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Judgment: approved by the Court for handing (subject to editorial corrections) | ***Delivered:*** **04/06/10**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION (PROBATE AND MATRIMONIAL)

BETWEEN:

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Petitioner;

v

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Respondent.

MASTER REDPATH

1. In this case the parties married in 1983 and the Decree Nisi was pronounced in June 2008. Accordingly this is a 25 year marriage and must be regarded in terms of the Matrimonial Causes (Northern Ireland) Order 1978 (The Order) as a lengthy marriage. There are 2 sons of the family, one in his twenties and the other now aged 14 and at school. I was advised that the case was not suitable for a Financial Dispute Resolution Hearing as a result of which it moved to a full hearing.

2. The assets in the case are largely agreed and are as follows:-

1. Commercial premises valued at £1.2m.
2. The matrimonial home valued at £375,000.
3. A holiday home which has been sold with proceeds of sale of £54,912 as at the date of trial held on deposit.
4. A new home purchased by the petitioner husband valued at £356,000 which sum is charged on the commercial premises.
5. An AXA Policy valued at £14,000.
6. A Standard Life Policy valued at £2,930.
7. A Current Account with a balance of £56,958 at the start of the trial. This included inheritance of £29,000 which for reasons I will later set out I intend to largely disregard.
8. Pensions which are comparable.

The liabilities essentially were small credit card debts and a tax debt of £23,333.

3. There were 3 main issues in the case:-
    1. How any inherited assets should be dealt with.
    2. The case made by the husband that a figure of £125,800 should be taken from the overall total representing an implied trust in favour of his brother.
    3. What the rate of ongoing periodical payments should be between the parties.

4. <u>Inherited Wealth</u>

I have had to consider this issue in a large number of recent judgments.

As Lord Nicholls said in White -v- White [2000] 2FLR 981 at page 994: -

> "Plainly when present this factor [inherited property] 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 circumstances in which the property was acquired are among the factors to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs can be met without recourse to the property."

5. The issue of inherited property was also recently considered in the case of D v D [2010] EWHC 138 Fam by Mr Justice Charles. This is an exceptionally detailed judgment running to some 70 pages. In the case (which involved a farm) Mr Justice Charles also dealt inter alia with the issue of whether farmland constituted a different type of asset from other inherited assets and whether it should be dealt with in a different way. He dismissed this approach. In D v D the husband's submission was that as the main asset in the case had all been gifted to him by his father they should be wholly disregarded in a division of the assets. Charles J firmly rejected that argument. I quote this portion at length as not only is it relevant to this case but also to the very many farming cases that come before me. He states at paragraph *247*of the judgment:-

> *" Sharing*:-
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> I have already discussed need in the context of the husband's offer and rejected his approach to sharing. As it appears from my decision in R v R and the decision of Colridge J in J v B by a different

> route the need principle may have a large and informative and possibly determinative part to play in assessing a departure from equality, but an assessment applying the sharing principle and all the circumstances still has to be carried out.
> 248. Here the application of a sharing principle is complicated by (a) the period over which the husband was given his shares and the participation in the business of the husband's father (with the matrimonial contribution from his wife) … "

6. D v D is a very complex case, necessitating as I have already pointed out, a 70 page judgment. In that case the learned judge came to the view that the wife was entitled to 35% of the inherited assets, but in that case some of the assets had been transferred very late in the marriage.

The learned Judge continues at para 154:-

> "At the heart of the husband's case is the proposition, that as a matter of principle in the application of the sharing principle (that he accepts applies to all of the assets of the parties) his interest in the Company should for good reason be left wholly out of account because it is a gifted or inherited farming company. So, he says that as a matter of principle the award is to be based on, and only on, the application of the need principle applying the s.25 criteria to it (and so acknowledges that the departure from equality in respect of his interest in the Company that he argues for on the application of the sharing principle is subject to him meeting the wife's claim based on need generously assessed).
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> 155 In my view this is wrong.
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> 156 A theme of the husband's argument in support of this proposition was that as this was a "farming case" the principle to be applied in assessing the fair result is only the need principle or, put another way, the departure from equality in applying the sharing principle to the husband's shares in the company should be one that gives the

husband 100% (and should be left out of account subject to the satisfaction of an award based on need).

In my judgment, no such principle or approach can be founded on existing authority. Although, I accept that:

(i) a fair departure from equality for "good reason" in the application of the sharing principle can amount to a result that gives one party 100% of the value of the relevant assets; and

(ii) inherited or gifted land (and perhaps in particular estates and farms) that have been in a family for generations (or for less time) may found arguments that there should be such an approach. In my view the cases do not show that simply because the relevant assets are, or derive from, gifted or inherited farms or farming assets (or estates) they are to be so treated with the result that there is no need to look further at the circumstances of the case to see what impact (if any) the sharing principle is to have on the ascertainment of the fair award".

