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17/038488/01

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

L

Petitioner

and

L

Respondent

MASTER SWEENEY

Introduction

[1] The L family's ancillary relief case was listed before me for hearing on 15th June 2018, a Decree Nisi having been granted on 3rd May 2018 on cross decrees grounded on the fact that each party had behaved in such a way that the other could not reasonably be expected to live with them.

[2] On 15th June 2018 after progress made in negotiations, an adjournment was afforded until 21st September 2018 when the hearing commenced, continued on 12th October 2018 and comes before me for judgement today, 19th October 2018.

Background

[3] The Petitioner married the Respondent on 29th September 2006, though they had cohabited for a period before that, during which time their eldest son A was born. He is now aged 16 years. The parties went on to have two more children B, now aged 10 years and C, now aged 8 years.

[4] The parties separated in or about July 2016, lived in challenging circumstances under the same roof for some time after the marriage broke down

until finally Mr L was caused to leave the former matrimonial home in or about December 2017.

[5] The breakdown of their marriage has been acrimonious. The parties make allegation and counter allegation against each other and this pattern continued during their evidence to the court. Contested non molestation and occupation proceedings took place following the breakdown of the marriage and ultimately resolved on the basis of undertakings by the Respondent. Contested divorce proceedings were resolved on the basis of cross decrees grounded on acceptance that each had behaved in a way that one could not reasonably be expected to live with the other. Their differences are irreconcilable. They need to be enabled to move forward.

[6] Despite their unhappily evident ill feeling towards and distrust of each other, the parties' ancillary relief case was not wholly without hope. Ultimately the parties were able to resolve their Divorce and the Domestic Proceedings Court applications. More importantly they appear to have agreed post separation that the children of the family would live with their mother and they would enjoy contact with their father.

[7] While expressing his belief that he should have been allowed to remain in the former matrimonial home for reasons which I will later refer to, the Respondent did not seem to anticipate any situation other than the children residing with their mother. Thus the Respondent, when proposing the Petitioner move to other accommodation owned by the parties, suggested undertaking works to create a fourth bedroom which the Petitioner said she needed. Contact in the main has been regular and unproblematic. This did not surprise me because, despite having different perspectives, the parties' love for their children appeared obvious.

[8] In relation to this ancillary relief case too there is a commendable amount of agreement.

[9] The Petitioner's income mainly comprises government benefits and child maintenance, calculated by the Petitioner as being £1972.83 monthly and by the Respondent as being £1971.00 monthly. The Respondent also refers to the Petitioner operating from home a small business called "C… C… and K….". The Petitioner considers this more of a hobby than a revenue stream.

Income and assets

[10] The Respondent is a self-employed Plumber and Bathroom Installer. He describes pre-tax profits of £15,108 in 2014 which had risen to £22,070 in 2017. The Petitioner describes the Respondent's 2017 net profit as being £23,270.

[11] There are three relevant properties all of which are held in the sole name of the Respondent:

(a) The former matrimonial home in Coagh was built on family land gifted to the Respondent by his parents in 1997. The five bedroomed property is currently occupied by the Petitioner and children of the family. The property is free from mortgage and has an agreed value of £175,000.

(b) A property in Ballyronan, purchased by the Respondent in 2004. The Petitioner's Valuer, Mid Ulster Properties valued the property at £90,000. The Respondent's Valuer, Paul Quinn Estate Agents, valued the property at £85,000. The parties agreed to split the difference and allowing for the outstanding mortgage, there is equity, of approximately £49,500.

(c) A property in Stewartstown, purchased in 2015. The Petitioner's Valuer, Mid Ulster Properties valued the property at £65,000. The Respondent's Valuer, Paul Quinn Estate Agents, valued the property at £70,000. The parties again have agreed to split the difference between the two valuations so there is equity, of approximately £67,500.

