Ref:	**Master54**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**04/03/08**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

B

Petitioner;

and

B

Respondent.

Master Bell

[1] In this application the petitioner seeks Ancillary Relief pursuant to a summons dated 23 February 2007.

[2] At the hearing the petitioner was represented by Miss McCullagh. An affidavit was sworn by the petitioner on 23 February 2007 for the purpose of the proceedings. She gave sworn oral evidence during which she adopted this affidavit as her evidence. I also had the benefit of submissions and a skeleton argument from Miss McCullagh on the petitioner's behalf.

[3] The respondent neither appeared nor was represented. The petitioner handed into court a copy of a letter dated 20 April 2007 from Patrick Fahy & Co, solicitors, which stated that they wished to confirm in open correspondence that the respondent did not intend making any representation to the court in the course of the proceedings. The consequence of that was that I did not have the advantage of hearing oral evidence from the respondent, nor of hearing the petitioner cross-examined on his behalf. The petitioner's evidence as to the history of the marriage and the parties financial affairs was therefore uncontested.

[4] Miss McKeagney appeared for GE Money Home Finance Ltd who were a Notice Party to the proceedings and I had the benefit of submissions from her on behalf of the Notice Party.

[5] Following the hearing I recalled both counsel on a later occasion to receive submissions from them in relation to a significant legal issue which had not been dealt with.

[6] Evidence was given by the petitioner that the matrimonial assets were limited to :

(i) the matrimonial home with equity in the property amounting to £147,744 ; and
(ii) a Friends Provident endowment policy which has a surrender value of £6,731.

Both assets are held in the joint names of the parties. The petitioner gave evidence in her affidavit that the respondent's employment as a broker with an insurance company would probably have carried pension entitlements. Given the lack of discovery by the respondent I cannot be certain that there do not exist matrimonial assets other than the two referred to above. This decision is therefore limited to the two assets in respect of which I received evidence.

THE HISTORY OF THE MARRIAGE

[7] The petitioner wife is aged 44 and the respondent husband is aged 39. The parties married on 13 February 1988. They were separated in April 2001 when the respondent left the matrimonial home and a Decree Nisi was subsequently granted on 6 November 2006. There are two children of the marriage: a son aged 20 and a son aged 12. The younger son lives with the petitioner, as does the elder, who is at university, at weekends and during vacations.

[8] The parties purchased the matrimonial home together in November 1987. A mortgage was arranged with the Alliance and Leicester plc and the purchase was carried out under the Co-Ownership scheme. The parties subsequently decided to purchase the equity held by the Northern Ireland Co-Ownership Housing Association and obtained a second secured loan from the Alliance and Leicester plc to do so. A third secured loan was obtained from the Alliance and Leicester plc to finance home improvements.

[9] For approximately the first eight years of their being in the matrimonial home, mortgage payments were debited from a joint account. In 1986 the respondent opened a new bank account in his sole name and mortgage payments were thereafter made from this account. Shortly after the

parties separated in April 2001, the petitioner discovered that the respondent had allowed the mortgage to fall into arrears of some five months' payments. The petitioner made an arrangement in respect of the £1,700 arrears with the Alliance and Leicester and these were subsequently cleared by her. She also discovered that the respondent had allowed £1,000 of rates arrears to accumulate. She has managed to clear these arrears also.

[10] During the marriage the respondent incurred a number of debts without the knowledge of the petitioner. Firstly, the First National Bank (now known as GE Money Home Finance Ltd), the Notice Party in these proceedings, granted what purported to be a joint loan to the parties. The petitioner was not aware of the debt. The Notice Party registered a charge in 2000 against the matrimonial home. The Particulars of the charge reads "Charge for all moneys secured by the said document". In or about 2002 the Notice Party issued proceedings in the Chancery Division for possession of the matrimonial home, relying upon the charge. During the course of these proceedings, a handwriting expert engaged on the petitioner's behalf concluded that the signature on the Deed of Charge purporting to be the petitioner's signature was a forgery. That report was shared with the other parties and filed with the court. Master Ellison subsequently ordered the dismissal in 2004 of so much of the Notice Party's claim as related to the petitioner. The forgery of the petitioner's signature was not reported to the police by the petitioner. She had fears for how her children would be treated if the matter had become public and did not want her children to have the stigma attached to a conviction of their father for forgery. The Notice Party also failed to report the matter (perhaps surprisingly, given the existence of a legal duty under section 5 of the Criminal Law (Northern Ireland) Act 1967 to report to the police information which is likely to be of material assistance in the prosecution of an individual for certain offences.) The charge remains registered against the matrimonial home. Secondly, the respondent incurred debts with the Bank of Ireland. These were the subject of a judgment against him in 2001 and a charge "on the estate or interest of" the respondent in the matrimonial home was registered in 2002. Thirdly, the respondent incurred debts with the NIIB Group Ltd. These were the subject of a judgment against him in 2001 and a charge "on the estate or interest of" the respondent in the matrimonial home was registered in 2003. Fourthly, the Commissioners of Inland Revenue obtained a judgment against the respondent in 2002 and registered a charge "on the estate or interest of" the respondent in the matrimonial home in 2006.