I accept, as was submitted on behalf of the wife that:-

(i) *P v P (Inherited Property* [2005] 1 FLR 575 (cited with approval in *Miller*) does not support the view that there is a rule or approach that applies to "farming cases" alone (even if they could be sensibly defined), and that
(ii) the leading cases of *White, Miller* and *Charman* make it clear that the principles to be applied in reaching a fair result on a principled basis are ones that fall to be applied in all cases having regard to all their circumstances, and thus in a fact sensitive manner (see for example paragraph 162 of my judgment in *R v R*)".
(i) and (ii) above will in my view only apply in truly exceptional circumstances and will depend on the time, size and nature of the gift of inherited property".

7. That is not the situation in this particular case as the main inherited asset was inherited at a relatively early stage after the commencement of the parties relationship.

8. Duckworth's Matrimonial Property and Finance sets out recent decisions in relation to inherited wealth or wealth introduced to a marriage and includes White v White [2001] 1 AC596 where the wife was awarded 42.5%.

9. In K v K [2005] 2 FLR at 1137 assets divided 50-50. G v G [2006] 1 FLR at 1263 wife awarded 41%. There are many other such examples given. The only example that would tend to support the husband is P v P (Inherited Property) [2005] 1 FLR 576 in which Mumby J awarded 25% of an inherited farm to the wife in part on the basis that a farm was a different type of asset from other assets found in these cases. I believe that approach has now been thoroughly discredited by the judgment in D v D which I have already quoted.

10. Allegation of Implied Trust

It was the husband's evidence that his mother, before she died, had said to him words to the effect of `I am sure you will look after x'. Mr Malcolm argued on his behalf that this created an express trust, which after capitalising sums paid by the husband on his brother's behalf, (and there is no doubt that such payments were being made) removed a figure in the region of £125,800 from the assets on foot of this alleged trust. I cannot accept that as a proper interpretation of the law. I take the view that the mother's words are

at best precatory words which do not contain a sufficient degree of certainty to create a trust which would entitle me to remove such a sum from the assets in this case.

11. Lord Langdale MR in Knight v Knight (1840) 3 BEV.148 at 173 states that for the creation of a trust three things are necessary:-

(i) the words must be so used that in the whole they ought to be construed as imperative;

(ii) the subject matter of the trust must be certain; and

(iii) the objects of persons intended to have the benefit of the trust must be certain.

12. These matters are referred to as the three certainties. Snell's Equity 31st Edition notes at paragraph 20-18:-

> "(c) *Modern Attitude*
> There never has been any such entity as a precatory trust; the question is whether precatory words had created an express trust, and at one time the Court of Chancery was very ready to infer a trust from such words. But by the time of Lambe v Eames (1871) 6 Ch App 592 the tide had turned. For over a century a strong tendency has been against construing precatory words as creating a trust, and undoubtedly many of the older cases would not now be followed. As James LJ observed after hearing many of the older cases cited:-
>
> I could not help feeling that the vicious kindness of the Court of Chancery in interposing trusts wherein many cases the father of the family never meant to create a trust, must have been a very cruel kindness indeed. The leading case is Re: Adams and the Kensington Vestry (1884) 27 Ch.D394 there, a testator gave all his real and personal estate to the absolute use of his wife, her heirs, executors, administrators and assigns, "in full confidence that

> she will do what is right as to the disposal thereof between my children" and the Court of Appeal held that the wife took the property beneficially".

Snell continues at paragraph 20 – 19:-

"*Modern Decisions*

> Since that decision there have been few cases in which precatory words have been held to create a trust, though there have been many in which the court has negatived a trust. Thus in Re Connolly a testator give `to my sisters, Ann and Louisa, equally the rest of my stocks and shares' and added `I specially desire that the sums herewith bequeathed shall … be specifically left by the legatees to such charitable institutions of a distinct and undoubted protestant nature as my sisters may select and on such proportions as they may determine"; it was held that the sisters were entitled beneficially. Again, in Re Hill, Public Trustee v O'Donnell [1923] 2 Ch.259 a residuary bequest to the testator's five named brothers and sisters `for the benefit of themselves and their respective families' was held to be a gift to legatees absolutely and not as trustees without children".

13. It is most refreshing for a family lawyer to review a line of authority that concludes in 1923.

14. Accordingly I hold that these precatory words, even taken at their height, do not create a trust, and whilst I am prepared to regard expenditure on his brother as a deduction from the husband's income stream, I am not prepared to remove a capital sum from the assets to be divided as suggested by Mr Malcolm.

