

Neutral Citation No.: [2009] MASTER 64

Ref:

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

Delivered: **12/2/09**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

N

Petitioner;

and

N

Respondent.

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 13 September 2007.

[2] At the final hearing of this matter the wife was represented by Miss Connolly who had been instructed by John Ross and Son solicitors. The wife gave oral evidence during which she adopted the contents of her affidavit which had been sworn on 13 September 2007 as her evidence for the purpose of these proceedings. Counsel also advanced her client's case by means of oral submissions.

[3] The history of the proceedings is as follows. At the first directions hearing held on 8 November 2007 Master Redpath ordered that the respondent (to whom I shall refer, for ease of reference, as "the husband") make and file an affidavit as to his means and assets within 35 days. The husband failed to do so. At a second hearing on 21 February 2008 there was no appearance by or on behalf of the husband. The day before the hearing the Matrimonial Office had received a telephone call from a woman purporting to

be the husband's sister who informed the office that the husband was unfit to travel to Northern Ireland for the hearing. At the hearing Master Redpath listed the matter for an undefended hearing before me on 4 June 2008. On 4 June 2008 there was again no appearance by the husband but the Matrimonial Office received a telephone call from a woman purporting to be the husband's sister who informed the office that the husband had missed the boat from Scotland that morning and would not be able to attend. In the circumstances I then adjourned the proceedings until 24 June 2008 and ordered the husband to make and file an affidavit as to his means and assets by 19 June 2008. Again, no affidavit was filed by the husband within the time allowed. At the hearing on 24 June 2008 the husband did not appear and was not represented. I received sworn evidence from the wife that the husband's sister had informed the wife's solicitor that it was not she who had telephoned the court office on 4 June 2008. I also received sworn evidence from Gemma Smyth, solicitor, of John Ross and Son, who had written to the husband firstly on 4 June 2008 to advise him of the hearing date of 24 June 2008 and, secondly, on 10 June 2008 enclosing a copy of the court order of 4 June 2008. She gave evidence that these pieces of correspondence were sent to the address in Scotland which she had previously used for the husband and from which he had previously responded. In the light of the history of the proceedings and the sworn evidence I received, I concluded that the husband was deliberately refusing to engage in the proceedings and, in the circumstances, it was appropriate to continue with the final hearing in the husband's absence.

[4] The assets which were the subject of the hearing were stated by counsel to be a property in Scotland which the husband inherited from his mother in 2005 and the husband's pension. The property had been valued by an estate agent on behalf of the wife at approximately £120,000. Counsel, however, submitted that the wife was not in a position to give evidence from her own knowledge as to whether the property was free of charges and had been advised that she could not enforce any order made by the Northern Ireland courts against the property unless she instituted separate proceedings in Scotland. The CETV of the husband's pension amounts to £175,090.93.

THE HISTORY OF THE MARRIAGE

[5] The wife is aged 39 and the husband is aged 42. The parties married on 27 June 1987. They separated in January 2004 and a Decree Nisi was granted on 27 April 2007. There are three children of the marriage: daughters aged 20 and 15 and a son aged 17, all of whom live with the husband. The husband now lives with his girlfriend in Scotland. The wife lives alone in rented accommodation in Northern Ireland.

WIFE'S SUBMISSIONS

[6] The wife seeks a 70% - 30% pension sharing order to be made in her favour in respect of the husband's pension.

[7] She argues that this is an appropriate decision in the light of the following factors :

- (i) Their equal contributions during the 16 year marriage;
- (ii) The financial conduct engaged in by the husband during the marriage;
- (iii) The fact that the husband inherited a house from his mother in 2005 which was, in all likelihood, inherited free from a mortgage.

HUSBAND'S SUBMISSIONS

[8] In the light of the husband's deliberate non-attendance I had no submissions made on his behalf and the wife's evidence on all points, including the fact of his having inherited his mother's house and her allegations as to his conduct, was therefore uncontested, as were the arguments advanced by the wife's counsel.