[11] A matrimonial charge was also registered against the property in 2002. This provided that the estate or interest of the respondent in the matrimonial home was subject to a matrimonial charge within the meaning of Article 5(1) of the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 to the extent of the rights of occupation of the petitioner.

PETITIONER'S SUBMISSIONS

[12] The petitioner sought a clean break settlement with :

(i) an outright transfer to her of the matrimonial home and endowment policy ; and
(ii) a declaration as to the respective interests of the parties in the matrimonial home, namely that the respondent's interest in the property has been extinguished and that full and equitable title vests in the petitioner.

[13] The petitioner argued that such a decision was an appropriate one in the light of the following factors :

(i) The conduct of the petitioner incurring a number of debts without her knowledge ;
(ii) The petitioner's assumption of the sole care of the children since 2001 ;
(iii) The petitioner's housing need and that of a child under the age of 18, for whom she will continue to be responsible for the foreseeable future; and
(iv) The inability of the petitioner to raise sufficient finance to satisfy the charges registered against the respondent's interest in the matrimonial home.

NOTICE PARTY'S SUBMISSIONS

[14] The Notice Party sought :

(i) Immediate sale of the matrimonial home and division of assets between petitioner and respondent ; or
(ii) A *Mescher* order postponing the sale of the matrimonial home and division of the net sale proceeds until the younger child of the family reached a certain age.

[15] The Notice Party argued that such decisions would be appropriate in the light of the following factors :

(i) The respondent had made a substantial contribution to the mortgage payments. While the petitioner had given evidence that she had paid the mortgage since 2001, she had also had exclusive occupation of the matrimonial home since that time. If this had been a case of partition in respect of co-ownership, the principles of equitable accounting would allow the court to balance the occupation of the matrimonial home against 50% of

the mortgage payments which the respondent could have been expected to have made during the period in question.

(ii) By not appearing or being represented, the respondent could be taken to be assisting the petitioner as against the Notice Party.

(iii) The respondent's conduct in this case was not "gross and obvious". The forgery of the wife's signature had not been prejudicial to the petitioner in that it had not caused financial loss.

(iv) No evidence had been offered by the petitioner as regards local housing costs.

(v) The decision of Mr Justice Gillen in *H v W* [2006] NIFam 15 which supported the Notice Party's contentions as to the appropriate disposal of these proceedings. In that case the respondent wife argued that she required a four bedroom house with a garage as living accommodation and Mr Justice Gillen concluded that she did not.

THE ARTICLE 27 FACTORS

[16] Despite the lack of an appearance by the respondent and the absence of evidence on his behalf, I must nonetheless attempt, as Thorpe J did in *H v H (Financial Provision : Conduct)* [1994] 2 FLR 801 "to arrive at a fair and realistic order" reflecting the statutory criteria.

Financial needs of the child

[17] 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. As stated earlier, there are two children of the family, the elder of whom is aged 20 and the younger of whom is aged 12. The younger resides with the petitioner on a full time basis; the elder, who is at university, resides with her every weekend. The petitioner is therefore the parent who provides a home for the younger child and is responsible for his daily care. The matrimonial home is a semi-detached house with three bedrooms. Miss McCullagh argued that, if the house was to be sold and the equity divided evenly between the parties, purchasing alternative accommodation with her share of the net equity would be impossible.

Income and earning capacity

[18] The petitioner works for a retail store as a supervisor in the clothing department. She usually works for approximately 40 hours per week, earning approximately £760 per month. In addition she receives monthly tax credits of £703 and monthly child benefit. The petitioner gave evidence in her

affidavit that she believed the respondent to be working as a labourer for a particular firm. In her oral evidence she updated this by saying that she now believed he had since given up that employment. She gave evidence that she had been visited by a member of the DHSS who was investigating the respondent for alleged benefit fraud and she had been told on 15 September 2007 by the respondent that he was now no longer working.

[19] It was submitted on her behalf that the petitioner had made financial enquiries in June 2007. She had been unable to obtain a loan from a financial institution. With a monthly income of approximately £1532 and monthly outgoings of £1426, that left only £100 for unplanned and emergency expenditure. In the circumstances therefore she had no borrowing capacity.