Ongoing periodical payments

15. In this case there was a very significant disparity between the incomes of the parties. In addition to the rental income that the husband enjoyed from

the commercial properties, he was also in employment at the start of the case earning £45,000 per annum, giving him a total income of somewhere in the region of £130,000 per annum. The wife had an income in the region of £20,000, working part-time, although it was accepted that if she increased her hours she might earn up to £30,000 per annum. The husband claimed half way through the case, that his income was being reduced, as a result of the recession, from £45,000 per annum to £35,000 per annum. I only had his word for that but no contrary evidence was called and for the purposes of the case I had to accept his evidence. However that still leaves a very significant disparity between the parties' incomes. It is a clear case for some degree of ongoing support by way of periodical payments. In his closing submissions Mr Martin for the respondent made the case that the husband's net annual income was at least £84,000.

16. In relation to ongoing periodical payments Mr Martin made the following points in his detailed and very helpful closing submissions:-

> "The entitlement to a share of post divorce income, even where the children have grown up or there have been no children, is powerfully demonstrated in the decision of Sir Mark Potter, President of the Family Division in S v S [2008] EWHC and (519) Fam. The husband's net income was found by the District Judge to be in the order of £145,000 per annum, the wife's net income (including a return on capital surplus to her accommodation requirements) was £32,000. The District Judge awarded the wife periodical payments in the order of £50,000 per annum with the net effect that the wife had £82,000 net per annum and the husband £95,000 net per annum a percentile division of 46-54 which the President did not disturb on appeal.

> In V v V {Financial Relief] [2005] 2 FLR697 the District Judge adopted the previously conventional one third/two thirds approach to income distribution. The wife had contended for a 50-50% of division of income on appeal to the High Court. Mr Justice Coldridge increased periodical payments from £1,750 per month to £2,000 per month to effect of 40-60% by division of income.

At [paragraph 37] Coldridge J stated:-

> "There was almost no guidance or authority in relation to the way which the court should determine this aspect of an ancillary relief claim, save in circumstances where the incomes are huge. They provide no assistance to me whatever. This is not such a case. This is a case of a solid, secure income which is capable of providing decently for both sides, although, obviously after division, will lead to a considerable drawing in of horns by both husband and wife.
>
> Again there can be of course, no hard and fast rules in these cases. In particular in relation to the available income – section 25 are the only real criteria. However, in my judgment, the district judge did err in this limited respect. He should have given the wife a greater proportion of the available income, particularly after a marriage of this very great length. That he fails to do, so, he did not fully recognise her contribution over the length of the marriage. In my judgment she should have a 40% of the income and the husband 60%".

17. I should state that in my view, in cases such as this, lifetime periodical payments awards should only be made in the most exceptional circumstances. I am after all encouraged by statute to promote as far as possible a clean break. I must also recognise that the husband's nett income will be very extensively reduced by the Lump Sum Order I am making in favour of the wife and furthermore as I will point out shortly I have factored

5% of that Lump Sum Order in as partial capitalisation of periodical payments.

18. At the end of the day all of these matters fed into the final result. That result must be a fair one. As Coleridge J states in C v C [2006] EWHC 1879 (Fam) at paragraph 58 of his judgment:-

> "Matrimonial Causes Act 1973 S.25 rules the day. And despite the endless judicial gloss which is applied to it year in and year out at every level it is always best to start and end in that familiar section."

In Miller v Miller [2006] 1 FLR 1186 Lord Nicholls states in paragraph 4 of his judgment:-

> "Fairness is an illusive concept, it is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case."

Lord Nicholls continues at paragraph 8: -

> "For many years one principle applied by the Court was to have regard to the reasonable requirements of the claimant, usually the wife, and treat this as determinative of the extent of the claimant's award. Fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed. The glass ceiling which was put in place was shattered by the decision of Your Lordships House in the White case. This has accentuated the need for some further judicial enunciation of general principles.

> The starting point is surely not controversial. In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party to the other, still typically the wife, is not in the nature of largess. It is not a case of taking away 'from one party' and giving 'to the other' property which 'belongs to the former'. The claimant is not a suppliant. Each party to the marriage is entitled to a *fair* share of the available property. The search is always for what are the *requirements* of fairness in the particular case.

Lord Nicholls goes on to state at paragraph 11:-

> "This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money earner, homemaker and childcarer. Mutual dependence begets mutual obligations of support. When the marriage ends, fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."

Lord Nicholls therefore identifies the first principle to be applied is the search for fairness. He continues at paragraph 13: -

> "Another strand, recognised more explicitly now than formally, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning

> capacity is concerned. Then the wife suffers a double loss; a loss in her earning capacity and the loss in a share of her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as a homemaker and childcarer."

