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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **11/04/2019**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

S

Petitioner

and

S

Respondent

(No.2)

MASTER SWEENEY

[1] The parties are invited to consider this judgment and unless they inform the Matrimonial Office in writing within two weeks of any reason why the judgment should not be published on the Court Service website, or anonymised further before publication, then the judgment will be published in its present form.

[2] This case involves an application for ancillary relief issued by the Petitioner, whom I herein call "the Husband" for convenience. The case came before me for Hearing on Wednesday 8th January 2019 and continued on 9th January 2019. It was adjourned for HMRC to be asked to provide clarification in relation to documents presented at the hearing. It has not proved possible to secure that information and therefore the case was listed for judgment today.

[3] At the outset the case had every appearance of being straightforward. As will appear from the facts recited below, the case presented as involving the relatively short marriage of a reasonably young couple who had separate careers, had moved on with their lives but who both contributed to the care of their child.

[4] There were few assets of value of the marriage but the Husband operated his own Independent Financial Advice company from which he derived his income. A valuation was sought of the company but against a background where the Husband had previously been involved in an equal partnership with the Wife's mother and had bought out her interest. This occurred three years before the separation date and was for an agreed lump sum of £120,000 paid at £1,000 monthly over a period of 10 years. The Husband continued to pay this debt from his income after the separation.

[5] Disappointingly, although the parties were able to resolve by agreement any issues surrounding their divorce and the care of their daughter, a wholly different approach was taken in relation to the resolution of the financial matters. Notwithstanding best practice guidance, agreement was not achieved in relation to a valuer of the Husband's business which resulted in delayed resolution, increased costs, heightened bitterness and understandable frustration. The court did sound a cautionary note at a relatively early stage but it would have required both sides to listen and sadly that did not happen. Therefore, a case which ought otherwise to have been capable of resolution by agreement instead required a hearing on a variety of issues.

[6] At the hearing, both parties relied on the sworn affidavits which they filed with the court and they each gave evidence. In addition counsel appearing for the parties, Ms. Kerr BL on behalf of the Husband and Ms. O'Grady QC on behalf of the Respondent filed detailed position papers for the assistance of the court.

Facts:-

[7] As I have said, the parties' marriage was relatively short. The parties married on 18th August 2006 and according to the Husband's undefended petition, separated on 11th July 2012. Notwithstanding conflicting accounts, I find that to be the date of separation. Therefore the parties have been apart for a longer period than they were together in marriage which was a period of 5 years and 11 months.

[8] They were aged 33 years and 31 years respectively at separation. The Husband is now aged 40 years and the wife aged 38 years.

[9] The parties have a daughter who was aged just 3 years at the time of the separation. She resides with her mother but has such extensive contact with her father that the parties virtually share her care. I was shown a Family Court Officer report among the papers filed which describes a happy child who sees herself as living in two homes and enjoying a close bond with both of her parents.

[10] I also note that as a result of an application by the Wife and assessment by CMED, (the Child Maintenance and Enforcement Division) the Husband pays to the Wife £475.11 monthly toward the Wife's child maintenance expenses in respect of the parties' daughter.

[11] After their separation the parties each formed new relationships with other partners as a result of which the wife has two young children born at separate times

in 2016. The Husband married his partner and a child was born to them in December 2018.

[12] The Husband secured a decree nisi of divorce on 27th April 2015 on the grounds that the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consented to a decree being granted. The Decree Absolute issued on 17th July 2015.

[13] The issue of pre-marriage cohabitation was raised on behalf of the Wife. The parties did cohabit before their marriage. However, they differed about the duration and nature of the cohabitation. The Husband said they did not cohabit until the year of their marriage. The Wife said that they lived together for around three years before their marriage when she was a student and stayed in the Husband's house.

[14] Having heard from the parties, it seemed to me that initially, in the Wife's student days she stayed in the Husband's house as his girlfriend. However, as the parties' relationship developed, so too did their commitment to each other and they decided to marry. I consider it relevant that the Husband bought his home in Bloomfield Street in 2004 and despite the fact that the Wife was staying with the Husband at the time, unlike the former matrimonial home, which was bought in the joint names of the parties, the Bloomfield property was bought in the Husband's sole name.

[15] In considering the application before me, I have had regard to the income and assets of the Husband and the Wife.

[16] It was clear to me that during the marriage, the parties had separate career paths and furthermore that they each applied their incomes to their household. It was additionally apparent that at the time of the separation, the parties' financial position was precarious in that they were required to seek the financial assistance of their respective parents in order to meet the outgoings related to their household.

