Master 65

Ref:

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

Delivered: **04/03/09**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

M

Petitioner;

and

M

Respondent.

(CHILD MAINTENANCE)

<u>Master Bell</u>

[1] This matter concerns an application by the Petitioner (to whom, for ease of reference, I shall refer to as "the wife") for ancillary relief made pursuant to a Summons dated 15 April 2008 and an application by her dated 25 February 2007 to have a matrimonial agreement made an Order of Court

[2] At the hearing of this matter the wife was represented by Mr Brendan Devlin instructed by Martin, King, French and Ingram solicitors. The wife gave sworn oral evidence during which she adopted the contents of her affidavit sworn on 15 April 2008 as her evidence to the court. As it appeared that her current financial position was different from that set out in her affidavit, I granted the wife leave to file a further affidavit and she subsequently filed an affidavit sworn on 23 February 2009. It is, however, regrettable that this affidavit had to be sought by the court rather than offered in response to the continuing duty to make full and frank discovery. Mrs Jenny Dunlop of Martin, King, French and Ingram solicitors also gave sworn

oral evidence. In addition, counsel advanced his client's case by means of oral submissions and a paginated trial bundle of relevant documents was helpfully lodged by the wife's solicitors.

[3] The Respondent (to whom, for ease of reference, I shall refer to as "the husband") did not appear and was not represented. The husband had also not appeared or been represented at any of the previous six listings of this matter. He had, however, been represented by Francis Hanna solicitors and by Miss Jennings in recent Children Order proceedings before Master Wells.

[4] The husband had communicated in writing with the Matrimonial Office on a number of occasions in connection with this matter, for example providing bank statements and making representations in an unsworn form.

[5] I concluded that the husband was clearly aware of the proceedings and of the date of the final hearing. In his most recent correspondence he indicated that he understood the matter was to be dealt with on the date in question but would be unable to attend as he would be in a certain Middle Eastern country. He provided a telephone number to the court but indicated that he could not confirm that he would be available on the telephone on that date, though he would endeavour to be available. I did not consider it appropriate to conduct the final hearing of this matter by telephone conference.

[6] Taking all the circumstances into consideration and in particular:-

(i) that the husband had arranged for representation in the recent Children Order proceedings;

(ii) that the husband had not, however, appeared or been represented at any of the previous six listings of the ancillary relief proceedings; and

(iii) that he had not sought an adjournment to allow him to be present

I concluded that it was appropriate to conduct the final hearing in his absence.

THE HISTORY OF THE MARRIAGE

[7] The parties were married on 19 December 1995. They separated in 2005 and a decree nisi was granted on 13 February 2008. There are two children of the marriage who are aged 10 and 12. Following their separation the parties entered into a matrimonial agreement on 10 March 2006 (hereafter referred to as "the matrimonial agreement"). The husband currently lives in a

Middle Eastern country where he works as a pilot with the rank of captain. The wife lives in Northern Ireland with a new partner.

WIFE'S SUBMISSIONS

[8] Although the wife's ancillary relief summons originally sought various forms of relief including a periodical payments order and a pension sharing order, her position at the hearing was that she sought an award for child maintenance only. She therefore sought an order under Article 25(1)(d) of the Matrimonial Causes Order (Northern Ireland) 1978. This raised an issue of jurisdiction. The principal legislation dealing with child maintenance is the Child Support (Northern Ireland) Order 1991. As Bird's "Ancillary Relief Handbook" (6th Edition) observes in relation to the equivalent legislation in England and Wales, one of the features of the legislation is that the jurisdiction of the court is replaced by that of the Child Maintenance and Enforcement Division of the Department for Social Development (which replaced the Northern Ireland Child Support Agency on 1 April 2008). Nevertheless the court's powers to make an order remain intact, by virtue of the provisions of Articles 10 and 41 of the 1991 Order, where a party is not habitually resident in the United Kingdom. However the Department retains jurisdiction (and hence the court has no jurisdiction) in respect of non-resident parents who fall within Article 41(2A) of the 1991 Order. One of these categories is a parent who is :

