Neutral Citation No. [2012] NIMaster 2 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **09/01/12**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

Y

Petitioner;

and

McG

Respondent.

Master Bell

[1] In this application the respondent (to whom I shall refer, for ease of reference, as "the husband") seeks Ancillary Relief pursuant to a summons dated 22 December 2009.

[2] The parties are requested to consider the terms of this judgment and to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be published in its present form.

[3] At the hearing both parties gave oral evidence. An affidavit was sworn by the husband on 22 December 2009 for the purpose of these proceedings. An affidavit was sworn by the petitioner (to whom I shall refer, for ease of reference, as "the wife") on 8 February 2010. I also had the benefit of helpful oral and written submissions by Miss Gregan on behalf of the husband and Miss Ranaghan on behalf of the wife.

[4] The following assets (abbreviated for the purpose of anonymisation) were the subject of the hearing :

(a) A property at 17 CL (the former matrimonial home). The equity in this property is in the region of £90,000 - £120,000;
(b) A property at 6 SM (an investment property in the husband's name);
(c) A property at 1d SC (an investment property held in the husband's brother's name but which the husband accepts he owns);
(d) A property at 16 CQ (an investment property in the husband's name). The total equity in the three investment properties is approximately £102,000;
(e) The wife's occupational pension with a CETV of £58,302 ; and
(f) The husband's occupational pension with a CETV of £557,674

[5] It is noteworthy that there are mortgage arrears of some £15,000 in respect of the matrimonial home and repossession proceedings are pending in respect of it.

THE HISTORY OF THE MARRIAGE

[6] The parties were married on 26 November 2004. They separated sometime between March 2006 and July 2006 and a Decree Nisi was granted on 16 December 2009. There are no children of the marriage. The wife has a son aged 16 from a previous marriage and a son who is aged almost 2 years from a relationship subsequent to the marriage. The husband has a daughter aged 2 years, also from a subsequent relationship.

THE ARTICLE 27 FACTORS

Welfare of the child

[7] 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. There are no minor children of the family.

Income and earning capacity

[8] The husband is an army officer. He earns approximately £3,400 per month. The wife is employed as a civil servant and, including tax credits, child benefit and child maintenance, her total income is approximately £1763 per month.

Financial needs, obligations and responsibilities of the parties

[9] There was no evidence placed before me of unusual financial needs in respect of the parties.

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

[10] Although the parties owned four properties between them, 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

[11] Both parties are aged 43. The parties are in dispute as regards the effective length of the marriage. In the decision of *GW v RW (Financial Provision: departure from equality)* (2003) 2 FLR 108 Nicholas Mostyn QC, sitting as a deputy High Court judge, dealt with the issue of whether a period of pre-marital cohabitation should be equated to marital cohabitation. He took the view that, where a relationship moved "seamlessly from cohabitation to marriage without any major alteration in the way the couple live", it was unreal and artificial to treat the periods differently. On the other hand, he held that, if it was found that the premarital cohabitation was on the basis of a trial period to see if there was any basis for later marriage, then he would be of the view that it would not be right to include it as part of the "duration of the marriage". By the same token he held that it was equally unreal to characterise an 18 month period of estrangement, conducted under the umbrella of a divorce petition which alleged the irretrievable breakdown of the marriage, as counting as part of "the duration of the marriage". In his judgment a period of estrangement where there had been a formal separation should not count as part of the duration of the marriage.

[12] In *M v M (Short marriage: clean break)* [2005] EWHC 528 (Fam) Singer J considered a case where from marriage to separation the parties lived together as spouses for 2¾ years. However counsel on behalf of the wife argued that the weight to be given to the duration of the marriage as a circumstance of the case to be taken into account when performing the section 25 exercise should be affected by "the exclusive and committed nature of the parties' relationship for the 5 years prior to their marriage". Singer J found as facts that the parties' relationship before their marriage was undoubtedly close and apparently exclusive virtually from the outset. Their physical relationship was established from the summer of 1995 onwards. Until the marriage the parties never cohabited and indeed until shortly before the marriage they did not live in the same city. But he was satisfied that they spent the overwhelming bulk of their leisure time together and were in virtually daily contact. Those were the practical and geographical boundaries of their relationship. Emotionally the position was, in his assessment, more complex. Their relationship developed over time until their engagement

resulted in July 1999 from a formal proposal made by the husband. Until then the wife was hoping to marry the husband with more enthusiasm than he was demonstrating for that commitment. This rather tentative relationship, at least on the husband's part, until their engagement did not fit entirely happily to Singer J's mind with the epithets "exclusive" and "committed". Singer J was referred to, amongst others, the reported cases of *GW v RW (Financial Provision: Departure from Equality)* [2003] EWHC 611 (Fam), [2003] 2 FLR 108; *M v M (Financial Relief: Substantial Earning Capacity)* [2004] EWHC 688 (Fam), [2004] 2 FLR 236; *J v J (Ancillary Relief: Periodical Payments)* [2003] EWHC 611 (Fam), [2004] 1 FCR 709; and *CO v CO (Ancillary Relief: Pre-marriage Cohabitation)* [2004] EWHC 287 (Fam), [2004] 1FLR 1095. Singer J then concluded :

> "There is not a case in the calendar where a court has expressly taken into account (whether while assessing the impact of the duration of the marriage, or simply as a circumstance deemed relevant) a relationship which did not involve cohabitation. Moreover, and self-evidently, these parties did not mingle their finances, purchase or rent property together or have a child."

