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Number 2/2005

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

C

Petitioner

v

C

Respondent

(No.2 of 2005)

Master Redpath

In this application the parties were married on the 29 September 1992 and separated in or around October 1998. A Decree Nisi was pronounced on the 12 November 2001. Accordingly the parties lived together for 6 years following the marriage. There are no children of the marriage

The main asset in the case is 22 acres of land with development value. Various valuations have been provided during the course of the ancillary relief application with the lowest being £800,000 and the highest being £4million. Fortunately for the hearing the valuation of the lands has been agreed at £2.7million with a potential Capital Gains Tax bill in the event of sale of £185,000. It was estimated that the cost of sale of this land would be £25,000. The property is unencumbered save for a mortgage of £67,000 and is held in the sole name of the Respondent, he having been left the property by his father who died in 1981. His mother was life tenant in the property and carried out various works of maintenance

and improvements to the lands from time to time. The Respondent's mother died in September 2001 whereupon the lands came into the possession of the Respondent.

There are other minor assets in the case. The Petitioner owns a house with an equity of £47,000; she also has some shares and other investments adding up to a few thousand pounds. Valuations were provided of the Petitioner's parents property in the sum of £400,000. However, the Petitioner's parents are relatively young and in good health and I do not feel that this property at this point in time comes into the equation.

The Petitioner is a bank official earning approximately £25,000 per annum gross with a pension scheme which is not of any significance. The Respondent was medically discharged from his occupation and received a lump sum of £39,000 and receives an ill health pension of £7,850.00 per annum.

Mr Toner QC for the Petitioner indicated that the Petitioner was seeking somewhere in the region of 30% of the value of these lands. Mr Long QC for the Respondent said he was not in a position to put any figure forward which his client felt was fair to the Petitioner and indeed it would be "otiose", to use his term, to do so.

A practice has grown up in recent years in the Ancillary Relief Court of asking the parties to indicate to the court during the course of the opening of the case what their expectations of the litigation are. I consider it to be a good practice and it is extremely helpful to the Court. I note in passing that Rule 2.69E of the Family Proceedings Rules 1991 in England require that not less than 14 days before trial, unless the court otherwise directs, the applicant must file and serve on the Respondent an open statement setting out concise details (including amounts) of the orders he or she will be asking the court to make. The Respondent must reciprocate within 7 days. This in fact goes much further than we in Northern Ireland go in exercising an identical jurisdiction.

The two legal issues in the case relate to the issue of inheritance and the length of the marriage. In this case the bulk of the estate was inherited by the Respondent from his father and indeed he only became the full owner of the property in 2001, three years after the marriage had broken up. Mr Long for the Respondent argued that the inherited property should not in fact be part of the case as it did not represent a contribution to the wealth of the family made during the course of the marriage as it only fell into the possession of the Respondent after the parties had separated. He also pointed to a passage in Lord Nicholl's speech in White v White [2000] 2FLR 981 where Lord Nicholls states at page 994: -

> "Plainly when present this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The Judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, the time when and the circumstances in which the property was acquired are among the factures to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs can be met without recourse to the property."

Mr Long argued that the Petitioner's financial needs could be met without recourse to this property. However, Mr Long was not in a position to advise me either how much his client felt the Petitioner was entitled to in this case, if anything, and furthermore no submissions were directed to me as to where the Petitioner's financial needs could be met from anywhere other than this inherited property.

The issue of inheritance and the effect it has on Ancillary Relief is a constantly evolving one.

Duckworth's Matrimonial Law and Property in commenting on the speech of Lord Nicholls states at C [25]: -

> "For the time being, however, as Lord Nicholls indicates the inheritance factor is best seen as an aspect of contribution where its importance may be emphasised or muted according to the circumstances."

