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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 26/02/2019*

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

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FAMILY DIVISION

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BETWEEN:

B

Petitioner;

and

B

(Ancillary Relief)

Respondent.

_____

Master Bell

INTRODUCTION

[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 21 July 2017.

[2] I have anonymised this judgment for the reason that it requires me to deal with a number of health issues in connection with members of the family and it would therefore be inappropriate to identify the family concerned. 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to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the JudiciaryNI website in this form or whether it requires any further anonymisation prior to publication.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] In this case I had the benefit of helpful written and oral submissions by the respondent (to whom I shall refer for ease of reference as "the husband"),

who appeared as a personal litigant, and by Miss Trainor on behalf of the wife.

[4] I note that the husband submitted a medical report dated 12 June 2018 from Professor Miller. That report dealt with the husband's capacity to act as a litigant in person and concluded:

> "It is my opinion that the recognisable psychiatric illness noted above is not of a severity that renders a substantial and significant impairment of his ability to adequately follow, process and understand the legal proceedings in an absolute manner. As is common there will be a fluctuation and variation depending on environment. However there is a substantial degree of higher executive impairment, which will be predictably worsened in an adversarial setting and where there is triggering of posttraumatic material. Given that he is dealing with highly personal areas of his life and that his former partner is in apparent conflict with him, this presents a potential impairment in his capacity in respect of the following areas: following the course of the proceedings and giving evidence in his own defence."

[5] The husband sought to have a McKenzie friend to assist him in court and I readily agreed to the application. In the light of Professor Miller's report I was careful to observe whether he became upset or agitated in any way during the two sessions which the hearing of this case required. From my perspective the husband was nothing other than calm, courteous and polite in the courtroom environment and I had no concerns that his health issues were affecting his performance. When it came to him giving oral evidence I allowed him to use the written summary which he had prepared in advance of the hearing.

[6] An affidavit was filed by the wife on 11 May 2018 for the purpose of these proceedings. An affidavit was also filed by the husband on 15 June 2018.

[7] At the hearing both parties gave oral evidence and each adopted their own affidavit as part of their evidence to the court.

[8] As is often the case with personal litigants, who may lack a knowledge of the rules on the admissibility of evidence, the husband submitted a number of documents of which I can take no account because they did not comply with Order 38 Rule 2 of the Rules of the Court of Judicature. In particular I mention three statements from his brother, his sister, and a family friend. These were signed but did not come in the form of sworn affidavits. His brother subsequently gave sworn oral evidence about whether or not he and

the husband operated a business together and I accept the brother's evidence that they do not do so.

[9] The parties were married in September 1990, separated in March 2017 and a Decree Nisi was granted in January 2018. There are two children of the marriage, both sons.

THE ASSETS

[10] The parties are agreed that the following assets are available for division :

(i) Proceeds of £145,813 from the sale of the former matrimonial home;
(ii) The husband's pension which is in payment - £1,024 per month
(iii) A pension held by the wife : CETV £54,571
(iv) Another pension held by the wife : CETV £5,376

In addition there are two potential assets in relation to which the parties gave evidence and made submissions. These are :

(i) A possible future inheritance to the wife; and
(ii) Possible damages from a personal injuries claim which has been made by the husband.

THE PARTIES' EXPECTATIONS

[11] The wife seeks :

(i) A 60% - 40 % division of the proceeds of the net proceeds from the matrimonial home in her favour;

(iii) A lump sum of £2,856 in respect of arrears which the husband allowed to accumulate in respect of the mortgage;

(iv) A lump sum of £30,000 as a half share of what the wife believes existed from the husband's retirement lump sum at the time of separation;

(v) A 50% pension sharing order in her favour in respect of the husband's PSNI pension in payment; and

(vi) A 50% pension sharing order in her husband's favour in respect of her NILGOSC pension

[12] The husband seeks :

(i) An 80% - 20% division of the net proceeds of the matrimonial home in his favour;

(ii) A lump sum of £9,250 to be given to the husband by the wife in respect of half of all cash payments previously given to the wife over the previous 18 months by the husband;

(iii) A sum of £2,000 as half payment for his involvement in discharging an IVA;

(iv) The return of an eternity ring valued at £2,500;

(v) No pension sharing order to be made in respect of the parties' pensions; and

(vi) The sum of £30,000 to be paid to the husband as compensation in damages due to the distress she has caused him.

