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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

J

Petitioner;

and

J

Respondent.

(Ancillary Relief)

Master Bell

[1] In this judgment I shall, for ease of reference, refer to the petitioner and the respondent as "the wife" and "the husband". In this application the husband seeks Ancillary Relief pursuant to a summons issued by his former solicitors on 2 May 2014.

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to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication.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

[3] At the hearing the wife was represented by Mr Martin and the husband appeared on his own behalf, having originally been represented in the proceedings by solicitors and counsel. At the hearing both parties gave

oral evidence. Affidavits had been sworn by the wife on 18 March 2014 and on 13 August 2014 for the purpose of these proceedings. The wife adopted these as her evidence before me, as she also did with the statements attributed to her in the reports of Dr Best. Two affidavits had been sworn by the respondent on 23 February 2014.

[4] During the hearing I heard oral evidence on a number of days from the parties. However it is difficult to assist a personal litigant to learn the skill of how to adduce facts into evidence. After the hearing had concluded, I received a letter from the husband dealing with a number of matters. The husband asked me to take the contents of his letter into account. There was no indication that the letter had been copied to the wife's solicitor. I am of course unable to do so. Evidence which a court receives from a party in a contested hearing must generally be sworn evidence which the other party has an opportunity to cross examine. It would therefore have been unfair of me to accept evidence from the husband which was unsworn and which the wife had not had an opportunity to cross examine.

[5] There were a number of rulings which were made before and during the hearing of this case which for convenience I will set out at this point.

RULING ON SKYPE EVIDENCE

[6] For the sake of completeness I record in this judgment that, early in the history of these proceedings, counsel made an application for what, if these had been criminal proceedings, would have been termed "special measures", that is to say that the wife should be allowed to give her evidence via a Skype connection from the office of her solicitor. The basis of this application was that the husband had been convicted of a number of criminal offences against her and that during the marriage she had been the subject of chronic domestic abuse. As a result she had severe emotional vulnerability and did not wish to be in the same room as him. In support of the application I received a medical report from Dr Stephen Best, consultant psychiatrist. There is no statutory provision providing a regime for such "special measures" in civil proceedings. Nevertheless I considered that, under the inherent jurisdiction of the court to organise and control its own proceedings, I had the power to allow the application. In my view it was appropriate in the circumstances outlined to me to grant such an application and I did so. The husband mounted no objection to this application.

RULING ON ADJOURNMENT APPLICATION

[7] The first day of the hearing was taken up with various procedural matters, the opening on behalf of the wife, and the evidence in chief and cross-examination of the valuer, Mr Tim Martin. The remainder of the day

would not have been sufficient to complete both the evidence in chief and cross examination of the wife. Her counsel was anxious on grounds of the witness' health to have both her evidence in chief and cross-examination conducted over one day rather than divided between two days. I therefore rose early and adjourned the hearing of her evidence until the second day.

[8] The following day, when the husband appeared for the hearing he said that he had suffered a fall while going to his car at the end of the previous day. As a result he had hurt his left arm. He described it as having throbbed all evening. He felt that he could manage hearing the wife give her evidence in chief, and could take notes of her evidence using his right hand, but he felt could not manage to conduct a cross examination as he doubted that he would be able to turn over pages using his left hand. He wished me to adjourn the case so that he could attend his GP and then go to hospital for an X-ray. Counsel for the wife opposed this application robustly. He suggested it was a "stunt" by the husband, designed to put the wife under more pressure. He did not wish his client to have to give her evidence divided across two days, especially since the two days would be separated by a period in excess of four weeks. This would also have had the effect of meaning that the wife could not consult with her lawyers during this period. Upon considering both submissions I told the husband that he had two choices. If he maintained his adjournment application I would grant it. However I informed him that I would wish to see a copy of any A&E hospital notes created as a result of a hospital visit. I made it clear that if there was objective evidence of a difficulty with his arm, and a doctor concluded that there genuinely was a sprain or other difficulty, that would be the end of the matter. If, however, there was no objective evidence of any problem then there would potentially be cost implications in respect of the wife's costs of the wasted day. The other alternative was that he could continue. The husband decided he wished to have an adjournment so that he could see his GP and attend hospital. I granted the adjournment. There was then a period of 10 minutes during which there was a discussion about future listing dates and a timetable as to how the hearing would proceed. During this period the husband began to use both hands to gesticulate, whereas previously he had only used his right hand, with his left arm lying apparently injured in his lap. After observing the husband during this 10 minute period I formed the conclusion that his arm had recovered sufficiently for him to be able to participate fully in the hearing. I therefore reversed my decision to adjourn the hearing and told the parties that we would after all be hearing the evidence of the wife via a Skype connection. The day proceeded in that way and I satisfied myself during the hearing that the husband did not appear to be inhibited from full participation in the hearing by any injury which he may have suffered the previous evening. Had his performance appeared in any way to have fallen below its usual standard, I would have invited him to renew his adjournment application. I observed during the hearing that the husband made occasional use of his left hand to turn over documents and to make gesticulations. I also