THE ARTICLE 27 FACTORS

Financial needs 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. Although they reside outside the jurisdiction, two of the children of the marriage are currently aged under 18. However, because of the nature of the order sought by the wife, the impact of any such order will not be felt by the children while they are under the age of 18 and hence this Article 27 factor does not fall to be considered in this case.

Income and earning capacity

[10] The wife gave evidence that she is employed as a home care worker [and earns £1,000 per month including mileage allowance]. The limited hearsay evidence available in respect of the husband's income was that the husband did not appear to be working and that his girlfriend was receiving incapacity benefit.

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 parties have different current needs given that the husband cares for the children and the wife does not. However, given that the wife's application solely concerns a pension sharing order, this is not a factor which impacts on whether to make such an order.

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] As stated previously, the wife is aged 39 and the husband is 42. The marriage was of significant duration, having lasted over 16 years until the separation.

Any physical or mental disability by the parties of the marriage

[14] Evidence was adduced by the wife that, as a consequence of the way she had been treated by the husband during the marriage, she suffered from depression and had to go on sick leave from her employment for approximately six months. There was no evidence that this appeared likely to be a continuing factor and it was not strongly submitted that it was one which should affect the ancillary relief determination.

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

[15] The evidence before me was that the contribution made by each of the parties to the welfare of the family was equal. While the children live with the husband, this does not indicate a lack of desire by the wife to be involved in her children's lives. Her evidence to the court was that the husband, unfortunately in her view, had persuaded the children to come and live with him and that he had then moved with them to Scotland in 2006. She gave evidence that, since that time, the husband has done his utmost to prevent the wife having contact with the children.

Conduct

[16] Article 27 of the 1978 Order provides that the court shall in particular have regard to 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 issue of financial conduct was raised in respect of the husband's behaviour. Evidence of three separate matters was offered in this regard. The first allegation was in respect of house sales. During the history of the marriage the parties have

lived in Scotland, England and Northern Ireland. Over the time of the marriage there have been four matrimonial homes, purchased on a serial basis, as the couple moved from one location to another. The wife asserted that she had been told by the husband that none of the four house sales had resulted in any surplus equity being realised. In her affidavit she deposed that while she initially believed him on this point, having since learnt "the extent of [his] deceptions" she was now "not sure". Given the absence of any documentation as to purchase and selling prices, and the vagueness of the allegation, I cannot be satisfied that this conduct allegation is proven and I do not therefore take it into account. The second allegation concerns a compensation payment from the husband's employer. The wife's evidence was that the husband had been employed as a depot manager. However he experienced stress which led him to go on extended sick leave. When he subsequently returned to work he was offered a lower position and received a lump sum of £25,000 in compensation. The wife stated that she had been told of this fact in 2007 by the husband's sister. The third allegation was in relation to an affair which the defendant was alleged to have carried on. The wife's evidence was that over a 20 year period the defendant had carried on an affair with his present girlfriend. During their marriage the husband, on a monthly basis, told the wife that he had to attend a work-related course which would last a week. He then left the matrimonial home and returned a week later. The wife subsequently discovered that the husband had over this period been visiting his girlfriend, who comes from Manchester, and that he had been lying about the amount of his income "in order to fund this relationship". In neither her affidavit nor in her oral evidence was the source of this allegation dealt with. While the mere fact of an affair will not be relevant in ancillary relief proceedings, this conduct allegation has however, if proven, implications for the ancillary relief proceedings because of its financial dimension.

[17] The second and third allegations by the wife are hearsay evidence. The law governing the admissibility of hearsay evidence in civil proceedings is found in the Civil Evidence (Northern Ireland) Order 1997. By virtue of Article 3(1) evidence must not be excluded on the ground that it is hearsay. The Order then goes on to provide various safeguards in relation to hearsay evidence. The first of these is a power contained in article 4 for the party who did not introduce the statement to apply for leave of the court to call the person who made the statement as a witness and cross-examine him on it. It would have been open to the husband to have applied to seek to have the witness or witnesses available for cross examination. Because he did not engage in the proceedings, the husband did not avail himself of this option. Article 5 of the 1997 Order deals with the question of the weight the court should give to hearsay evidence. It provides that, in estimating the weight (if any) to be given to hearsay evidence in civil proceedings, the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

[18] Article 5(2) of the 1997 Order provides regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given. The Rules of the Supreme Court do not lay down any particular form of notice which should be complied with. Both hearsay allegations were contained in the wife's affidavit which was served on the husband. This satisfies the notice requirement. Neither allegation was challenged through the filing of an affidavit by the husband nor by the adducing of any oral evidence.

