

2016/6890

IN THE COUNTY COURT FOR NORTHERN IRELAND

BETWEEN:

JP

Petitioner

and

CP

Respondent

District Judge Gilpin

The Proceedings

[1] This case involves an application by for Ancillary Relief for division of matrimonial assets brought by the Petitioner Wife against the Respondent Husband.

[2] Ms Jessica McCaffrey, Barrister at Law, appeared for the Wife and Mrs Blathin Cleland Barrister at Law appeared for the Husband. I am grateful not only to both counsel for their written and oral submissions but also to their instructing solicitors, The Elliott Trainor Partnership and Rafferty & Co, respectively for their preparation of this case.

The Parties

[3] The Wife was born in 1965 and is now 53 years of age. She is a self-employed specialist foster carer. Through a combination of her earnings from this employment and state benefits she has a monthly income of just over £3000. She continues to reside in the former matrimonial home situated in the Newry area. The three children of the marriage reside with her.

[4] The Husband was born in 1968 and is now 50 years of age. The Husband describes himself before this court as a "Property Manager". His living expenses appear to be met from the rental income of some of the properties he manages and from certain other sources which I will return to later. Suffice to say at this stage both the full extent and sources of the Husband's income remain somewhat

shrouded in mystery. The Husband is residing in rental accommodation in the Newry area.

The Marriage

[5] The parties were married in October 1994. The three children of the marriage now living are aged 20, 18 and 14 years. As one of the children has not yet reached her majority I have anonymised this judgment.

[6] The parties separated in October 2013. A Decree Nisi was granted in June 2016, the court having found that the marriage had irretrievably broken down as evidenced by the fact that the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition for divorce.

[7] The Decree Absolute has not yet issued.

[8] By a Notice of Application issued on 5 December 2016 the Wife commenced these ancillary relief proceedings.

The Law

[9] In an ancillary relief application in this jurisdiction the factors set out in Article 27 (2) Matrimonial Causes (Northern Ireland) Order 1978 provide the starting point for the court's determination.

[10] The factors set out in Article 27(2) are:

- (a) 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;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

[11] These factors must be applied to the facts of the each case to achieve fairness by balancing appropriately its three constituent parts namely:

- **Need.** In Miller v Miller [2006] UKHL Lord Nicholls said:

“financial needs are to be assessed having regard to a range of factors including age, earning capacity, standard of living, and any disability, most but not all of which will have been generated by the marriage.”

- **Sharing.** As a starting point it is fair to divide the matrimonial assets equally. In H v H [2014] at para 15 Maguire J, in a passage subsequently approved by the Court of Appeal, stated succinctly:

“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”.

- **Compensation** to address what Lady Hale termed in *McFarlane v McFarlane* [2006] 1FLR “relationship-generated disadvantage.”

The Capital Assets

[12] The assets in this case consist largely of various properties namely:

- (i) The former matrimonial home situated in the Newry area. It has a value of approximately £270,000.00 and a mortgage of approximately £152,000.00 leaving an equity of £118,000.00. This is the former matrimonial home in which the Wife and children continue to reside.
- (ii) An investment property in the Newry area. This has a value of approximately £70,000.00 and a mortgage of approximately £32,000.00 leaving an equity of £38,000.00. This property while occupied by the Husband for some time after his separation from the Wife is held as an investment and is from time to time let to tenants.

- (iii) An investment property in the Belfast area. This has value of approximately £62,500.00 and a mortgage of approximately £65,500.00 leaving a negative equity of £3000.00. This property is held as an investment and is from time to time let to tenants.
- (iv) An investment property in the Warrenpoint area. This has value of approximately £80,000.00. This property is held as an investment and is from time to time let to tenants.
- (v) An investment property subdivided into flats in the Banbridge area. These properties have a collective value of approximately £85,000.00 and are unencumbered. These properties are held as investments and are from time to time let to tenants.
- (vi) A holiday home in Portugal. This has a value of approximately €120,000.00 and a mortgage of approximately €34,000 leaving an equity of €86,000.00 or a sterling equivalent of approximately £75,000.00. During the course of the marriage this property was used principally as holiday home for the family and not an investment. However, since the parties have separated the property has not been used for the family but rather has been rented out from time to time.