THE ARTICLE 27 FACTORS

Welfare of children

[13] 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. The parties' sons are aged 21 and 24. The younger son is gainfully employed and lives independently. He initially bought a house under the co-ownership scheme and he and the husband lived together for a time after the parties had separated. The younger son now lives in a property that he and his girlfriend rent together and the husband now lives in the house bought by the son under the co-ownership scheme.

[14] The parties' elder son has Downs Syndrome. He has severe learning difficulties and needs care on a continuous basis. He cannot be left alone. The wife gave evidence that she was his main carer and that she transports him wherever he needs to go, such as to the day centre that he attends, to her parents' house, and to the Technical College that he attends. The husband has not seen the elder son since November 2017 when he withdrew contact through the son's social worker. The level of care that their son requires impacts on the wife's employment. She works for 25 hours per week and, due to being the carer for their son, cannot increase those hours. She has to work term-time only. She noted in her evidence that their son's needs may change in the future and that her parents' health may get worse, impacting on their

capacity to look after him. The son has a car, which is changed every three years, under the Motability scheme. The wife uses it to transport him where he needs to go and to do the shopping. She stated in her evidence that, if she is out on her own, she will use the Translink Glider to get into Belfast.

[15] The husband displays a robust keenness to be the primary carer for their elder son. He describes what occurred as their son being unlawfully and illegally removed from his home of 23 years without any consultation process, and with his human rights being violated in the process. In the husband's view, the wife forced their son against his will and his best interests to be removed from his father, his brother, his pet dog and everything he was familiar with, to live against his wishes in a life of seclusion away from his true family. The husband views the wife as using their disabled son for financial gain. He envisages that such a future change in their son's care arrangements would enable his wife to return to full time employment.

[16] The husband has written to the Chief Social Work Officer at the Department of Health registering complaints against the social worker involved in his son's case. He had previously complained to the social worker's team leader. He has requested that a new social worker is appointed to act in relation to his son. Although the husband has submitted copies of his complaints, he has not submitted copies of any substantive replies he has received and therefore I am not aware as to what substantive responses may have been made.

[17] In respect of the parties' elder son I am unable to foresee whether there are going to be any future changes in his living arrangements. In particular, I have no idea as to whether the husband's health issues (which I address below) will be regarded by Social Services as rendering him unable to care for his elder son on a long term basis, as he so clearly wishes to do. Inevitably I must therefore make an order for asset division based on the current arrangements and not in respect of possible future changes, as I am not able to anticipate whether these are likely to occur.

Income and earning capacity

[18] Article 27(2)(a) requires the court to have regard to, inter alia, "the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire." As Lord Sumption indicated in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34 this is a broad and inclusive definition of the relevant resources of the parties to the marriage so that the court may assess what the parties' resources really are.

[19] In terms of income, the wife gave evidence that she earned £930 per month as an admin officer. She does not receive benefits. Her elder son does, however, receive benefits. He receives £527 per month housing benefit. He receives £125 per week ESA. He receives £85.60 PIP (Enhanced Care). His benefits are paid into his account but he contributes to the household food and electricity costs. The wife gave evidence that she uses her money first, and only then his. While the son uses a bank card, the wife is nevertheless in control of his finances. She gave evidence that she does not abuse this position and their son has more money saved than ever before. The wife stated that during the parties' marriage their son's benefits were used as part of the household income. Upon their separation, the wife asked the husband for the son's bank cards.