[17] Both parties suggested that this was "not a maintenance case". The Husband made this case on the basis that he was not a high earner at the time of the separation and that the wife had her own career. In her submissions, while not necessarily for the same reasons, senior counsel for the Wife similarly stated that "all agree this is not a maintenance case".

<u>The income of the parties:-</u>

[18] The Husband is the Managing Director of his own Independent Financial Advice Limited Liability company.

[19] Excluding contribution from any other person, the Husband derives his income from salary and dividends paid by the company. The Husband now enjoys a comfortable income. After tax this appears to produce a net income of more than £5000.00 monthly and less than £6000.00 monthly.

[20] The Wife is employed as a Systemic Practitioner.

[21] Excluding contribution from any other person, the Wife derives her income from salary, child benefit, CMED and Tax Credits. The Wife is presently undertaking a maternity relief placement which she anticipates will last at least 4 – 6 months. As a result her monthly wage has increased from £1161.00 to £1964.00. In addition she has Child benefit of £208.00 monthly, Child tax credits of £533.00 monthly and the Husband's CMED payment of £475.00 monthly. Thus the Wife has a total income of £3180.00 monthly.

[22] In relation to the assets, some, such as the former matrimonial home, are agreed to be assets of the marriage. However, the relevance of other assets is in dispute. The disputed assets include those obtained after the separation and those not held in the names of the parties but in respect of which one party claims the other has an interest. I have highlighted the assets regardless of their provenance or relevance below.

<u>The assets:-</u>

- **The proceeds of sale of the parties' former matrimonial home**

[23] The Husband said the proceeds amount to £8392.85 while the Wife said they amount to £8389.00.

[24] The parties agreed that after the separation the parties were struggling financially. The Husband recounted that both parties' parents had loaned monies to assist the parties to meet their outgoings and that the said monies required to be repaid from the proceeds of sale of the former matrimonial home. The Husband said that £1500.00 required to be repaid to the Wife's parents and £4000.00 to the Husband's parents.

[25] The Wife initially acknowledged the debt owed to her own parents but not the repayment alleged as due to the Husband's parents. However, under cross examination the Wife was directed to the parties' joint bank account statements which confirmed the payments made by the parties' respective parents and then the Wife finally did accept the Husband's parents were owed £4000.00.

[26] Repayment of these debts would leave a very modest balance of less than £3000.00 from the proceeds of sale of the parties' former matrimonial home.

- **The parties each have an eighth share in a Belmont Road property**

[27] The said property is held with three other couples. The Husband undertook the management of the property which attracts a rent of £596.00 monthly and is subject to a mortgage which the Husband asserted had a redemption figure of £133,369.97 at separation resulting in a negative equity at that time. However, with the rental income being applied to reduce the mortgage, just £95,938 was owed at September 2018 allowing the property to move to a position of positive equity.

[28] By agreement, the property was valued by UPS in October 2018 at £134,950 giving the property an equity value, of £39,012. The parties' respective one eight shares are valued at £4876.50 separately or £9753 together, before provision for sale costs.

- **The Husband's Old Mutual Wealth Pension.**

[29] This had a CETV of £22,101 at November 2018.

- **The Husband's Platinum Financial Group pension.**

[30] This had a CETV of £638.80.

- **The Wife's Old Mutual Wealth Pension.**

[31] This had a CETV of £8995.

- **The Wife's Friends Life/Aviva Pension.**

[32] This had a CETV of £1732.

- **The Husband's Platinum Financial Planning Limited**.

[33] The Husband derives his income from this Individual Financial Advice practice, set up by the Husband in July 2012, "the company", which I valued at £476,288.

[34] In my valuation Judgment, I observed that the increased value of the company took account of the increase in the net cash of the company from £27,886 noted in the Wife's Valuer's January 2018 report, to the updated and agreed cash figure of £230,634.

- **Headspace NI**

[35] This was a business opened and operated at one stage by the Wife to offer counselling advice and support. I conclude that it has no value of note and refer to it only for the sake of completeness.

Other properties:-

- **The Husband and his second wife's home in Belfast.**

[36] This was purchased by the Husband and his second wife in October 2016 in their joint names. This property continues to be occupied by them. The property was purchased with a mortgage of £199,980 which was reduced to £192,299 by December 2018 and the property at that date had an agreed value of £240,000. Therefore the current equity of this after acquired asset, before sale costs, is £47,701 which interest is shared with the second wife.

