

SHERIFFDOM OF STRATHCLYDE, DUMFRIES & GALLOWAY AT DUMFRIES

[2021] SC DUM 29

F58/18

JUDGMENT OF SHERIFF BRIAN A MOHAN

in the cause

NN

Pursuer

against

RN

Defender

Pursuer: Maxwell; Brazenall & Orr, Dumfries
Defender: Shields; Colledge & Shields, Dumfries

Dumfries, 20 December 2019

Introduction

1. This was an action for divorce and financial orders under the Family Law (Scotland) Act 1985. Before the parties met the pursuer owned a house outright, with no loan secured over it. During the course of their marriage a mortgage in joint names taken out against the property. The parties separated in 2013 after eight years of marriage. The pursuer lives with three children and cannot afford to re-mortgage in her own name. The defender wants to be released from the joint mortgage. The complications of this case presented a financial and legal conundrum, which partly explains why the parties waited for some years before seeking a divorce.

2. The sheriff, having resumed consideration of the cause,

Finds in fact*Parties*

- (1) The pursuer is NN, residing at [] Dumfries. The defender is RN, residing at [] Lockerbie. The parties were married on 9 July 2005. There are two children of the marriage, R born 13 April 2006 and M, born 17 July 2008. The parties separated in March 2013.

Children

- (2) The two children of the marriage continued to live with the pursuer after the parties' separation. The child R is aged 13 and attends secondary school. The child M is 11 and attends primary school. The defender exercises contact to the children every second weekend. The arrangements for their care and upbringing are satisfactory. The parties have reached agreement regarding residence and contact, and neither seeks an order from the court relating to the children.

House at [] Dumfries

- (3) The pursuer's parents both died when she was a young child. When she became an adult she inherited a sum of money. She used this to purchase the property at [] Dumfries in or around 2001. Title to the property was in her sole name and there was no mortgage or other loan secured on the property when the pursuer purchased it. She lived there on her own before she met the defender.

Minute of Agreement

- (4) The parties met in 2004 and married in 2005. In 2007 the parties signed a Minute of Agreement in terms of which the pursuer conveyed to the defender for no consideration or price a one half *pro indiviso* share of the house. It was agreed between the parties that the other half share of the house would remain non-matrimonial property. This agreement was signed by the parties on 8 February 2007 and recorded in the Books of Council and Session on 14 March 2007.
- (5) The parties completed this conveyance to enable them to obtain secured loans over the property. At the time of completion of the agreement the defender had £8,000 of personal debts. £4,000 of this was debt incurred prior to the parties' marriage. The defender agreed to maintain payments in respect of the secured loan in contemplation at that time.
- (6) Shortly after completion of the agreement the parties obtained a loan secured over the property at [] from Mortgages plc for the sum of £37,000. The funds were used in part to repay personal debts of the defender amounting to £8,000. In 2008 the parties re-mortgaged the property with Chelsea Building Society and borrowed £63,245. Some of the funds borrowed from these two companies were used for spending for the family and some were used on home improvements to the property.
- (7) At the time of the parties' separation in March 2013 the defender conveyed his one half *pro indiviso* share of the matrimonial home back to the pursuer for no consideration or price. He did so in implementation of a clause in the Minute of Agreement referred to. As a result, shortly after the parties' separation, title to the house at [] Dumfries reverted to the pursuer's sole name. The Chelsea Building

Society consented to the change in ownership, though the loan secured over the property remained in the joint names of the parties.

Matrimonial property

- (8) The relevant date is 1 March 2013. At the relevant date the matrimonial property comprised one half of the matrimonial home at [] Dumfries. At that date the house was valued at £88,000, with an outstanding balance due to the Chelsea Building Society of £64,253. At the date of proof the property was valued at £90,000 and the balance outstanding to the building society was £62,658. The mortgage over the property with the Chelsea Building Society is an 'interest only' mortgage; the capital sum borrowed will require to be repaid in full at the end of its term. The pursuer has maintained the interest payments on the mortgage since the relevant date.
- (9) There were other unsecured matrimonial debts due at the date of separation. These comprised debts due to (1) Lowell Finance for Shopdirect of £110.14, (2) Bank of Scotland (reference4077) of £246.02, (3) Cabot Financial for an Ace Mail Order debt of £1,379.20, (4) AB & A Matthews solicitors of £116.40, and (5) a sum in joint names of the parties due to Santander bank of £264.75. The total amount of these unsecured debts at the relevant date was £2,116.51.

