[2017] NIMaster 4

Ref:

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

Delivered: **21/6/17**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

W

Petitioner;

and

W

Respondent.

Master Bell

[1] In this judgment I shall, for ease of reference, refer to the petitioner and the respondent as "the wife" and "the husband". In this application the wife seeks Ancillary Relief pursuant to a summons issued on 25 November 2015.

[2] This is an anonymised version of the full judgment given in these proceedings.

[3] Affidavits were sworn by the parties and relied on for the purpose of these proceedings. At the hearing both parties also gave oral evidence. Each counsel, Mr Toner QC for the wife and Miss Houston for the husband, also advanced their client's case by means of oral and written submissions.

[4] The marriage existed for almost 17 years. The parties were married in August 1997. They separated in June 2014 and a Decree Nisi was granted on 20 June 2016. There are two children of the marriage: daughters aged 11 and 14, both of whom live with the wife.

THE ASSETS

[5] The parties own the following assets :

The Matrimonial Home

[6] The matrimonial home in Holywood is in the husband's sole name with a valuation in the region of £700,000. There is a mortgage on the property, leaving equity of approximately £334,000. It is a detached property with four bedrooms.

A Halifax Account

[7] An account containing £76,436 matures in April 2021.

Speedboat

[8] The parties own a speedboat worth approximately £4,000.

Pension

[9] The husband has a pension with a CETV of approximately £298,200.

Shareholdings

[10] The husband owns shares valued at approximately £17,937.

[11] A more significant shareholding is the husband's shareholding of 1,896 shares in a company (which equals 1.52% of the shares in that company). In respect of the value of these shares I heard oral expert evidence from Johnny Webb of Webb and Co on behalf of the wife, and from Tony Nicholl of Goldblatt McGuigan on behalf of the husband**.** Both of these accountants had submitted reports on their valuations of the shares.

[12] Mr Nichol's evidence to me was that the shares would end up being sold for between £278,000 and £300,000. Capital Gains Tax would be payable on any sale of the shares and so the net figure the husband would receive would be between £235,736 and £253,336. Capital Gains Tax would be payable on income derived from the sale of the shares. Mr Webb gave evidence that Entrepreneurs' Relief would be available but Mr Nichol stated that this was not the position as the shareholding was less than 5%.

Trust income

[13] The husband has an interest in four trusts. Firstly, 25% of The M Trust. Secondly, 25% of The K Trust. These are accumulation and maintenance trusts. Thirdly, the husband has received funds from The I Trust. Fourthly, the husband has received funds from The H Trust. The latter two trusts are funded by dividends from the company referred to in paragraph 11 of this judgment.

[14] Mr Ian Conlon of IWC Actuarial was called on behalf of the wife and gave evidence as to the value which might be placed on the trust income over the husband's lifetime. He stated that there were three different

methods which could be adopted to place a lifetime capital value on the income stream. In his opinion the best method of achieving this was to use the Ogden tables. These gave a best estimate rather than a guarantee. He estimated the capital value of the income stream to be between £1,939,750 and £3,342,950 depending on whether the estimate was of non-increasing income or of income increasing with price inflation. Mr Conlon noted however that the capital value was sensitive to assumptions in relation to the rate of interest and the mortality assumptions which were made. Mr Conlon also noted that he understood that the income from the trusts reflected the dividends paid by the company to the trusts. The income which the husband could expect to receive over future years from the trusts was dependent upon the future dividend policy which was related to some extent to the company's future profitability. This was not an issue on which he could comment and therefore he could not consider the risk of dividends reducing or indeed ceasing over future years which would lead to a reduction or cessation of income payments from the trusts. He did however observe that over the period 2005 – 2015 dividends had trebled but gave evidence that he had no understanding whatsoever of the circumstances which had led to this trebling. In cross examination he stated that there could be difficulties or opportunities ahead for the company. The trusts were "prisoners of fortune to the company".

[15] As the hearing progressed, however, it transpired that I did not require to consider Mr Conlon's evidence with a view as to reaching a conclusion regarding the capitalisation of the trust income. Mr Toner conceded that he could not argue that the husband had the means to offer the wife a lump sum based on the value which might be placed on the trust income over the husband's lifetime.