observed when he removed materials from his bag and placed them on the conference table, that he appeared to have pain killers in his possession, although he did not take any of them during the hearing.

[9] I note for completeness that, on the day following the hearing of the wife's evidence, the husband attended my chambers and handed into court a document for filing on the court file. He was wearing a plaster cast on his left wrist and arm and informed me that he had attended hospital and had been found to have a broken bone in his wrist.

RULING ON ADMISSIBILITY OF TRACKER EVIDENCE

[10] During his evidence in chief the husband sought to have evidence admitted of the movements of the wife. He submitted that this evidence would show that she was working, something which she had denied. The evidence consisted of tracking data which had been obtained as a result of a tracker which he had fitted to the car which the wife drove. This action by the husband had led to him being convicted of one count of harassment contrary to Article 4(1) of the Protection from Harassment (Northern Ireland) Order 1997 after a plea of guilty on 27 May 2016 at the Crown Court sitting in Downpatrick.

[11] In *Tchenguiz v Imerman; Imerman v Imerman* [2010] EWCA Civ 908 the Court of Appeal for England and Wales dealt with **t**he use in court of unlawfully obtained information and documents, particularly in the context of what is sometimes referred to as "illegal self-help discovery". Giving the judgment of the Court Lord Neuberger MR said :

> "168. We have left until this stage consideration of the future use in the ancillary relief proceedings of the information and documents obtained by Mrs Imerman. We distinguish between the documents (which, because of the order we have made, she will no longer have access to unless at some stage her husband produces them, either voluntarily or pursuant to an order made in the ancillary relief proceedings) and any relevant information she may have, including but not limited to whatever she may be able to recall of the contents of the documents.
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> 169. At this stage there is no question of any use at all. It is premature to consider utilisation of the information which Mrs Imerman obtained until the time for which the Rules provide. That is after her husband's Form E has been delivered and if and when she is inviting the court to conclude that his disclosure has been inadequate or dishonest. At that

stage Mrs Imerman might be in a position to challenge the adequacy of his disclosure on the basis of the information she had previously seen in documents she has been compelled to return. Of course, compelled as she should be to return copies, her recollection will be inadequate. But if there is information, which will include the records of conversations with her brothers, to suggest inadequate disclosure by her husband, that is the time she can deploy it. There is, as Mostyn J pointed out (in the passage we have cited at [113]), no process by which her recollection of what she has learnt from the documents can be removed. And it is unlikely that the husband will be able to resist reliance by the wife on such evidence merely by saying that part of the information she relies upon had been culled from documents unlawfully obtained.

170. After all, the use in court as evidence of material which has been improperly obtained (whether in breach of confidence, tortiously, or even criminally) is permissible, though such use may be refused by the court or permitted only on terms. Subject to certain exceptions, notably information obtained by torture, the common law does not normally concern itself with the way evidence was obtained when considering admissibility: see *R v Sang* [1980] AC 402, relying on *Kuruma v The Queen* [1955] AC 197. Accordingly, in the present case, it appears to us that information derived from the documents obtained, albeit unlawfully, from Mr Imerman's computer records is, subject to questions of privilege and relevance, admissible in the ancillary relief proceedings. However, just because it is admissible, it does not follow that the court is obliged to admit it.

171. Thus, it appears that, as a matter of common law, a judge often has the power to exclude admissible evidence if satisfied that it is in the interests of justice to do so: *Marcel v Commissioner of Police for the Metropolis* [1992] Ch 225, page 265, per Sir Christopher Slade. Where the CPR apply, the position is even clearer: see *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 1 WLR 954. In that case, relying on CPR 32.1(2), which provides in terms that the court can exclude evidence, as well as the overriding objective in CPR 1.1, the Court of Appeal held that the trial judge had a discretion as to whether or not to admit highly relevant evidence obtained in an underhand manner. Although they upheld his decision to admit the evidence, it is quite clear from the reasoning that the

court had power to exclude it in the light of the way in which it had been obtained.