[12] The Petitioner initially claimed a 70% interest in the former matrimonial home and a 50% interest in each of the remaining two properties. The Respondent initially said the Petitioner had a 60% interest in the former matrimonial home and a 50% interest in the remaining two properties.

[13] On the day that the case was first listed for hearing, the parties agreed that by way of clean break of their respective ancillary relief claims against each other and taking account of all those matters to which regard should be had under Article 27 of the Matrimonial Causes (Northern Ireland) 1978 as amended:

> "The Petitioner was entitled an interest representing two thirds, the Respondent to an interest representing one third of the equity in the former matrimonial home and that each party was entitled to a 50% interest of the remaining two properties. On that day the Respondent said he could raise a lump sum equal to the amount due to the Petitioner. He said he could raise £180,000. Otherwise each party would retain all other assets held by them."

[14] If the Petitioner were to receive two thirds of the equity in the former matrimonial home and 50% of the equity in the other two properties, she would receive the amounts of £116,666 + £24,975 + £33,750 being a total sum of £175,391 which approximately equates to the value of the former matrimonial home.

The issue

[15] However, the parties were unable to reach agreement about one particular matter. In giving effect to the agreed division of assets, both wanted to retain the

former matrimonial home as their own. This in essence became the issue in dispute between the parties.

[16] In a situation where the Husband could raise the lump sum necessary to discharge the full value of the Wife's agreed Ancillary Relief interest without having to sell the property, without reference to sale costs or tax liabilities and obviating the need for the Wife to live in such close proximity to the Husband's family, this may appear to be a plausible solution.

[17] The former matrimonial home was built on land owned by the Respondent's parents and before them, Mrs L senior's family. The Petitioner says she bears no ill will towards the Respondent's family but with the exception of one of the Respondent's sisters, R, the relationship with Mr L's family, though not obviously hostile does not appear to be a close one. From both parties' accounts the Respondent's father presents as a quiet, cordial, measured man. The Petitioner under cross examination accepted that though it is the neighbouring property she had not visited the L parental home at all this year and if she visited the property last year, it would only have been in relation to the children.

[18] The Petitioner's own family live some distance away with her parents, with whom the Petitioner seems to enjoy a close relationship, residing in Maghera and the Petitioner's brothers living in Draperstown. Given the said background facts, in June 2018 the case was adjourned so that the Petitioner would be enabled to consider her position including whether other suitable property was available for purchase.

[19] In addition, the Petitioner was not convinced that the Respondent's proposal about raising the lump sum was not just an idle promise. Therefore, the Respondent wanted the opportunity to formally seek a mortgage on a without prejudice basis.

[20] When the parties returned after the summer the Respondent confirmed his ability to raise the proposed lump sum within a set time. However, the parties could not reach agreement. In essence, both were fixed on their wish to retain the former matrimonial home.

Preliminary Application

[21] On the morning of the hearing on 21st September 2018, Ms. O'Kane BL on behalf of the Petitioner sought to introduce an affidavit sworn by the Respondent's sister who was not present at court. Ms. Brown BL on behalf of the Respondent objected to the introduction of the affidavit on the grounds of its lateness and the fact that the deponent was not present to give evidence or subject herself to cross examination. Although it may have been possible for the said deponent to make herself available on a later date, I acceded to Ms. Brown BL's objection.

[22] Whilst having no wish to unreasonably fetter the evidence which a party wishes to introduce, it was accepted that this was a sister who did not have a good

relationship with the Respondent and if her evidence was introduced I would be asked to allow evidence from the Respondent's other family members so that the family would be pitted against each other in a way which I did not consider helpful or proportionate or even necessary.

[23] The fact that the Petitioner had developed a close relationship with the Respondent's said sister, who lived in a rented property proximate to the former matrimonial home, was not in dispute. Neither was it in dispute that the children attended the same schools and the older children used the same school bus. The extent of the closeness of the children was disputed. Calling a range of family members to support one or other account did not serve to advance the case either way.