> "a member of the naval, military or air forces of the Crown, including any person employed by an association established for the purposes of part XI of the Reserve Forces Act 1996"

The husband is a part time member of HM Naval Reserve. Mr Devlin submitted that, while it might appear at first sight that it was the Department and not the court which had jurisdiction in respect of the husband, this was not the correct position. He submitted that it was clearly the intention of Parliament that the amendments were designed to cover those parents who were not habitually resident in the UK but who were working abroad as members of HM Forces. He argued that the husband worked in a Middle Eastern country as a pilot for a private company. Had he been serving in that Middle Eastern country as an officer in the Royal Navy then he would fall within the Article 41(2A) exception. Mr Devlin offered as support for his contention the material in paragraph B2[40] of Duckworth's Matrimonial Property and Finance which, in dealing with the equivalent English provisions, states that the provisions "apply to people on overseas tours of duty". This view is supported also by the Explanatory Notes to the Child Support, Pensions And Social Security Act 2000 which states at paragraph 265 that the amendment has the effect that "certain non-resident parents who are employed abroad will be required to pay child support for their children who live in the United Kingdom" and paragraph 267 which states that the Child

Support Agency will have jurisdiction to calculate and collect maintenance in respect of "people employed abroad … in the armed services." I am persuaded that this is a correct interpretation of Article 41(2A) of the 1991 Order, that the husband does not fall within the exception, and that the court therefore has jurisdiction to consider an application under Article 25(1)(d) of the Matrimonial Causes Order (Northern Ireland) 1978.

[9] The wife invited the court to make an order in the amount of £500 per month in respect of each of the children. This was, she submitted, the amount which the husband had agreed to in the matrimonial agreement.

THE HUSBAND'S SUBMISSIONS

[10] In the light of the husband's non-attendance and failure to instruct legal representatives, I had no submissions made on his behalf. The general provision under Rule 2.40 of the Family Proceedings Rules (Northern Ireland) 1996 is that facts to be proved shall be proved by the examination of witnesses orally. Rule 2.41 then provides that in certain circumstances facts may be proved by affidavit. The husband submitted an undated statement to the court which was signed by him and which purported to be sworn, but which was not done so before any third party, whether entitled to administer oaths or otherwise. I was therefore unable to take any account of its contents as evidence on the husband's behalf. The wife's evidence on all points was therefore uncontested, as were the arguments advanced by Mr Devlin on her behalf.

THE PREVIOUS MAINTENANCE ARRANGEMENTS

[11] The matrimonial agreement originally provided that the husband would pay to the wife the sum of £1000 per month (being £500 per month per child) for the children's maintenance. Such payments were to remain in force until the children completed full time education up to primary degree level (if applicable) and to be index linked.

[12] Within two months of the matrimonial agreement, however, the husband ceased to make the agreed maintenance payments. The wife referred the matter to the Northern Ireland Child Support Agency which subsequently made an assessment in the amount of £960 per month. The husband then applied for a variation reduction and the assessment was reduced to £744 per month. The wife gave evidence that a significant factor taken into account when reducing the maintenance was that the husband, being the non-resident parent, had the children for 52 nights per year and hence was entitled to a one-seventh decrease. The wife gave evidence that the husband discharged these payments until March 2008 when the Northern Ireland Child Support Agency advised her it no longer had jurisdiction as the husband was no longer habitually resident in the United Kingdom.

[13] In two emails to Mrs Dunlop the husband set out his position in relation to the child maintenance. The first, dated 16 May 2008, states:

> "Whereas I am not unwilling to pay maintenance for my children this will be a private matter between myself and your client and when she co-operates fully with access to the children".

In a further email dated 12 June 2008 he stated:

> "There is no legal standing for me to pay maintenance, ask the CSA.
>
> I am willing to pay a fair amount to the upkeep of my children and that will be a private agreement between me and her. But while your client continues to attack my pension funds outside our agreement, after her fantastic divorce settlement which was achieved by her lies and mis-truths and whilst she continues to attempt to harass my access to the children there will be no such agreement".

THE ARTICLE 27(3) FACTORS

[14] Article 27(1) of the 1978 Order provides that it shall be the duty of the court in deciding whether to exercise its powers under Article 25 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.