Parties' present circumstances and resources

- (10) The pursuer continues to occupy the former matrimonial home in Dumfries. The property has three bedrooms. The pursuer lives there with the two children of the marriage and her other child, a daughter aged 4. The defender is not the father of that child. The pursuer entered into a relationship with the father of her daughter

after the parties separated. For a period of less than one year her then partner lived with the pursuer at []. She is no longer in that relationship.

(11) When the parties met, the pursuer worked full time as a veterinary nurse. After the parties married the pursuer worked in different part-time jobs for some of the time. For a short period she was self-employed, though her earnings were restricted. She is now unemployed and in receipt of state benefits including child benefit and tax credits. In addition she receives £87 per week from the defender as maintenance for the parties' children. At the present time her childcare responsibilities restrict her ability to work in shifts or on a flexible basis.

(12) The defender lives in Lockerbie with a partner. The house in which he lives is owned by his partner. Because of the arrangements concerning the matrimonial home (whereby the mortgage remains in the joint names of the parties), the defender currently is unable to obtain a mortgage for another property. During the parties' marriage the defender worked full time in a variety of jobs. He was unemployed for short periods during the marriage. At present he works full time five or six days per week. He does not contribute to the mortgage payments over the matrimonial home, but he pays maintenance to the pursuer for their two children, at the rate of £87 per week.

Finds in fact and law

(1) The defender has derived economic advantage from contributions made by the pursuer to payment of his pre-marriage debts.

Finds in law

- (1) The marriage of the parties has broken down irretrievably as established by their non-cohabitation for a continuous period of over two years.
- (2) Orders for financial provision under the Family Law (Scotland) Act 1985 and incidental orders relating thereto are justified and reasonable.

[3] Therefore

- 1) In respect of the pursuer's crave 1 and plea in law number 1, and the defender's plea in law number 1, divorces the pursuer from the defender,
- 2) In respect of the pursuer's crave 2 and plea in law number 2,
 - (a) orders the defender to make payment to the pursuer by 31 January 2025 a capital sum of TEN THOUSAND EIGHT HUNDRED AND EIGHTY SIX POUNDS (£10,886) in terms of the Family Law (Scotland) Act 1985, with interest at the rate of 8 per cent per annum on any balance remaining from the date the sum falls due until payment,
 - (b) makes an incidental order in terms of Section 14 (2) (k) of said Act that the defender will be responsible for repayments remaining due to Santander Bank in respect of the parties' joint account or loan with that bank,
- 3) Repels the pursuer's plea in law number 3,
- 4) Repels the defender's plea in law number 2,
- 5) Dismisses crave 1 of the defender's counterclaim,

- 6) In respect of the defender's crave 2 and plea in law number 3, makes the following orders:
- (a) By 31 January 2025 the pursuer will take all reasonable and necessary steps to free and relieve the defender of his obligations to the Chelsea Building Society in respect of the mortgage or loan currently in the joint names of the parties and secured over the property at [] Dumfries,
 - (b) In the event that the pursuer is unable to relieve the defender of his obligations in respect of said loan by 31 January 2025, the property at [] Dumfries will be sold and, after repayment of the secure borrowings and any necessary expenses, any net free proceeds will be retained by the pursuer for her own use,
 - (c) Makes an incidental order in terms of Section 14 (2) (e) of said Act that the pursuer will be responsible for all necessary repayments due to the Chelsea Building Society in respect of said loan meantime,
- 7) Dismisses pursuer's crave 3 and defender's crave 3, and makes no award of expenses to or by either party.

NOTE

[1] This case presented a problem which the parties found intractable for several years since the separation. They have reached agreement about the arrangements for the children, but have been unable to resolve their differences regarding what to do about the matrimonial debt. Much of the evidence in the case was agreed by joint minute.