Financial needs, obligations and responsibilities of the parties

[20] There was no evidence placed before me of unusual financial needs in respect of the petitioner or the respondent. The respondent has, of course, also a need for a home but that need is not capable of more precise evaluation in the absence of evidence from him. The evidence from the petitioner was that he had been living with a new partner since December 2006. However I cannot regard the respondent's need as having a priority equal to the younger child's need for a continuing stable home in his mother's care.

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

[21] Both parties enjoyed a modest 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 petitioner is aged 44 and the respondent is 39. The marriage was of significant duration, having lasted 18 years until the Decree Nisi was granted.

Any physical or mental disability by the parties of the marriage

[23] There was no evidence that the petitioner suffered from any such disability. According to the petitioner's evidence, the respondent has suffered from diabetes in the past and has a long standing alcohol problem. No evidence was presented in respect of his current condition.

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

[24] The evidence before me was that the contribution made by each of the parties to the welfare of the family had been equal. After the younger child

was born in 1995, the petitioner reduced her working hours to 25 per week. In the years since then she increased her hours and is now contracted to work 35 hours per week, although with overtime she generally works approximately 40 hours.

Conduct

[25] Article 27 of the 1978 Order provides that the court shall in particular have regard to 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. In *Primavra v Primavera* [1992] 1 FLR 16 Butler-Sloss LJ observed :

> "Speaking entirely for myself, the conduct of a spouse in relation to financial matters, both those during the marriage and those taking place subsequent to the marriage, are capable of being considered as conduct which comes within s 25(2)(g). The question is whether or not this is in fact conduct which should come within that section, in that it should be inequitable to disregard it."

[26] In *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618 Lord Nicholls observed that it was implicit in this provision that conduct outside this description was not conduct which should be taken into account. He had detected signs that courts were beginning to depart from the criterion laid down by Parliament for the taking into account of conduct. He therefore emphasised the limited circumstances in which conduct should be taken into account in ancillary relief decisions :

> "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."

[27] It is clear that financial improvidence may be taken into account as conduct. In *Martin v Martin* [1976] Fam 335 a husband, who after the separation and without his wife's knowledge, charged the matrimonial home with a heavy overdraft to raise capital for a number of businesses which failed, thereby leading to the loss of some £33,000 was required to give credit to the wife *pro tanto*. Cairns LJ stated :

> "Such conduct must be taken into account because a spouse cannot be allowed to fritter away the assets by

> extravagant living or reckless speculation and then to claim as great a share of what is left as he would have been entitled to if he had behaved reasonably."

[28] Miss McCullough argued that the respondent's behaviour went beyond financial recklessness into fraud. The breakdown of a marital relationship inevitably involves emotional pain and disappointment. Each party, however, has a right to expect honesty in their financial dealings from the other. The respondent's conduct does not fall into the category of an error of judgment. I am satisfied on the balance of probabilities that it was instead deceitful and dishonest conduct. Indeed it may possibly have lead to prosecution for a criminal offence had the petitioner or the bank decided to report the matter to the police. I am of the view that the respondent's dishonest conduct falls clearly into that category of conduct which it would be inequitable to disregard.

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

[29] No evidence of such matters was offered.

Other matters taken into account

[30] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which do not fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. As indicated, I recalled counsel to address a legal issue which bears on the ancillary relief issue. The submissions at the hearing appeared to have been made on the assumption that, if an order were made in the ancillary relief proceedings transferring the respondent's interest in the matrimonial home to the petitioner, the petitioner would receive that interest free of the charges registered without her knowledge by the respondent. I invited both counsel to reconsider this issue.

[31] Miss McKeagney subsequently submitted that this was not the correct position. She referred me to the decision of Park J., in *Edwards v Lloyds TSB Bank plc* [2005] 1 FCR 139. This was a case where, following divorce, the husband's legal estate and beneficial interest in the matrimonial home was to be transferred to the wife. The wife discovered, however, that, without her knowledge, the husband had forged her signature and created a second mortgage. The question before the court was whether, in these circumstances, the bank had any form of secured interest in the matrimonial home. After reviewing the authorities, Park J concluded that, as a matter of law, where the signature to a mortgage of one co-owner is ineffective, the mortgage remains good against those who signed. Therefore, the deed created an equitable mortgage against the husband's beneficial or equitable interest in the

property. Miss McCullagh reluctantly conceded that the *Edwards* decision represented the true position as a matter of law and that, in the instant case, her client could not receive in the ancillary relief proceedings a better interest than the respondent possessed.