[16] Mr Nichol gave evidence that the trust income received by the husband in the previous year was £62,550 (gross) and £40,992 (after tax).

[17] The question as to whether or not the trust income would be maintained at its current level or would increase or decline was the principal factual dispute in these proceedings.

[18] Mr Nichol gave evidence that he could not be sure that the trust income would be maintained because he could not tell whether the dividend income would be maintained. Declining profits and the pension deficit were the reasons which the company had given as to why the dividend might be reduced. Consideration had already been given to reducing the dividend but the company had decided to maintain it at its present level. Mr Nichol stated that past performance is usually used as an indicator of future performance. He accepted that while there was no certainty that the trust income would continue, it was likely that it would continue in the short term.

[19] The husband gave evidence that the company finds itself in a difficult position. The company pension scheme is currently £5 million in deficit and the projection is that this will increase to £6.2 million. The Pensions Regulator has expressed a strong view that the deficit should be quite severely reduced. The company is therefore considering putting more money into the pension scheme and reducing the amount of dividends given to shareholders in order to reduce the pension liability.

Mr Nichol gave evidence that he had spoken to the company chairman and the chairman had told him that declining profits and the pension deficit were two factors as to why the dividend might be reduced.

[20] The husband gave evidence that the trusts were established to help him and his siblings. Their purpose was to finance the children and their education. He stated that this was what the trust income had been applied to and that, if the children went to university as both the husband and wife hoped, the trust income would be directed to paying for their fees and accommodation.

[21] The couple's two children are both pupils at an independent fee-paying school. The husband gave oral evidence that the trusts were initially set up to assist him and his three siblings provide for their children as they grew up through their education. When asked by his counsel if that was what he had applied his income to, he answered in the affirmative, saying that that was the only way he could afford to do this. He confirmed in cross examination that the trusts were set up to assist with the cost of their education. He did not however suggest that this was the central, sole purpose of the trusts. Nevertheless he gave evidence that most of the income coming from the trusts goes towards their education. He conceded that there was no reference in the trust documentation to the education of children but stated that in recent times he had used the trust monies for the education of his children.

WIFE'S SUBMISSIONS

[22] In his initial written submissions Mr Toner proposed that, on a clean break basis, a capitalisation of spousal maintenance should result in a lump sum to the wife of £2,000,000 together with a transfer of the matrimonial home to her and with the husband continuing to pay maintenance for the children. At the hearing, however, Mr Toner abandoned this option. The wife conceded that the husband was unlikely to be able to obtain a sufficient sum from either family or banking sources which would allow him to capitalise spousal maintenance. The wife therefore sought a Pension Sharing Order of 50% of the pension assets accrued during the marriage, the transfer of the matrimonial home to her, and a lump sum of £300,000 which she would use

to pay off the mortgage. In addition she sought spousal maintenance on a joint lives basis. Mr Toner submitted that she currently received maintenance of approximately £3,100 per month and he submitted that an appropriate award was £2,083 per month on a joint lives basis.

[23] Mr Toner submitted that the principles in respect of lifetime maintenance had been set out by Mostyn J in *SS v NS* [2014] EWHC 4183 where the judge summarised the position in the following way :

> "46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:
>
> i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.
>
> ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.
>
> iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.
>
> iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.
>
> v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.
>
> vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.
>
> vii) The essential task of the judge is not merely to examine

> the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.
>
> viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.
>
> ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.
>
> x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.
>
> xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

[24] Mr Toner submitted that there is a difference in principle between cases where a party is asked to pay continuing or lifelong maintenance out of earned income and where a party is asked to make payments out of unearned income which is guaranteed for life and which is most likely increasing into the future.

HUSBAND'S SUBMISSIONS

[25] The husband emphasised that the discretionary trusts were all established before the parties were married. The trusts were dynastic in nature, quite clearly set up to provide for the next generation, and were not part of any attempt to avoid division of assets or payments to the wife in matrimonial proceedings.

[26] As regards the principles which apply in relation to the granting of lifetime maintenance, Miss Houston did not seek to assert that the principles summarised by Mostyn J in *SS v NS* were incorrect, though she did characterise them as *obiter dicta*.