[20] In terms of his income, the husband gave evidence that he was on benefits and he had a pension in payment. Currently his benefit payments are ESA of £443 per month and DLA of £90.60 per month. His ill-health pension award amounts to £1024 per month. PSNI Pensions Branch confirmed on 20 June 2018 that the current Cash Equivalent Transfer Value ("CETV") of his pension was £320,982. The husband submits that his benefits position is not stable and that he is likely to be moved to Universal Credit in the near future and that his DLA benefit is constantly under review. As indicated earlier, although it was suggested on behalf of the wife that the husband was in his business with his brother, this was in my view unfounded speculation.

[21] There was from each party in this case a submission that I should have regard to resources which were likely to be in the hands of the other party in the foreseeable future.

[22] Not infrequently ancillary relief cases may involve a party who has ongoing personal injuries litigation. Often these cases will be settled between the parties on the basis that if the personal injuries litigation is successful, the spouse will receive, for example, 20% of the damages awarded. The thinking behind an agreement of this kind may be that, since 20% of nothing is nothing, there is no downside in recognising that there is the smallest possibility that the litigation will be successful.

[23] In a contested case, however, the position is not as simple. Before future assets or income are included in an order of the court, the party making the claim against the potential resource must satisfy the court on the balance of probabilities that firstly, it is *likely* that their spouse will receive the potential resource and secondly that that receipt is in the *foreseeable* future. These are two separate matters of fact and they must be individually addressed with the claiming spouse being successful in regard to both elements.

Likelihood of Future Resources

[24] When it comes to whether it is *likely* that a party will receive a potential resource, some such resources are more likely than others and in some instances the receipt of the resource is almost certain. A pension or gratuity being received from an employer will usually fall into this category. Courts have therefore found the receipt of pensions or gratuities to be likely in *Morris v Morris* (1977) 7 Fam Law 244, *Priest v Priest* (1980) 1 FLR 189 and *Milne v Milne* (1981) 2 FLR 286.

[25] In *C v C & Ors* [2009] EWHC 1491 (Fam), an ancillary relief case which focused on when, and in what circumstances, a party might be able to obtain some value from a trust fund, Mumby J said :

> "If the court is satisfied that there is, within the meaning of section 25(2)(a), some "financial resource" which, although not presently available for distribution, is "likely" to become available "in the foreseeable future" to one of the spouses in circumstances where it might be right to direct that some part of it should be paid to the other spouse, the court has a choice: it may either adjourn the application or it may make an immediate order, for example by directing that the applicant spouse be paid some specified share of the property if and when it comes into the hands of the respondent spouse: see *Michael v Michael* [1986] 2 FLR 389 at page 392. Which course is appropriate will depend upon the circumstances of the particular case, being ultimately a matter for judicial discretion: *Davies v Davies* [1986] 1 FLR 497 at page 503 and *D v D (Lump Sum: Adjournment of Application)* [2001] 1 FLR 633 at pages 635-636."

Foreseeability

[26] In *Michael v Michael* [1986] 2 FLR 389 the Court of Appeal for England and Wales dealt with the issue of whether a potential inheritance should be considered as a foreseeable resource under the Matrimonial Causes legislation. Nourse LJ held :

> "I have already expressed the view that section 25(2)(a) could in certain circumstances extend to an interest which might be taken under the will of a living person. Suppose, for example, a case where there was clear evidence, first, that the respondent's father was suffering from a terminal illness, secondly, that his will left property of substantial but uncertain value to the respondent and, thirdly, that it was highly improbable that he could or would revoke it. In such a case it could hardly be doubted either

> that the property was property which the respondent was likely to have in the foreseeable future or that the application should be adjourned to abide the death of the father. However, those facts, being extremely special, demonstrate that the occasions on which such an interest will fall within section 25(2)(a) are likely to be rare. In the normal case uncertainties both as to the fact of inheritance and as to the time at which it will occur will make it impossible to hold that the property is property which is likely to be had in the foreseeable future."