172. It was suggested by Mr Turner for Mrs Imerman that a judge in ancillary relief proceedings has no such power. We do not agree. First, the equivalent of the overriding objective in CPR 1.1 applies to ancillary relief proceedings: see Rule 2.51D of the Family Proceedings Rules. Secondly, and even more significantly, unlike in proceedings governed by the CPR, where the parties have a general disclosure obligation, and can normally choose what documentary evidence to tender, it is, as we have said, the court which controls what documents are to be disclosed and tendered by way of evidence in ancillary relief proceedings.

173. As these provisions indicate, judges hearing ancillary relief applications, unlike judges in normal civil proceedings, have a far greater control than they have under the CPR in normal civil proceedings, over which documents should or should not be produced in evidence.

174. It seems to us that, where the court is satisfied that a husband has documents which may be relevant to the issue before it, but that his wife has, in some way retained copies of those documents she has wrongly obtained, it would be open to the court in an appropriate case to refuse to order the husband to produce the documents on the ground that to do otherwise would render the way it dealt with the application unfair, even taking into account the fact that the documents contain, or may contain, information which is relevant to the proceedings. Equally, it would be open to the court in an appropriate case to permit the wife to give evidence of their contents as a prelude to ordering the husband to produce them, However, on our analysis of the law, it is unlikely that questions as to use of unlawfully obtained documents will arise in the future. Hitherto the family courts have, as we have pointed out at [108], considered the question of the use of unlawfully obtained documents at a time when no prior application has been made for their delivery up, along with any copies. Now, if we are right, by the time the court comes to consider the adequacy of the husband's disclosure any wrongfully obtained documents will have been returned. The question for the court will be, in the future, the extent to which the wife's recollection of information derived from unlawfully obtained documents may be deployed to establish the inadequacy of her husband's disclosure.

175. It was also suggested that the court would have no power to exclude documents which might affect the ancillary relief awarded, in the light of the provisions of section 25 of the 1973 Act. It is true that section 25(2)(a) provides that, when making financial provision, the court must "have regard to ... the [actual and prospective] income, earning capacity, property and other financial resources [available to] each of the parties". However, and as we have already explained, that cannot automatically require the court to admit any evidence and every document which relates to such issues, however unfair the court thinks that it would be to do so.

176. It would be surprising if the court in ancillary relief proceedings had no power to exclude evidence which was confidential to the husband and had been wrongly obtained from his records, however outrageous the circumstances of the obtaining of the evidence and however unfair on the husband it would be to admit the evidence. It would be all the more surprising in the light of the Human Rights Act 1998. As was explained by Ward LJ in *Lifely v Lifely* [2008] EWCA Civ 904, in a case of this type, the decision whether to admit or exclude evidence involves weighing one party's (in this case, the wife's) article 6 right to a fair trial with all the available evidence, against the other party's (the husband's) article 8 right to respect for privacy. (It may also involve the wife's right under Article 10 to say what she wants to say, and the husband's article 6 right, on the basis that he might say the trial was unfair if it extended to evidence which had been wrongly, even illegally, obtained from him).

177. Accordingly, we consider that, in ancillary relief proceedings, while the court can admit such evidence, it has power to exclude it if unlawfully obtained, including power to exclude documents whose existence has only been established by unlawful means. In exercising that power, the court will be guided by what is "necessary for disposing fairly of the application for ancillary relief or for saving costs", and will take into account the importance of the evidence, "the conduct of the parties", and any other relevant factors, including the normal case management aspects. Ultimately, this requires the court to carry out a balancing exercise, something which, we are well aware, is easy to say in general terms but is often very difficult to effect in individual cases in practice. "

[12] I considered Mr Martin's application to exclude the tracker evidence.

The evidence had been the fruits of the husband's harassment of his wife. The trial judge in the criminal proceedings described the husband's actions as "something of a psychologically disturbing tracking and harassment of his wife". Having conducted a balancing exercise taking into account the factors referred to in *Tchenguiz v Imerman*, I considered that I should exclude the evidence.