Pursuer's position

[2] The pursuer sought an order for a capital sum payment from the defender to represent a fair contribution by him to the matrimonial debt. The pursuer's arguments can be summarised as follows:

- 1) She owned her home outright before she met the defender. Her natural parents died when she was very young and she was adopted by an aunt and uncle. When she reached adulthood she received an inheritance. Before she was 20 years old she purchased the property at [] with no mortgage or other secured debt.
- 2) It was after she met and married the defender that she was persuaded by him to use the house as security for a loan. £8,000 of the loan first obtained in 2007 was to pay personal debts of the defender. These were pre-marriage debts.
- 3) The sums obtained from the first lender and then Chelsea Building Society were used for a variety of matters, including a new kitchen in the home. She was left at separation with a mortgage of over £64,000. This was an interest-only mortgage and the defender had not made any payments to that since separation.
- 4) She did have another partner after separation, and her four year old daughter C was born from that relationship. Her partner lived with her for less than a year, but that period of cohabitation was why the defender had refused to contribute to the mortgage. She was now the only adult in the house and lived on tax credits, child benefit, and maintenance paid by the defender. She

had to pay the mortgage and other unsecured debts by instalments out of her very limited income.

- 5) Over £62,000 was still owed on the mortgage. She did not want to have to sell the house as it had been her home all of her adult life, and the only home the parties' two sons had known. She could not afford at this stage to take on the mortgage in her own name, even though she made all of the interest payments, because the Chelsea Building Society would not agree. It would be unfair, however, to insist on a sale of the home.
- 6) She hoped to improve her financial position over the next few years. She was going to college to study for a healthcare qualification. She had applied for several jobs, but at the moment her domestic responsibilities limited her flexibility. Her mother helped out but was aged 70 so was restricted; the defender had refused to look after the boys on Saturdays to allow her to work. Her daughter was aged 4 but would be starting school in 2020 so that would improve her availability for work.
- 7) Granting an order for the sale of the former matrimonial home would have no practical effect on the defender, but would have a huge impact on the pursuer and the children.

Defender's position

[3] The defender sought an order for the sale of the matrimonial home to redeem the mortgage and release him from its terms. The reasons advanced on his behalf can be summarised as follows:

- 1) The parties separated in 2013 and nothing had been resolved in the six years since. He could not move on with his life.
- 2) It was acknowledged in the agreement entered into in 2007 that the transfer of one half of the house to his name was a device to enable the parties to use the house as security for loans. He was the one working full time and his income was needed to allow a mortgage to be considered. It was also acknowledged that £8,000 of the funds borrowed were to pay his personal debts. These were not all pre-marriage debts, however. Most of the debt related to a car loan. The defender's pleadings included a crave to set aside the 2007 agreement, but he was no longer insisting on that.
- 3) After the first mortgage was taken out until the separation in March 2013 he made all of the mortgage payments. After separation the pursuer moved a new boyfriend in. He did not think it was fair that he should pay for that home. He did not recognise or agree the other unsecured debts spoken to by his wife. It was agreed that they existed, but he did not recollect these being sums owed during the marriage.
- 4) He did not think it was fair that he should remain tied to a mortgage for a property he did not own or occupy. For as long as the mortgage existed he was vulnerable to the lender pursuing him for any arrears. If repossession steps were taken this would impact significantly on his credit status. In addition, his being tied to that mortgage prevented the possibility of him and his partner moving home and/or obtaining a joint mortgage.

- 5) He worked six days per week. His work commitments did not enable him to care for his sons every Saturday. He paid an appropriate figure as maintenance for the boys and had a good relationship with them.
- 6) The appropriate solution here was for the house to be sold and the mortgage paid off. Because only half of the value of the home was matrimonial property, this would leave a technical deficit, but the remaining profit from the sale would be sufficient to pay this deficit (of around £17,600). This would still leave a healthy balance to the pursuer to enable her to start over.
- 7) While he did not want to force his children out of their home, the current situation was unsustainable. Since the pursuer lived in the town of Dumfries and the children went to school there, there were many options for alternative housing, including renting from a social landlord.