[13] In the case before me the husband gave evidence that the parties had casual encounters through the late 1990s but only began to date in 2000. When he returned from tours of duty he stayed with her. They became engaged in 2003 and married in 2004. He emphasised that they shared no bank account prior to or, indeed, after marriage. However, upon marriage, they bought the matrimonial home together. The wife gave evidence that she had met the husband when she was aged 16. They were in a relationship for a couple of years and then they started again in 1996. She agreed that he used to stay over in her home on occasions. The wife's counsel laid stress on the fact that the quality of the parties' relationship did not change after marriage. After marriage it was as it had been before marriage. She argued therefore that there was the "seemless blending" referred to in *GW v RW (Financial Provision: departure from equality)*. I cannot accept this argument. Lack of change in the nature of the relationship is, in my view, insufficient. The disappointing nature of the relationship after marriage does not elevate the nature of the relationship pre-marriage into something akin to marriage. The decisions starting with *GW v RW (Financial Provision: departure from equality)* are designed to cover factual situations where the parties have a marriage in all but name which is then subsequently formalised by a marriage ceremony. This is, however, a case where the wife has come very close to arguing (as will be seen when I deal with the submissions in respect of conduct) that the parties have never had a relationship which was worthy of the name of marriage. I conclude therefore that the marriage must therefore be regarded as being of brief duration, having lasted approximately 16 months until the separation.

Any physical or mental disability by the parties of the marriage

[14] Although the wife's core issues raised the issue of anxiety for which she was prescribed anti-depressants, the issue of health was not pursued at the hearing.

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

[15] Contribution made by each of the parties to the welfare of the family was not an issue which either of the parties raised.

Conduct

[16] The wife argued that there are two kinds of conduct present which it would be inequitable for me to disregard. The first category of conduct is matrimonial conduct. The wife alleges that the way the husband conducted himself during the marriage amounted to such conduct. She gave evidence that the husband only spent 66 nights with her in the matrimonial home during the entire marriage. When married only six weeks, rather than spending Christmas with his new bride, he spent it with his mother. Similarly, he spent their second Christmas with his mother. The wife said she felt totally rejected. The wife also complains that some three years after their separation the husband suggested that he move back into the matrimonial home. The wife's counsel argued that this behaviour intimidated the wife and caused her considerable distress during her pregnancy. The husband gave evidence that he was at the time sleeping on a friend's sofa when he was in Belfast. He stated in his evidence in chief that he wanted to try and get the marriage back on track. However the husband's evidence was inconsistent on this point. He said in cross examination that he "needed a base" and that his new partner's house was very cramped and there was no space for him and his belongings there. On the other hand there was ample storage space in the matrimonial home. While I accept that the husband's behaviour and expectations were insensitive, unrealistic and strange, I do not accept that his conduct falls within the statutory provision. Counsel for the wife was unable to cite any authority for conduct falling short of violence or criminal sexual acts being taken into account. 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. 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". Clearly the matrimonial conduct in this case does not exceed that standard.

[17] The second category of conduct is financial conduct. There are three elements of this alleged by the wife. She gave evidence that the husband

undertook to make up the tax credits which she had lost upon marriage, a sum of approximately £400 per month. He defaulted on this agreement. His unreliability in this regard does not in my view amount to conduct within the meaning of the statutory provision.

[18] The wife also argued that the re-mortgage of his investment properties so as to release £150,000 capital which was subsequently invested in a property company, the directors of which were Army comrades, amounted to financial conduct. The husband gave evidence that the two company owners had been making money from the property boom. He invested the £150,000 in the company but shortly afterwards, the property bubble burst and he lost the investment. The wife expressed the view that in making the investment he had taken equity from the properties and attempted to hide it. However there was no factual evidence from which I can draw this conclusion. In *Jones v Great Western Railway Company* [1930] 144 LT194 the court said "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof." I therefore cannot regard this in the way her counsel sought, namely as action by the husband with the intention of defeating his wife's claim such as occurred in *Kemmis v Kemmis Welland and Others Intervening*); *Lazard Brothers and Co (Jersey) Ltd v Norah Holdings Ltd and Others* [1988] 2 FLR 223. I must also reject the argument that this amounts to conduct under Article 27. There was no evidence that this was anything but an ill-advised, unsecured investment, but an investment which does not reach the level of risk necessary for the husband's action to be classified as financial conduct under Article 27. It does, of course, make even a needs-based property division more difficult for the court.

