

Neutral Citation No.: Master 71

Ref:

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

Delivered: **19-05-09**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

N

Petitioner

and

N

Respondent

(Ancillary Relief - Conduct : Sexual Abuse of a Child)

Master Bell

[1] In this application the petitioner (to whom I shall refer, for ease of reference, as “the wife”) seeks Ancillary Relief pursuant to a summons dated 20 January 2009.

[2] At the hearing of this matter the wife was represented by Miss Sara Kinney and her instructing solicitor whom I shall not identify. The wife gave oral evidence during which she adopted the contents of her affidavit sworn on 20 January 2009 as her evidence to the court. She also adopted the contents of her divorce petition as setting out certain conduct which she relied upon. In addition I heard evidence from the wife’s solicitor, and Miss Kinney further advanced her client’s case by means of oral submissions.

[3] The Respondent (to whom, for ease of reference, I shall refer to as “the husband”) did not appear (he is currently serving a sentence of imprisonment) and he was not legally represented. The court file contains a

copy of a letter dated 13 March 2009 from the solicitors on record for the husband, addressed to the Matrimonial Office in the High Court in which it is stated that the husband had been refused legal aid and therefore did not wish to defend the proceedings against him

THE HISTORY OF THE MARRIAGE

[4] The parties were married in 1991. They were separated in 2005 and a Decree Nisi was granted in 2008. There are two children of the family: a son aged 22 (who is not the husband's natural child) and a son aged 16. Both sons live with the wife in the matrimonial home.

[5] The parties purchased a home together in 1989 for approximately £26,500. The purchase was funded by an interest-only mortgage of approximately £26,000. The linked endowment policy is currently worth £21,384 and has a maturity date of 1 April 2011. The house is currently worth approximately £110,000. Both the house and the endowment policy are in the joint names of the husband and wife.

WIFE'S SUBMISSIONS

[6] The wife seeks a clean break settlement and the transfer to her of the husband's complete interest in both the matrimonial home and the endowment policy.

[7] The wife argues that the extinguishing of the husband's interest in the house and the policy is justified in the light of the following factors :

- (i) The welfare of both children, one of whom is a minor ;
- (ii) The wife's contribution of having maintained both children since separation ;
- (iii) The wife's willingness not to seek future maintenance ;
- (iv) The husband's conduct ; and
- (v) The health of the wife.

HUSBAND'S SUBMISSIONS

[8] In the light of the husband's failure to instruct legal representatives, I had no submissions offered on his behalf. The wife's evidence on all points was therefore uncontested and I accepted it as entirely credible.

THE ARTICLE 27 FACTORS

Welfare of the child

[9] Article 27 of the Matrimonial Causes Order (Northern Ireland) 1978 provides that first consideration must be given to the welfare while a minor of any child of the family who has not obtained the age of 18. One child of the family falls into this category.

Income and earning capacity

[10] The wife's income is from benefits. She receives a total of £214 per week made up from Severe Disablement Allowance, Disability Living Allowance, Tax Credits, Income Support and Child Benefit. In his acknowledgement of service of the petition for divorce, the husband states that he is presently in prison and has no income other than benefits.

Financial needs, obligations and responsibilities of the parties

[11] There was no evidence placed before me of unusual financial needs in respect of the parties. The wife has a need for housing. The husband is due for release from prison later this year and at that stage will have a need for housing.

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

[12] Both parties enjoyed a modest standard of living prior to the breakdown of the marriage.

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

[13] The wife is aged 42 and the husband is 47. The marriage was of significant duration, having lasted 14 years until the separation.

Any physical or mental disability by the parties of the marriage

[14] The wife gave evidence of how her health had suffered as a result of the abuse she suffered at the hands of the husband. She submitted a report from a consultant psychiatrist dated 4 September 2007. This report states that she attended two psychiatrists for years regarding problems arising from her husband's alcoholism and violence. The consultant psychiatrist's diagnosis is that she suffers from an adjustment disorder. The report states that she carries a long term susceptibility to anxiety and depression into the future. It offers the opinion that this is largely a reflection of experiences that happened to her in her younger, formative years but the experience of marriage to her

husband will make her even more susceptible to emotional problems in the future.

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

[15] The wife suffered from a serious road traffic accident in 1990. Since that event she has been registered as seriously disabled and has not been able to work. She has kept mortgage payments on the matrimonial home up to date with assistance from Social Security. Prior to his imprisonment the husband's employment status was erratic. He was self employed in the construction industry and last worked in 2001-2002. Miss Kinney submitted that his ability to obtain gainful employment has been affected by his alcoholism and by his convictions for criminal offences. The husband has made no contribution to his wife or children since 2005.