[27] In *Alireza v Radwan and Others* [2017] EWCA Civ 1545 King LJ stated that the words in Nourse LJ's final sentence above in *Michael* still hold good 30 years on. (She then, however, went on to say that the case before her was different as it involved an inheritance under Saudi Arabian 'forced heirship' laws and hence the wife's inheritance prospects had a certainty brought to it by those laws and it did not have the inherent uncertainty found where a will is made in a country such as England where there is no concept of forced heirship.)

[28] Applying this approach, MacDonald J held in *Her Royal Highness Tessy Princess of Luxembourg, Princess of Nassau and Princess of Bourbon-Parma v His Royal Highness Louis Xavier Marie Guillaume Prince of Luxembourg, Prince of Nassau and Prince of Bourbon-Parma and another* [2018] EWFC 77 :

> "I am likewise satisfied on the evidence before the court that the husband's prospect of a future inheritance is not sufficiently certain to enable the court to regard the same as a financial resource falling for distribution in these proceedings. It may well be that the husband will in due course receive further funds by way of inheritance. However, on the evidence currently before the court it is not possible, as the wife concedes, to say with sufficient certainty when he will do so. Nor is it possible on the evidence before the court to be sufficiently certain of the amount of any further payment to be made. In the circumstances, the husband's future inheritance prospects are simply not a sufficiently certain foundation upon which to rest an award to the wife."

[29] There will however be instances where the court finds it difficult to be satisfied whether a party may receive resources in the foreseeable future and may adjourn the application to see what happens. *Davies v Davies* 1985 WL 1157373 concerned whether it was likely that the husband would in the foreseeable future come into a sum of capital out of which a lump sum could be ordered to be paid to the wife. Judge Mander had heard evidence and submissions in relation to what the husband's future prospects were. The husband was engaged in a farming partnership and his business partner was aged 78. The judge had contemplated that that there was a real possibility that the partnership might be dissolved and the husband would receive a significant amount of money because of both the profitability of the

partnership and the age of the husband's business partner. Accordingly he decided to adjourn the wife's application to see whether the event that he thought might well occur fairly soon, did in fact occur. On appeal, the Court of Appeal held that the judge had jurisdiction to adjourn the wife's application in the way that he had. The Court of Appeal accepted that it was desirable whenever possible to achieve finality but in this case the judge was projecting forward for a period which was not long. Keeping the situation open in the circumstances in which the judge did in order that justice could be done was a thoroughly sound basis for his order.

The Wife's Inheritance Prospects

[30] The wife was cross examined by the husband as to her inheritance prospects. The wife gave evidence that her parents were currently healthy. She stated that she was not a beneficiary in her parents' wills. Their wills left everything to their grandchildren. Neither she nor her siblings were beneficiaries in the wills.

[31] The husband in his evidence stated that the wife's parents were 85 and 82 respectively. He commented that they had had a "good innings". He was not aware of the current state of their health. He described them as the wife's "wealthy parents". Her father had been a senior manager working in Shorts and had a very large pension (although the husband did not know what it was). He stated that they lived in a luxury bungalow worth upwards of £300,000 to £350,000. The wife's parents had themselves received wealthy inheritances from their relatives. In cross examination the husband conceded to Miss Trainor that he was being "speculative" about the possibility of the wife's inheritance. Speculation is not, however, a legitimate, judicial fact-finding methodology.

The Husband's Personal Injury litigation

[32] The husband gave evidence that he had a pending legal claim against the PSNI, the Department of Justice and the Policing Board. He alleges negligence during his ill-health retirement process. No evidence was offered as to the amount of damages being sought, the stage the action had reached, or whether it was suggested that the action had any merits of success.