The final strand is dealt with by Lord Nicholls at paragraph 16 of his judgment:-

> "A third strand is sharing. This equal sharing principle derives from the basic concept of equality permeating a marriages as understood today. Marriage, it is often said, is a partnership of equals…this is now recognised widely, if not universally. Parties commit themselves to sharing their lives, they live and work together. When that partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase, unless there is good reason to the contrary. The yardstick of equality is to be applied as an aid, not a rule."

19. Finally, as far as general principles are concerned, I frequently quote Duckworths Matrimonial Property where at B3 [13] the author teases out the nine principles emerging from White v White.

(1) Although the Matrimonial Causes Act 1973, Section 25 is couched in terms of the widest discretion, guidelines are needed to ensure consistency of judicial decision making and to limit peoples' exposure to costs;

(2) The implicit objective of Section 25 is to achieve a fair outcome, giving first consideration to the welfare of any children;

(3) Fairness is a flexible concept that can move with the times, but in current conditions, it means that at the very least, there can be no discrimination between husband and wife in their respective roles;

(4) The mere fact that one spouse stays at home while the other goes out to work (whilst any other division of labour is agreed upon) is immaterial;

(5) Fairness generally implies equal division, although not invariably so. There will be many situations where having carried out the Section 25 exercise, the Judge's decision means that one party will receive a bigger share of the assets;

(6) There is however, no presumption of equality as there is in the Scottish system;

(7) Moreover, there is no warrant on the statute for elevating needs above resources in so far as earlier authorities limited a wife's claim to the ceiling of her reasonable requirements, they were wrong to do so;

(8) There is no rule of law that a party's wish to leave property to the next generation is irrelevant under Section 25. On the contrary the Court should respect the wishes of both parties in this regard;

(9) It follows that the Duxbury calculation (which amortises a wife's income needs over her assumed life expectancy) is of limited relevance in the Family Division other than to capitalise an income stream where that is strictly required.

20. As I have already said this was a long marriage; there are 2 children and a large element of the case from the wife's perspective, is needs driven. I

have therefore concluded that she should receive 45% of the net value of the inherited wealth, of which percentage 5% is for part capitalisation of spousal payments a matter that I will come on to in due course. If any assets have to be sold to realise the lump sum that I will order to be paid then the parties shall share the capital gains tax on such disposal pro rota.

21. As to periodical payments I think it is also important to note that the wife can now increase her earnings given the ages of the children, and I feel she should be encouraged to do so. Accordingly I intend to order that the husband pay to the wife the sum of £2,000 per month, the first payment to be on 1 March 2010. Following the payment of the lump sum that I have ordered, those spousal maintenance payments shall reduce to £1,000 per month to be paid for a period of 5 years or until the remarriage or cohabitation of the wife.

22. Accordingly the final order is as follows:-

1. The husband shall transfer to the wife his interest in the former matrimonial home.

2. The husband shall execute all deeds and other documents necessary to give effect to such transfer.

3. In default of the husband executing the said deeds and documents, they shall be executed on his behalf by the Master.

4. The husband shall pay the Respondent a lump sum of £425,000 within 3 months to represent 45% of the nett value of the commercial premises.

5. In the event that the said lump sum is not paid within 3 months the commercial premises shall be sold.

6. The husband's Solicitor shall have carriage of the said sale.

7. Upon sale of the said premises the nett proceeds of sale shall be divided 45% to wife and 55% to the husband.

8. In the event of sale the parties shall bear any capital gains tax liability in the same proportion.

9. In addition to the sum realisable in the event of sale, the husband shall pay the wife a lump sum of £43,000 from his share of the proceeds to represent 50% of the nett cash in hand (after tax) her interest in the Axa and Standard Life Policies with approximately 20% of the husband's inheritance added in.

10. Pending payment of the said lump sum or the said sale whichever is the earlier the husband shall pay the wife spousal maintenance of £2,000 per month with the first payment to be on the 1 March 2010.

11. Following the payment of the said lump sum or the said sale whichever is the earlier the figure for spousal maintenance shall reduce to £1,000 per month to be paid for a period of five years from the relevant date or until the marriage or cohabitation of the wife whichever is the earlier.

12. The parties shall otherwise retain any assets in their own name.

13. On implementation of the above terms the respective claims of each party in respect of periodical payments, secured provision, lump sum, property adjustment, pension provision and other forms of Ancillary Relief shall stand dismissed.

23. As I was at pains to point out throughout the hearing to the parties this was a straightforward case. Without going into detail I indicated on a number of occasions the likely structure of any eventual outcome. Despite that it ran over a period of 13 days during the course of which, in my view, a number of unsustainable arguments were raised by the husband. This was in no doubt due in large part to the extreme bitterness he felt upon what he saw as his betrayal by his wife and the breakdown of the marriage. It is likely that this will have serious implications in relation to the costs of these proceedings

which run well into six figures. Accordingly I will hear argument as to costs on the 11 June.