[32] It is not of course this court's function to determine the issue of the Notice Party's position in respect of the charge it has registered against the respondent's interest in the matrimonial home. However, in dividing the matrimonial assets as whole between the petitioner and the respondent, I must bear in mind the likely result of any proceedings brought by the Notice Party in the Chancery Division. If I am satisfied that, even if I award the respondent's full interest in the matrimonial home to the petitioner, that this interest will be reduced by the amount of some £63,000 (being the amount of the charges registered following the financial conduct of the respondent) then I must bear this in mind when it comes to my decision on the disposition of the Friends Provident policy.

CONCLUSION

[33] 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. Duckworth expresses the view at paragraph B3[58] of 'Matrimonial Property Finance': -

> "Plainly, a clean break would be more 'appropriate' in some cases than in others. A young, childless wife will experience a fairly rapid termination of support; an older women on the other hand, stranded careerless in her 40's after bring up a family may incur greater sympathy."

The particular facts of each individual case must therefore be considered with a view to deciding the appropriateness of a clean break.

[34] The first issue which requires to be determined is to decide how the equity in the matrimonial home should be shared between the parties. The starting point is that after a marriage of some duration, each party can reasonably expect to receive a half share. A party's share may be increased

up or down, but only on a strict application of the Article 27 criteria. While there may be occasions on which a court will transfer a house to one spouse outright, this will require special factors justifying such a course. Miss McCullagh submitted that all four of the special factors referred to in Duckworth's Matrimonial Property and Finance section B4 paragraphs 32-38 were present. These factors are as follows.

Conduct

[35] I have previously addressed the issue of conduct in the context of the Article 27 checklist and concluded that this factor is strongly present.

Husband a Poor Provider

[36] Whether a spouse is a good or poor provider cannot be an absolute test. It must be seen in context and will depend on a number of factors which may include those such as educational opportunities and the economic environment. Duckworth suggests that there may be cases post-*White v White* where lack of support justifies a transfer. I am not persuaded that the facts of this case exhibit such circumstances.

General Ground of Need

[37] Duckworth states that financial vulnerability on the part of a wife, for example because of gloomy career prospects, or having responsibility for a disabled child may justify an outright transfer, particularly if the husband has found alternative accommodation. It would appear however that petitioner has a more stable employment situation than the respondent and is, though not well off, perhaps less financially vulnerable than the respondent. I am not therefore persuaded that this ground applies.

Risk of Bankruptcy

[38] Miss McKeagney submitted that in this case the debts incurred by the respondent amounted to approximately £63,000 and hence almost half of the equity in the matrimonial home. One of the difficulties in the present case is, however, that there is no evidence as to whether the respondent has obtained further loans or incurred further debts which may be charged against his interest in the property.

[39] Miss McCullagh referred me to *Atkinson v Atkinson* [1984] FLR 524 as a case where there were substantial debts and bankruptcy proceedings were imminent. The court ordered that the husband transfer his entire legal and beneficial interest in the matrimonial home to the wife. She also referred me to the decision in *B v B (Financial Provision : Welfare of Child and Conduct)* 2002 1 FLR 555. In that case the court award to the wife of the entire net value of the matrimonial home was justified by the need to house the child of the marriage to a reasonable standard. A *Mescher* order was concluded to be inappropriate not only in the light of the contributions of the parties, particularly the wife's ongoing contribution to the care of the child, but also

of the parties conduct (the husband had been convicted of child abduction and had failed to disclose a material asset.)

[40] I am not satisfied that this factor is present. Although future Chancery Division proceedings by the Notice Party may at some point have the effect of recovering the debt owed to them, the petitioner's personal bankruptcy is not threatened.

[41] On the facts presented to me I therefore conclude that it is appropriate, in the light of the Article 27 checklist exercise and, in particular, in the presence of the special factor which I have identified, to order the transfer of the respondent's interest in the matrimonial home to the petitioner.

[42] The second issue to be determined is what order should be made in regard to the Friends Provident policy with its surrender value of £6731. I have considered whether it would be appropriate to award it to the petitioner. Even if I was to disregard the possibility of a future forced sale of the matrimonial home to satisfy the charges registered against it, undoubtedly there will be exceptional expenses that are bound to arise from time to time for the parent who is the primary carer for a child under 18. I have concluded in the light of the Article 27 exercise therefore that I ought to make an order in favour of the respondent in respect of the policy.

[43] This amounts to a division of the matrimonial assets in terms of 100% to the petitioner and 0% to the respondent. I nevertheless consider this to be an appropriate needs-based and sharing-based division of the assets in the light of the particular facts of this case and in the context of an Article 27 consideration.