[33] I note that in respect of both submissions the only evidence offered was oral evidence offered by the parties. Where an application concerns resources that a party is likely to have in the foreseeable future, the party seeking the taking into account of a particular resource should insist on proper discovery so that the court is in possession of any relevant documentary evidence regarding the matter. If discovery is not given then, as Lord Sumption said in *Prest v Petrodel Resources Ltd and others* :

> "The proper exercise of these powers calls for a considerable measure of candour by the parties in disclosing their financial affairs, and extensive procedural powers are available to the court to compel disclosure if necessary."

[34] The wife did not offer by way of disclosure copies of her parents' wills. Nor has the husband sought an order for specific discovery or a Khanna subpoena to obtain copies of the wills. Similarly, the husband has not made discovery of the Writ or any of the pleadings in his personal injury litigation. Nor has the wife made a specific discovery application for any of that documentation or issued a questionnaire seeking information in respect of the litigation.

[35] I conclude that, neither in respect of an inheritance which the wife could receive, nor in respect of any personal injury award which the husband might receive, can I be satisfied on the balance of probabilities that these are resources which the party concerned "is likely to have in the foreseeable future". Hence I cannot include them in my consideration.

Financial needs, obligations and responsibilities of the parties

[36] 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

[37] Both parties enjoyed an average standard of living prior to the breakdown of the marriage, at least until they began to get into debt problems and the husband entered an IVA arrangement.

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

[38] The wife is aged 49 and the husband is 51. The marriage was of long duration, having lasted 26 years until the separation.

Any physical or mental disability by the parties of the marriage

[39] The husband has submitted a number of documents in relation to his health. In his written submissions for the hearing of this application the husband stated that he had provided numerous documents and reports which provided very clear evidence as to his extensive physical and mental ill health conditions which were as a direct result of his previous employment. He considered that these conditions had been exacerbated through having to take part in the proceedings.

[40] A report by Claire McDowell from Safe Horizon UK sets out how complex PTSD affects the husband's day to day functioning. Her report indicates that the husband may have unpredictable outbursts and rage, with risk of harm to the husband himself, and to the public and colleagues. She also indicated that he cannot function in an environment with distractions, noise and other people.

[41] One of the documents submitted by the husband is a psychiatric report by Professor Miller dated 13 October 2016. I note that this report was commissioned specifically for the husband's "claim against the PSNI, the Northern Ireland Office, Dr Cochrane, and the Policing Board for Northern Ireland for negligently rejecting his ill-health pension retirement application". Although there are a number of missing pages from the report, it is clear that Professor Miller concludes that the husband fulfilled the criteria for PTSD at a severe and complex level. Professor Miller described the husband's main phenomena as being anxiety-related and marked with anankastic (obsessive-compulsive) behavioural patterns. He concludes that the husband will not now fully resolve his symptoms and is permanently disabled by them.

[42] In a report dated 11 January 2018, again commissioned for the husband's negligence claim, Dr Curran, reviewing the husband's previous medical reports, was of the opinion that it would be difficult to dismiss the conclusions of Professor Miller. He stated :

> "Regrettably the prognosis has to be somewhat guarded in this case given the chronicity of problems both in relation to the patient's physical and mental health. It is likely that [the husband] will continue to attend physicians, his GP and mental health professionals most likely in the sector Rehabilitation and Recovery Team into the foreseeable future and remain on an extensive array of medications.
>
> Once the present action against the DOJ is concluded I would however expect a degree of amelioration in his raised anxiety symptoms and fluctuating lowered affect."

[43] A subsequent report dated 31 January 2018 from Dr McBride, a GP, noted that the husband was at that time suffering from anxiety with depression and hypertension and that the current court proceedings were contributing to his levels of anxiety and stress.

[44] In considering the medical evidence, I note that, although it states that the husband is not sufficiently well enough to perform the duties of a police officer, it does not go as far as stating that he is not well enough to engage in other forms of less onerous employment. I am therefore unable to gauge whether or not this is a possibility.