[15] Article 27(3) of the 1978 Order provides that as regards the exercise of the powers under Article 25(1)(d) in relation to a child of the family the court shall have regard in particular to the factors set out in Article 27(3)(a) to (e). I now consider those factors in turn.

<u>The Welfare and Financial Needs of the Children</u>

[16] Welfare is a broader concept than the meeting of financial need and will usually be taken to include emotional, social and other aspects of wellbeing but, in context of a child maintenance application, there is a large overlap between the two concepts. In seeking to ensure the welfare of the children, regard must be had as to whether their financial needs are being met. In her first affidavit the wife states that her monthly income is £1187 per month. She states her expenditure to be £2,054 per month. She offered no

particular evidence that the financial needs of the children were unusual in any respect. Even in light of the updated financial information, it would appear likely that there is a strain on the wife's finances.

Income, Earning Capacity, Property And Resources of the Children

[17] No evidence was offered as to whether the children had any income or property in their names.

Physical and Mental Disabilities of the Children

[18] The wife's affidavit states that the children are in good health.

Manner and Expected Manner of Education

[19] The children are of school age. No evidence was offered as to their having particular needs in respect of their education.

Income and Earning Capacity

[20] This is the factor in respect of which there had been the greatest conflict between the parties.

[21] The wife set out in her first affidavit that she received Incapacity Benefit, Disability Living Allowance, Child Benefit and a pension. These totalled £1187 per month. She gave oral evidence that this remained her level of income. In her supplementary affidavit she deposes that her and her partner's salaries are not mixed in a joint account but that he makes a contribution to paying for food, clothing and gifts for the children, and for fuel for the car. She does not quantify the level of this assistance.

[22] The central issue related to the husband's earnings. It was submitted on behalf of the wife that he was attempting to conceal his true level of income. The husband had submitted documents direct to the Matrimonial Office. These included a letter dated 30 August 2008 to which were attached a number of bank statements in respect of his Barclays Bank account. These had been annotated by him.

[23] The husband has three sources of income. Firstly, income from his employment as an airline pilot. Secondly, income from his service as a member of HM Naval Reserve. Thirdly, rental income from a property he owns in England. The wife raises no issues in respect of the husband's second and third sources of income.

[24] At one stage his pilot's income came from employment with Easyjet. The wife produced in evidence a copy of an email dated 2 October 2006 from

the husband in which he stated that this salary had increased to £77,481.60. However in February 2008 he ceased to be employed by Easyjet and moved to a Middle Eastern country. The wife gave evidence that the husband claimed that this change was so as to reduce lifestyle pressures. Her evidence was that she rejected his claims that he was now working part time and had made this change for health and lifestyle reasons.

[25] In his undated statement submitted to the court, the husband stated that he had taken up new employment in a Middle Eastern country. He stated that he received his earnings tax free but that they were considerably less than he received after tax in the UK and amounted to approximately £1900 per month. The identity of the husband's new employer was not entirely clear from the evidence. The emails admitted into evidence show that the husband is in charge of flights for "V.V.I.P's" and the wife gave oral evidence in respect of the inferences she drew from this. An email dated 21 May 2008 from the husband confirmed this type of employment :-

> "I reiterate, I have a confidentiality clause and therefore am unable to provide any details. If you wish to pursue that further you may do so with the [name of country deleted] Embassy, but I can guarantee you will not get very far as the movements and security of their V.V.I.P's take priority over a greedy ex wife. I will however ask my employer if they are willing to allow access to my contract and if they agree will pass this on".

[26] The husband marked particular deposits on his Barclays Bank statements and annotated one deposit as being his salary for March and April; another as being his salary for May and a third as being his salary for June and July. In respect of the first of these, the explanatory details on the statement corresponding to that deposit include a name and the letters "TFR". In respect of the second, the explanatory details on the statement corresponding to that deposit include the husband's Naval Reserve reference number. In respect of the third, the explanatory details on the statement corresponding to that deposit include the same name and certain code letters.