[19] Article 5(3) of the 1997 Order provides that, in estimating the weight (if any) to be given to hearsay evidence in civil proceedings, regard may also be had, in particular, to the following-

- (a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;
- (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
- (c) whether the evidence involves multiple hearsay;
- (d) whether any person involved had any motive to conceal or misrepresent matters;
- (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
- (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

[20] I have considered the Article 5(3) factors and, in particular, have taken into account the following matters. Firstly, the husband's sister was not called to give oral evidence. Miss Connolly argued that while the sister may have been willing to inform the wife of certain matters, she was unlikely to have been willing to give evidence on the wife's behalf against her brother's interests. It would not therefore have been reasonable and practicable for the wife to have produced the maker of the original statement as a witness. Furthermore, no documentary evidence from the husband's former employer was submitted in respect of the compensation payment nor was any witness from the husband's former employer called to give evidence at the hearing. No explanation was offered as to why this was the position. Secondly, though the wife might have had a motive to misrepresent her husband's financial conduct, she gave her evidence in what appeared to be an entirely honest and truthful manner. I was therefore content to accept her account as credible. I have therefore concluded on the balance of probabilities that I may accord the hearsay evidence sufficient weight as to regard the second and third of the wife's conduct allegations as proven.

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

[21] Other than the pension arrangements, there was no submission or evidence that there were such matters.

Other matters taken into account

[22] Article 27 of the Order 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 regard the husband's inheritance of his mother's house falls to be considered. As before, I have applied the provisions the Civil Evidence (Northern Ireland) Order 1997 in respect of hearsay evidence. I have therefore concluded on the balance of probabilities that I may accord the hearsay evidence sufficient weight as to regard it as proven that the husband has inherited the property in Scotland from his mother and that he received it free from encumbrances.

[23] The issue of inheritance and the effect it has on Ancillary Relief is a constantly evolving one. In *White v White* [2001] AC 596 Lord Nicholls stated at page 610:

“Property acquired before marriage and inherited property during marriage come from a source wholly external to the marriage. In fairness where this property still exists the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.

Clearly, when present this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, the time when, and the circumstance in which this property was acquired, are among the relevant matters to be considered”

In *Norris v Norris* [2003] 1 FLR 1142: Bennett J said :

“Applying the words of the statute, in my judgment, the court is required to take into account all property of each party. That must include property acquired during the marriage by gift, or succession, or as a beneficiary under a trust. Thus, what comes in by statute through the front door ought not, in my judgment, be put out through the back door and thus not remain in the courts discretionary exercise without very good reasons. In my judgment, merely because inherited property has not been touched, or has not become part of the matrimonial pot, is not necessarily, without more, a reason for excluding it from the courts discretionary exercise.”

[24] I therefore intend, in the circumstances of this case, not to exclude inherited wealth from the case but to regard it as one factor to be taken into consideration in applying the Article 27 checklist.

CONCLUSION

[25] Article 27A of the Matrimonial Causes (Northern Ireland) 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[2] of ‘Matrimonial Property Finance’ that one of the principles emerging from *White v White* [2001] AC 596 and *Miller v Miller ; McFarlane v McFarlane* [2006] 2 AC 618 is that the court should, whenever practicable, bring about a clean break between the parties. 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 I consider that a clean break is possible and desirable.

[26] On the evidence presented to me, and in particular :

- (i) The duration of the marriage;
- (ii) The parties equal contributions during the marriage;
- (iii) The financial conduct which was engaged in by the husband during the marriage; and

- (iv) The fact that the husband inherited a house from his mother in 2005

these factors collectively warrant a pension sharing order in terms of 65% to the wife and 35% to the husband. I therefore so order.