- **Holywood Road property.**

[37] This property is held in the name of the Wife's parents, from around the time of the separation and the Wife moved to the property following the sale of the former matrimonial home. The Husband contended that the Wife had a beneficial interest in this property.

[38] The Husband emphasised the fact that the Wife always discharged the rates in respect of the Holywood Road property. The Husband also asserted that the Wife spent money improving the property and installed gas and a new kitchen in 2014.

[39] The Husband further referred to the fact that after the Wife moved with her partner to the property held in her partner's name in Donaghadee, the Holywood Road property was rented. The Husband maintained that prior to that, the Donaghadee property was rented.

[40] The Wife meanwhile gave evidence that the rent for the Holywood Road property was received by her parents. However the Husband asked the court to take notice of the fact that thereafter regular payments were made by the Wife's parents to the Wife's account. On occasion the payments seemed similar to the advertised rental price for the property.

[41] The Wife said the payments to her account represented reimbursement for the Wife's expenses when her father became very ill in Spain and payment for the furniture which the Wife left in the property. On the whole, I deem that the evidence was insufficient to conclude that the Wife had a beneficial interest in the property.

- **The Wife's partner's property in Donaghadee.**

[42] The Wife and her partner moved to this property from the Holywood Road property. This Wife is not named on the title to this property which property had been the former matrimonial home of the Wife's partner. The Wife denies any interest in the property. I am satisfied that the Wife made no financial contribution to

the purchase of this property and accept that there is no evidence that she acquired an interest in this property.

[43] Other issues of contention were raised for adjudication in an effort to support the parties' very different proposals for resolution. I have underlined the issues below:-

Is the Company "an after acquired asset"?

[44] It will be clear from the foregoing that the most valuable disputed asset is the Husband's Company and the parties disagreed about how it fell to be considered. The Husband maintained that the company was simply the source of his income and should be treated as such. The Husband further contended that if the Company was to be regarded as an asset, it was not an asset of the marriage, but instead, a post acquired asset, as it had been set up by the Husband following the parties' separation.

[45] On behalf of the Wife it was argued that the Company was an asset albeit that its value lay, in its generation of income as reflected in the turnover recited in the accounts of the Company. Moreover, the Wife did not accept that the Company was an after acquired asset. The Wife saw the company as being, with the exception of the period of time between the closure of the Partnership business and the commencement of the limited company, generally a continuation of the same business operation.

[46] The wife pointed to the retention of the name and major clients to support her account.

[47] As noted earlier, the original business operation had been a partnership between the Husband and the Wife's mother who in 2009, having expressed the wish to retire was bought out of the partnership for the price of £120,000 which was agreed to be paid in monthly instalments of £1,000 over a period of 10 years.

[48] It is perhaps worth noting here that in the Valuation Hearing I was told that this was not an unusual arrangement but instead a necessary mechanism for enabling payment in IFA retirement or sale events.

[49] In consideration of the agreed sum of £120,000, the Wife's mother completely retired and deregulated. It appears therefore that the partnership at that time was roughly accorded a value of £240,000. Indeed, no issue has been taken with that general premise. At the time of the separation and since that time, the Husband continued to discharge his obligation to pay the £120,000.

[50] This was treated as the Husband's debt rather than a company liability by the parties' respective Experts in their valuations of the Company. Therefore, if at the time of the separation, the Husband had a business with a value on account of the income it generated, we should not lose sight of the fact, that the Husband also carried the liability of the debt.

[51] It was accepted that the practice was one of a considerable number of practices which operated under the insurance, protection and regulation of Burns Anderson who were part of the Honister Capital group. On 3rd July 2012, widely reported unfortunate and somewhat unexpected circumstances caused the Honister Capital group to go into administration. This had an obvious and considerable impact on the practice operated by the Husband which in a sense was cut adrift from its insurer and protector and no longer had the authority to trade that had been afforded by Burns Anderson.

[52] At the Valuation Hearing the Wife's accountant said the impact was that the Husband was unable to novate new business for a period. The Husband's counsel however argued that the previous partnership had been rendered worthless because of the administration. I found the impact on the Husband was more serious than that described by the Wife's accountant. The Husband started a business under the same name but as a Limited Company. The Husband's new company was authorised to trade on 11th September 2012 under a new capital group, Tenet Connect. He set about reaching out to clients old and new and it is clear that he was successful in his endeavours. Therefore, although there was an enforced break and the uncertainty that went with it, the Husband was able to start again relatively quickly with almost the same name and utilising a loyal client base.

