many academic commentators such as Emma Katz in her "Coercive Control in Children's and Mothers' Lives", Oxford University Press) are only now beginning to seep into legal culture. It is clear, in my view, that following the

creation of that criminal office, with such a significant maximum sentence, there has to be a major shift in legal thinking and it can no longer be argued (if it ever could have been) that it can be equitable to disregard coercive control conduct by one spouse against the other. An important issue, however, is what is the effect of this kind of abuse within the field of ancillary relief. There appears to be an absence of caselaw on this matter. However, in an article entitled "Domestic Abuse in Financial Remedy Cases" in the Financial Remedies Journal, (Summer 2022), Crisp, Hunter and Hitchings make a number of important observations:

> "While domestic abuse is one of the issues currently at the top of the family law agenda, it is not as prominent in financial remedy work as it is in children work and professional discussion is limited. The absence of a Practice Direction and … the perceived high threshold for 'conduct' under section 25(2)(g) of the Matrimonial Causes Act 1973 (MCA 1973) have meant that domestic abuse may not be routinely considered in financial cases.
>
> …
>
> The case of *Re H-N & Ors (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448, albeit not a financial remedies case, provided an opportunity for the Court of Appeal to give some guidance on the issue by reiterating a movement away from the emphasis on specific 'incidents' of abuse, to a focus on the wider context illustrated by patterns of behaviour. The Court of Appeal criticised the judge for accepting the father's submission that the mother in this case had taken trivial incidents and blown them 'out of all proportion', noting that the judge had wrongly characterised a slap to a heavily pregnant woman as 'trivial' because she had remonstrated with him for opening her private mail. Rather than being 'trivial', these incidents taken together appear to be clear indicators of coercive and controlling behaviour on the part of the husband.

The difficulties for the judiciary in assessing the presence of coercive and controlling behaviour and potential issues of the 'idealised stereotype' of the 'blameless' victim, can be seen in the recent case of *Traharne v Limb* [2022] EWFC 27, where Cohen J considered the issue of coercive control in the context of a post-nuptial agreement. The court dismissed the wife's allegation of coercive control in this case noting that the parties' relationship was 'at times tempestuous' and the very different characters of the parties. However, in this case, Cohen J did note how the approach in *Edgar v Edgar* [1981] 2 FLR 19 has stood the test of time, and that coercive and controlling behaviour is 'plainly an example of undue pressure, exploitation of

> a dominant position or of relevant conduct' when it comes to considering whether an existing financial agreement can be vitiated.
>
> …
>
> Given that research has suggested that approximately one-third of contested financial remedy cases within the court will have a domestic abuse background, it is imperative that consideration is given to the potential relevance of domestic abuse in financial proceedings especially where it may clearly be affecting the parties' positions and their ability or willingness to negotiate.
>
> …
>
> In considering either consent applications or a final order following contested proceedings, the judge should bear in mind that the experience of having survived an abusive relationship is likely to impact on the victim's future needs. If a party has been deprived of money or financial independence during the marriage, if their financial resources have been depleted, if they have limited or no pension provision, then their future financial needs will be increased accordingly."

[42] If there is one word with which I disagree that has been used by the authors of this article, it is their use of the word "perceived" in the expression "the perceived high threshold for 'conduct' ". There *is* a high threshold for conduct. It is not just a perception. That height was enshrined in legislation and has been repeatedly referred to by the courts in decisions such as *Miller v Miller; McFarlane v McFarlane* and *OG v AG*. However, it may be that other expressions used by lawyers, such as "the gasp factor" (used in *S v S*), should now be regarded as overstating the position and raising the high threshold above what Parliament actually intended. There is, in my view, a clear obligation on the court in ancillary relief proceedings to recognise cases of coercive control because it would be inequitable to disregard that coercive control. I recognise that there is a clear risk that, in taking coercive control into account in ancillary relief proceedings, courts will be asked to delve into factual situations which are not "obvious and gross". In my view that risk should not be overstated. This is for two reasons. Firstly, because counsel are under a duty to the court not to present cases as being cases of coercive control when the available evidence cannot reasonably support such a submission. Where this has been done the court may make costs orders, or even Wasted Costs Orders, as a disciplinary sanction. Secondly, because the genuine cases of coercive control will frequently be distinguishable through the consideration of medical or psychological evidence from reputable expert witnesses. However, to exclude genuine cases of coercive control from amounting to conduct in ancillary relief proceedings would be to fail to do justice to women, for it is women who are disproportionately the victims of such conduct.

