

**THE HIGH COURT
CIRCUIT COURT APPEAL**

[2011 No. 54 CAF]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND
FAMILY LAW ACT 1995**

BETWEEN

F.F

APPELLANT

AND

P.F

RESPONDENT

JUDGMENT of Mr Justice Michael White delivered on the 23rd day of May, 2012

1. This is an appeal from an order of the Circuit Court of the 9th March, 2011. The appeal was filed on the 15th July, 2011, extension for appeal having been granted by the Master of the High Court on the 13th July, 2011.
2. The appeal was heard on the 15th March; 17th and 18th of April; and judgment was reserved.
3. The appellant has appealed the declaration that the maintenance order of the Circuit Court of the 22nd May, 2009 in her favour of €5,000 a month was a gross payment thus rendering her liable for income tax on these payments.
4. The respondent has given notice that he appeals the order of €3,100 maintenance per month, but he has accepted that he did not intend to originally appeal, but has availed of the opportunity given by the applicants appeal.
5. The parties were married on the 19th April, 1986, and have three children aged 24, 22, and 21.
6. The appellant is a former radiographer who subsequently qualified as an accountant. The respondent is a medical practitioner running his own GP practice in Dublin. The appellant is 52 and the respondent is 54.
7. Irreconcilable differences arose between the parties with difficulties apparent from 2002. The appellant issued proceedings in the Circuit Court on the 12th July, 2007 seeking judicial separation and ancillary relief. The proceedings were heard on the 22nd May, 2009.
8. A decree of judicial separation was granted in respect of the marriage contracted on the 19th April, 1986. It was directed that the family home be sold when the youngest child completed his leaving certificate examinations, and the net proceeds divided 60% to the appellant and 40% to the respondent.
9. The appellant was to retain a house in Co. Donegal and the respondent retains his medical practice. The respondent owns the building within which the practice operates. He also owns an apartment in central Dublin.
10. It was directed that the respondent fund the children's financial requirements, and pay the appellant €5,000 a month for 18 months to be reviewed after that time.
11. Separate pension adjustment orders were made on the 18th May, 2010 pursuant to s. 12 of the Act, the effect of which was to grant the appellant 40% of the pension entitlements of the respondent up to date of the judicial separation. They were directed on the 22nd May, 2009 as part of the comprehensive orders on separation but not concluded until the 18th May, 2010.
12. A clarification of the order of the 22nd May, 2009 was made on the 22nd July, 2009, when it was clarified that the payment of €5,000 per month for 18 months was to give the applicant an opportunity to return to the workplace by that time
13. The respondent duly invoked the review and issued a motion on the 3rd December, 2010, seeking variation or a discharge of the maintenance order.
14. This motion was heard on 9th March, 2011 when the trial judge declared that the maintenance order of 22nd May, 2009 was a gross payment of €60,000 per annum. This payment was to continue for two months, then reduce to €3,800 per month and further reduce to €3,100 a month after completion of sale of the family home. It is that order that is appealed to this Court.

Taxation of Spousal Maintenance Benefits

15. Part 44 of the Taxes Consolidation Act 1997 as amended deals with the taxation of maintenance benefits.

16. Section 1015(2) states:-

"(2) A wife shall be treated for income tax purposes as living with her husband unless either –

(a) they are separated under an order of a court of competent jurisdiction or by deed of separation, or

(b) they are in fact separated in such circumstances that the separation is likely to be permanent."

17. Section 1025(3) states:-

"(3) Notwithstanding anything in the Income Tax Acts but subject to section 1026, as respects any payment to which this section applies made directly or indirectly by one party to the marriage to which the maintenance arrangement concerned relates for the benefit of the other party to the marriage –

(a) the person making the payment shall not be entitled on making the payment to deduct and retain out of the payment any sum representing any amount of income tax on the payment,

(b) the payment shall be deemed for the purposes of the Income Tax Acts to be profits or gains arising to the other party to the marriage, and income tax shall be charged on that other party under Case IV of Schedule D in respect of those profits or gains, and

(c) the party to the marriage by whom the payment is made, having made a claim in that behalf in the manner prescribed by the Income Tax Acts, shall be entitled for the purposes of the Income Tax Acts to deduct the payment in computing his or her total income for the year of assessment in which the payment is made.