In the Northern Irish case of M v M (Financial Provision: Valuation of Assets) [2000] Fam Law 509 McLaughlin J deducted a figure of £400,000.00 from the total assets to reflect the value of the husbands inheritance. The learned Judge also says however at page 38 and 39 of the Judgement: -

> "It appears to me that the proper approach is firstly, to determine the value of the assets available to the parties; secondly, to take account of the principles set out in the statute, and matters which bear on the fairness of the division of the assets and thirdly, to set about the task of achieving fairness by dividing the value of those assets in such a way as to attain it. Once that has been done the Judge should then stand back and test the potential result against the yardstick of equality."

It is against that background that the deduction was made having taken into account the inherited wealth that the husband had brought to the marriage. In a recent Northern Irish case of G v G & J there was a large estate of which a significant amount had been acquired by the parties through inheritance. This was a very lengthy marriage and because of the length of the marriage the learned judge does not seem to have ascribed any particular importance to the inheritance aspect to the case. Gillen J states at paragraph 48 of the judgment: -

> "In summary therefore these authorities make it clear that the court has a very broad discretion to make financial awards under Article 25 and has, in big money cases, increasingly chosen to guide the exercise of this discretion by the overarching objective of fairness. The Courts have chosen to measure fairness of outcome by adherence to the principle of equality unless there is good reason for variation such as wholly exceptional contributions by one party to family welfare."

In the recent case of G W v R W [2003] 2FLR 108 Nicholas Moston QC sitting as a Deputy Judge at the High Court states at page 120: -

> "The case of White v White has emphasised that the law in this is not moribund but must move to reflect social values."

On page 124 he quotes Bennett J in the case of Norris v Norris [2003] 1FLR 1142: -

> "Applying the words of the statute, in my judgment, the court is required to take into account all property of each party. That must include property acquired during the marriage by gift, or succession , or as a beneficiary under a trust. Thus, what comes in by statute through the front door ought not, in my judgment, be put out through the back door and thus not remain in the courts discretionary exercise without very good reasons. In my judgment, merely because inherited property has not been touched, or has not become part of the matrimonial pot, is not necessarily, without more, a reason for excluding it from the courts discretionary exercise."

The learned Deputy Judge continues at page 125: -

> "This analysis cannot be challenged. I therefore propose to treat all the arguments advanced by Mr Marks on his second point as impacting on the question of contributions. It must be artifice and contrary to the expressed words of section 25(2)(a) of the Matrimonial Causes Act 1973 as Bennett J has pointed out, to exclude the non-marital assets from the pool of assets to be divided."

The next subject I wish to deal with is the effect that the length of the marriage has on the case.

Early authorities such as Churchill v Churchill [1981] Fam Law 179 dealing with a three year marriage allowed nothing for the wife from the pot of the husband's inherited wealth. It is questionable if this approach would be followed today.

In G W v R W [2003] 2FLR 108 Nicholas Moston QC in discussing the issue of the length of the marriage states at page 121: -

> "I do not shrink from saying that this is a difficult issue. The logic deployed by Mr Pointer has obvious force. But on the other hand it seems to me that to adopt it requires me to put a blue pencil straight through the statutory criterion of the duration of the marriage. The failure of the judge in L v L (Financial Provisions: contributions) [2002] 1FLR 642 to give sufficient weight to this factor was specifically criticised by the Court of Appeal. It seems to be that the assumption of equal value of contribution is obvious when the marriage is over 20 years. For shorter periods the assumption seems to me to be more problematic."

Such a case was Foster v Foster [2003] 2 FLR at 299. That involved a childless marriage that lasted four years. What the District Judge did was to essentially return the property each of the parties had brought into the marriage. Baroness Hale says at page 301:

> "The district judge's approach was that, as this is a short marriage 'essentially so far as possible' taking into account the other aspects of s.25 … the parties should be returned more or less to the position that they were before the marriage was celebrated'. What she did, therefore, was to return to each party what they had brought into the marriage and what had been contributed to the outgoings on the property after the separation but divide the profits made during the marriage equally". (The parties were engaged in property development.)

This approach was approved by the Court of Appeal.

However in that case each party had brought sufficient into the marriage to ensure that the result was a fair one with the husband receiving 39% and the wife 61% out of an estate of £394,813.