[53] It remained the Husband's case that the administration caused the demise of the partnership and left him in a position of debt to the Wife's mother. For that reason the Husband's maintained that the new Limited company represented an after acquired asset and that in valuing the company, it is really the Husband's future income stream which was being valued. In making that case however, the Husband paid little or no regard to the weight to be attached to the value of the clients who had been clients of the partnership and kept faith with the Husband's new company. Therefore, although the Company is not the original asset, neither does it have all the characteristics of an after acquired asset and I take that into consideration when taking full and fair account of the Wife's interest.

[54] At the same time, in meeting the fairness of this case, bearing in mind the relative shortness of the marriage, the virtual shared care of the parties' child, the separate careers of the parties, the fact that the company value is based on a multiple of earnings, it is also important to recognise that since the separation and since the

Husband started the limited company, it has grown in turnover and value and as a result of the Husband's endeavours. The Wife's accountant valued the company at £276,106 in his January 2018 report.

[55] In the case of Martin v Martin [2018] EWCA Civ 2866 – Moylan LJ considered the court's approach to valuation. He drew from the broad choices identified by both King LJ and Lewison LJ, being (i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in specie" but went on to say:

> *"However, to repeat, even when the court is able to fix a value this does not mean that that value has the same weight as the value of other assets such as, say, the matrimonial home. The court has to assess the weight which can be placed on the value even when using a fixed value for the purposes of determining what award to make. This applies both to the amount and to the structure of the award, issues which are interconnected, so that the overall allocation of the parties' assets by application of the sharing principle also effects a fair balance of risk and illiquidity between the parties."*

[56] He emphasised

> "*the need to address this issue when the court is deciding how to exercise its discretionary powers so as to achieve an outcome that is fair to both parties*" and added that "*the assessment of the weight which can be placed on a valuation is not a mathematical exercise but a broad evaluative exercise to be undertaken by the judge."*

[57] A private company is not equivalent to liquid cash and Moylan LJ surmised that

> *"This was why Holman J was entitled in Robertson v Robertson to reject the "accountancy" approach, not only because it seemed unfair to the husband, but because he did not consider that this fairly reflected the relevant considerations in the "overall exercise of (his) discretion",*

That was a case which concerned the development of trading companies and Moylan LJ felt that Holman J's observations apply with particular force in such circumstances.

[58] Duckworth makes similar observations (Matrimonial property and Finance B1 [71A] :

> *"self-evidently, the paper value of an asset may not always match its current realisable value…….for example when valuing a business, the court must apply common sense and allow a generous margin for uncertainty."*

[59] In the case of N v N (Financial provision; Sale of Company) [2001] 2FLR 69, after a 14 year marriage, the parties had been separated for 13 years and during that time, the husband's company underwent a huge increase in value. Coleridge J reflected on the Husband's counsel's argument that the Wife's lack of contribution to the huge increase in turnover post separation should be reflected in a discounted share. The Husband's counsel however argued that traditionally these applications have always

been approached on the basis of the values existing at the date when the hearing takes place. Coleridge J stated at page 78;

[60]

> *"I am quite sure that even now in most cases that is the correct date when the valuation should be applied. But I think the court must have an eye to the valuation at the date of separation where there has been a very significant change accounted for by more than just inflation or deflation…."*

[61] Therefore, though Coleridge J concluded that the company should be valued as at the date of the hearing he also decided that the husband's contribution, post separation should be viewed as a discretionary factor reducing the wife's entitlement.

[62] In that particular case, Coleridge J also weighed in the balance the Wife's continuing contribution which similarly did not end when the parties separated. The parties in that case had a marriage which lasted for a period of 14 years and the Wife was found to continue to play the valuable part she played throughout the marriage in caring for the parties' home and three children of whom the eldest was aged 13 years and the youngest 4 years. Unlike the subject case, in the case Coleridge J was considering, the parties' children were "now being brought up by the Wife on her own". Moreover, the Wife was not employed nor expected to return to any kind of serious paid employment any time soon. Therefore, balancing all the factors, the Wife was awarded 40% of the asset and the Husband was afforded longer than the normal time to pay.

[63] It was for the reasons outlined above that while valuing the company at £476,288, I noted that the valuation is of course no indication of the fair resolution of the parties' ancillary relief claims. Instead I said that following a hearing of all the evidence I would consider the parties' respective interests taking account of the specific facts and circumstances of this case and the legal principles to be applied.