[13] In conducting that balancing exercise I had of course to examine the tracker material and photographs submitted by the husband and I note that, even if I had admitted that material, I would not, in the light of the evidence of the wife, have reached a conclusion on the balance of probabilities that the wife was working on a regular basis and therefore had had an income which she had not disclosed.

THE HISTORY OF THE MARRIAGE

[14] The parties were married on 23 September 1995 following a period of some ten years cohabitation. They separated on 24 August 2012. A Decree Nisi was granted on 9 September 2014. There is one child of the marriage: a son now aged 22.

[15] The assets which were the subject of the hearing were agreed to be the matrimonial home, which is in the name of the wife and a number of pensions. The husband gave evidence that the reason the matrimonial home was in the wife's name was so as to prevent legal action being taken against the assets. However he strongly emphasised that he "paid for everything during the marriage." The pensions held by the parties are as follows :

(i) Aegon pension held by the wife – CETV £8,746 on 4 April 2017.
(ii) Phoenix Life pension held by the wife - CETV £11,790 on 3 April 2017.
(iii) Prudential pension held by the husband – CETV £32,744 on 9 November 2016.
(iv) Bombardier pension held by the husband – CETV £126,220 on 16 February 2017.
(v) Guardian Pension held by the husband – CETV £7,563 on 4 November 2016.

THE VALUE OF THE MATRIMONIAL HOME

[16] The wife called Mr Tim Martin of Tim Martin, Auctioneers, Estate Agents and Valuers to give evidence on her behalf. Mr Martin has been a valuer for some 47 years. Mr Martin had provided two valuation reports dated 11 August 2014 and 1 July 2017. He valued the matrimonial home in Downpatrick at around £300,000. During cross examination the husband did

not challenge the accuracy of this valuation, or the competence of the valuer. He did however attempt to challenge whether Mr Martin was a truly independent expert. He put it to Mr Martin that the wife's aunt had previously worked for Mr Martin's father. He also put it to Mr Martin that he had met the wife on a number of occasions. Mr Martin conceded that he had met the wife after he had received instructions to value the property. If he had ever met her before this then he could not remember having done so. He explained that during the course of his professional career he had met numerous people, many of whom he could not remember. I accept the evidence of Mr Martin as an independent valuer and was not satisfied on the balance of probabilities that his independence from the parties was in any way compromised. I therefore conclude that the matrimonial home ought to be valued at £300,000.

THE ARTICLE 27 FACTORS

Welfare of minor children

[17] Article 27 of the Matrimonial Causes (Northern Ireland) Order 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. The parties only son is aged 22 and there are therefore no minor children.

Income, earning capacity and other financial resources

[18] The husband gave evidence that he works for Bombardier. He earns £1520 per month. He had to give up riveting due to carpel tunnel syndrome. He was a fitter but limited in what he could do. The wife submitted that her income was confined to state benefits.

[19] The husband alleged that the wife was working in Saintfield, grooming horses. He noted that her car mileage showed that she had travelled 9,000 miles in a 9 month period. He alleged that the wife took on a job that her aunt had previously done. The wife's evidence was that she had assisted her aunt with feeding her livestock two or three times a week for a four month period and she had been paid approximately £16 to £24 per week for this. However she stated that she no longer did this. As I noted above in connection with my ruling on the admissibility of the tracker evidence, even if I had admitted that material, I would not, in the light of the evidence of the wife, have reached a conclusion on the balance of probabilities that the wife was working on a regular basis and therefore had had an income which she had not disclosed.

[20] The wife submitted that during their marriage the husband had done a considerable number of "homers", working on cars, and from which he had

generated a significant income and therefore had a capacity to earn far more than his current salary.

Financial needs, obligations and responsibilities of the parties

[21] The wife currently lives in the matrimonial home and the husband resides in rented accommodation. I will consider the wife's financial needs further under the issue of her health and the issue of conduct.

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

[22] The wife gave evidence that the parties enjoyed a largely debt-free and comfortable standard of living prior to the breakdown of the marriage. Much of their surplus income was spent on assisting their son to compete in horse events.

[23] The husband also considered that the parties had a good standard of living and noted that they were able to finance their son's horse-riding activities. An example given by the husband was that he had spent 1200 Euros on a saddle.

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

[24] The wife is aged 59 and the husband is 61. The marriage was of significant duration, having lasted 16 years until the separation.