[27] Of course, unlike the wife, the husband argued strongly that the trust income was not guaranteed for life.

[28] The husband made an open offer to the wife which amounted to a Pension Sharing Order of 50% of the pension assets accrued during the marriage together with the sum of £432,681 (which sum included a maintenance buy-out of £2083 per month with a 4 year multiplier).

THE ARTICLE 27 FACTORS

Welfare of any minor children

[29] Article 27 of the Matrimonial Causes (Northern Ireland) Order 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 two such children. They reside principally with the wife and their financial needs are being met in a generous fashion by the husband.

Income, earning capacity and other financial resources

[30] As indicated previously, the principal factual dispute in these proceedings concerns the income and financial resources of the husband. Will the trust income continue as before or will it increase or decrease? I have already set out the expert evidence given by the various witnesses and my view on this issue will be set out in the conclusions.

The husband's annual income for the year ending April 2016 was £119,484. This figure included the trust income together with his income from employment.

The parties were married when the wife was aged 24. Her first job was as a hotel receptionist. She later worked as an estate agent where she worked her way up to the position of valuer and office manager. When their first daughter was born, she stopped remunerated employment at that point. She gave evidence that her being a stay-at-home mother was by mutual agreement. One factor in this decision was that the husband travelled with his work. She has not been in remunerated employment since then. The wife gave evidence that she is willing to work but needs to retrain. She wishes to work in the field of mediation and counselling. She envisages doing a four year part time course with Belfast Metropolitan College but will first require to do an access course. She stated that at the moment she could not afford to do evening classes and, furthermore, to do them would be emotionally difficult for her.

Financial needs, obligations and responsibilities of the parties

[31] There was no evidence placed before me of unusual financial needs in respect of the parties. The wife currently lives in the matrimonial home and the husband lives in rented accommodation.

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

[32] Both parties enjoyed a high standard of living prior to the breakdown of the marriage. The wife gave evidence that it was very much funded by the trust income. The wife stated that she had a housecleaner whom she had had for quite a few years. The husband asserted that the wife demonstrated "a profligate and frightening attitude to money and expenditure". As an example he gave evidence that some six to eight months into the marriage the wife revealed that she was having great difficulty paying off credit card debts. The husband realised that the wife had been accruing debt without him knowing about it. He found he could not deal with the debt and had to approach his father for assistance. The wife responded that 85% of her current credit card expenditure was on their children, although she conceded some expenditure on a social life. The wife submitted that the husband's criticism of her spending did not sit well with his own spending on lavish and frequent foreign visits and attendance at premier sporting events. In a context where the husband stated that he and his wife had personalised number plates on their cars, he maintained membership of five different golf clubs, two of which were in Scotland, and he gave evidence of having attended Ireland's rugby match against the All Blacks in Chicago, the Hong Kong rugby sevens, the Masters in Augusta, and went shooting twice a year in Scotland, this comment had a certain resonance. Although counsel focused some of her cross-examination on the wife's expenditure, I did not come anywhere close to being persuaded that the wife's expenditure was "profligate and frightening". Nevertheless, courts often remind parties to ancillary relief proceedings that they will have to "cut their coat according to their cloth", in other words adjust to a reduced standard of living post-separation (See for example *N v F* [2011] EWHC 586 (Fam), *M v W (Ancillary Relief)* [2010] EWHC 1155 (Fam), and *TL v ML and Others* [2005] EWHC 2860 (Fam)) and there were indications during the parties' evidence that this may be one of those cases where both parties have yet to make such an adjustment. It is clear that even on the husband's income the parties would not be able to afford to maintain two properties of the standard of the matrimonial home and keep the lifestyle they have become accustomed to. Divorce usually has financial consequences which the parties need to adjust to.

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

[33] The parties are each aged 43. The marriage was of significant duration, having lasted 17 years until the separation. Mr Toner described it

as a long marriage in modern terms and sufficiently long for all assets to be fully assimilated into the marital acquest. He submitted that the marriage was of sufficient longevity and the contributions by each party were of such a nature that there ought not to be a departure from equality. Miss Houston saw the marriage as a medium length marriage. I do not view it as a long marriage but it is certainly well into the medium length category.