[64] It is often pointed out in the area of Ancillary Relief that no two cases are the same. Every case turns on its individual facts. This case is no different.

The Wife's Cohabitation with L

[65] An issue which arose for adjudication related to the Wife's cohabitation with the father of her two children. The Wife gave evidence of a very limited period of cohabitation. The Husband challenged the veracity of the Wife's account and queried the reasons why the Wife did not give a frank account of her period of cohabitation.

[66] On the Husband's part it was queried whether the delay in producing standard proofs of the Wife's government benefit income was related to the fact that the Wife

had claimed benefits as a single person. The wife asserted that she was not cohabiting at times when the Husband maintained the Wife was actually cohabiting with her partner. The said partner was a Bank Manager at the time who owned the property in Donaghadee to which the couple moved when they left the Holywood Road property.

[67] Furthermore, the Husband did not accept that the Wife's relationship with her said partner was over. He considered it no coincidence that the partner was now working with the firm who operated in the same Independent Financial Advice market as the Husband. Furthermore this was the same firm whom the Wife had controversially originally instructed to advise her in relation to the Husband's company before a less contentious route was taken.

[68] The Wife said she no longer cohabited with L and moved with the children to her parent's home in December 2018. This was not accepted by the Husband. Having heard the evidence of the parties, I was not convinced that the Wife's relationship with L had ended. Despite having the care of their children the Wife did not claim CMED from L nor apparently receive any child maintenance in respect of the two children she has with him. This contrasts with the CMED application brought by her in relation to A in respect of whom she and the Husband virtually share care.

[69] The Wife said that she did not make an application for child maintenance because she did not want to cause difficulty with the said younger children's contact with their father. I was not satisfied with the reason offered. Nothing at all in the Wife's relationship with L supported grounds for any purported concern on the part of the Wife. Similarly I did not find the Wife's account credible in relation to her reasons for planning and travelling on holidays (on occasion with the children) with L after the date when the Wife said their relationship had ended.

[70] The parties further disagree about the duration of the Wife's cohabitation with L. The Wife said she met L in 2014 and cohabited from September/October 2017 until June 2018. The Husband maintained the Wife was in a cohabiting relationship with L since 2015. At that time the Wife was living at a property at Holywood Road which had been purchased in her parents' names following the breakdown of the parties' marriage. The Husband gave evidence that when he returned their daughter sometimes, the Wife was not there. Instead it was L who received the child. In addition the Husband stated that when the Wife was hospitalised for several weeks around the time of the birth of her youngest child, when A was not being cared for by the Husband, it was L who cared for A at Holywood Road. This was despite the fact that L owned his own former marital home in Donaghadee.

[71] The Wife on the other hand, denied that she was in a cohabiting relationship with L for the extent of the period described by the Husband. She gave evidence of a much more limited period of cohabitation from September/October 2017 until June

2018 when she said she left to live with her parents, problems having developed in her relationship with L from December 2017.

[72] Despite that account, in the Wife's C2 application to the Family Proceedings Court dated 26th July 2017 in which she sought to change A's primary school to one in Donaghadee, the wife gave her address as L's Donaghadee address. Also in answer to a question about which other adults lived at the same address as the subject child, the Wife wrote L's name and the words "Live Full Time". The Wife further wrote that she had recently moved from Belfast to Donaghadee and that A had been offered a place at Donaghadee primary school.

[73] Furthermore, the Court Children's Officer interviewed the parties and their daughter A and prepared a report for the court. The report records that the Wife and L were living together in Belfast at the time which is now disputed by the wife, and thereafter, in Donaghadee. Neither party called the Court Officer to challenge the report which was filed with the papers for consideration by me.

[74] In her said report of 19th December 2017 the Officer stated that the child, A, told her that the Wife and L moved from Belfast to Donaghadee in the summer holidays of 2017 for more space. The child was reported as saying that she would have liked the Wife and L to move to a bigger house in Belfast but the Wife had explained that it made more sense to move to the Donaghadee house because L owned it

[75] In her affidavit sworn on 14th December 2018, the Wife said that she lived at the Holywood Road property "until end of September 2017" and then, "In or about September/October 2017 I moved in to L's house on a more permanent basis although he was not there all week with me."

[76] In cross examination, the Wife was asked to explain the difference between the account in her affidavit and evidence and (a) what she had written on 26th July 2017 about L at that time living with her "Full Time" in Donaghadee, and (b) her daughter's account confirming to the Court Children's Officer that her mother and LC lived together in Belfast before moving to the bigger property in Donaghadee in the summer holidays of 2017.