Any physical or mental disability by the parties of the marriage

[25] The wife's evidence is that she suffers from fibromyalgia and carpel tunnel syndrome. The wife also offered two medical reports, dated 25 February 2017 and 6 March 2017, by Dr Stanley Best, consultant psychiatrist in respect of her mental health. The husband made no application to have Dr Best called to give oral evidence so that he could cross examine him. As the wife's health and the husband's conduct are so interrelated, I will deal further with the matter of her health in the section of this judgment which deals with conduct. The husband stated that he did not wish to formally challenge the wife's evidence as regards her health (though he did submit that her "bad moodswings" were caused by the menopause). His perspective was that she had obviously experienced mental health issues because of what she had done in terms of wasting approximately £200,000 of their matrimonial finances. (He calculated this sum in terms of £60,000 having been wasted on rent which had to be paid by the husband after he had to move out of the matrimonial home; £13,000 having been wasted on legal expenditure; and £50,000 which the wife spent from funds which had been contained in an ISA account).

[26] The husband stated that he had a number of health issues. He had previously had skin cancer. He currently has two heart problems. One of these is heart palpitations and the second is microregurgitation of a heart valve. He stated that he was exhausted at the end of the day. He also stated that he had arthritis.

[27] I do not consider that the husband's health issues are sufficiently serious that they should affect the division of matrimonial assets. However in respect of the wife's health, which I will consider in further detail in the section of this judgment dealing with conduct, I accept the submission by counsel that the wife has relationship-generated health needs over and above those of the husband.

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

[28] The husband's evidence was that he had paid for everything during the marriage. He stated that he had kept the wife and their son safe and that he had done without for their sake.

[29] There was no evidence offered to me that the contribution made by each of the parties to the welfare of the family was unequal. In *White v White* [2001] 1 AC 596 Lord Nicholls said :

> "But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): "the contributions which each … has made or is likely … to make to the *welfare of the f*amily, including any contribution by looking after the home or caring for the family" (Emphasis added). If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and

> built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.' "

Conduct

[30] Article 27 allows the court to take into account 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. Such conduct is often divided into three categories: marital conduct, financial conduct and litigation conduct. Both parties submitted that all categories of such conduct were present and I shall deal with each allegation in turn before setting out the law on the issue.

Wife's Allegations of Conduct

Matrimonial Conduct

[31] The wife submitted that the husband has been convicted of four criminal offences concerning the wife. These were :

a) Common assault contrary to section 42 of the Offences Act 1861
b) Breach of a non-molestation order
c) Breach of a non-molestation order
d) Pursuit of a course of conduct amounting to harassment.

The wife stated in her oral evidence that as a result of the assault she suffered bruises. The husband accused the wife of lying at his trial though he was not specific. The husband also submitted, correctly, that the offence of common assault is the least serious type of assault on the statute book.

[32] In respect of the harassment conviction counsel submitted into evidence a transcript of the Crown Court proceedings on 26 June 2016. In that transcript Judge Fowler is recorded as saying :

> "…this is a case in which the defendant comes before the court changed with harassing his ex-wife. The position is that he in many ways has been engaged in something of a psychologically disturbing tracking and harassment of his wife. One can readily see why after a number of years of marriage and commitment that there are difficulties that can arise in respect of one or other of the partners letting go, and realising and appreciating that the relationship is at an end. Unfortunately this defendant has taken it to a whole different level by placing a tracking device on his wife's car."

[33] In her oral evidence the wife explained the harassment that the husband had perpetrated. The husband used to ring their son and tell him what room he and his mother were currently in. On one occasion the husband rang the son and asked who had died because the wife had been at Roselawn Cemetery twice in a week. Then he told the son that his mother had spent the night in Portadown. The wife found the husband's harassment very upsetting. The outcome of the husband's behaviour is that the wife now feels that she is watching for people watching her. She feels very vulnerable and that she is not safe anywhere. She does not want to go out at night now unless she has another adult with her. Despite the benefit of giving her evidence by Skype, and despite the protection of the court from questions which would have been inappropriate, the cross examination of the wife by the husband clearly caused her considerable distress. At one point he accused her of having had an affair with a particular individual. She appeared genuinely shocked and appalled. At another point he accused her of having attempted to murder him by poisoning him. Again, she appeared shocked and appalled at the suggestion.