[27] In respect of the first deposit the wife gave oral evidence that she inferred that the deposit was not a direct lodgement to her husband's account from his employer but rather represented a transfer from another account held by her husband in his name. She compared this deposit with salary deposits when he worked at Easyjet where the deposit maker was identified in the explanatory details as "Easyjet Airline Co." In respect of the second deposit she that it was clearly a payment in respect of his Naval Reserve duties and not a salary payment in respect of his employment as a pilot.

[28] In respect of the third deposit, the wife gave oral evidence that she had googled the code letters and her internet search had revealed that the term is the Swiftcode for a particular bank branch in a Middle Eastern country . A Swiftcode is a unique clarification code of a particular bank and is created by the Society for Worldwide Interbank Financial Telecommunications. Such codes are used for international wire transfers between banks. She offered in evidence a printout from an HSBC website showing this to be the position.

[29] Mrs Dunlop gave oral evidence that she had received an email from the husband dated 2 February 2009 in relation to this account in which he stated

> "[this] is NOT an offshore (to my knowledge), account, it is where my employer pays me from… probably one of his accounts. Once again I can't provide you with someone else's accounts."

[30] The wife gave oral evidence that she inferred that the husband's salary was paid into an offshore bank account held in his name, the details of which the husband had not provided in discovery, and that he then transferred lesser amounts from the offshore account into his Barclay's account, attempting to represent these as his full earnings.

[31] Mrs Dunlop gave evidence that the husband had stated in an email dated 12 June 2008 that his earnings were the equivalent of £1,900) per month. He also stated that he did not receive any payslips and that his employer paid his salary directly into his account. In an email to Mrs Dunlop dated 10 December 2008 the husband made the point that V.V.I.P. flights may be prestigious but did not normally attract a higher salary. In fact, because they were a status symbol in the Middle East, they normally attracted less of a salary. I did not find this explanation persuasive.

[32] The wife gave oral evidence that the husband's known expenditure levels were consistent with a higher income and inconsistent with his claims of a lower income. For example, she calculated from his Barclay's Bank statements that his expenditure during April 2008 amounted to £9,600. The wife also offered in evidence printouts from the husband's Facebook page. His entries on the social networking site indicated that he had been holidaying in Spain, Poland, and Jordan. Also, in an email to the wife dated 25 December 2008, the husband indicates he had been in Dubai with his girlfriend. The wife also gave evidence that the husband's hobbies were expensive ones. One item on his bank statement is 598 Euros in relation to skydiving in Spain and another is £830 in respect of a helmet for that sport.

[33] On the evidence before me I am driven, in the absence of admissible evidence from the husband, to conclude that the husband is working full time as a pilot and that he is earning at least what he did from his last employer,

namely the equivalent of £75,000 and he is receiving this amount tax free. I must also therefore conclude that the husband has failed to discharge his duty of full and frank discovery in respect of his means and assets.

Financial Needs, Obligations and Responsibilities of the Parties

[34] The wife's financial needs are somewhat lessened by a financial contribution from her new partner. The husband's financial needs are significantly lessened by his receipt of an income on which he does not pay tax. There was no evidence submitted that the husband had new family responsibilities.

Standard of Living Enjoyed by the Family before the Breakdown of the Marriage

[35] I received minimal evidence outlining the standard of living engaged by the family before the breakdown of the marriage. That which there was suggested a comfortable standard of living.

Any Physical or Mental Disability of the Parties

[36] The wife sustained injuries while serving as a police officer with the PSNI. She is now unemployed and in receipt of Disability Living Allowance. The husband states that he has suffered from insomnia, high blood pressure, an inability to recover from minor injury and the stress associated with a cancer scare. I am, for two reasons, unable to accept that the husband has any physical disability. This is because, firstly, the assertion was not offered to the court as sworn evidence, and, secondly, the wife's evidence that the husband would have had to have passed a vigorous medical to continue flying.