[77] I found it informative that the Wife did not accept that her account in her affidavit was untrue or that one or other account had to be untrue. The Wife instead attempted to explain the differences by stating that she was living between the two properties and in relation to her daughter's contrary account said "I understand this is A's interpretation aged 8 years. I'm not saying she was wrong. I'm saying this was her interpretation".

[78] I was not persuaded by the Wife's evidence of the timing of the move to Donaghadee and on the basis of the evidence heard conclude that she and L did live together in Belfast as described by her daughter to the Court Children's Officer, before they all moved to L's property in Donaghadee.

[79] The Wife's description of moving between two houses in two different towns with three children, two of whom were toddlers, and not regarding herself as living with L because for some part of the week he undertook his share of the overnight care of his mother, was not plausible. It remains unclear whether the wife was claiming and receiving government benefits during such cohabitation.

- **Should either party's conduct be reflected in a costs Order?**

[80] There was a further matter which caused me concern. Both parties had previously represented to the court that they would endeavour to agree a single expert to value the company in order to save costs. The Wife instead made no effort to agree a single expert and admitted this to the court. In evidence in chief, by way of excuse, the Wife referred to a prior occasion where she said she had agreed the Husband's choice of solicitor to undertake the conveyance of the former matrimonial home. The Wife told me that when she phoned to speak to the solicitor on the day of the sale she was concerned to learn that the said solicitor was not available to speak to her. He was instead playing golf with her estranged Husband. The implication was that the solicitor's impartiality was questionable. However, under cross examination the wife admitted that the solicitor in question was in fact a friend of both parties who was undertaking the conveyance for a much reduced fee and there was nothing untoward in his conduct.

[81] The parties blame each other for poor conduct in litigation and for each incurring escalating costs. The Husband maintains the Wife should bear a share of his costs. This was a further issue to be determined by the Court.

[82] I have already expressed the court's considerable disappointment about the rising costs and unnecessary delay in this case.

[83] On the Husband's part, he initially engaged his accountant to value the business. This decision proved to be counter-productive. The accountant gave a negative valuation which opinion may have been sincerely held but was wholly unhelpful. When this was pointed out by the court, the Husband and his accountant expressed a willingness to move from that position in an effort to agree a valuation.

[84] On the Wife's part, as described earlier, she initially engaged a Financial Advisor in respect of whom concern was raised that he was unsuitable as he was a competitor of the Husband. It was therefore considered unacceptable that he was

being afforded access to the Husband's confidential business information. The information was retrieved and the Wife engaged a new expert. Subsequently on a day the case was before the court, the parties' experts indicated to the court their agreement to engage with each other, in an effort to reduce costs and agree a fair value of the company. However despite the court affording time for this to be achieved, and despite the Husband and his expert wishing to engage, it became apparent that no such engagement had occurred. Consequently the opportunity, valuable court time and further costs were wasted.

[85] I accept on that day in an effort to advance matters the Husband further proposed funding the cost of an agreed expert and the parties advised the court that they would endeavour to agree a single joint expert. In her evidence, the Wife conceded that she subsequently disagreed with the Husband's suggestion for a joint expert and had made no suggestions of her own. In effect notwithstanding the representations to the court, the Wife made no effort to agree a joint expert and further time was wasted.

[86] The Husband said that he took the advice of Mr Tony Nicholl, an experienced expert witness in ancillary relief cases, that a Professional Broker was best placed to advise on the market value of IFAs. On that basis the Husband proposed and subsequently engaged Mr Blunt of Retiring IFA. Unfortunately, although Mr Blunt had experience of the market, he lacked experience in accountancy matters and therefore the Husband was required to also engage Mr Nicholl. Happily with Mr Nicholl's engagement, agreement was achieved in relation to some, albeit not all, of the differences between the experts.

[87] As the market for the sale of IFAs is specialised and uncommon it was considered necessary to secure the broker expertise outside the jurisdiction and this presented its own challenges with regard to cost and delay. However, I find that if the Wife had followed best practice Guidance and engaged a single joint expert, a valuation hearing could have been avoided and the cost and delay would have reduced considerably.

The proposals for resolution:-

[88] Both parties seek a clean break. The parties made separate proposals for resolution which I summarise below:-

[89] **The Husband** proposed by way of clean break:-

- Each party receives 50% of the proceeds of the FMH after discharge of the loans which, he said, are to be repaid to the parties' respective parents.