The Hearing

[24] Following the breakdown of their marriage, giving first consideration to the best interests of their children, parents will often seek a resolution which enables children to remain in their home. In this case, the Petitioner was adamant that the children A, B and C should not have to leave their home.

[25] Both parties gave evidence that B had autism and the Petitioner was keen to impress that routine was very important for him. The Petitioner relied on and the Respondent took issue with letters from Dr W. dated 12th October 2017 and from Ms. Flemming (Autism Intervention officer) and Ms. Harpur (Assistant Advisory Officer) dated 13th October 2017 secured and filed by the Petitioner in relation to B. The Respondent felt Dr W. in particular did not know B and he felt B was brought to the surgery to secure a self-serving report. Dr W. noted in her letter that when she asked B if he would feel excited or annoyed if they were to move to another house he immediately said he would be annoyed and that he "was quite adamant about this".

[26] None of the authors of the said letters were present to give evidence or be cross examined and I weigh that in the balance. I note too that at no stage during the hearing did either party suggest that any of the children would be excited about having to move home.

[27] The Petitioner has the primary care of B. The Respondent said that before the separation he would have been the one to rise in the night to attend to B's needs. This account was not challenged. However, it is clear that the Petitioner had the main parenting role during the marriage. She gave up working outside the home before B was born to devote herself to the parties' home and children.

[28] The Petitioner gave evidence about the challenges experienced as a result of B's autism. B's condition did not become particularly apparent until he was a toddler and C was born. B attends the local primary school. Although B is in main stream education, he has a special educational needs statement and is supported. The Petitioner recounted that B met the criteria for attending a specialist unit but she was

keen that he derived the benefit of attending the local school which had a small intake and where B's older brother A and friends were pupils.

[29] A is no longer a pupil there. Instead, the Petitioner now takes B and C to the said primary school. The Petitioner said that B is not meeting his educational targets and that although he shares a class with his age group, he is doing the work of a Primary 3 pupil.

[30] The Respondent felt that B was doing well and was improving. He said that there had been difficulties but when he attended a recent meeting at the school with the Headmaster and Educational Psychologist he found that they were "very happy" with B's progress.

[31] When asked in examination in chief about the impact on B if he had to leave his home, the Petitioner responded that she felt it would be "really traumatic for all of" the children. The Petitioner said she has had to prepare the children for changes in the family. In relation to a possible move the Petitioner said she was not dealing with it alone but instead she was "relaying to all the children and dealing with how they deal with it". I am not convinced that the Petitioner's involvement of the children in this way has been particularly helpful.

[32] The Petitioner gave evidence that if she goes away B has only ever stayed with her parents. She said that B is "up with my mum and dad, if not every weekend, every other weekend". The Petitioner was clearly not including the Respondent in the said description of events as it is accepted that since the separation B and the other children have gone away on holiday with their father to Donegal, Galway and Derry. Moreover, the Petitioner confirmed she would not have an issue with the children of the family staying with their father. However, the Petitioner would not agree to the Respondent taking the children on holiday to Majorca saying she felt he could not cope.

[33] When the Petitioner gave her evidence in September 2018 the Respondent had not enjoyed contact with A after an unhelpful text exchange between A and his father in August 2018. Happily, in the intervening period before the Respondent came to give his evidence, overnight contact had taken place between A and his father which appeared to be positive. I would hope that the parties can build upon this in the future.

[34] The Respondent is currently living in his parent's home and in the context of the needs created by his mother's medical condition, says that there is no accommodation for the children. He gave evidence that the property is a four bedroomed property with the Respondent's mother and father occupying separate bedrooms, the Respondent occupying a third bedroom and the Respondent stated that a fourth bedroom had been converted to a television room for those caring for his mother. It is for the Respondent to find a workable solution which would enable overnight contact to take place.

[35] Addressing what she believed would be the effects of the children having to move from the former matrimonial home, the Petitioner said she thought a move would adversely impact on B's behaviour at school.