Conduct

[16] Article 27 gives the court a discretion to take into account the conduct of a party, if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Such conduct is sometimes divided by practitioners and textbook writers into three categories, namely those of marital, financial and litigation conduct. While this classification may represent the types of conduct most often encountered by practitioners, it is not, of course, a classification created by the legislation and hence cannot be considered as limiting the nature of conduct which may be taken into account. The legislature has left it at the discretion of the court as to the nature of conduct which should be taken into account but has imposed a standard as to seriousness, namely it must be such that it would in the opinion of the court be inequitable to disregard it.

[17] The wife submits that the court should take account of the following conduct :

- (i) During the course of the marriage the husband subjected the wife to severe violence, physical abuse and threats of harm. The wife gave evidence that the husband had beaten her with a pick shaft and had left her with bruises. She said the impact of the pick shaft "almost destroyed" her. Her evidence was that she had suffered years of turbulent violence at his hands. This always occurred at weekends, approximately twice per month, and always because of a link with his drinking of alcohol. She had to attend hospital on a number of occasions following such incidents.
- (ii) During the marriage the husband subjected the wife to severe mental and emotional abuse.

- (iii) The wife gave evidence that on one occasion in or around 2002 the husband loaded his shotgun and put it to her throat, threatening to kill her. She reported the incident to the police and only refrained from pursuing a prosecution when the husband pleaded with her not to pursue the matter.
- (iv) On several occasions the husband seriously assaulted the parties' elder son. In or around 2004 the husband hit the elder son with a thick stick with such force that the stick broke across the child's back.
- (v) On another occasion the husband struck his elder son with a steel pot. Following this incident the wife reported the matter to their family doctor and the husband was admitted to hospital for treatment to alcohol addiction.
- (vi) In or about 2005 the husband put a live electric cable into a garden pond at the matrimonial home and then asked the wife to clean out the pond with a metal rod. The wife sensed that the additional wires to the pond "didn't look right". When the wife discovered what he had done, she considered that he had deliberately tried to cause her serious harm or, at the very least, had attempted to terrify her.
- (vii) When her elder son was aged 7, the wife discovered the husband and elder son both naked in the bedroom, with the son lying on top of the husband. The wife challenged the husband, as she knew she had seen something which she described as "evil", "wrong" and "abnormal". She warned her husband that she never wanted anything like that to happen again. In 2005, however, the elder son made a disclosure that the husband had been sexually abusing him. The elder son disclosed that :
 - i. the husband had made him wear his school uniform while engaging in oral sex with the husband ;
 - ii. the husband had masturbated the elder son ;
 - iii. the husband had masturbated himself all over the elder son ; and
 - iv. the husband would not allow the elder son to play on a sports team unless he performed sexual acts for the husband.
- (viii) I received sworn evidence from the wife's solicitors that her firm had received a letter dated 16 July 2007 from Mr S.W. Ferguson of the Public Prosecution Service which stated that the husband had been convicted of a number of criminal offences in the Crown

Court. The husband had been convicted, in relation to his elder son, of 10 counts of indecent assault, one count of child cruelty and one count of assault occasioning actual bodily harm. The husband had also been convicted, in relation to his wife, of one count of assault occasioning actual bodily harm and two counts of common assault. There was no evidence adduced before me, whether in terms of a copy of the husband's criminal record or of a transcript of the trial judge's sentencing remarks, as to the sentences which were imposed in respect of the offences. I was not therefore able to reach any view as to how seriously the trial judge considered the offences along the spectrum of conduct which each offence is capable of representing. I was, however, able to make an assessment of seriousness from the limited evidence of the incidents provided by the wife.

- (ix) The husband mismanaged the family finances and accrued a credit card debt of £4,500 which the wife has had to take responsibility for.

[18] The wife (unlike the applicant in *H v H (Financial Relief: Attempted Murder As Conduct)* [2005] EWHC 2911 (Fam)) did not adduce any evidence such as witness statements, photographs or other documentary material from the criminal investigation in order to support her case. Nevertheless section 7(1) of the Civil Evidence Act (Northern Ireland) 1971 provides that, in any civil proceedings, the fact that a person has been convicted of an offence by or before any court in the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence. Section 7(2) then provides that in any civil proceedings in which a person is proved to have been convicted of an offence by or before any court in the United Kingdom he shall be taken to have committed that offence unless the contrary is proved. As no evidence was offered to the contrary, I am therefore satisfied for the purpose of these proceedings that the husband committed the offences.

[19] The starting point for any consideration of 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."

[20] 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."