Pursuant to Section 1026 of the Act the parties can elect to be jointly assessed. In those circumstances the party receiving maintenance is not taxable nor is the paying party allowed to claim a deduction or allowance. Both parties must elect in writing to be jointly assessed."

Disputed Issues as to Taxation

18. The appellant has asserted in her evidence that at the hearing of the judicial separation proceedings on the 22nd May, 2009 the trial judge when giving judgment made specific reference to the maintenance being a net amount and in her recollection acknowledged that the cost to the respondent of maintenance of €5000 per month would be approximately €100,000. Denise McNulty solicitor for the respondent who attended the hearing and exhibited an attendance note of the judge's ruling gave evidence at the appeal and asserted that the trial judge in the course of her judgment did not refer to the maintenance as net, nor did she mention the sum of €100,000. Mr. Denis Barror solicitor understood the amount to be net because this sum of €5,000 was the amount of outgoings that the appellant had and the judge accepted this. He had no specific recall of €100,000 being mentioned.

19. The perfected order of the court of the 22nd May, 2009, or the revised order of the 22nd July, 2009, made no reference to income tax.

20. When the learned judge reviewed the maintenance on the 9th March, 2011, she was aware of the controversy in respect of tax, and it was open to her if she had intended the payment of €5,000 to be non-taxable in the hands of the appellant, to structure future maintenance to take that into account. Contrary to this approach the trial judge declared that the maintenance was a gross payment.

21. Examining the original order from a proper provision aspect, and taking into account all factors this court would have been surprised if the trial judge considered the payment of €5,000 a month without any benefit accruing to the respondent in his tax payments was fair, particularly when the respondent was ordered to fund the children's financial requirements.

22. I accept that the appellant misunderstood the situation and expected the respondent not to elect for single assessment, which was his entitlement. However that is not an error on the part of the respondent. The appellant is an accountant by profession, and one would expect that she in particular would have understood the tax position subsequent to a decree of judicial separation.

23. The appellant is not entitled to a payment to compensate her for the taxation due on the maintenance awarded to her.

Current Maintenance

24. The present maintenance order is €3,100 in favour of the appellant which is taxable in her hands. The respondent is entitled to tax relief on this amount at his highest marginal rate.

25. The appellant's gross income including car allowance from her employer is €74,900. Gross maintenance is €37,200 per annum.

26. The respondent's net profit before personal taxation for year end 31st January 2012 is €177,845 and adjusted to exclude a special tax provision it is €228,092 and projected for year end 2013 to be €197,585.

27. I accept that the respondents gross practice income has been decreasing from a peak in 2009, also that he will have to negotiate higher mortgage payments to his bank in respect of the mortgage on the practice premises, and that he has continuing financial responsibilities for two children which are onerous.

28. The appellant will have to enter into an arrangement with the Revenue Commissioners to discharge the tax arrears.

29. While the respondent has made a good case to reduce the maintenance payment of €3,100 per month, I am reluctant to interfere with it because of the appellant's recent entry into the workforce and her tax liabilities built up at a time of unemployment. I accept her bona fides in seeking and procuring employment which was in doubt for some time.

30. I reject her contention that the respondent's financial position is rosy. His commitments are substantial and only discharged by huge effort and time in his medical practice.

31. He is at present able to discharge the maintenance payment. That is not to say that he should be liable for spousal maintenance up to the date of his retirement. I do not want to specify a review because the respondent may feel he can live with the present maintenance payments without the difficulty of returning to court. It is in everyone's interest that litigation cease and the parties get on with their lives.

32. I will affirm the maintenance payment of €3,100 per month, which I repeat is taxable in the hands of the appellant.