Relevant Law

[4] In deciding financial matters in a divorce the court is afforded much flexibility by the Family Law (Scotland) Act 1985. The general principles and factors detailed in Sections 9, 10 and 11 are of course relevant, but do not need to be restated in full at this point. Other specific measures referred to in submissions and relevant to my consideration are the following:

[5] Section 8 Orders for financial provision

- (1) In an action for divorce, either party to the marriage may apply to the court for one or more of the following orders—

(a) an order for the payment of a capital sum to him by the other party to the action;

(aa) an order for the transfer of property to him by the other party to the action;

...

(c) an incidental order within the meaning of section 14(2) of this Act.

(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is—

(a) justified by the principles set out in section 9 of this Act; and

(b) reasonable having regard to the resources of the parties.

(3) An order under subsection (2) above is in this Act referred to as an “order for financial provision”.....

...

[6] **Section 12 Orders for payment of capital sum or transfer of property**

(1) An order under section 8(2) of this Act for payment of a capital sum or transfer of property may be made—

(a) on granting decree of divorce or

(b) within such period as the court on granting the decree may specify.

(2) The court, on making an order referred to in subsection (1) above, may stipulate that it shall come into effect at a specified future date.

[7] **Section 14 Incidental orders**

(1) Subject to subsection (3) below, an incidental order may be made under section 8(2) of this Act before, on or after the granting or refusal of decree of divorce

(2) In this Act, “an incidental order” means one or more of the following orders—

(a) an order for the sale of property;

...

(e) an order regulating liability, as between the parties, for outgoings in respect of the matrimonial home or furniture or plenishings therein;

...

(h) an order setting aside or varying any term in an antenuptial or postnuptial marriage settlement

(j) an order as to the date from which any interest on any amount awarded shall run;.....

(k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.

Analysis

[8] There were few elements of this case where the evidence was disputed. Most of my findings in fact are based on matters which were detailed in the Joint Minute of evidence, the Minute of Agreement entered into between the parties in 2007 (Production 5/5), or concessions made during the proof. There were two disputed areas where I have had to make findings in fact.

[9] Firstly, the 'personal debts' of the defender which were £8,000 as at 8 February 2007 (this figure was agreed in the Minute of Agreement entered into on that date). The pursuer maintained that this all came from debts which the defender had incurred prior to the date of marriage on 9 July 2005. The defender disputed this, though he was unclear about exactly when the debt had accrued, saying only that it related to a car. Neither party produced any vouching for that debt, beyond the recognition of it in the written agreement. It seemed unlikely to me that this debt all arose after the date of marriage. Equally, it seemed unlikely that it was all from a date before the marriage and that was not serviced in some way for almost two years. I have decided on the evidence that the fairest conclusion is to make a finding that half of that sum – £4,000 – relates to debt which the defender incurred prior to the date of marriage. This calculation is relevant to my assessment of the economic advantage/disadvantage considerations (under Section 9 (1) (b) of the 1985 Act), which are detailed below.

[10] Secondly, the personal debts in the pursuer's name were detailed in the joint minute, though it was not agreed that these were all extant at the relevant date. On the basis of the evidence led about this I am satisfied that the following debts existed at the relevant date (the lettering follows that in the joint minute):

- a. Shopdirect/Lowell - £110.14
- b. Bank of Scotland (reference ending ...4077) - £246.02
- c. Cabot Financial for Ace Mail Order - £1,379.20,
- d. AB & A Matthews solicitors - £116.40
- h. Sum due to Santander bank of £264.75.

[11] Accordingly I have found that the total amount of unsecured debt which is relevant to the assessment of matrimonial property is £2,116.51 (the total of the five debts detailed in the paragraph above). I was not satisfied that the pursuer proved that the other debts detailed in the joint minute (e, f and g) were matrimonial debts. This is because (1) There was insufficient documentation to support them, (2) items 'f' and 'g' appeared to relate to the same debt, and (3) although the pursuer said in evidence that her mother had helped her to pay off one large debt, her mother's affidavit was silent on that point.

