

**Neutral Citation No. [2010] NI Master 5**

Ref:

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

Delivered: **21/4/10**

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

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**FAMILY DIVISION**

**PROBATE AND MATRIMONIAL**

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**BETWEEN:**

**Mary Philomena Donnelly**

**Petitioner;**

**and**

**Patrick Gerard Donnelly**

**Respondent.**

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**Master Bell**

[1] In this application the petitioner (to whom I shall refer, for ease of reference, as “the wife”) seeks Ancillary Relief pursuant to a summons dated 15 September 2008.

[2] 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to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any anonymisation prior to publication. If the Office is not so informed within that timescale then it will be submitted to the Library for publication in its present form.

[3] At the hearing both parties gave oral evidence. An affidavit was sworn by the wife on 3 July 2008 for the purpose of these proceedings. An affidavit was also sworn by the respondent (to whom I shall refer, for ease of reference, as “the husband”) on 4 March 2009. Both parties adopted their affidavits as

their evidence. I also had the benefit of helpful submissions by Miss O'Grady on behalf of the wife and Miss Cunningham on behalf of the husband.

## **THE HISTORY OF THE MARRIAGE**

[4] The parties were married on 7 August 1981. They separated in 2007 and a Decree Nisi was granted on 11 March 2008.

## **THE ASSETS**

[5] The assets which were the subject of the hearing are as follows :

- (i) The former matrimonial home at 103 Old Junction Road (with an agreed valuation of £72,000);
- (ii) The property at 101 Old Junction Road (with an agreed valuation of £85,000);
- (iii) A derelict property at Old Junction Road (with an agreed valuation of £50,000);
- (iv) A site with foundations (with an agreed valuation of £55,000);
- (v) A site without foundations (with an agreed valuation of £45,000);
- (vi) 70 acres of farmland (with an agreed valuation of £395,000);
- (vii) 50 acres of farmland (with an agreed valuation of £300,000);
- (viii) A Standard life Endowment Policy (with an agreed valuation of £12,000);
- (ix) Livestock (valued by the husband at approximately £21,900 and by the wife at approximately £27,090 );
- (x) Farm machinery (valued by the wife at approximately £9,600);
- (xi) Savings in the name of the wife amounting to approximately £18,000; and
- (xii) The wife's pension with a PCEV of £363,402.

Also to be taken into account are the fact that there is a loan owing to the Northern Bank in the amount of £14,306 and a business overdraft of £16,247. Both of these amounts are secured on the properties held by the husband.

[6] As will be observed, the value of two of the items in the list of capital assets were not agreed. In respect of the livestock the husband offered a value through his counsel. The wife had a report from a valuer but the valuer was not present in court to give oral evidence. The general rule as to evidence under Order 38 of the Rules of Judicature is that any fact required to be proved by the evidence of witnesses shall be proved by the examination of witnesses orally. The exceptions to this general rule are for evidence by affidavit where, in the circumstances of the case, the court thinks it reasonable so to order and that written medical reports may be read. In respect of the

livestock valuation both parties offer valuations, neither of which are in the form of admissible evidence. The only appropriate course of action which is open to the court is to adopt a valuation which is at a mid point between the two valuations offered. In respect of the machinery, the position is somewhat different. The wife offered a valuation but the husband did not do so, nor did he dispute the valuation offered by the wife. I therefore accept that value for the purposes of the calculation. The alternative course of action is to disregard the machinery assets altogether which would be unfair to the wife. I therefore exercise my discretion under Order 2 Rule 1 to accept the valuation despite the manner in which it was offered. That I do so should not, however, be regarded as an encouragement that evidentially admissible valuations are unnecessary.

[7] The total value of the capital assets is therefore found as a fact to be £1,035,543.

[8] The issue of inherited property is a significant factor in these proceedings. A number of portions of the lands were transferred to the husband prior to the parties being married. During the unmarried phase of the husband's life he inherited :

- (i) 70 acres of land;
- (ii) The property at 103 Old Junction Road;
- (iii) The property at 101 Old Junction Road; and
- (iv) The site without foundations.

[9] During the marriage the husband :

- (i) Inherited one third of 50 acres of land which was transferred to the husband as a beneficiary following his uncle's death; and
- (ii) Purchased two thirds of 50 acres of land purchased from relatives who had also been beneficiaries.

## **WIFE'S SUBMISSIONS**

[10] The wife seeks a clean break settlement.

[11] She seeks a 50% - 50% division in the capital assets. In outworking such a division her expectation is that she will be awarded ;

- (i) The 50 acres of agricultural land;
- (ii) The derelict house;
- (iii) The site with foundations;
- (iv) The site without foundations;
- (v) The Standard Life policy;

- (vi) Her own savings; and
- (vii) A lump sum of £25,000.

