

## THE HIGH COURT

## FAMILY LAW

[2013 No. 25 CAF]

## IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989, AND

## IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

G.S.

APPLICANT/RESPONDENT

AND

P.M.

RESPONDENT/APPELLANT

## JUDGMENT of Mr. Justice Henry Abbott delivered on the 16th day of March, 2013

1. This is an appeal from an order of the Circuit Court (Judge Martin Nolan) dated 27th February, 2002, whereby an order of judicial separation was made together with provision for the parties.
2. The parties were married on the 25th May, 2009. The respondent/appellant (husband) had been married and separated before and had just recently been divorced. The applicant/respondent (wife) has not been married before but had a non-marital child, now aged twenty six. The husband and wife also had (with each other) three non-marital children: a daughter born on 19th October, 1995, a son T. who was born on 25th February, 2001, and a son H. who was born on 24th February, 2003. The husband is aged 58 and the wife is 48.

## Outline of order appealed

3. The Circuit Court order may be summarised as follows:-

The heavily indebted family home was to be sold. The sum of €100,000.00, from proceeds of the sale after discharging the mortgage was set aside for interim maintenance of both parties payment of school fees ect, and thereafter the sum of €450,000.00 was set aside for the immediate purchase of a house for the wife and the three dependent children of the marriage for their sole residence until the youngest child of the marriage, namely H., reached nineteen years. When H. reached nineteen years, the wife was to pay to the husband a sum representing 25% of the value of the house at that date and in the event of the wife being unable to do so, the house to be sold with the wife obtaining 75% of the proceeds and 25% to the husband. The husband was to receive a lump sum of €100,000.00 from the proceeds of the sale of the family home, and the learned Circuit Court judge estimated that a sum of €46,000.00, being the balance, should be distributed equally between husband and wife.

## Outline of decision on appeal before this Court

4. This Court has decided that a sum of €300,000.00 be allowed be paid to the wife together with a pension adjustment order of 80/20 in favour of the wife. The balance of funds available to the family, are to be paid to the husband so that the husband may be better able to deal with his debts and re-establish his business, to the possible detriment of the wife's plans as supported by the Circuit Court to purchase a dwelling within the general vicinity of the former family home.

5. The reasons for such outline decision are set out in the discussion of the statutory consideration of, the Family Law (Divorce) Act 1996, s.20(2)(a), as follows:-

*(a) The income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,*

The income of the parties, on which they are solely reliant, is the income of, the wife, as a temporary administrator with a reasonable security earning a gross salary of €46,000, leaving a net monthly income after all deductions of approximately €2,630.41. In addition, the wife is in receipt of children's allowances in respect of the sum of €390.00 monthly.

The husband is at present unemployed. He was an auctioneer having set up his own very successful auctioneering business, which has been entirely dissolved. He hopes to re-establish commercial activities in the property business as some sort of deal maker exploiting the beginnings of activity by NAMA and banks, in encouraging some commercial development in Dublin and the outlying centres. He hopes that when he receives a qualification in international arbitration, this will provide an opportunity for earning income in his less energetic older years. While the wife's current employment involves a considerable amount of PR activity and she is obviously very talented, this Court discounts the possibility of her being headhunted into better employment for the foreseeable future, due primarily to the bad economic circumstances.

*(b) The financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouses or otherwise),*

The applicant must provide for herself and three dependent children, currently without any financial assistance from the husband, and the probability is that in the short to medium term it will not be possible for the husband to provide any maintenance. Both parties received a sum of €18,000.00 at the conclusion of the Circuit Court case and both husband and wife have used that money to assist