[21] 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. “

[22] 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”.

[23] It is clear from the authorities therefore that conduct by one party which is directed at the other may be taken into account by the court in the division of the matrimonial assets. An important question is whether conduct directed at a child of the family may also fall within conduct taken into account by the court. The children of a marriage are not themselves parties to the ancillary relief proceedings. Article 27(2)(g) of the 1978 Order provides that the court shall in particular have regard to a number of factors including “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.” The statute does not limit the conduct which may be taken account of to conduct which takes place between the husband and the wife only.

[24] Miss Kinney offered only one authority for the proposition that sexual abuse of a child of the family might amount to conduct such that it would in the opinion of the court be inequitable to disregard it. In *S v S* [1982] Fam Law 183 (one of the 13 cases cited by Burton J in *S v S (Non-Matrimonial Property : Conduct)*) the court considered a prolonged series of indecent assaults amounting to incest committed by the husband against his two daughters. He pleaded guilty to criminal charges and was placed on probation for 12 months. In his judgment Purchas J concluded that he had no doubt that the husband’s conduct had substantially contributed to the breakdown of the marriage even though part of the conduct had been specifically aimed at the children rather than the wife. He considered that it would be repugnant to the normal sense of justice to ignore conduct “of that kind” in the context of the breakdown of the marriage and in the context of doing justice between the parties on a matrimonial property division. Purchas J posed the question of whether the doing of justice within an ancillary relief context demanded

that the husband should retain some interest in the former matrimonial home. He considered that, once the husband had put behind him the shame and degradation of his past conduct, there was no reason why he should not be gainfully employed and therefore liable to make substantial periodical payments for the wife and one of the children. In the circumstances of that case Purchas J considered that, in giving up her right to a nominal order which could be subsequently enlarged to a substantial order upon the husband obtaining employment, the wife was giving up a substantial right. Purchas J concluded that justice demanded that the wife should be relieved, so far as possible whilst doing justice between the parties, from the obligation of having any further contact with the husband. It followed that justice would be done by transferring the whole of the interest of the matrimonial home to the wife on her abandoning any rights to periodical payments.

[25] Another of the 13 cases cited by Burton J in *S v S (Non-Matrimonial Property : Conduct)* also supports the proposition that conduct aimed at a child of the family might amount to conduct such that it would in the opinion of the court be inequitable to disregard it. In *Al-Khatib v Masry* [2002] EWHC 108 (Fam) [2002] 1 FLR 1053 the court took into account the misconduct of the husband in abducting the children of the marriage. In that case Munby J agreed that conduct under the legislative provisions did not have to have a financial consequence for it to be taken into account and that “the husband’s conduct in abducting the children and depriving ... them and the wife of that most basic human right, their mutual society, falls squarely within the class of case contemplated by Parliament” when enacting the ancillary relief provisions.

[26] I therefore conclude that conduct by a husband or wife which is aimed at a child of the family is capable of being taken into account under the statute, providing it meets the standard which is set out in Article 27. Given the tragic apparent prevalence of child sexual abuse in society it might appear that there may be a considerable number of cases where evidence of such abuse of a child might be adduced in ancillary relief proceedings. It is not possible to identify particular principles as to when such conduct is likely to be taken into account in the division of matrimonial assets and what its impact is likely to be. Conduct issues are fact-specific and each will require to be considered on their own merits.

[27] In this case the impact of the husband’s conduct against each of the members of the family was inevitably very great. The wife gave evidence that the elder son had attempted to commit suicide as a result of the abuse but had been prevented by others from doing so. She gave evidence that the elder son remains very angry at the husband and does not yet appear ready for counselling. The medical evidence adduced in respect of the elder son states that for the most part the elder son suppresses his rage. To his very great credit the elder son has, despite the abuse, achieved academic and sporting

success and the consultant psychiatrist has concluded that there was encouraging evidence that he had adjusted well and that it is unlikely that he will suffer any long term psychiatric problems.

[28] The wife gave evidence that the younger son was not the direct target of physical or mental abuse by the husband. However he had witnessed the physical abuse perpetrated on the wife. One of the impacts of this on the younger son was that he found it difficult to leave the house. While I was not offered medical evidence in relation to the impact of the husband's conduct on the younger son's mental health, the wife is clearly concerned for him.

[29] In addition to the physical and emotional impact of the husband's conduct on the wife which I have referred to above, it has also had a financial impact on her. The wife has attended counselling privately for four years in an attempt to come to terms with the abuse she and her sons suffered at the hands of her husband. She saves to pay £70 per hour for counselling out of what is a very limited income.