[45] A review of the case law in this area indicates that the instances where courts have awarded an increased tranche of the matrimonial assets due to the ill health or disability of one party are few and far between. Furthermore, cases involving ill health factors in an ancillary relief context will of course always be very fact-specific. *Seaton v Seaton* [1986] 2 FLR 398 concerned a husband who had had a major stroke which had incapacitated him. He could barely speak and was quite unable to look after himself and quite unable to command any earning capacity. His parents had voluntarily assumed the burden of looking after him. There was no prospect of any significant recovery from his disabilities. His wife had a secure salary as a teacher. He appealed an order dismissing his application for periodical payments. The Court of Appeal for England and Wales dismissed his appeal, holding that there was no ground for holding that the trial judge was wrong when he considered that as a matter of justice no continuing obligation should be imposed upon the former wife to support her husband.

[46] As Duckworth's *Matrimonial Property and Finance* observes, a foreshortened life expectancy may be a reason for taking an unusual course with regard to the division of the matrimonial assets. For example, in *M v M (Property Adjustment: Impaired Life Expectancy)* [1994] 2 FCR 174, where a 36-year-old wife had a brain tumour and was likely to die in the short term, the court settled £135,000, (which amounted to 75% of the proceeds of sale of the former matrimonial home), on the purchase of new accommodation for the wife and children, subject to a charge back to the husband on her death. However in *M v M* [2015] EWFC B63, the fact that a 58-year-old wife had been diagnosed with ovarian cancer did not lead to any departure from equality in relation to pensions. Judge Wildblood expressed the view that life expectancy was not a science and concluded that there was great uncertainty about the life expectancy of Mrs M. While it had to be recognised that Mrs M was very likely to have a reduced life expectancy, it was pure guesswork as to how reduced it might be. The court specifically rejected the husband's attempt to define the wife's entitlement by reference to her reduced life expectancy.

[47] In the unreported decision of *L v L* (24 November 2005) Master Redpath dealt with an application where ill health was raised as an issue (though he did not indicate the nature of the ill health condition). He stated:

> "It was also argued before me that the Respondent suffers from ill health. *Duckworth* states at B3 [42]: -
>
> > 'Poor health on the part of one spouse may create a need for greater capital, for example to adopt the home or to finance nursing care. However, the court must always perform a balancing exercise and the point may be reached in some cases where it is not

> reasonable to expect the spouse to underwrite the healthcare of the other spouse.'
>
> .... It does not seem to me that the nature of the Respondent's ill health is likely for the foreseeable future to require the adaption of the home or the financing of nursing care."

[48] In the case before me the facts do not involve any of the features which have previously been taken into account by the courts, such as reduced life expectancy, the need for the adaptation of property, or the need to finance nursing care. In my view, although the husband in this case clearly has health issues, those health issues are not of a kind as justify awarding the husband a greater proportion of the assets.

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

[49] I heard no evidence that the contribution made by either of the parties to the welfare of the family merited being taken into account under Article 27(2)(f). The evidence before me led me to the conclusion that the contribution made by each of the parties to the welfare of the family was equal.

[50] In *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 Lord Nicholls made it quite clear that in most cases fairness did not require considerations of the parties different contributions:

> "Apparently, in this post-White era there is a growing tendency for parties and their advisers to enter into the minute detail of the parties' married life, with a view to lauding their own contribution and denigrating that of the other party. In the words of Thorpe LJ, the excesses formerly seen in the litigation concerning the claimant's reasonable requirements have now been 'transposed into disputed, and often futile, evaluations of the contributions of both of the parties': *Lambert v Lambert* [2002] EWCA Civ 1685; [2003] Fam 103, 117, para 27.
>
> On this I echo the powerful observations of Coleridge J in *G v G (Financial Provision: Equal Division)* [2002] EWHC 1339 (Fam); [2002] 2 FLR 1143, 1154-1155, paras 33-34. Parties should not seek to promote a case of 'special contribution' unless the contribution is so marked that to disregard it would be inequitable. A good reason for departing from equality is not to be found in the minutiae of married life. "