Any physical or mental disability by the parties of the marriage

[34] There was no evidence that either party suffered from any such disability.

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

[35] There was no evidence offered to me that the contribution made by each of the parties to the welfare of the family was unequal. In *White v White* [2001] 1 AC 596 Lord Nicholls said :

> "But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): "the contributions which each … has made or is likely … to make to the *welfare of the family*, including any contribution by looking after the home or caring for the family" (Emphasis added). If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.' "

Conduct

[36] Neither party made submissions that there were matters of conduct which it would be inequitable to disregard and which I should take into account.

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

[37] There are two benefits which by reason of the dissolution of the marriage the wife will lose. Firstly, there is the loss of a share in the husband's pension. Secondly, there is the loss of sharing in the trust income received by the husband which has been made such a fundamental contribution to their more than comfortable lifestyle.

Other matters taken into account

[38] 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. In this case there were no such matters.

CONCLUSION

[39] Counsel for the parties differed fundamentally as to the overall approach to this case. Miss Houston saw this as a "needs-based" case. Mr Toner saw it as a "sharing" case.

[40] The Family Justice Council for England and Wales published its "Guidance on 'Family Needs' in Divorce" in June 2016. It referred to the Law Commission for England and Wales having stated that needs is "a very broad concept with no single definition in family law" and using the term :

> " … to refer to how the law of England and Wales understands spousal support, encompassing a wide range of provision: income and capital, present and future. "Needs" includes payments made with a view to providing income, whether made on a regular basis or capitalised, but it also includes the provision of a home, including privately owned housing where that is appropriate, and provision for old age."

[41] In essence, however, as the Family Justice Council for England and Wales stated, the needs of the parties are a question of fact to be determined by the court.

[42] I do not consider that, in their application to factual situations of particular marriages, the needs principle and the sharing principle are somehow locked in watertight compartments. On occasions both principles

will apply. Even if the sharing principle is to be applied, it will either be applied once needs have been taken account of, or it will be applied in such a way as to ensure that needs have first been taken account of. This is not a matter of different application, simply a matter of different language being used to describe the process.

[43] I have reached the conclusion that this is not exclusively a needs-based case. The lifestyle enjoyed by the parties during the marriage went far beyond what most members of the public would regard as just meeting their "needs". The husband cannot seriously expect that he has a "need" to be a member of five different golf clubs, or that he has a "need" to attend international sporting events. This is in my view clearly a case of "sharing" the fruits of his own labours and of the labours of others as reflected by the trust income. However that this is a sharing case does not automatically lead me to the conclusion which Mr Toner has urged upon me, namely that a joint lives spousal maintenance order is appropriate.

The future trust income

[44] The husband conceded in cross examination that the trust income would not cease whenever the children left university. He also conceded that the children's education was not the formal object of the trust. Although in recent times the trust income may have been used to pay for the children's education, there was, for example, no reference in the trust documentation to the children's education. Therefore the trusts did not in any way limit expenditure to education or to spending on the children. Mr Toner submitted that the children will have left university in approximately 10 years. Thereafter the husband will have the entire benefit of the trust income. That would leave a great disparity in incomes between the husband and the wife.

[45] Mr Toner submitted that the performance of the company was a testament to the W family. The company has adapted to the modern world. Of course there were concerns in every commercial enterprise but, in the light of the way in which the company had developed, it was reasonable to suggest that the company will continue to thrive, and that income would increase rather than decrease. The most desirable approach to a case of this nature would have been to seek a clean break and therefore for the husband to raise a capital sum to satisfy the wife's interest in the assets. However because of the husband's inability to raise a capital sum, Mr Toner was driven to seeking continuing maintenance for life on the wife's behalf. He argued for joint lives maintenance rather than maintenance for an extendable term. Specifically, he proposed a sum of £2083 per month for the rest of their joint lives. The distinguishing feature which led to this approach was that the trust income was secure for life to the husband. It was important to note that this was unearned income and that therefore the husband would not, to use

Mr Toner's expression, become a "wage slave". Mr Toner observed that in paragraph viii of Mostyn J's principles in *SS v NS*, the judge distinguished between different types of income.