[34] The wife told Dr Best that she was first involved with mental health services in 2014. She had attended her GP and was put on an antidepressant. Initially her husband would not allow her to take this medication. She told Dr Best that her husband was very controlling. He always got his way. He gave the impression he involved her in decisions, but it became clear that he just wanted control. She said that her husband controlled her social life; he interfered with attempts to visit relatives.

[35] Certain aspects of the wife's evidence were difficult for me to assess in terms of her credibility. This was because of the approach by counsel asking her whether she wished to adopt the contents of her affidavits and of the statements attributed to her by Dr Best as her evidence before me, but then not leading her through that evidence in any detail. This approach, combined with a lack of rigorous cross examination by the husband meant that I often only had the words on the page to assess. By way of example, Dr Best records the wife as saying "He told my son and me that he would kill me and cut me in pieces and I will beg for mercy. He told James he would get me and nobody would find me." I was not able to reach a conclusion as to whether or not these words were, as a matter of fact, uttered by the husband. While the approach of the wife's counsel was understandable as an attempt to minimise the level of distress experienced by the wife, it is an example of how counsel appearing against a personal litigant may have to alter their normal approach in order to assist the court in its fact-finding task. A failure to do so may leave a court unable to be satisfied on the balance of probabilities that words were said or actions performed.

[36] The husband did, however, cross-examine the wife as to her health. He put it to her that she was lying when she stated she was ill. He suggested to her that she engaged in a full social life and did up to three hours of horse

riding when she went on "horse camps". She denied that this was the position and said that, while she did engage in horse riding, this would be limited to about three quarters of an hour.

[37] I was in no doubt however, given the written evidence of Dr Best, the oral evidence of the wife, and the cross examination of the wife by the husband, that the evidence of Dr Best that the wife has been the victim of domestic violence for over 20 years is correct.

[38] Dr Best's second report deals with the wife's capacity to hold down employment. He opined that the marital abuse she suffered has had a detrimental effect on her self-confidence and her mental well-being and has resulted in a persistent mental disorder. Once free of involvement with her husband Dr Best believes it will take a number of years free from contact before her self-confidence will improve. He expects it will take several years before her mental health will improve adequately to allow her to be usefully employed. There is no guarantee she will ever recover adequately to hold down useful employment.

Financial and Litigation Conduct

[39] The wife alleges that the husband has sought to conceal from the court funds and dissipate same. In connection with this the wife submits that the husband has invented a fabrication about having borrowed money from a paramilitary moneylender.

[40] Mr Martin cross examined the husband over the sum of approximately £60,000 which had over time been withdrawn from accounts. The husband then gave evidence that the money had been used to pay back loans from a money lender. Mr Martin put it to the husband that this account of money being paid back to a paramilitary money lender was simply a "fairy tale". The husband's account was utterly implausible. The husband described the loans as being at twice the bank interest rate, yet also stated that this was "cheap money". The loans allegedly commenced in 2001 but he stated that he only started repaying the capital in 2012. The husband said he viewed that as "clearing his overdraft". He denied that the money had in fact come from working on other people's cars, stating that he had only ever worked on his own car or on cars of family members. I found the husband's evidence on the issue of money lending and his income as evasive and viewed the husband's version of events as untruthful.

[41] The husband submitted an affidavit from the parties' son which stated that the son had arranged cash loans for his father from an unofficial money lender who was involved in a paramilitary group. (The husband was not prepared to name the individual concerned as naming him would endanger the son). The son stated in his affidavit that he did not have full details of the

monies borrowed. However his affidavit nevertheless goes on to refer to what the balance allegedly owed was at various times. The husband decided not to call the parties' son as a witness. Rule 2.64(5) of the Family Proceedings Rules (Northern Ireland) 1996 provides

> "At the hearing of an application for ancillary relief the Master shall, subject to rules 2.65 and 2.66, investigate the allegation made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined, and order the discovery and production of any document or require further affidavits."