The income of the parties

The Wife's Income

[13] As noted above the Wife is a self-employed specialist foster carer who enjoys a monthly income of just over £3000 from this employment and certain state benefits.

The Husband's Income

[14] The Husband's income is considerably more problematic to determine. His description of himself as a "Property Manager" derives from his management of the various investment properties set out above. Since the parties have separated he has retained all of the profits these properties have generated.

[15] The information provided from the Husband's Accountants, RPB Chartered Accountants, for the years since separation in 2013, appear to show the monies retained by the Husband amount to in or around £100,000.00. I have calculated this figure based on the Accounts furnished from those for the year ended 5 April 2014 to 5 April 2017, estimated a figure of £20,000.00 for the year ended 5 April 2018 and finally halved the figure for the year ended 5 April 2014 since the parties only separated mid-way through this financial year.

[16] Prior to this matter coming on for hearing the Wife had made considerable efforts to satisfy herself that certain expenses made by the Husband recorded in the accounts for the investment properties was business and not personal expenditure.

[17] In the view of the court the Husband has deliberately frustrated the Wife's attempts to elicit this information. The court refuses to accept the explanation he offered that the stress of these proceedings prevented him from addressing the Wife's requests.

[18] From the information the court does have before it there is at least some evidence that justifies the Wife's suspicions. By way of example from what information the court does have before it it can be seen that on 15 July 2015 some £480.00 appears as "expenses" amongst a list of business expenses. The Husband's own annotation beside this sum shows it to be personal expenditure in that it was part of his legal fees in connection with his matrimonial affairs.

[19] The Husband sought to advance an argument that the management role he performed in relation to the investment properties entitled him to retain all of the profits generated effectively as a wage. Having heard the evidence of the Husband the court does not accept his contention that what work he does do in connection with the properties amounts to a full time job entitling him to retain all of what are effectively the profits of the investments although the Husband chooses to term these as drawings. When he had previously been running a successful painting contracting business, the Husband had seemingly been in a position to also manage the investment properties. Now when the demands of that business are no longer upon him the court struggles to see how managing these investment properties which were once something he tagged onto the end of his day has become a full time occupation. Furthermore, the Husband accepted in relation to many of the repairs that were necessary to the properties he did not carry these out himself but instead simply made arrangements for tradesmen to do so. When pressed under cross-examination as to what a typical day as the property manager of these properties looked like the Husband's answer was unconvincing in support of his contention it demanded his full time attention.

[20] Astonishingly given the pre-trial history of these proceedings it was only in the course of his examination in chief that the Husband first gave evidence that in addition to the investment properties he also received income from continuing to carrying out some form of painting business. Ms McCaffrey in her cross-examination of the Husband identified a number of significant payments made to the Husband which appeared in his bank statements and for which no adequate explanation had been proffered. She went on to suggest to the Husband that business accounts prepared by his accountants showed he retained equipment of a significant capital value which he was using to carry on a painting business. The court believes this to be so.

[21] To compound the piecemeal fashion in which the Husband's income was made known to the court it emerged, this time only under cross-examination, that he also enjoys some income from sub-letting rooms in the property in which he currently resides in.

[22] In relation to the lifestyle enjoyed by the Husband I do not accept it is as modest as he sought to portray. In the course of cross-examination it became apparent that his lifestyle includes expenditure on dating websites, sunbed studios, hotels, performance nutrition supplements and a coaching course called "Rich Dad Coaching". In contrast to this expenditure on himself the Husband, by his own admission, has failed absolutely to pay any maintenance to the Wife. In relation to the children I find that he has made some contribution to their needs by way of making certain purchases for them he has fallen far short of his claim of providing everything they need.

[23] In proceedings such as this the parties are under an obligation to provide full, frank and clear disclosure of their finances [v] [1955] 3WLR 72. Where a party does not play by these rules the court is at liberty to draw such adverse inferences from this provided it is warranted by the evidence.

[24] In NG v SG [2010] 1FLR 1211 Mostyn J stated:

"...[W]here the court is satisfied that the disclosure given by one party has been materially deficient then:

- (i) The court is duty bound to consider by the process of drawing adverse inferences whether funds have been hidden.
- (ii) But such inferences must be properly drawn and reasonable. It would be wrong to draw inferences that a party has assets which, on an assessment of the evidence, the court is satisfied he has not got.
- (iii) If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms
- (iv) In making its judgment as to quantification the court will first look to direct evidence such as documentation and observations made by the other party
- (v) The court will then look to the scale of the business activities and at lifestyle.