[43] *Re H-N & Others (Children) (Domestic Abuse: Finding of Fact Hearings)* has been described as a landmark decision in respect of domestic abuse. It began by emphasising a well-recognised point about judicial fact-finding:

> "Where an allegation of domestic abuse is made, but not admitted and the court goes on to conduct a 'fact-finding' hearing to determine whether the allegation is proved, it does so under the ordinary civil law. The burden of establishing truth is on the parent who makes the allegation. It is for that parent to satisfy the court, on the balance of probabilities, that 'the occurrence of the event was more likely than not' [*Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563]. This is a binary analysis in which each allegation is either found to be 'proved' or 'not proved':
>
> > "In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other." (*Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35"

After that scene setting, the Court of Appeal explained that over the past 40 years there have been significant developments in the understanding of domestic abuse. The definition of domestic abuse currently enshrined in legislation is plainly a far cry from the 1970s' concept of 'domestic violence' with its focus on actual bodily harm. It is now accepted without reservation that it is possible to be a victim of controlling or coercive behaviour or threatening behaviour without ever sustaining a physical injury. Importantly it is now also understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour. Central to the modern definitions of domestic abuse is the concept of coercive and/or controlling behaviour. The court considered it fully justified that greater prominence should be given to coercive and controlling behaviour in Family Court proceedings.

I am entirely satisfied as a matter of fact from the evidence of the parties, and from the limited medical evidence, that the husband's coercive conduct prevented the wife from becoming financially independent and has increased her level of vulnerability. It has impacted on her future needs because of her inability to engage in gainful employment. Furthermore, it has had serious effects on her mental and emotional health.

[44] I now turn to the impact on the wife of the husband's conviction for the 2012 murder of Philip Strickland. In his sentencing remarks at the husband's trial, Weir J recorded how the husband brought a shotgun to a house at which he had been told Mr Strickland was present. After a fight, the husband discharged the shotgun at him causing a serious injury to Mr Strickland's leg. Later there was a second discharge of the shotgun into Mr Strickland's face causing a fatal injury. At the trial, the husband denied that he was present at the scene at all. Weir J in his sentencing remarks was,

however, satisfied that the husband was the prime mover in, and director and controller of, these wicked events. Weir J stated that if, as is unclear, the husband did not fire the second shot, he was satisfied that the husband directed it.

[45] The parties' two sons admitted their involvement in the murder of Mr Strickland. One son, Ian, gave evidence for the prosecution against his father. Weir J's comments about the sons were:

> "I am satisfied that you and Jason had a violent upbringing that was calculated by your father to bend you both to his will. You described your father to the Probation Office as 'an angry wee man' and I have no doubt from all I now know about this case and your family that such was a fair description.
>
> …
>
> You both had a miserable childhood under the thumb of your bullying, domineering father."

This view is, of course, entirely consistent with my earlier finding of the husband's domestic abuse of the wife.

[46] In cross-examination the husband refused to accept that having had her husband and two of her sons convicted in relation to the murder of Mr Strickland would have had a devastating effect on the wife. Nor did he accept counsel's suggestion that his and his sons' convictions had made her a "social pariah" in the local area. He did not accept that she did not feel safe at home and he completely rejected the suggestion that he had paid a Dublin gang to kill her.

[47] During the first day of the hearing the husband robustly declared that he wished to contest the fact that he had murdered Philip Strickland. I explained to him that he was entitled to try to do so. I clarified for him that, even if he was to persuade me that he had not murdered Mr Strickland, this would not overturn his criminal conviction, but would only have the effect that the impact of the conviction would not be taken into account in the division of the matrimonial assets. I explained that section 7 of the Civil Evidence Act (Northern Ireland) 1971 provides:

> "(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or of a service offence (anywhere) shall (subject to subsection (3)) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or of a service offence—

(a) he shall be taken to have committed that offence unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose."