[36] The Respondent was less pessimistic. He felt that B knows the days he will be with his father and asks where they are going. He said B "goes with the flow". The Respondent felt C was more likely to raise an issue about where they might be going.

[37] In relation to C, the Petitioner said that recently C has "opened up" , that C does not want to leave and she has said this.

[38] Having heard from both parties, it certainly appeared that it was the parties' eldest son A who was most resistant to having to leave his home. I was shown some very critical text messages sent by A who is now aged 16 years, to his father. The Petitioner relates the timing of the text messages to the Valuer attending the property. In those messages A asked why his father "could not accept what you are doing". His father responded by saying it was time they both talked and A was told "some truths". A then queried why his father felt he needed "to live in a five-bedroom house and see 3 children, one with special needs away" The Respondent felt A's texts were influenced by the Petitioner. Whilst I found that the Petitioner remained quite fixed on remaining in the former matrimonial home, made no real effort to identify alternative accommodation and did not appear to make any effort to discuss a possible move in a positive light, I still formed the view that the text messages were composed by A who has a deeply held view that it is unfair if the Petitioner and children are required to leave their home.

[39] It is clear that the Petitioner is not well motivated towards the Respondent. The accounts of the burning of the Respondent's relatively new van were concerning, if not probative. There was a suggestion that a photograph taken by the Respondent of A while on holiday should be interpreted as A being sad. I was unable to draw such a conclusion. There was an unhelpful and unproductive evidential analysis about whether the Respondent was first responder or not on his mother's personal alarm facility. Moreover, the Petitioner alleged the Respondent had installed new cameras at the garage of the former matrimonial home to spy on her and the children. A in text messages to his father seemed to make a similar accusation in relation to the timing and purpose of the cameras. However, a report commissioned by both parties tended more to the Respondent's account that the cameras were not installed recently as suggested by the Petitioner but instead had been installed earlier for security reasons.

[40] For the sake of completeness, it is perhaps worth noting that the Respondent admits to placing a tracking device, after the separation, on the car driven by the Petitioner. I found the Respondent's reasons implausible and such conduct may

provide some explanation for the Petitioner not being well disposed towards the Respondent.

[41] The Respondent alleged the Petitioner told him she could not "wait until the Judge gives me this fxxxin home til I sell it". The Petitioner denied this. I weigh the alleged taunt in the context of the Petitioner's account under oath that it never entered her head to sell the former matrimonial home and in her evidence she further emphasised the importance of the location of her friends and community, of B and C's small school and the fact that they "look out for B too".

[42] The Petitioner was asked about Mr L senior visiting the Petitioner. The visit was in the context of the parties' separation. Mr L senior apparently sought reassurance about the formal granting of an easement in relation to access to his lands through the gate at the former matrimonial home which was erected for that purpose. Mrs L at one stage of her evidence said she could not agree to an easement because "it would depreciate the value of the house".

[43] However, in contrast, she also said that she would never stop Mr L senior from entering through the gateway. It was further repeatedly stated on behalf of the Petitioner that the Petitioner had no difficulty granting an easement to Mr L, Senior. When I sought clarification, I consider it important, that in response to a direct question about the matter at the end of the hearing, it was made very clear to the court that, provided that the former matrimonial home was transferred to the Petitioner, she would agree to an easement being created in favour of the Respondent's father so that he could access his fields through the aforesaid gate at the former matrimonial home.

[44] Therefore, having heard all the evidence, I could not conclude that the Petitioner's desire to remain in the former matrimonial home is solely motivated by the desire to hurt and have an advantage over the Respondent, as the Respondent seemed to believe. Instead, I conclude the Petitioner genuinely does believe that it is in the children's best interests to remain living in their home. In relation to A, he is close to his friends and his Gaeilge club. The Petitioner said that at the suggestion that he would have to move home, A was "angry or worse, reclusive".