- (vi) Vague evidence of reputation or the opinions or beliefs of third parties is inadmissible in the exercise."

[25] There has been a lack of candour on the part of the Husband as to his income. He failed to give full and frank disclosure of it in the course of the pre-trial proceedings. Only in the witness box did he, with some hesitation and then only with the barest of details give evidence of additional sources of income that he enjoys. Some of the expenditure that he has made is suggestive of the Husband having some additional funds available to him beyond those generated from the investment properties.

[26] The Court has formed the view that the Husband enjoys an income beyond that which the accounts prepared by his accountant show. He has the time, expertise and equipment to carry on a painting business. He admits to sub-letting of certain rooms. His lifestyle is more affluent than he seeks to portray.

[27] All of that having been said, even in the broadest of terms, in seeking to quantify this additional income the Court is of the view it is unlikely to give the Husband anything beyond the income enjoyed by the Wife.

[28] Next the Court must address three loans that have been made to the parties by family members which loomed large at hearing and each requires to be adjudicated on by the court.

The A McP Loan

[29] The Wife alleges in the Core Issues filed on her behalf dated 7 December 2017 that from in or around November 2013 until January 2016 she borrowed a total sum of £35,750.00 from her sister, A McP. The Wife said she had to do so as the absence of any financial assistance from the Husband was causing her financial hardship particularly given the children on the marriage resided with her and she had to meet the mortgage payments in respect of the matrimonial home.

[30] A McP gave evidence before me and suggested that the amount of monies she had loaned to the Wife was more than the Wife had suggested and in fact amounted to £49,650.00 given to her at various dates between February 2013 and October 2017. The figure of £49,650.00 is supported by certain bank statements furnished to the court by A McP.

[31] Both the Wife and her sister were adamant that the monies advanced were by way of a loan and were not a gift.

[32] The Husband sought to suggest that rather than AMcP making a loan to the Wife she was in fact repaying monies she had previously loaned to the Wife. I do

not accept the Husband's allegation. It does appear that the Wife had loaned monies to AMcP many years ago but these have long since been repaid.

[33] I am satisfied given the evidence of both A McP and the Wife that A McP did provide a loan to Wife of some £49,650.00 which is to be repaid on demand.

[34] Given the frequency in which these monies were paid and in light of the Husband's total failure to maintain the Wife and partial failure to maintain his children, I am satisfied the purpose of the loan made by AMcP was primarily to meet the ordinary household expenditure of the Wife and the children. I do not find that it is loan is to attract interest.

The BP Loan

[35] The Husband alleges in 2011 his mother, BP, lent the parties the sum of €10,000.00 a deposit to assist them in purchasing an investment property in the Newry area. The Husband alleges that:

- If the loan was repaid within 2 years a sum of €1,000 must also be paid in respect of interest
- If the loan was not paid within 2 years it would attract interest at the rate of 5% per annum

[36] The Husband provided the court a copy of a handwritten document dated 26 February 2013 signed by himself and BP which set out the alleged terms of the loan as noted above.

[37] The Wife's evidence was to the effect that she could not recall whether the monies advanced by BP were a loan or a gift.

[38] The Court is highly suspicious of the veracity of the handwritten document the Husband has placed before the court. The Wife was not a party to it despite, on the Husband's own case being a party to the loan; BP's evidence as to its construction, content and execution was limited and the stark resemblance of this document to one the Husband had allegedly entered into with his brother AP in 2008 together leads the court to place no reliance on this document.

[39] That having been said having considered all of the evidence that is before the court in relation to this matter that Court finds that BP did lend the parties the sum of €10,000 and those monies are repayable by them without interest thereon.

The AP Loan

[40] The Husband alleges that in or around 2007 his brother AP lent the parties the sum of €50,000.00 to assist in the purchase of the property in Portugal. This is accepted by the Wife.

The Husband alleges that:

- If the loan was to be repaid within 2 years together with a sum of €5000 in respect of interest
- If the loan was not paid within 2 years it would attract interest at the rate of 5% per annum

[41] The Husband provided the court with a copy of a handwritten document dated 25 January 2008 signed by himself and AP which set out the alleged terms of the loan as noted above.