Baroness Hale continues at page 304:

> "The Matrimonial Causes Act 1973 was designed to move away from the application of strict property law principles with their dependence upon evaluating contributions in money or money's worth, towards the recognition of marriage as a relationship to which each spouse contributes what they can in their different ways".

Accordingly Foster v Foster should not be taken as authority for the proposition that in a short marriage that a spouse who brings nothing to the marriage should take nothing from the marriage.

Applying all of this to the facts of this particular case, it is clear this substantial asset should be taken into account; but what also must be taken into account is the fact that inherited wealth, inherited very recently, forms the major asset in the case and to use Duckworth's words, its effect in this case must be very considerably muted as a result.

Duckworth states at B 3 paragraph 13 in summarising the propositions that emerged from White v White: -

> "(1) Although MCA 1973 Section 25 is couched in terms of the widest discretion, guidelines are needed to ensure consistency of judicial decision making and to limit peoples exposure to costs.
>
> (2) The implicit objection of Section 25 is to achieve a fair outcome, giving first consideration to the welfare of any children.
>
> (3) Fairness is a flexible concept that can move with the times. But in current conditions, it means at the very least that there can be no discrimination between husband and wife role.
>
> (4) The mere fact that one spouse stays at home while the other goes out to work (or that any other division of labour is agreed upon) is immaterial.
>
> (5) Fairness generally implies equal division, though not invariably so. There will be situations where, having carried out the Section 25 exercise, the Judge's decision will be that one party will receive a bigger share of the assets."

He then quotes Lord Nicholls in White v White where Lord Nicholls states at page 605: -

> "Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yard stick of equality of division. As a general guide, equality should be departed from only to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the courts to focus on the need to ensure the absence of discrimination."

In this regard I frequently refer to, and commend, the comments made by McLaughlin page J on page 39 of the judgment in M v M where he states in relation to long marriages:

> "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, 66.6 – 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 portion gets 50% more than the other and if 55 – 45, one portion is 25% approximately larger than the other. Viewed in this way from the perspective of the partner left with the smaller portion - the wife in the vast majority of cases - some of these divisions may be the antithesis of fairness and I commend practitioners to look at any proposed split in this way as a useful double check."

What then constitutes fairness in the context of this case? If after a twenty year marriage one should approach a case from the perspective of equality, one could argue that after six years the starting point for a spouse should be 30%, precisely what the Petitioner has sought in this case. I feel to approach the case from that perspective would be over simplistic. The goal of fairness cannot be achieved by a simple percentage approach; it would, for instance, discriminate against a spouse in a smaller case. 30% of £3,000,000 is one thing; 30% of £100,000 is quite another.

Equally, in very large case, a one year marriage may not entitle a spouse to even 5%, of a very large estate brought to the marriage by the other spouse.

This was a six year marriage. Whilst this could not remotely be regarded as a long marriage, it cannot equally be regarded as a very short marriage. I return once again to Baroness Hale's words which I quoted earlier concerning the move away from strict property law principles towards the recognition of marriage as a relationship to which each spouse contributes what they can in different ways.

Accordingly, having taken all the circumstances into account, in particular the length of the marriage and the inheritance issue, I am of the view that the Respondent should pay the Petitioner a lump sum in the region of 15% of the combined assets in the case. The nett value of the development land after tax and the mortgage is £2,448000. The Petitioner has equity in her property of £47,000 giving total assets (leaving aside the Petitioner's other very small investment) of £2,495,000 15% of this figure is £374,250. The Petitioner will retain her equity of £47,000 leaving a figure of £327,250 which I will round up to £330,000. Applying the reverse check recommended by McLaughlin J this gives the Respondent lands with a nett valuation of £2,165,000 being approximately 85% of the matrimonial assets. Given the length of the marriage and the fact that the vast bulk of the estate was acquired by the Respondent through inheritance after separation I regard this as a fair division.

I will now hear arguments as to costs.