Rule 2.64(5) therefore makes it clear that the primary method whereby evidence is admitted in ancillary relief proceedings is through oral testimony. However given the terms of that Rule and the provisions of Order 38 of the Rules of the Court of Judicature (Northern Ireland) 1980 I consider that I have the power to admit into evidence an affidavit without hearing from the witness who made it. Rule 2.64(5) also indicates that ancillary relief proceedings are not fully adversarial proceedings but rather require the Master to carry out an investigation. To that end the Master has the power to order the attendance of any person for the purpose of being examined or cross-examined. In the current case the husband has served an affidavit by the parties' son which provides supporting evidence for him but then declined to call the son as a witness. There was no indication given by the husband that the son was unwilling to attend and I was not asked by the husband to exercise my power to order the son to attend as a witness. The outcome of this is that the wife's counsel does not have any opportunity to cross-examine the son in respect of the contents of the affidavit which has been filed. Had the son given oral evidence it was clear that there would have been a robust cross-examination.

[42] To allow the evidence in the affidavit to be admitted in these circumstances, supporting the husband's version of events and denying the wife an opportunity to cross-examine the affidavit's maker, would have given the husband an unfair advantage over the wife and therefore I declined to take the affidavit evidence into account.

[43] The wife also sought the husband's failure to comply with an order for maintenance pending suit to be considered as conduct. On 20 May 2014 the court made an order that the husband should pay the sum of £500 per month as maintenance pending suit. The wife submitted that the husband had paid this sum for the first three months following the order but then paid nothing.

Husband's Allegations of Conduct

Matrimonial Conduct

[44] The husband gave evidence that the parties had entered into an agreement that they would have no children. He stated that the wife then broke that agreement by becoming pregnant with their son. The husband submitted that there had been a deliberate plan by the wife to get pregnant. He gave evidence that she was responsible for the contraception. The husband submitted that as a result of these facts he should get a greater portion of the matrimonial assets. I cannot accept this submission. Firstly, there was an absence of evidence that the pregnancy was deliberately planned rather than being an accidental pregnancy. Secondly, the issue arose for the first time during the husband's evidence in chief and had not been put to the wife in his cross-examination of her, thus depriving her of an opportunity to respond to it.

[45] The husband also asserted that the wife had tried to poison him in 2007. He asserted that foxglove and hemlock grew at their matrimonial home and that suddenly some of it had disappeared around a time that he suddenly became ill. On the day in question, the only food and drink he had consumed was a bacon butty, some orange juice, and a cup of tea. These had been prepared by his wife. However he conceded that the doctors had found no poison in his system after doing tests. Although the husband reported this matter to the police, the wife gave evidence that she had received a letter from the Public Prosecution Service that there would be no criminal proceedings taken in respect of the allegation.

[46] The husband also made a somewhat vague allegation during his evidence that the wife "swiped a knife at me during the menopause". However he was not stabbed on that occasion and did not attend either his GP or a hospital A&E.

Financial Conduct

[47] In terms of financial misconduct the husband asserted that there had always been money kept in an envelope in his gun locker, to which she had a key. The husband asserted that at any one time there would have been £5,000 or more in the gun locker. However the wife was in his view frivolous with her spending having, for example, spent money on "pub crawls" with her aunt. He stated that she would have taken money from the gun locker anytime she needed to purchase something from the saddlery. When asked how much money the wife had taken the husband said he did not know because he "never really kept a full count." The husband stated that he himself did not take money out of the gun locker but rather he withdrew money from the bank account.

[48] The husband also alleged that the wife had spent £50,000 which had been held in an ISA account. It was difficult to assess whether this allegation had any relevance. I was not referred to any ISA documentation, nor was the wife cross examined by the husband in respect of what the money had been spent on (assuming it had been spent by her) so that I could assess whether it was reasonable spending on their son, their home, and their horses or whether it was reckless frittering away of assets .

Litigation Conduct

[49] The husband also requested that litigation conduct by the wife be taken into account. Under this heading the husband asserted that his wife "could have come to the negotiating table", agreed to him having the matrimonial home and the money and in those circumstances he would have bought a house for her.

The Law on Conduct

[50] The concept of "conduct" is a broad one. It does not simply mean behaviour. As Charles J said in *J v J* [2009] EWHC 2654 (Fam) :

> " 'Conduct' is an ordinary English word and its meaning can extend to cover the application by the parties of the choices they made as to the way in which, and the principles by which, they ran their lives, and perhaps to the agreements and discussions that underlie those choices."

[51] The starting point for any consideration of marital 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."

[52] 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."

[53] I turn now to the particular authorities on marital conduct. 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. "

[54] 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".