In *Miller v Miller; McFarlane v McFarlane* [2006] 1 FLR 1186 Lord Mance stated that:

> "…section 25(2)(g) recognises the difficulty and undesirability, except in egregious cases, of any attempt at assessing and weighing marital conduct. I now recognise the same difficulty in respect of marital contributions - conduct and contributions are in large measure opposite sides of a coin: see e.g. *G v. G (Financial Provision: Equal Division)* [2002] 2 FLR 1143, per Coleridge J at paragraph 34."

The issue of special contribution was subsequently addressed in *Charman v Charman* [2007] 1 FLR 1246 in the judgment of Sir Mark Potter:

> "The notion of a special contribution to the welfare of the family will not successfully have been purged of inherent gender discrimination unless it is accepted that such a contribution can, in principle, take a number of forms; that it can be non-financial as well as financial; and that it can thus be made by a party whose role has been exclusively that of a home-maker. Nevertheless in practice, and for a self-evident reason, the claim to have made a special contribution seems so far to have arisen only in cases of substantial wealth generated by a party's success in business during the marriage. The self-evident reason is that in such cases there is substantial property over the distribution of which it is worthwhile to argue."

Conduct

[51] The husband asked the court to take conduct into account for the purpose of the asset division. I decline to so. Much of the alleged conduct does not fall within any reasonable definition of conduct as the courts have applied the matrimonial proceedings legislation. The husband, for example, submits that because the wife has defaulted in respect of their marriage contract she therefore has no claims over him and his property.

[52] In *S v S (Non-Matrimonial Property: Conduct)* [2007] 1 FLR 1496 Burton J observed that there were "only rare cases" reported where courts had taken into account non-financial conduct. This rarity is underlined by the fact that counsel had only been able to refer him to 13 such authorities over a 27 year period. In all the cases with the exception of one Burton J found that the conduct appeared to be manifestly serious. The conduct can only be such, he noted, as Sir Roger Ormrod described in *Hall v Hall* [1984] FLR 631 as "nothing to do with the ordinary run of fighting and quarrelling in an unhappy marriage" and which the judge's "sense of justice required to be taken into account". Counsel in *S v S*, Nicholas Mostyn QC, suggested to the court that another way of describing such exceptional conduct was that it possessed a "gasp factor".

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

[53] Other than the pension arrangements previously mentioned which I shall refer to again shortly, there were no such matters.

Other matters taken into account

[54] 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

[55] 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 both possible and desirable.

[56] The current approach to ancillary relief applications has been summarised most recently in this jurisdiction by Maguire J and affirmed by Gillen LJ in the decision in *H & H* [2015] NICA 77. In that Court of Appeal decision the Court adopted Maguire J's analysis of the principles to be followed:

> "The following from the case law appear to be of general application:
>
> 1. There is in operation what might be described as a non-discrimination principle as between the roles performed by husband and wife. The object rather is to achieve a fair outcome as between the parties.
>
> 2. Equality of division is a useful yardstick it should only be departed from if there is good reason for doing so. This

> however does not mean that there is a presumption in favour of equal division.
>
> 3. In seeking to achieve fairness between the parties the court will keep in mind the needs of the parties; the fact that compensation may be required to address any significant prospective economic disparity due to the manner in which the marriage was conducted; and the idea of marriage is a partnership of equals.
>
> 4. To a greater or lesser extent, all of the above, together with all other relevant factors, will need to be considered in the particular case the court is dealing with."