- The Wife transfer her one eighth interest in the Belmont Road property to the Husband.
- Not a maintenance case.
- Costs.

[90] **The Wife** proposed by way of clean break:-

- Each party receives 50% of the proceeds of the FMH with repayment to her own parents but without any repayment of loans to the Husband's parents. (This changed during her evidence when the Wife accepted that the Husband's parents should be repaid the £4000 paid by them).
- Wife transfers her interest in the Limes to the Husband and he discharges the joint over-draft. (Wife acknowledges Husband has been paying mortgage on the property since the separation).
- 40% of the Husband's company.
- 20% of the Husband's alleged 50% interest in his post acquired home at Oakland Avenue.
- Ignore pensions as modest.

[91] The Wife said in summary she sought £195,285 plus 50% of proceeds of FMH. The Wife valued total assets at £518,280 and said she would therefore be getting 37%.

The Wife had costs £85,000.00 + VAT. The Husband had costs of £60,000.00 + VAT. It should be obvious that the costs are wholly disproportionate to the assets in the case.

The Law:-

[92] In H v. H [2015] NICA 77 Court of Appeal (NI) approved Maguire J's summary of the law in ancillary relief in Northern Ireland:

> *"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."

[93] In the case of S v. S and ES [2016] NI Fam 2**,** Keegan J adopted that analysis but also paid specific regard to the Article 27(2) of the Matrimonial Causes (NI) Order 1978.

[94] It should not surprise that I agree with this approach. This is the primary legislation and therefore must be the starting point. The court is required to give first consideration to the welfare while a minor of any child of the family who has not obtained the age of 18. In exercising the court's powers, the court must have regard to the circumstances of the case and in particular the Article 27(2) factors for consideration 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 of 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.

[95] In the much reported case of Miller v. Miller; Mc Farlane v. Mc Farlane [2006] 1 FLR 1186 at paragraph 150 Baroness Hale was considering the competing arguments related to matrimonial and non-matrimonial assets when she said;

> "*More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family…. But in these non-business partnerships, non-family assets cases, the bulk of the property has been generated by one party. Does this provide a reason for departing from the yardstick of equality?*

[96] Taking account of the facts in that case, Baroness Hale concluded at paragraph 158;

> "*..there was a reason to depart from the yardstick of equality because those were business assets generated solely by the husband during a short marriage. Whether one puts this as a result of the contacts and capacities he brought to the marriage or as a result of the nature and source of the assets generated… it comes to the same thing*"

[97] In the case of B v. B [2008] EWCA Civ 543 Hughes LJ gave the lead judgment. I pay particular reference to that part of his judgment where he says:-

> *"We have been taken helpfully to the landmark cases of White v White [2001] 1 AC 596 and Miller v Miller; Mc Farlane v Mc Farlane [2006] UKHL 24; [2006] 2 AC 618. These cases do not establish any rule that equal division is the starting point in all cases. On the contrary, the starting point in all cases is the financial position of the parties and section 25 MCA 1973: see Sir Mark Potter P in Charman v Charman [2007] EWCA Civ 503, at paragraph 67. And in all cases the objective is fairness, which requires an individual assessment of each case: see White per Lord Nicholls at 604, and Miller per Lord Nicholls at paragraph 9, and Baroness Hale at paragraphs 134 & 136"*

[98] Hughes LJ's leading judgment found support from Wall LJ who also appeared to espouse the view that in seeking fairness, it was necessary to assess the particular facts of the individual case under consideration. In furtherance of that thinking, he warned about the dangers of using that instant case as a precedent. He took the

opportunity to share his thoughts on the principles of fairness and discrimination in ancillary relief cases. At paragraph 59 of the judgment he said;

> *" In the instant case, both the district judge and the circuit judge, in my judgment, mistakenly sought to give effect to what they wrongly thought to be the need to achieve equality. In so doing, their decisions were plainly wrong and the outcome was, as a consequence and in each case, unfair. What this court proposes to put in its place is, in my view, both pragmatic and fair.*
>
> *I would, accordingly, warn the legal profession against regarding this case as a precedent. In every case the court must ask itself the two questions: (1) is the outcome fair in all the circumstances of the case? and (2) is it in any way discriminatory? Of course, the court must follow White and look at the extent to which the court has departed from equality. But in my judgment, this latter exercise is a check: the primary objectives remain fairness and an absence of discrimination.*
>
> *When that approach is applied to the order proposed by Hughes LJ, the answer seems to me to be clear. The result is plainly fair. It recognises both the source of the family's wealth, and the contributions past, present and future made and to be made by each. It does not discriminate. It departs from equality, but it remains fair."*