Conclusions in relation to Conduct

[55] There is essentially a two-step process when the court is asked to consider conduct. Firstly, the court must consider whether the alleged conduct reaches the threshold of the statutory test. (It may be that the conduct alleged, even if accepted at its height, would not amount to conduct which is "obvious or gross". In some circumstances therefore a court may decline even to allow the evidence to be led. In other circumstances the court may have to hear the evidence in order to determine whether the allegations are sufficiently "obvious and gross" to qualify). If the first hurdle is surmounted then the party must surmount a second hurdle, namely whether the conduct which is being alleged has been proved on the balance of probabilities to have occurred as a matter of fact.

[56] In this case I am satisfied that the matrimonial conduct of the husband, as alleged by the wife, does reach the standard of the statutory test and has been proved on the balance of probabilities. By placing a tracking device on her car and following this up with telephone calls to show her that he knew where she was at any given time, he deliberately targeted her with psychological abuse which in the opinion of Dr Best has resulted in a "persistent mental disorder". I am also satisfied that the allegations by the wife of financial conduct or litigation conduct meet the high threshold of the statutory test. I consider that the version of events put forward by the husband in respect of paramilitary money lending as being a lie to conceal what was going on in respect of his finances. I conclude that it ought to be taken into account as litigation conduct which it would be inequitable to disregard.

[57] In terms of the conduct of the wife, as alleged by the husband, only one of the allegations is capable of meeting the statutory test. This is the allegation that that the husband had been poisoned by the wife. However in respect of this allegation, the husband did not produce sufficient evidence to satisfy me on the balance of probabilities that the wife had as a matter of fact attempted to poison him. In particular no toxins were found in his system when he was medically examined. I therefore decline to take into account the husband's conduct allegations.

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

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

Other matters taken into account

[59] Article 27 of the Matrimonial Causes (Northern Ireland) Order 1978 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. In this case there were no such matters.

WIFE'S SUBMISSIONS

[60] The principal issue in the application before me was how these assets should be divided between the parties. Counsel urged me to make a 75% - 25% split in favour of the wife. He also submits that I should make a Pension Sharing Order to equalise the parties' pensions. He further submitted that I should award the wife the full costs of the proceedings (which are estimated to be in the region of £65,000). In his view, the factors which lead to this being the correct decision are :

(i) The need to provide for an equal division of funds which the husband has concealed by falsely claiming that money has been being paid back to a paramilitary money lender.
(ii) In order to capitalise spousal maintenance.
(iii) In order to address the surplus of income which the husband had while breaching the order for Maintenance Pending Suit resulting in arrears of some £18,000.
(iv) In order to address the matrimonial conduct by the husband which has led to a chronic and continuing impact on the wife's health.

(v) In order to address the litigation misconduct in his failure to make full and true disclosure.

HUSBAND'S SUBMISSIONS

[61] The husband submitted that he should receive 100% of the value of the matrimonial home. In his view, the factors which lead to this being the correct decision are :

(i) The matrimonial assets which the wife has already taken.
(ii) The wife's conduct of not having made offers during the litigation, not having made full discovery and working while on state benefits.
(iii) Procuring a house valuation from a family friend.
(iv) Concealing the existence of shares.

CONCLUSION

[62] 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 both possible and, furthermore, is absolutely necessary for the mental and physical health of the wife.

[63] I conclude that in all the circumstances of this case which are outlined above, it is appropriate to divide matrimonial assets in terms of 75% to the wife and 25% to the husband. In terms of a Pension Sharing Order, I conclude that it is appropriate that there should be a Pension Sharing Order to equalise the value of their respective pensions.

[64] 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."

[65] 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.

[66] I do not consider that it is appropriate to make an order in favour of the wife's costs. It is not that she does not deserve such an order. Frankly, this is a very deserving application for costs. Had the matrimonial assets been more substantial, I would have made such an order. However, given that this is a clearly needs-based case, I must have regard to the fact that the husband does in fact also have the normal needs that all individuals have and that, after a long marriage deserves to get something in terms of a financial division in order to meet current and future needs.

[67] I therefore order that :

(i) the matrimonial home shall be sold and the net proceeds of sale shall be divided on a 75% - 25% basis in favour of the wife.
(ii) A pension sharing order will be made in favour of the wife in respect of 58% of the husband's Bombardier pension.
(iii) The contents of the matrimonial home should be divided equally between the parties by agreement.