[57] This is a needs-based case. In needs-based cases it will usually not be possible to give the parties what they "deserve" in an application of a rigorous mathematical approach applied to each aspect of their past financial behaviour. A number of ancillary relief decisions have rejected a formulaic, mathematical approach in the calculation how marital assets should be divided: see for example *Montagnino v Montagnino* 1984 WL 988982; *J v J* [2009] EWHC 2654 (Fam), *SK v WL* [2010] EWHC 3768 (Fam); *N v N* [2010] EWHC 717 (Fam); and *Hart v Hart* [2017] EWCA Civ 1306. According to those decisions, the outcome of a mathematic and formulaic approach can result in spurious or arbitrary results. As the English Court of Appeal said in *Montagnino v Montagnino;*

> "It is not desirable in these cases to adopt a strictly mathematical approach. The court should, as the judge said, take a broad approach with a view to doing substantial justice between the parties."

[58] As Lord Nicholls said in *Miller v Miller* ; *McFarlane v McFarlane* [2006] 1 FLR 1186 :

> "In most cases the search for fairness largely begins and ends at this stage. In most cases the available assets are insufficient to provide adequately for the needs of two homes. The court seeks to stretch modest finite resources so far as possible to meet the parties' needs." ….

[59] The wife seeks a lump sum of £2,856 in respect of arrears which the husband allowed to accumulate in respect of the mortgage and a lump sum of £30,000 as a half share of what the wife believes existed from the husband's retirement lump sum at the time of separation. I do not consider that I should make such an order. There will be many ancillary relief cases where it can be

reasonably argued that a party *deserves* a share of an asset which has previously existed and, in cases where the sharing principle is being applied, this will often be possible. Likewise there will be many ancillary relief cases where it can be reasonably argued that a party *deserves* funds in respect of mortgage arrears to be paid to them where mortgage payments have not been equally shared. However in needs-based cases the primary focus is on what a party *needs* as opposed to what that party *deserves*. Nevertheless, in instances where a party's behaviour is such that there has been reckless spending amounting to conduct which it would be inequitable to disregard, the court will make the order which is being sought, even in needs-based cases. The evidence before in this case does not lead me to conclude that the husband was engaged in reckless spending which deserves to be taken into account under the heading of conduct.

[60] The husband submits that that the wife's present and future financial circumstances are extremely stable and beneficial. He argues that if fairness and equity are to prevail he needs to be placed back into the position which he was in, with a similar standard of living, prior to the intentional, premeditated destruction of his family and home by the wife's actions. In my view this expectation is utterly unrealistic given the incomes and assets which the parties have between them.

[61] I conclude that, in all the circumstances of this application, it is appropriate to divide proceeds of the matrimonial home in terms of 50% to the wife and 50% to the husband. I find from the evidence given before me that there is no good reason to depart from an equal division of the assets. This outcome achieves the best that it is possible to achieve in stretching the limited available resources to meet the parties' needs.

[62] The wife also submits that the court should make pension sharing orders to equalise the pension positions of the parties. The issue of whether to make a pension sharing order is a difficult one. If the court makes such an order now, it has an immediate impact of reducing the husband's income. On the other hand if the court does not make such an order, then at a point in the future when the wife is of pensionable age, her income position will be much worse than her husband's. Although the parties' current financial needs are being met, although certainly not in any lavish way, the future needs of the wife cannot be met without a pension sharing order being made. It has been submitted on behalf of the wife that I should simply make 50% pension sharing orders in respect of all of the pensions. In my view, while this has a mathematical attractiveness, it would have the unfortunate impact of maximising the level of charges which the husband and wife would have to pay. In the absence of an actuary's report from the parties, I am left without accurate guidance but at least, because the husband's pension is currently in payment, I can assess the impact upon him of making a pension sharing order. I can also take into account that the wife is currently aged 49 and

therefore has some years in which she can contribute to a pension fund, although I bear in mind that, because of her responsibilities as a carer, she is limited in the number of hours which she can work. I therefore conclude that I should make a pension sharing order of 20%.

[63] I make no order in respect of the eternity ring which the husband seeks the return of. I regard it as having been a gift. Although it was a generous gift, and no doubt received as such at the time, it is not so valuable as to merit its sale and the division of the proceeds.