There is an order in force which requires the husband to pay £600 per month maintenance of which he pays £300 per month. The wife therefore seeks an additional sum of £12,500 to reflect the £7,500 arrears of maintenance and an amount of £5,000 which she says the husband owes her. This amount of £5,000 was given as a loan by the wife to the husband out of her retirement lump sum so that he could purchase a tractor. Having heard the evidence of the parties I entirely accept the evidence of the wife in respect of this matter.

[12] She also proposes that a Pension Sharing Order is made in respect of her DENI pension giving the husband a 33% share of it.

[13] The wife submits that the court should make a transfer of land and property to her, rather than make a lump sum award, as she regards her husband as unreliable and would not want him to remain in control of selling property to fund any award.

#### **HUSBAND'S SUBMISSIONS**

[14] The husband submitted that the property assets in this case were largely inherited by the husband prior to the marriage. He submitted that he has a strong emotional attachment to the farm and hoped that it could be retained for future generations. However the husband is not in a position to raise any finance to buy out the wife's interest in the matrimonial assets.

[15] The husband wishes the maintenance arrears to be disregarded. He said that his solicitor did not appear on the day the order was made. The husband gave evidence that he had simply ignored the order and that he could have returned to court at any time to have had the maintenance element discharged on the basis that the wife had significantly more income than the husband.

[16] The husband subsequently proposed that the wife receives :

- (i) The 50 acre parcel of land;
- (ii) The derelict house;
- (iii) The site with foundations;
- (iv) The Standard Life policy; and
- (v) Her own savings.

The husband seeks a Pension Sharing Order in respect of 44% of the wife's pension.

## **THE ARTICLE 27 FACTORS**

### Welfare 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. There are five children of the marriage all of whom are over the age of 18. This factor does not therefore apply.

### Income and earning capacity

[18] The wife is a retired teacher who does some substitute teaching. She gave evidence that, in addition to her pension of £1070 per month she had an income from such work in the amount of some £400 per month. In addition, as part of a separation order, the husband pays her the sum of £300 per month. The husband submitted that the wife has a much larger income. The wife conceded in cross examination that her income was five times what the husband's was but expressed the view that this had been an unusual year as she had been able to obtain some longer term substitute teaching to cover periods of sickness.

[19] The husband gave evidence that there was not a good living to be made from the farm. He was just about able to make ends meet. He indicated from his farm accounts that his net profit in the years 2006, 2007 and 2008 was £2,034 ; £5,432 ; and £7560 respectively. (He did, however, admit that the accounts did not represent the true business turnover in that he sold tractors for cash and such payments were not recorded in the accounts. Nevertheless he emphasised that he did not have a regular cash income and this had only happened on a few occasions.) Given that the husband has been consistently paying the wife £300 per month maintenance I do not consider that his farm accounts represent a credible picture of his true income. I am led to the inference that it must be higher than he states.

### Financial needs, obligations and responsibilities of the parties

[20] The wife gave evidence that she is living in rented accommodation for which she pays some £360 per month. The wife gave evidence that, since the parties separated and she moved into rented accommodation, she has nonetheless continued to make the mortgage and endowment policy payments in respect of the matrimonial home. She stated that her largest short term need is to purchase a house for herself and that she also needs money to help their daughter in the event that she goes to university.

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 wife is aged 55 and the husband is 55. The marriage a long one, having lasted some 25 years until the separation.

Any physical or mental disability by the parties of the marriage

[23] The wife gave evidence that she had no health problems. The wife gave evidence that the husband suffered from a serious alcohol dependency. Her affidavit evidence was that the husband's alcohol problem regularly impaired his ability to work and that if he was incapacitated due to drink, neighbours had to step in to help him. The husband admitted he previously had a drinking problem but stated that the current situation was that he took a drink now and then. He stated that he was not receiving treatment and his neighbours did not have to assist him on the farm. I did not therefore consider that there was evidence before me in relation to physical or mental disability which required to be taken into account.

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 was equal. No argument was made suggesting that either party considered that they had made a special contribution.

Conduct

[25] Neither party made a conduct case against the other.

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

[26] Other than the pension arrangements previously mentioned 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. I was not asked to take any such matters into account other than the inherited property factor to which I have referred.

## CONCLUSION

[28] 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 to 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 both possible and desirable.

[29] Ancillary relief farming cases, as Wilson J observed in *R v R (Lump Sum Repayments)* [2003] EWHC 3197 (Fam), [2004] 1 FLR 928, are notoriously difficult to resolve. A significant factor in determining a fair outcome in these proceedings will be how the inherited land is treated.

[30] The husband’s evidence was that the farm has been in his family for generations. He initially stated he has a very strong emotional attachment to the lands and wishes to continue farming. He stated that he would be devastated to see the farm sold and it is his wish to pass the lands onto the next generation. The wife gave evidence that she did not think that any of the children were likely to go into farming as a profession.

[31] There are five children. Joseph is a mechanic and currently in Australia. Paula is in full time education and wishes to do a teaching or business studies course at Queen’s University. Briege is a beautician. Michelle is a full time mother with an 8 year old child. Patrick previously helped the husband on the farm but he is now taking a computer course and wants to go travelling again.