[46] Miss Houston argued that the husband's shareholding "has to be looked at in the light of market volatility particularly as a result of Brexit and the Trump election." I disagree with this submission. Judges are not prophets. The impact of the Brexit negotiations and of the US Presidential elections on world trade are unforeseeable. As Lewison J stated in *Whaley v Whaley* [2011] EWCA 617 :

> "No judge can make a positive finding about the future: the best that can be done is to assess likelihood. What is relevant is the likelihood of the trust fund or part of it being made available to him, either by income or capital distribution."

[47] Having heard evidence from the parties and their witnesses, together with submissions from counsel, I have reached the conclusion that the company has adapted well to the changes in economic conditions over the years and that, while there may be some difficulties which lie ahead in meeting pension obligations, it is likely that the company will continue to do well and prosper. For this reason, while there may be a short term drop in company dividends and hence in trust income, I do not find that there is any basis on which it could be said to be seriously threatened on a long term basis.

Clean break or maintenance for life ?

[48] Lord Wilson has recently pointed out extra-judicially the challenging nature of judicial decision making in this area :

> "Another hot potato is the possibility under our current law for periodical payments to continue to be made by the husband to the wife for many years following the divorce, sometimes (unless she remarries) even until one of them dies. I well understand that it is a running sore for husbands to have to continue payments long after the divorce; and my experience is that their new wives are often even angrier about it than they are! The obligation can eat into their married life in more ways than one. The trouble is that it is usually unrealistic to tell a wife, left on her own perhaps at age 60 after a long marriage, that, following payments for say three years, she must fend for herself. So we judges have to strike a difficult balance." ("Changes over the centuries in the

financial consequences of divorce", Address to the University of Bristol Law Club, 20 March 2017).

[49] As Mostyn J said in *SS v NS* "Unless undue hardship would likely be experienced, the court ought to be thinking of providing an end date to a periodical payments order." In the same decision Mostyn J referred to the Law Commission for England and Wales' report "Matrimonial Property, Needs and Agreements (Law Com No 343) 26 February 2014. The Commissioners wrote at para 3.96:

> "Exactly how, and at what level, needs will be met will depend on the resources available and, usually, the marital standard of living. Replicating the marital standard of living in two homes, after divorce, will be rare: most parties will not be able, in the short to medium term, to live at the standard they enjoyed during the marriage. That said, their former standard of living will be relevant in so far as any reduction in standard of living as a consequence of the financial settlement made on divorce should not fall disproportionately on one party. In addition, the transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her own resources"

Mostyn J then continued:

> "I would emphasise the final sentence. It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence."

[50] 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 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 not possible because the means and borrowing capacity of the husband do not enable him to have access to a sufficiently large sum to make this possible.

[51] I do not consider that this is an appropriate case in which to make a joint lives order for spousal maintenance. As indicated, the wife is aged 43. She intends to retrain and seek paid employment. However, because of the trust income, there is an element of sharing appropriate in this case and hence I consider that the periodical payments should continue for longer than would normally be the position.

[52] When I consider the value of the assets held by the parties and take into account the Article 27 factors I conclude that the appropriate order is as follows :

(i) The husband's interest in the matrimonial home shall be transferred into the name of the wife.
(ii) The husband shall pay to the wife a lump sum of £20,000
(iii) A Pension Sharing Order be made in favour of the wife in respect of 50% of the pension assets accrued during the marriage.
(iv) Spousal maintenance shall be paid by the husband to the wife in the amount of £2,800 per month for the term of 12 years. At the conclusion of the 12 year period the court will consider whether this amount should be modified or whether spousal maintenance should then cease entirely. At that time the court will consider whether it is just and reasonable to have expected the wife to have made a transition to independence.
(v) For the avoidance of doubt, the husband shall maintain the level of financial support of his children at the current level, paying their school fees, for school trips and social events, holidays and spending money. In the event that there is any dispute in relation to this level of funding, I give liberty to the parties to make further application in relation to it. Given the husband's love of, and previous provision for, his daughters I do not anticipate that any such application will become necessary.

[53] Once the parties have had an opportunity to consider this judgment, I shall hear them as to whether they wish to make any submissions on the matter of costs.