[45] As for B, he is settled in his small local school and both parties readily acknowledge that he derives a particular benefit from the facility of the garden at the former matrimonial home. It is true that some of the other properties for sale in the general locality have a garden but none appear to be the match of the gardens at the former matrimonial home.

[46] In addition, the children's home is close to a property rented by the Petitioner's sister R. The parties have different views about how friendly the children are with each other. However, the children are cousins and of similar ages. Moreover, it is seems to be agreed that the Petitioner and Respondent's sister have become closer since the separation and the said sister is a support to the Petitioner.

[47] In support of his claim that he should be enabled to live in the former matrimonial home, the Respondent relies on three main submissions namely that:

(a) The former matrimonial home in his name was built on land owned by his parents, gifted to him and in respect of which he undertook much of the building work himself. The Respondent also points out that the property is next to his parent's home and land. The Respondent said when the land was gifted to him "Daddy asked me to put on a gate so that he could access that field". The Respondent said that his father would have accessed his land through the gateway during winter months. The former matrimonial home is also close to his sister T's home which was built on a site on the far side of the Respondent's parental home.

(b) The Respondent's business is based at the former matrimonial home. To that end a garage was built to store the Respondent's business materials. There was room for accommodation upstairs which the Respondent intended to use to create an office and store accounts although this plan did not come to fruition. Driveway and pathways were created to make particular allowance for vans accessing the garage not to have to turn. Diesel tanks were installed to store diesel and beneath a facility to store and divide materials. Given the stated importance of the garage to the Respondent's business the Respondent explored whether the garage could be partitioned from the house. Despite the Petitioner's reservations about the negative impact of the physical structure of any partition so close to the home, the Respondent believed partition was an achievable option. I share the Petitioner's reservations.

(c) The Respondent is able to raise a lump sum equal to the value of the Petitioner's entitlement which would enable the Petitioner to purchase a suitable home elsewhere.

[48] It is perhaps worthy of note that the Respondent made no effort whatsoever to deny or disguise his clearly held view that the former matrimonial home belongs to him and by extension, the children. He recognises the Petitioner's need to be rehoused and his responsibility to enable that. However, he has no acceptance of the Petitioner sharing ownership and entitlement to what had been their home.

[49] Given that the Petitioner is no longer living with the Respondent, he cannot see any good or justifiable reason for the Petitioner wanting to remain in the property which he believes was built on his family land and remained L property. The marriage having ended, the Respondent believes the Petitioner will sell the property, probably to a neighbour who he believes would be interested in buying and for a price which the Respondent believes he could not meet. The Respondent did not dwell on the children's wish to remain in their home. They also are Ls living on L land. Yet, from the time when it was apparent that the marriage had irretrievably broken down, the Respondent anticipated the Petitioner and the

children of the family would leave and he appears to believe that he was addressing the interests of the children by agreeing to build a fourth bedroom in the roof space of one of the other properties also held in the name of the Respondent. This did not appear to be a suitable option given its proximity to the road and its lack of a garden amenity.

[50] When asked in examination and cross examination about the impact on the children of having to leave their home the Respondent held the clear view that the parties were separated now and "everyone is going to have to adapt". In relation to B, he felt Ms. Flemming would be able to help the parties address any issues arising and the Respondent felt that B and the other children would need to have the situation explained in the right manner. He felt this had not happened.

[51] In the case of Azizi v Reza Aghaty [2016] EWHC 110 (Fam) Mr Justice Holman reflected:

> "Where the matrimonial home is in the joint names of the parties, some, justification is normally required before it is transferred into the name of one party solely. That justification may often, of course, lie in needs. For instance, a property may be transferred from joint names into the sole name of one of the parties if that party is living in the property as his or her home with the child or children of the family."

[52] In hearing the evidence of the parties I concluded that the Respondent did not fully appreciate that while he may have worked hard, financed and built the former matrimonial home and financed the purchase of the other two properties, the Petitioner also made a valuable contribution to their household in managing their home and devoting herself to the care of their children.