[30] The husband's toxic conduct has therefore had a poisonous impact on each of the other members of the family and substantially contributed to the breakdown of the parties marriage. The conduct alleged by the wife includes serious acts of child sexual abuse. It clearly possesses what was described in *S v S (Non-Matrimonial Property: Conduct)* as "the gasp factor". Parliament has laid down a high standard for the consideration of conduct. It is only exceptional conduct which can be taken into account, hence the statutory test of conduct "such that it would in the opinion of the court be inequitable to disregard it". I am satisfied that the conduct in this case meets this standard. It therefore justifies a departure from equality in the division of the assets in favour of the wife.

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

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

Other matters taken into account

[32] Article 27 of Order requires the court to have regard to 'all circumstances of the case'. There are therefore matters which not do fall within the ambit of Article 27(2) (a) to (h) but which may unquestionably be relevant in a given case. I was not asked to consider any factor under this provision.

CONCLUSION

[33] Article 27A of the Matrimonial Causes (NI) Order 1978 requires the court to consider whether it would be appropriate to exercise the powers afforded by Articles 25 and 26 in such a way that the financial obligations of each party towards the other would be terminated as soon after the grant of the Decree Nisi as the Court considers just and reasonable – the ‘clean break’ approach. In the words of Waite J. in *Tandy v Tandy* (unreported) 24 October 1986 ‘the legislative purpose... is to enable the parties to a failed marriage, whenever fairness allows, to go their separate ways without the running irritant of financial interdependence or dispute.’ The use of the word ‘appropriate’ in Article 27A clearly grants the court a discretion as to whether or not to order a clean break. Duckworth expresses the view at paragraph B3[58] of ‘Matrimonial Property Finance’: -

“Plainly, a clean break would be more ‘appropriate’ in some cases than in others. A young, childless wife will experience a fairly rapid termination of support; an older women on the other hand, stranded careerless in her 40’s after bring up a family may incur greater sympathy.”

The particular facts of each individual case must therefore be considered with a view to deciding the appropriateness of a clean break. In this case, and for very obvious reasons, the wife seeks a clean break division and wishes to avoid any future reliance upon her husband for maintenance. There is a compelling argument for seeking to achieve this.

[34] The husband has been convicted of various serious criminal offences. In respect of those offences he has received due punishment from a criminal court. It is not the function of this court to make a decision for punitive purposes and I do not interpret Purchas J’s remark in *S v S* that “the court could only give *recognition* to the husband’s conduct by affecting the way in which the matrimonial home, the only asset of the family, could be dealt with” as meaning anything to the contrary. This court is solely concerned with doing justice between the parties in terms of matrimonial property division. Any perception that an individual is being punished twice for the same offence would be a misperception. However the conduct which led to the consequences of criminal convictions and sentencing may also lead to other consequences without those being punitive in nature or purpose.

[35] How should the equity in the matrimonial home and the value of the endowment policy be shared between the parties? The starting point is that after a marriage of some duration, each party can reasonably expect to receive a half share. However a party’s share may be increased up or down, but only on a strict application of the Article 27 criteria. Nevertheless, the impact of conduct (and of other factors) may be very substantial. In *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 Burton J observed :

“There is no real guidance as to what would be the effect if I concluded that there has been such conduct by the Respondent as it would be "inequitable to disregard": it is described by Mr Mostyn QC as a "moral test involving no particular science". The exercise of such a sweeping power, which could deprive a party of all entitlement, or multiply or magnify what would otherwise be the entitlement of the other party, is of concern to me.”

Burton J therefore accepted that one of the possible outcomes in ancillary relief proceedings might be the extinguishing of a party’s whole interest in the total matrimonial property, albeit this was an outcome that caused him concern. It is clearly one that a court will only reach after very careful deliberation. However *S v S (Non-Matrimonial Property: Conduct)* was a case which concerned the appropriate division of some £6 million in assets and *H v H (Financial Relief: Attempted Murder As Conduct)* was a case involving the appropriate division of some £500,000 in assets. The present case is therefore very different and the only way of meeting the needs of the wife and children for secure housing in this case is the extinguishing of the husband’s whole interest in the total matrimonial property.

[36] On the facts presented to me, and on taking into account the following factors in particular:

- (i) The welfare of both children, one of whom is a minor ;
- (ii) The wife’s contribution of having maintained both children since separation ;
- (iii) The husband’s conduct ;
- (iv) The wife’s willingness not to seek future maintenance ; and
- (v) The health of the wife

I conclude that it is appropriate to extinguish the husband’s interest in both the matrimonial home and the endowment policy by transferring them to the wife.

[37] I therefore order that they be so transferred.