[12] I have therefore found that the matrimonial property and debts at the relevant date were as follows:

Property: valuation of matrimonial home at March 2013 - £88,000

A - Matrimonial property at relevant date: 50% of valuation - **£44,000**

B - Matrimonial debt at relevant date:

1)	Due to Chelsea Building Society -	£64,253.02
2)	unsecured debts (see above) -	<u>£ 2,116.51</u>
	total matrimonial debt	£66,369.53
	Net figure (A minus B) =	- £22,369.53

Wallis v Wallis 1993 SLT (HL) 1348 determined that changes in the net value of matrimonial property between the relevant date and the date of proof did not alter the size of the fund to be divided between the parties. However, changes to values of matrimonial property after separation are one of several factors which can be assessed when deciding the appropriate division of the property between the parties. In this case the changes in values are limited. The house has increased in value from £88,000 to £90,000. Since only half of the house value was matrimonial property, the net increase to the matrimonial pot is only £1,000. The secured borrowing has reduced from £64,253 to £62,657, a reduction of £1,596. These are of limited significance in the whole circumstances of this case. The pursuer has continued to pay the mortgage since separation, but she has had the continued use of it over that period. The parties' submissions took these revised valuations as their starting point.

[13] Taking into account those changes in the valuation of the matrimonial home and the secured debt, this alters the sums as follows:

C – Matrimonial Property at date of proof (50% of house value):	£45,000
D – Matrimonial Debt at date of proof :	£64,773
Revised net figure (C minus D) =	-£19,773

1985 Act principles and factors significant to this case

[14] Section 9 (1) (a) establishes that “the net value of the matrimonial property should be shared fairly” between the parties to the marriage. This means that it should be “shared equally or in such other proportions as are justified by special circumstances” (Section 10(1)). Under this calculation the defender would be responsible for half of the net debt, in other words he would require to make a payment of £9,886, being half of the £19,773 revised debt figure detailed above (rounded down to the nearest pound). If the values at date of separation were to be insisted upon, the figure would be £11,185.

[15] However, section 9 (1) (b) requires that

“fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interest of the family.”

Under this category I should note that the defender paid the mortgage from his earnings for the period from when a mortgage was first obtained (March 2007) until the date of separation six years later. On the other hand, the mortgage was not obtained in order to purchase the family home, since the pursuer already owned it outright. The loan was taken out to pay off some debts owed by the defender (£4,000 of which I attribute to pre-marriage debt) and to make improvements to the home, as well as for other spending. There are other balancing factors to consider when assessing fairness, however. The pursuer agreed to the joint mortgage and, apart from the repayment of the defender’s loan, benefitted from the spending

power that the secured loans gave them, and continues to benefit from the improvements made to the home.

[16] Also relevant under this heading is the circumstance that the pursuer gave up working to become the main carer for the children. She was working full time at the date of marriage, but her employment pattern thereafter during the marriage appears to have been patchy, with some part time jobs and a period of self-employment which did not generate enough income to be a sustainable enterprise.

[17] Section 9 (c) of the 1985 Act refers to a further consideration relating to children, and requires the court to consider that “any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties”. It should be noted under this heading that the defender makes weekly child maintenance payments and exercises contact to his children. However, his childcare commitments for the parties’ two sons have no effect on his earning capacity. The pursuer, on the other hand, bears the main economic burden of this. At the date of proof she was experiencing difficulties in getting back to work because her flexibility was restricted by her childcare commitments as a lone parent. I should note, however, that a significant restriction inhibiting her return to work was the care of her four year old daughter, who is not a child of the marriage.

[18] Apart from the complications detailed already, one further difficulty which the parties faced in this case concerns the type of mortgage over the matrimonial home, namely an interest-only arrangement. The joint minute lodged in evidence confirms that the parties obtained a mortgage with Chelsea Building Society in June

2008 and borrowed £63,245. More than 11 years later the amount still owed to the society had not altered by very much. Neither party was able to state with any degree of certainty what plans they had for repayment of the principal sum. There did not appear to be any savings vehicle such as an ISA or endowment policy to build up a fund to pay off the capital sum at maturity. So if nothing is done to alter the status quo both parties are likely to face the repercussions of this.

Decision

[19] Against all of that background, I have decided that in this case it is appropriate to make orders for financial provision. In addition I consider that it is appropriate to exercise the powers available to me under Sections 12 and 14 of the 1985 Act by stipulating that the orders will come into effect at a future date (just over five years from now), and to make incidental orders meantime.