[19] The wife also argued that the husband's conduct in forging her signature on a mortgage document extending the mortgage term amounts to financial conduct. She gave evidence that he told her it was none of her business and "no big deal". The forgery was investigated by the Nationwide Building Society and no criminal proceedings have been initiated as a result of it. The husband admitted during oral evidence that he had forged the wife's signature. He stated that he deeply regretted doing it to her. However his regret cannot be taken at face value. The husband explained in his evidence that he had been right at the edge of his overdraft limit and did not want to exceed it, then commented "It was done in good faith". The forgery of the mortgage documentation does amount in my view to the type of conduct with which the statute is concerned. However the *weight* which I consider should be attached to it is relatively small, given that the financial loss occasioned by the forgery would appear to have been minimal. (Had the husband obtained a significant amount of capital via the forgery and dissipated it, I would have been prepared to accord it far more weight.)

Nevertheless, forgery is a criminal offence involving dishonesty and the husband's admission in oral evidence of having committed the offence is therefore significant in assessing his credibility.

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

[20] Other than the pension arrangements previously mentioned, there were no such matters.

CONCLUSION

[21] The first issue to be decided is whether the husband's three investment properties should be included or excluded from consideration. The wife argues that they should be treated as matrimonial property. Her evidence was that at the time of their marriage the wife owned her own home at 4 FD. She had bought it a year previously. She had taken a mortgage of £40,000 and her father had financed the remainder of it. The husband made no financial contribution to its purchase. Upon marriage the agreement between the parties was that the husband would move in and it would be their matrimonial home. However the husband made excuses as to why he could not move in. First, the reason was the illness of his father (who subsequently died). Then he said he needed to be with his mother. He also said that he did not feel at home there because the house had previously been hers and that they needed a home that belonged to them both. They then agreed that the wife would sell her house. The wife said that she was initially content with this and put down a deposit on a new property. Subsequently she withdrew, being unhappy with both the husband's financial commitment and his commitment to her. However the husband persuaded her that she would not want for anything. He suggested to her that his three investment properties were also "in the pot" (but that they should not be sold as they provided a rental income); that he would pay the mortgage and she would pay the bills. Accordingly, she sold her house at 4 FD for £96,700 and contributed £90,000 towards 17 CL. She also spent £5,400 on a car. The husband contributed £53,000 towards 17 CL.

[22] The husband's evidence was the wife drove the purchase of a new matrimonial home and that he was simply "talked into it". He stated that his advice to her had been not to sell her house but rather to rent it out as a safety net in case something happened to him. He said that she saw it as an opportunity to upgrade her circumstances. He therefore argues that the three investment properties should not be considered matrimonial property. His justification for seeking the ringfencing of the investment properties was they were purchased following "demanding operation tours and huge personal sacrifice" and essentially denied ever saying to the wife that they should be regarded as being "in the matrimonial pot".

[23] Whether the husband represented to the wife that the three investment properties should be regarded as being "in the matrimonial pot" is an important factual issue. If he did, and as a consequence she was encouraged into selling the house in her name and purchasing the matrimonial home, then it would be unfair now to ringfence the investment properties and exclude them from the ancillary relief property division. Resolution of this factual issue is a credibility issue. Taking into account the husband's admission of dishonestly forging his wife's signature, together with the inherent probabilities surrounding the situation, I resolve the factual issue in the wife's favour and find that it is more probable that the husband did make this representation. I therefore conclude that each of the investment properties should be considered as matrimonial property for the purpose of this application.

[24] The second issue which requires to be determined is to decide how the equity in the matrimonial home should be shared between the parties. 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 there is a 'clean break' between the parties. 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 or order a clean break. The particular facts of each individual case must therefore be considered with a view to deciding the appropriateness of a clean break. I have concluded that a clean break in this case is both possible and desirable. In particular, given the brief length of the marriage I do not consider that this is a case where I should make a Pension Sharing Order. Although the husband's pension CETV greatly exceeds that of the wife, the vast bulk of it relates to periods during which the parties were not together as husband and wife. Furthermore, both parties still have a significant part of their working lives before them.

[25] The starting point for property division 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, so called needs-based cases, of which this is one, where the available property is insufficient to meet both parties' reasonable needs, are difficult because, as Moor J observed in *A v L* [2011] EWHC 3150 (Fam) "no outcome is in the least bit satisfactory." Taking into account the full facts and circumstances presented to me, and in particular that :

(i) The marriage lasting less than a year and a half;

(ii) Both parties having a need for accommodation;
(iii) The wife having responsibility for two children, even though they are not the first consideration of the court under Article 27, as they are not children of the family;
(iv) The husband's earning capacity being significantly greater than the wife's;
(v) The wife's greater initial contribution towards the purchase of 17 CL ;

I conclude that the fairest outcome that can be achieved is to divide matrimonial assets in terms by awarding the matrimonial home at 17 CL to the wife and the three investment properties to the husband and, given that the equity in the matrimonial home is slightly less than that in the investment properties, I also order the husband to pay to the wife a lump sum of £10,000.