with paying rent. Both parties are heavily indebted, the husband more so and in the case of the husband there is a pressing necessity for the husband to reduce this debt and provide credible proposals for payment into the future or compromise of same. Since the filing of the appeal, the husband has shown that he has a capacity to negotiate and compromise debts - as in the case of two judgment mortgages claiming money for past legal services due to the husband's family law proceedings against the wife. As it turns out, these judgment mortgages were released consequent to an order of White J. on the basis that the parties could argue in respect of either the joint or several liability thereof with an order that the wife's solicitor, would hold on deposit the net proceeds of the sale from which the proceeds of such attempted judgment mortgages might or might not be paid out by this Court. The husband is likely to require a sum for basic rent and frugal requirements. His rent should be kept to a minimum and the situation is really one where he cannot factor into any rented accommodation the fact that he is regularly having access to his two sons, who have a good relationship with him. Having regard to the resources available, they may all just have to make do with bachelor/studio type accommodation and nothing more. The wife sees her main financial needs after expenditure of salary on the day to day running of the household and maintenance of her three children to be the purchase, free from encumbrances, of a house in the price range envisaged by the Circuit Court Decree (just over €400,000.00). This is not considered by the court to be a very practical proposition, as based on the Circuit Court order, the wife would have to forego all the luxuries, leisure activities and cosmetic treatments which were so much part of her life and her children's lives to date. She wishes to continue to live in the leafy suburbs, but to do so having expended €400,000.00 in capital in a house together with incurring the overheads of house ownership. The Court cannot see how she will continue to enjoy the little luxuries which go to make up the culture of the area in which she chooses to live with her children, and which are necessary for the purpose of keeping herself well presented and motivated, in relation to her employment (which depends as much on her own positive good image and talent as anything else). This Court, therefore, sees a rental existence for the wife and children as being less oppressive for the formative part of the children's lives, even though that may be seen as less secure, from a capital point of view. This may be a great disappointment to the wife, but it is intended that to compensate for this (to some extent at least), a significant pension adjustment order will be made in her favour, against the husband's pension which currently is valued at €70,000 odd euro, but which according to the most recent letter from the provider, will more generously grow to a guaranteed €165,000.00, when he retires at 65, provided the pension is not cashed before that date.

*(c) The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be.*

The parties enjoyed an upper middle class lifestyle until some years after the dissolution of the husband's partnership business in 2005, and even after the collapse of the property market in 2008. The good standard of living available for the parties was exemplified by a gross salary of €900,000 per annum of the husband at a time when the wife was in employment as well, leaving the parties comfortably in a position to provide an upper middleclass lifestyle even if the husband was indebted through litigation and maintenance payments to his former wife. While the husband attempted to set up a business in a new location, this ultimately did not prosper by reason of the quick onset of the Lehman collapse in 2008, and the consequence of the collapse of the Irish market thereafter. The lifestyle of the parties and their income was sustained however by various revenue and balancing payouts consequent on the partnership dissolution following the dissolution of his partnership business in 2005.

*(d) The age of each of the spouses and the length of time during which the spouses lived together,*

The wife is 48 years old and the husband is 58 years old. Prior to the parties' marriage, the parties lived together for a considerable period of time in circumstances where their eldest child was born on the 19th October, 1996. The Court is not inclined to regard the marriage as a short one for two reasons, namely that there were marital type commitments from the birth of their eldest child in 1996 and there will remain commitments, in terms of child rearing and maintenance, for the wife in particular, for many years to come, with particular responsibilities for the youngest child who has some, but hopefully not insurmountable difficulties.

*(e) Any physical or mental disability of either spouse,*

The wife is in good health. The respondent has had heart trouble which necessitated the placement of three stents in or around 2006. He claims to have had admission for depression and the wife believes that this may be related to excessive alcohol consumption. While there are some reports for admission to hospital for depression, having heard the husband give evidence and read these reports, this Court is inclined to believe his claim in evidence that he has recovered as a consequence and does not now suffer from depression. The Court is more inclined to accept his wife's summary in relation to medical reporting, that after the property collapse he did suffer from some reactive depression which caused considerable distress to the family. While he may have used the depression label as a crutch to withdraw from responsibilities and even disrupt case progression, the Court is satisfied that, that regrettable behaviour will not reoccur. It is important, however, for his health, that he would have some financial comfort from the provisions in this case so as to be in a position to tackle, to a significant extent, his indebtedness, and certainly to a stage where he can have an opportunity to convince his creditors that he may operate again in the commercial field without being disqualified, either formally (or by public perception) by his debt.

*(f) The contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,*

In the past, and certainly up to a little time after the Lehman collapse, the contribution of both husband and wife to the family was stellar insofar as they had jointly engaged in an enterprise of purchasing an old listed building on interest-only finance, and watched its value creep up to the stage where the husband claimed that his friends thought it might be worth €6m. Certainly (applying adjustors consistent with local indices) the initial sale price of €2,225,000.00 and present value of €4,000,000.00 may be a more realistic but still a very impressive estimate. The mistake made in the contributions of the parties to the family was by continuing to consume conspicuously after the Lehman collapse. In this regard, it must be remembered that they got married in 2009, and that even at that stage the husband was paying for the high standard of living (and even marriage) of the parties with residual income arising, mainly from the dissolution of the partnership aspect of his former business. The husband may not be in a position to contribute any maintenance to the children in the immediate future and they will be dependent on the wife. The Court has heard the husband give evidence in which he stated clearly that he had begun to make contact with the market again and had two tentative scoping projects to show for his efforts. Neither of these projects produced any significant income, however the Court has been impressed with the husband's presentation and intent despite his poor showing during the years of recession. In making provision in this case, the Court has allowed the husband to make an "eleventh hour pact" whereby he gets some provision to deal with his debts so as to have a commercial space to project his new entry into the market and develop his professional prospects in arbitration. This is a "break or bust" pact when expressed in common parlance and the court has been motivated by the need of the family for maintenance from the husband when he re-establishes a business. The Court is also influenced by the need to have fairness of opportunity for both spouses having regard to the contributions they have made in the past, even if these contributions were