[99] In the England & Wales Court of Appeal case of Jones v. Jones [2011] EWCA Civ 41 , it was decided that the judge in the lower court should not have ascribed a capital value to the earning capacity of the husband at the date of the marriage and instead should have determined, which assets were matrimonial and which non-matrimonial. The lower court had erred in stating that the marriage represented one third of the life of the husband's company when on the evidence it equated to half. The court ruled that an award of some 20% of the assets after a ten-year marriage was too low where the bulk of the wealth was created during the term of the marriage. Instead where assets were found to total £25m, the court substituted the earlier award with the payment to the Wife of a lump sum of £8m.

[100] In the case of IX v. IY [2018] All ER (D) 104 (Nov) Williams J considered the case law to date;

> *"The balance of the authorities support an approach which permits the court in appropriate circumstances to identify an asset as a non-marital asset, or part of an asset being identified as a non-maritalasset. It seems to me that ultimately it is fact specific although the shorter the marriage, in practice, the easier it may be to identify a non-marital asset and the longer the period of the marriage and the greater the extent to which the asset has a mingled character, the harder it may be to identify it."*

[101] He went on to consider what Lord Justice Moylan said in the case of Hart v. Hart [2017] EWCA Civ 1306; [2018] 2 WLR 509. At paragraph 96;

> *"If the court has not been able to make a specific factual demarcation but has come to the conclusion that the parties' wealth includes an element of non-matrimonial property; the court will also have to fit this determination into the section 25 discretionary exercise. The court will have to decide, adopting Wilson LJ's formulation of the broad approach in Jones, what award of lesser percentage than 50% makes fair allowance for the parties' wealth in part comprising or reflecting the product of non-marital endeavour. In arriving at this determination, the court does not have to apply any particular mathematical or other specific methodology. The court has a discretion as to how to arrive at a fair division and can simply apply a broad assessment of the division which could affect "overall fairness" This accords with what Lord Nicholls said in Miller and, in my view, with the decision in Jones.*
>
> *[97] Finally, I would repeat that fairness has a broad horizon. I recognise, of course, the need for clear guidance and principles when the court is given a discretion as wide as that contained in section 25 of the 1973 Act. Such clarity not only assists judges when determining financial claims but also enables those seeking to resolve the consequences of their separation and divorce, as it has been described, "to bargain in the shadow of the law", in Matrimonial Property, Needs and Agreements 2014 (Law Com 343) paragraph 3.6. However, this should not lead to the imposition of constraints which are not needed to achieve, and which deprive the court of the flexibility required to achieve, a fair outcome."*

Conclusion:-

[102] Accordingly, taking particular account of all of the evidence in this case, mindful of the law and considerate of achieving fairness, by way of clean break settlement of all of the parties ancillary relief claims against each other in life and in death:-

1. The parties shall each receive 50% of the balance proceeds of sale of the former matrimonial home after discharge of the £1500 debt owed to the Wife's parents and the £4000 debt owed to the Husband's parents.

2. The Wife shall transfer her interest in the Belmont Road property to the Husband in return for the Husband indemnifying the Wife against all liability for the joint over draft.

3. The Husband shall pay to the wife the sum of £120,000 within 2 years as follows: He shall pay £30,000 within six months hereof, a further £30,000

within 12 months hereof, a further £30,000 within 18 months hereof and the final £30,000 within 24 months hereof.

4. The parties shall otherwise retain all assets held by them including their respective pensions as their own absolutely.

[103] Applying the reverse check commended by McLaughlin J, I consider this to be a fair division of the assets in the light of a consideration of the Article 27 factors and notwithstanding the departure from equality.

[104] I shall now address costs.

[105] In this case, the parties agreed to make efforts to agree a joint valuer. This agreement was given following a day where the individual accountants engaged by the parties had indicated a willingness to try to reach a resolution on their differences. Instead the court learned that while the Husband's accountant was willing to engage, his efforts were not reciprocated on the Wife's side. Thereafter the Wife made no effort to agree a joint valuer. In ancillary relief cases, generally I consider it appropriate that each party should bear their own costs. However, I find the Wife's approach to valuation did waste time and increase costs. Therefore the Wife shall pay £5000 towards the costs of the Husband.

I so order.