[48] Lord Diplock explained the equivalent English provision to that section in *Hunter v Chief Constable of the West Midlands Police and Others* [1981] UKHL in the following terms:

"Section 11 makes the conviction *prima facie* evidence that the person convicted did commit the offence of which he was found guilty; but does not make it conclusive evidence; the defendant is permitted by the statute to prove the contrary if he can. The section covers a wide variety of circumstances; the relevant conviction may be of someone who has not been made a defendant to the civil action and the actual defendant may have had no opportunity of determining what evidence should be called on the occasion of the criminal trial; the conviction, particularly of a traffic offence, may have been entered upon a plea of guilty accompanied by a written explanation in mitigation; fresh evidence, not called on the occasion of his conviction, may have been obtained by the defendant's insurers who were not responsible for the conduct of his defence in the criminal trial, or may only have become available to the defendant himself since the criminal trial. This wide variety of circumstances in which section 11 may be applicable includes some in which justice would require that no fetters should be imposed upon the means by which a defendant may rebut the statutory presumption that a person committed the offence of which he has been convicted by a court of competent jurisdiction. In particular I respectfully find myself unable to agree with the Master of the Rolls that the only way in which a defendant can do so is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence (which he could not have obtained by reasonable diligence before) which is conclusive of his innocence. The burden of proof of "the contrary" that lies upon a defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing this is likely to be an uphill task."

[49] I explained to the husband that, though he could call any evidence he wished in order to try and achieve the objective he had mentioned, this would, as Lord Diplock described it, be an uphill task, particularly for a personal litigant without legal training. During the hearing, however, he called no witnesses other than himself and offered no documentary evidence in relation to the conviction. His oral evidence in respect of the conviction was utterly underwhelming. It was essentially limited to saying firstly, that the forensic evidence at his criminal trial was flawed and the shotgun blast which killed Mr Strickland was fired from a different position than from where he was standing and, secondly, that the Criminal Cases Review Commission had given him a reference number in respect of his application which, he asserted, the Commission only did if they thought an applicant had a good chance of getting their conviction overturned in the Court of Appeal.

[50] The husband told me that he had a letter from a pathologist to show that the Crown case about the distance and direction of the fatal shot that killed Mr Strickland was "wrong". He produced no such letter. He told the court that he wished to call a forensic specialist. He called no such witness.

[51] Miss O'Grady reminded the husband in cross-examination that he had said that he had a letter from Price Waterhouse Coopers which would prove his innocence. She asked him if he had it. He replied to her that it was in the prison. She then reminded him that he had also told the court that he had a letter from KRW Law that proved his innocence. She put it to him that when a copy of the letter had been served on the wife, all it showed was that KRW Law was going to make an application to the Criminal Cases Review Commission on his behalf. His response was ineffectual.

[52] I concluded that, in his bold assertion that he would provide the court with evidence that he was innocent of the murder of Mr Strickland, the husband was being completely delusional.

[53] I note the comments of Weir J in his sentencing remarks at the husband's criminal trial:

> "This was a ghastly crime orchestrated by you. You have dragged your family and their friends into the matter and they and your wider family have and will continue to suffer as a result of your actions."

[54] In my view, the consequences of the husband's involvement in the murder of Mr Strickland on the life and physical and mental health of the wife have been profound. Post-separation, the wife was warned by the PSNI that she had been the subject of death threats. She believes that these were in fact threats from others at the husband's direction. She also said that that the threats came to her because of the death of Mr Strickland. I have not been satisfied of this evidentially on the balance of probabilities. However, I am satisfied that these threats have come either in retaliation for the husband's carrying out of the murder of Mr Strickland or, alternatively, at the husband's initiative as against the wife. There was no evidence of the threats having any other possible motivation.

[55] I am also satisfied that the husband's conviction and its aftermath has had a profound impact on the wife's ability to earn a living. She gave evidence that she was not able to work due to her anxiety. At one stage she did get a job but said that she "just fell to pieces". She finds it difficult even to leave the house unless she is accompanied by someone else. After her husband was arrested she had a breakdown and regards herself as "never right since then". She told the court that life had been non-existent since then. The lack of gainful employment would obviously make it difficult for her to obtain a mortgage in the future. Unsurprisingly, she wants to move from the current matrimonial home.