[20] Accordingly my decisions and specific reasons for each are as follows:

- 1) A divorce decree will be granted.

Reason: two years' separation is the ground, and this was agreed.

- 2) There will be an incidental order under Section 14 (k) in terms of which the defender will take on responsibility – as between the parties - for any sums remaining due to Santander Bank in respect of joint account owed by the parties [reference ending....2555].

Reasons: It is fair that the defender should take on the responsibility of settling the remaining joint debt to Santander (listed at 'h' in the joint

minute as £264.75 at the relevant date). The pursuer has the responsibility of dealing with the other unsecured debts, and has had to reach instalment arrangements with some of the creditors.

- 3) By 31 January 2025 the pursuer will take all reasonable and necessary steps to free and relieve the defender of his obligations to the Chelsea Building Society in respect of the mortgage or loan currently in the joint names of the parties and secured over the property at [] Dumfries.

Reasons: It is fair that the pursuer should be allowed a reasonable opportunity to make arrangements to transfer the existing mortgage to her own name, or to change mortgage provider with a loan in her sole name. A period of five years should allow her to seek a return to work and assess whether a mortgage in her own name is achievable.

- 4) There will be an incidental order under Section 14 (e) in terms of which the pursuer shall remain responsible - as between the parties - for the payments due to the Chelsea Building Society for the existing mortgage or loan secured over [] Dumfries.

Reasons: It is appropriate that in due course the defender should be released from the terms of the mortgage over the former matrimonial home, so the pursuer should continue to be responsible for payments towards the mortgage meantime. Such an order applies between the

parties but has no effect on the rights of the creditor to seek repayment from either of the parties (Section 15 (3)).

- 5) In the event that the pursuer is unable to relieve the defender of his said obligations to the Chelsea Building Society by 31 January 2025, the property at [] Dumfries will be sold in order to redeem the said mortgage and thereby relieve the defender of his obligations to the building society in terms of that loan.

Reasons: A prospective order in terms of Section 12 (2) is appropriate in this case to allow some certainty to parties after a reasonable period.

- 6) By 31 January 2025 the defender will pay to the pursuer the sum of £10,886.

Reasons: The pursuer has craved a capital sum award of £10,963.68. I have decided that the fairest way to approach this is to take as my starting point half of the current net debt figure, namely £9,886. Since I have determined that the defender gained the economic advantage of his pre-marriage debt being paid through the first mortgage over the property, it is appropriate that some adjustment is made for that. My decision is that a further £1,000 should be paid in order to account for this.

- 7) Interest on the sum to be paid by the defender to the pursuer will apply at the rate of 8 per cent per annum from 31 January 2025 (or on any remaining balance thereof) until payment.

Reasons: The order for a capital sum payment by the defender provides clarity about exactly how much is to be paid and will allow the defender time to make appropriate provision. In terms of the discretion permitted under Section 14 (2) (j) I am applying interest to the sums due by the defender after that date; this will therefore only apply if the does not make sufficient arrangements within that time frame.

[21] These decisions should present an achievable way forward for both parties, and gives one date by which it is realistic for each to meet their obligations to the other. The pursuer wants to continue living in the same home with her three children and wants to return to work. She is due a fair opportunity to try and achieve that. She has matrimonial debt for which she is responsible. But if she is able to obtain employment over the next few years she may be able to qualify for a mortgage in her own name, particularly if the payment to be made by the defender helps to reduce the amount she has to borrow. I think that five years is a fair period for her to aim for that, and if she is unable to resolve the mortgage difficulty by then, it is appropriate that the house is sold to repay the mortgage and release the defender from the terms of it.

[22] The defender wants to be freed from the obligation of the mortgage at his former home, which he left more than six years ago. However, when he married the pursuer she was a young woman who had a house with no loan secured on it, and he did not have to be concerned about the need to find and pay for a home.

Decisions made during the marriage enabled the repayment of his pre-marriage debt, and at separation there was joint debt of over £22,000 which he has done little to address in the intervening years. The capital sum ordered represents his fair share of the remaining debt. Payment by him of the orders made in this decision will allow him to move on in due course, without thereafter remaining committed to a mortgage secured over the home of his former wife.