[42] In addition the Husband suggested to the court that the interest rate of 5% was to be on a compound rather than a simple basis. He furnished to the court a copy of a document he had apparently drafted with calculations determining interest being paid on a compound basis up to 2016.

[43] The evidence of the Wife was that as far as she could recall AP had to date been repaid the sum of £5000.00 by the parties. She did not produce any documentation to support this recollection.

[44] The Court is highly suspicious of the veracity of the said handwritten document. Again the Wife was not a party to it despite, on the Husband's case being a party to the loan and the stark resemblance of this document to one the Husband had allegedly entered into with his mother BP in 2013 taken together leads the court to place no reliance on this document.

[45] Furthermore, the Court dismisses the suggestion by the Husband that the loan to AP was, after two years, to attract interest on a compound basis. AP seemed to have no knowledge of what compound interest was and that it might attach itself to the monies he had lent the parties. He himself said candidly all he expected to be repaid was the principal sum he had advanced together with "a few pounds." The fact that the document the Husband put before the court with his calculations of compound interest is dated up to 2016 which is the date the matrimonial proceedings were issued is more than just a co-incidence. It is the Court's view the Husband created the document at that time not in an effort to properly assess what monies were owing to his brother but to deprive his Wife in part of matrimonial Assets by inflating the debt owed by the parties.

[46] That having been said having considered all of the evidence that is before the court in relation to this matter that Court finds that AP did lend the parties the sum of €50,000 and those monies are repayable without interest thereon.

Consideration

[47] I am of the view that in this case there should be a clean break.

[48] I do not have jurisdiction over issues of child maintenance unless by agreement. I have formed the view that the Husband has failed to properly maintain his children since separation. I sincerely hope that he will however meet this obligation in the future.

[49] I find that the Matrimonial Assets in this case are:

- The Matrimonial Home with equity of £118,000.00. I consider that there should be a departure from equality in relation to that. I consider that there are good reasons for doing this on the basis of the needs of the parties. The Wife has had and will continue to have the greater child care obligations. I consider in all the circumstances of this case that the division of net proceeds of the matrimonial home should be two thirds to the Wife and one third to the Husband.
- The Investment Properties with a combined equity of £189,000.00. I do not accept the submissions of the Wife that the two properties in negative equity should be treated as having nil equity. All the investment properties, whether enjoying a positive or negative equity, should be treated on the same basis namely that their equity is what their equity is. In order to acquire certain of the investment properties the parties benefitted from unsecured loans provided by BP and AP and totalling €60,000.00 (for present purposes the sterling equivalent is approximately £53,000). These loans require to be repaid and thus in order to determine what is actually available to the parties the amount of them needs to be deducted. The monies available for distribution are £136,000.00. These monies should be divided equally between the parties.
- In addition I find that the Husband has failed to pay over to the Wife drawings from the Investment Properties since the date of separation of £50,000. I find that as a result of this failure the Wife has borrowed a broadly equivalent sum from her sister which she may have to repay in due course. The Husband must account to the Wife now for the £50,000.00 he has withheld.

Disposal

- The parties at this stage must pay to BP the sum of £8797.00 and £43,987.00 to AP in order to discharge this matrimonial debt.
- The Wife is to receive

- £78,666.00 being her share in Matrimonial Home
- £68,000 being her share of the investment properties after the debts owing to BP and AP have been accounted for. The loans from BP and AP were advanced to purchase the investment properties thus in my view they are Matrimonial Assets which the parties must now discharge.
- £50,000 being the unpaid drawings

The Wife's entitlement is therefore £196,666.00.

- The Husband is to receive:-

- £39,000 being his share of the Matrimonial Home
- £68,000 being her share of the investment properties after the debts owing to BP and AP have been accounted for. The loans from BP and AP were advanced to purchase the investment properties thus in my view they are Matrimonial Assets which the parties must now discharge.

The Husband's entitlement is thus £107,000.

In light of this judgment I will:

- Afford the parties some time to put their proposals to the court as to how given the assets in this case the judgment of the court is best satisfied.
- Hear counsel as to any issues they wish to raise in relation to costs between the parties.
- Hear counsel in relation to directions that need to be made in relation to any need to transfer title to the various properties to comply with this judgment.