[32] There was no evidence before me that any of the children is likely to take up farming as a career. On the balance of probabilities therefore the farm is likely to be sold on the eventual the death of the husband. I conclude therefore that his wish to see the farm pass to another generation of the family was mere wishful thinking.

[33] Miss Cunningham referred me to a quotation from the decision of *P v P (Inherited Property)* [2005] 1 FLR 576 where Munby J said :

“Fairness may require quite a different approach if the inheritance is a pecuniary legacy that accrues during the marriage than if the inheritance is a landed estate that has been within one spouse’s family for generations and has been brought into the marriage with an expectation that it will be retained *in specie* for future generations.”

[34] At first sight this quotation is highly supportive of the husband’s position. However the sentences immediately following that quotation are not so supportive as those counsel referred me to. A perusal of the judgment shows that the court continued :

“That said, the reluctance to realise landed property had to be kept within limits. After all, there is, sentiment apart, little economic difference between a spouse’s inherited wealth tied up in the long-established family company and a spouse’s inherited wealth tied up in the long-held family estates. ”

Munby J went on to make an award based upon the wife's reasonable needs for accommodation and income, not because that was the principle that applied in all farming cases, but because of the circumstances of the case.

[35] In *White v White* [2001] 1 AC 596 Lord Nicholls dealt with the distinction between inherited property and matrimonial property. His Lordship stated :

This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property. “

However his Lordship made it clear that the fact of property being inherited was not a trump card to be played by the party which had received the inheritance :



“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, and the time when and circumstances in which the property was acquired, are among the relevant matters 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 cannot be met without recourse to this property.”

[36] I must also take into account whether the farm is a going concern. As Coleridge J pointed out in N -v- N (Financial Provision; Sale of Company) [2001] 2FLR 69 & 80: -

“... I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed.”

It is clear that in this case, however, the farm cannot be considered a goose that is laying golden eggs.

[37] Where one party to a marriage operates a business (whether farming or otherwise) and that business makes little or no profit, the other party's argument for the sale of the business and the realisation of the assets so that funds are available to meet a fair ancillary relief award will have significant weight. There may, of course, be competing factors to be considered. Where, however, the business is losing money and there are no objectively viable reasons for believing that the business is liable to recover or be transformed into a profitable concern, or other reasons to believe that the business will have a significantly higher value in the future, then the argument for the sale of the realisable assets is compelling. Emotional attachment to a farm cannot outweigh a fair and reasonable needs-based decision in ancillary relief proceedings. The wife gave evidence that it was never the case that the farm generated an income stream. Rather she said “it just ticked by”. She gave evidence that the husband's bank account permanently ran an overdraft. The husband stated that the overdraft was currently in the region of £25,000. When asked how much he would receive if he leased out his land and farm buildings, the husband answered that it would be in the region of £7,000 -

£8,000 per annum and commented that he was doing farming for the love of it, not for the money.

[38] During the hearing, however, the husband recognised that his initial position that the farm not be divided was unrealistic. The wife had a legitimate claim for ancillary relief and the husband could not obtain finance to meet her claim. In the light of all the circumstances of the case, there was no alternative but to transfer some of the farmland to the wife. Neither party adduced evidence that this would have a destructive impact on the operation of the farm business.

[39] As with many ancillary relief cases, this case has both a capital and an income dimension. The husband has significant capital assets in his name with the wife having little. On the other hand the wife has a more significant regular income with the husband submitting that he is in a much weaker position than her in this regard. However, as referred to earlier, he did not present as a credible witness in respect of this issue. Nonetheless I do have regard to the fact that, on the balance of probabilities, he is in a weaker income position than the wife.

[40] Taking into account all the evidence before me, together with the submissions advanced by both counsel, I conclude that it is appropriate to make a Property Adjustment Order transferring to the wife :

- (i) The 50 acre parcel of farm land;
- (ii) The derelict house;
- (iii) The site with foundations;
- (iv) The site without foundations; and
- (v) The Standard Life Policy;

She will, in addition, retain the savings held in her own name. The effect of this is to divide the capital assets in terms of 46.35% to the wife and 53.65% to the husband.

[41] Taking into account all the evidence before me, together with the submissions advanced by both counsel, I also conclude that it is appropriate to make a Pension Sharing Order in favour of the husband in respect of 25% of the wife's pension.

[42] It is trite law to say that what is fair depends upon all the circumstances. The circumstances of this particular case are that it is a needs-based case where the needs of the wife cannot be met without recourse to the inherited property. The outcome which the court seeks to achieve is that both parties are as secure as is possible for the next phase of their lives. Nevertheless it must be borne in mind that there is often no ideal outcome to an ancillary relief application. Just as the court cannot protect a divorcing

couple from the emotional pain of divorce, so too it cannot protect them from the financial pain of divorce.