[53] In describing the value which ought to attach to such contribution, Butler-Sloss LJ perhaps best described it in the case of Dart v Dart [1996] 2FLR 286 when she said:

> "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. ……. 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 contribution which each has made or is likely . . . to make to the welfare of the family, including any contribution by looking after the home or caring for the family.' 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."

Conclusion

[54] It may appear an obvious solution that the Petitioner take the Respondent's proposed lump sum which equates to the Petitioner's agreed interest and purchases another home in the same locality or close to her parents. However, every single case is fact specific.

[55] As Lord Nicholls of Birkenhead put it in the case of White v White [2000] UKHL 54:

> "More realistically, the outcome ought to be as fair as is possible in all the circumstances. But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder."

[56] In this case, having heard all the evidence, I do not find that the Respondent's proposal that he pay the Petitioner a lump sum and that the Petitioner and the children vacate their home is the correct resolution.

[57] The Petitioner wishes to maintain the family home for the children. I accept that she is concerned for A who is obviously angry about the suggestion that he and his siblings move from their home. I accept that this is an important year in his education. I accept that B, as a result of his autism, would find a move particularly unsettling. Notwithstanding the progress which B has made, under cross examination the Respondent accepted that B is dependent on his mother. The Respondent accepted that he and the Petitioner will need to work with and for B in the years to come. I find that unlike A and B, C would find a move less problematic.

[58] In the case of Tweed v Tweed [2017] NIFam 11, Madame Justice McBride said:

> "The central question in this appeal is whether the court should award the wife a lump sum representing the

> value of the house and lands instead of a physical transfer of the house and lands. This is a matter which all the parties agreed falls within the discretion of the court".

[59] Article 27(1) of the Matrimonial Causes (Northern Ireland) Order 1978, as amended states:

> "It shall be the duty of the court in deciding whether to exercise its powers under [Article 25 or Article 26 or Article 26A] and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of 18."

[60] It is when giving first consideration to the welfare of the children that often parents and courts will try to find a resolution which obviates the need for children to move from their home. Sometimes the lack of available resources prevents such optimal outcome. In this case resources are not the problem.

[61] I take account of the following:

(a) The former matrimonial home though built on L land was built as a family home of the parties and their children.

(b) In support of the Petitioner's account that she has no wish to sell the children's home the Petitioner has agreed to grant an easement to Mr L senior to acknowledge his entitlement to access his fields through the gate at the former matrimonial home.

(c) In remaining in their home, the children of the family will remain living in close proximity to their paternal grandparents and their father who is living with his parents, to their cousins and their community.

(d) The proximity to their father ought to make contact easier.

(e) Hearing the Respondent's own account of materials, vehicles, machinery and equipment related to his business causes me to expect that the Respondent will be able to absorb the short term inconvenience of relocating from the garage at the former matrimonial home and to enjoy the long term benefit of retaining his business for himself.

[62] Accordingly, upon the Petitioner creating an easement in favour of Mr L senior so as to afford him access to and from his fields through the gate at the former matrimonial home, in clean break settlement of all the parties financial and ancillary relief claims against each other in life and in death, the former matrimonial home shall be transferred to the Petitioner.

[63] Following a similar course to Madame Justice McBride in the aforementioned case of Tweed v Tweed I make the transfer subject to the Respondent having a first option to buy the house, at market value, in the event that it is sold and provided that the Respondent's offer is not less than £180,000. The Respondent shall retain as his own the equity in the properties at Ballyronan, and, Stewartstown, and shall remove and retain as his own all the contents of and materials, vehicles and equipment related to his Plumbing and Bathroom Installation business located in and around the garage at the said former matrimonial home.

[64] In relation to costs, having heard the respective submissions of counsel for the parties, I make no Order as to costs between the parties.

[65] I extend the time for appeal by 3 weeks.