[56] Given that Weir J at the criminal trial took the view that the husband was "the prime mover, director and controller" of the murder of Mr Strickland, it follows that he was also responsible for the involvement of his two sons in the murder. The husband could have sent the sons away and refused to let them be involved in the murder. He did not do so and his activity as the prime mover, director and controller undoubtedly led to their participation and ultimately to their imprisonment. The consequence of that was that the wife was denied the support of her sons when the husband was imprisoned. I cannot say, and do not say, that the husband is responsible for the deaths of his sons, one of whom committed suicide in prison and one of whom died from a drug overdose. To suggest that would not be supported by the evidence. However, I am satisfied that the husband's involvement of his sons in the murder of Mr Strickland deprived the wife of their support while the husband was imprisoned.

[57] This case is, in my view, the paradigm example of a conduct case where the husband's conduct is so outrageous that it would be utterly inequitable to disregard it. I am therefore compelled to take both aspects of the husband's matrimonial conduct into account in the division of the matrimonial assets.

Financial Conduct

[58] The husband also owned at one time a piece of property referred to as the Burns Road property. He gave an undertaking during these proceedings that he would not dispose of it. However, while the husband was in prison, the property was subsequently transferred to his sister for no value and she then sold it to someone else for the sum of £75,000. The wife gave evidence that the husband and his sister were very close. She said that his sister also sold equipment from the yard and that the husband's mother then received the proceeds. When items of machinery left the yard she did not report them as being missing as she was aware that the husband had instructed his sister to sell such items. She did not know this directly but was informed of it by their daughter. Neither party called the husband's sister to give evidence. Although the husband denied that he had transferred the Burns Road property to his sister, his former solicitor's correspondence confirmed that the property had been so transferred. The wife received no part of the £75,000.

[59] In cross-examination of the wife, the control that the husband had over the family finances became clear as did his financial machinations. The wife gave

evidence that, at a time when the husband was bankrupt, the sum of £100,000 was lodged into her bank account and the husband subsequently withdrew it.

[60] It is difficult to communicate just how little credibility I assessed the husband's evidence as having. All the documentary evidence tended to contradict what he was asserting. Suffice to say that if he had told me the day was Thursday, I would have checked my calendar just to make sure. On the other hand, there was little to undermine the credibility of the wife. She came across as a woman in respect of whom her husband had brought much suffering into her life and who had been broken by the circumstances of life. She could not always give a precise history in respect of the sale of particular items of property, but I formed the view that this was not deliberate vagueness or obfuscation. Rather it was often a genuine lack of involvement in things which happened around her.

Litigation Misconduct

[61] The wife's counsel further advanced submissions that the way in which the husband has managed the litigation amounts to litigation misconduct. It has taken a significant number of years to bring these proceedings to a conclusion.

[62] I note that in their Financial Remedies Journal article, Crisp, Hunter and Hutchings observe that the way in which a party conducts the proceedings can itself be abusive. They write:

> "In financial remedy cases, controlling or coercive behaviour may be manifested by the abuser's refusal to comply with orders or reach agreement; by the abusive party's refusal to engage with proceedings; a refusal by the abusive party to give disclosure, and/or deliberately prolonging the process of disclosing assets, or in the alternative, the abuser may appear to comply in proceedings but presents the victim as a liar or claims that they are exaggerating their situation.
>
> Economic abuse may be manifested in efforts to exhaust the victim's financial resources by engaging in protracted court proceedings, and/or by making repeated and unnecessary applications which have the effect of prolonging proceedings and negatively affecting the other party both economically and emotionally; one party having limited access to money or to information regarding the other party's finances; one party being made solely liable for loans or debts."

[63] Counsel for the wife submitted, for example, that during a three year period there were 17 reviews of this case. Furthermore, it was observed that FDR hearings were listed on five occasions but had to be vacated due to the husband's delaying tactics. The wife's legal costs are therefore considerable.

[64] The sacking of his legal team and the non-instruction of a new legal team, despite assertions that he would do so, was a notable feature of the proceedings.

[65] The husband made no submissions in respect of the allegations made on behalf of the wife in relation to litigation misconduct and I accept the submissions made on behalf of the wife on this issue. In doing so, I have also taken into account the way in which the husband conducted the final hearing of these proceedings. The complete failure to call any evidence (other than his own oral denials) in relation to the murder conviction was also notable in the light of his earlier pledges to present proof of his innocence. In the light of the overall history of these proceedings, I am inevitably driven to conclude that he has engaged in litigation misconduct.