Other matters taken into account

[37] Article 27(1) of the 1978 Order provides that it shall be the duty of the court in deciding whether to exercise its powers under Article 25 to have regard to all the circumstances of the case. In this case a significant circumstance is that the parties entered into a matrimonial agreement which contained provisions as to child maintenance. The court rarely intervenes when an agreement exists which has been properly entered into. This reluctance is seen by the limited circumstances in which a court will intervene, as set out in *Edgar v Edgar* [1980] 1 WLR 1410. These well known circumstances are firstly, undue pressure by one party; secondly, exploitation of a dominant position to secure an unreasonable advantage; thirdly, inadequate knowledge; fourthly, possibly bad legal advice; and fifthly, an important change of circumstances, unforeseen or overlooked at the time of making the agreement.

CONCLUSION

[38] Mr Devlin submitted that the correct approach was that which is set out in paragraph 11.22 of Bird's "Ancillary Relief Handbook" (6th Edition). The text indicates that the first step is to make a provisional assessment of the child's needs and that in many cases, the formula prescribed by the Child Support Agency would assist as a starting point. In *E v C (Child Maintenance)* [1996] 1 FLR 472 Douglas Brown J thought the court might usefully have asked what the Child Support Agency assessment was. He stated that the court is not bound to make this enquiry and, if the court does do so, the assessment is not binding upon it. Nevertheless the court considered that the assessment would have been strongly persuasive. Similarly, in *GW v RW* [2003] 2 FCR 289 Nicholas Mostyn QC (sitting as a Deputy High Court Judge) identified the principle that the appropriate starting point for a child maintenance award should almost invariably be the figure thrown up by child support rules. Mr Devlin invited me to adopt the Child Support Agency assessment as a starting point and then to assess the reasonable needs and requirements of the children in the light of the evidence received regarding the statutory factors. Mr Devlin submitted that the starting point should be the original assessment of £960 per month. This was because the wife had given evidence that the husband now had the children for 40 nights per year at most and was therefore no longer entitled to a one-seventh reduction.

[39] In reaching a decision as to an appropriate amount a fundamental principle to be applied is that parents are responsible, and are to be held responsible, for maintaining their children. This principle receives statutory expression in Article 5 of the Child Support (Northern Ireland) Order 1991. Taking into account all the factors set out above I conclude that the appropriate child maintenance order is for £500 per month per child. The amount is to be index linked and is to continue in respect of each child until that child finishes full time education (at primary degree level if applicable). This order runs from the date the summons was issued, namely 15 April 2008.

[40] The making of a court order, particularly in a family law context, does not necessarily resolve the difficulties which have arisen between the parties. In the present case the difficulty is exacerbated by the effects of globalisation and the greater mobility of citizens in order to find employment. This order is not directly enforceable in a Middle Eastern country where the husband currently resides. It is to be hoped, however, that the husband will nevertheless comply. Should the husband not comply with his moral and legal duty to contribute to the maintenance of his children, enforcement, together with penalties for failure to comply with this order, will have to await his return to the United Kingdom.

[41] The wife also applies to have the matrimonial agreement made a Rule of Court. As Butler-Sloss LJ noted in *Kelley v Corston* [1997] 4 All ER 466 at 493

the court is not a rubber stamp. The court has the power to refuse to make the order even though parties have agreed it. The fact of the agreement is an important consideration but not determinative. Similarly, Thorpe LJ observed in *Xydias v Xydhias* [1999] 2 All ER 386 at 394 that the court does not either automatically or invariably grant the application to give an agreement the force of a court order. The court conducts an independent assessment to enable it to discharge its function to make such orders as reflect the criteria set out in the Matrimonial Causes legislation. The matrimonial agreement in the present case specifically notes that the parties have each taken legal advice and are each satisfied that they did not require further information from the other of their respective incomes and assets. In the correspondence produced before me the husband describes the agreement as representing a generous settlement. Given in particular the husband's high level of income as a pilot, the number of years of employment ahead of him, the wife's unemployed status and the ages of the minor children, the agreement falls within the bounds of a reasonable resolution of their financial affairs. I therefore order that the agreement be made a Rule of Court.

[42] The wife seeks her costs in respect of this application. In the light of the principle that costs normally follow the event, and the absence of any submissions to the contrary, a decision against in the husband for costs is irresistible and I so order.

[43] As the husband is resident outside the jurisdiction I extend the time during which any appeal should be filed to three weeks.