The Wife's Conduct as Alleged by the Husband

[66] The allegations by the husband in relation to conduct concerned the sale of his property while he was in prison. He put it to the wife in cross-examination that a number of vehicles and other property belonging to him had been sold by her without his permission at a time when he was powerless to prevent it. She acknowledged that she had sold a tractor and a skip lorry but she denied selling other vehicles and equipment. She gave evidence that she believed not only that the machinery she sold belonged to them both, but also that her husband had in fact instructed her to sell that property. She admitted that she could not remember exactly what was sold by her and what was not sold by her, as she had had her breakdown at around this time. The husband failed to undermine this explanation.

[67] The husband accepted in cross-examination that not everything that was sold had been sold by the wife. He acknowledged that his sister had sold some of it, although his position was that this was without his approval or direction.

[68] One of the rocks upon which the husband's credibility was fatally holed was in respect of the documentation released by the husband's former solicitor, R P Crawford, upon his written instruction. This turned out to be a treasure-trove of material for the wife showing that he had given instructions to a wide range of professionals and others to sell property on his behalf. Counsel for the wife cross-examined the husband in respect of a number of pieces of documentation from R P Crawford and Co solicitors, Diane Coulter solicitor, Rhonda Bowman, the Department of Agriculture and Rural Development, and others, all of which suggested that the husband had authorised the sale of property in his name. The husband denied that he had given any such instructions. However, he had no reasonable explanation for the existence of this documentation and his credibility sank without trace.

[69] As I have indicated earlier, the husband's evidence had, in my view, no credibility whatsoever. I therefore did not come close to being satisfied on the balance of probabilities that there was conduct by the wife which it would be inequitable to disregard.

CONCLUSION

[70] As previously indicated, the husband submitted that he deserved a 50% split of the family assets. He told the court that he was 66 years old, had two granddaughters to look after, and wanted to move on with his life when he was released from prison. He told me that, unlike his wife, he had had no benefit from any of his assets for the past 12 years. On the other hand, counsel for the wife submitted that the appropriate division of the assets would be a 75% award to the wife and a 25% award to the husband.

[71] I consider that, in the light of my findings of fact in relation to the conduct of the husband, the appropriate decision in this case is that the assets of the parties shall be divided on the basis of 75% to the wife and 25% to the husband. This must not in any way be regarded as further punishment of the husband for the crime of murdering Mr Strickland. His punishment for that was delivered by the criminal courts. In reaching this ancillary relief decision, I have taken into account the conduct that the wife has suffered for many years, its impact on her physical and emotional health, and that I do not foresee the wife ever being able to engage in gainful employment, such has been the devastation to her wellbeing. I therefore order that the two properties shall forthwith be placed on the market for sale and the net proceeds, together with the funds held by the solicitor, shall be divided in the way in which I have indicated.

[72] As an advance in terms of the total award she will receive in these proceedings, the wife should immediately be given the full amount of £186,561 held by the solicitors (or whatever the amount now is with interest having accrued) so that she can arrange new accommodation for herself.

[73] Despite the urging of the wife's counsel to do so, I have decided not to use the "add back" jurisprudence to add back the price of the Burns Road property into the husband's share of the "matrimonial pot". The add back doctrine is only utilised in exceptional cases. Without the husband's sister having been called to give evidence as to the circumstances of the transaction, how and why it came about, and whether the husband obtained any of the proceeds, it would be unsafe to do so,

[74] 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 or 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. I have concluded that a clean break in this case is absolutely essential.

[75] 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."

[76] 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.

[77] As for the issue of costs, I note the views expressed by Mostyn J in *OG v AG* where he said that litigation misconduct should be severely penalised in costs but not in terms of the substantive award. I therefore order that the husband shall be penalised in the amount of £50,000 which I understands amounts to approximately 30% of the wife's legal costs.

[78] The normal time period allowed for any appeal against such an order as this is 5 days from the date of delivery of the decision. As the husband is a personal litigant and currently incarcerated, I shall extend that time to 4 weeks from the date of delivery of this decision. Given his personal litigant status, and hence his being without legal advice, I consider it only fair to explain to him that if he appeals unsuccessfully against this decision, then the likelihood is that he will be required to pay the wife's considerable legal costs which will be involved in defending the appeal. Furthermore, as any appeal is by way of a complete rehearing of the case, it would of course be open to the Family Judge to increase the amount which I have awarded to the wife. Appeals always involve risk.