defeated by misplaced ambition (if not greed) and the property crash. Lest it might be interpreted that the Court is recognising the husband in this case as the first of "post recessionary man", the Court wishes to emphasise that its assessment of his prospects are based on the evidence he gave rather than any attempt to take judicial notice of the fact that the recession in property is over. However, there are more positive signs emerging by the day in relation to the property market and it seems that the husband, with his past experience and continued contacts in the milieu of property development at a high level, indicate that it is worth giving the husband a chance in his own, and in the family's interest.

*(g) The effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,*

If the husband has suffered a disastrous set back in his earning capacity, this was not caused by any of his marital responsibilities. The wife has continued to develop her career and earn a salary and she was generally assisted in this in the period the parties lived together as exemplified by the fact that, even as times began to become financially challenging, she was assisted in the home with full time care and help.

*(h) Any income or benefits to which either spouse is entitled by or under statute,*

As is unfortunately the case in many proceedings in this Court, it is unclear whether either of the spouses will qualify for a contributory old age pension under statute. The issue is more relevant to the husband than the wife by reason of his age and unless he was in a position to voluntarily pay PRSI contributions to continue his entitlement to contributory old age pension during the time of his corporate existence (rather than a partnership or sole trader), and commences in early course to pay such contributions by way of generation of income, he may lose the entitlement to contributory old age pension at age 68.

*(i) The conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances be repugnant to justice to disregard it,*

While the wife outlined conduct of the husband for which he may be criticised, it was not claimed in the proceedings that such conduct would be of such an egregious kind as to warrant any diminution in provision under para. (i).

*(j) The accommodation needs of either spouse,*

While counsel for the wife has suggested that as this subparagraph does not refer to the accommodation of both spouses, this Court considers that in accordance with the practice hitherto and the principles of the legislation, the accommodation needs of both spouses must be considered. One convenient solution which might be considered in this case such as ignoring the accommodation needs of the husband (head in the sand fashion), cannot be countenanced. As the children will predominantly be staying with the wife, this Court considers that Judge Nolan's assessment of the accommodation needs for her as in a house in the area costing approximately €400,000.00 is the standard. This Court accepts the quasi evidence used in the appeal hearing to scope the valuation of a house for purchase using [www.myhome.ie](http://www.myhome.ie) and [www.daft.ie](http://www.daft.ie) with subsequent triangulation by data from the National Property Sales Register, as in the interests of economy, valuers have been dispensed with in this case. This Court disagrees with Judge Nolan's assessment that the tenure of the wife's accommodation should be represented by full ownership through purchase for the reasons outlined above. In any event, Nolan's J.'s decision in relation to a redistribution of the capital proceeds on the 19th birthday of H., the eldest son, does import a sense of insecurity less than that associated with full ownership. This Court has already given reasons relating to cost saving factors why the husband's accommodation should be strictly bachelor, and he and his sons will just have to eke out arrangements in relation to overnights and no doubt they will learn how to "hack it" in that situation. In relation to the school accommodation, using private schools for the children is really beyond the reach of the parties at this stage. However, this Court accepts that exceptionally for the eldest daughter, who has lost all rapport (one hopes temporarily) with her father, would be severely disrupted, and a record of brilliant achievement put in jeopardy if she were moved from the current private school which will cater for her for the next two or three years. The Court accepts that the father is very agitated about the eldest son being moved from the current private school, but the very sensible arrangement made by the mother (reluctantly) to have him attend a comparable but non-fee paying school in the opposite direction to the family location, is to be ordered by the Court. If the father wishes to change this situation by spending money, then he must show to the wife that he has raised the money in some fashion outside the funds available in this case through a relative, to the satisfaction of the wife. In suggesting this course, the Court is conscious that the husband's counsel, canvassed the possibility of the wife herself raising funds from her wealthy mother and sibling. In relation to the courts taking into account the possibility of inheritance, that has been firmly rejected by the longstanding Supreme Court decision in *F. v. F.* [1995] 2 I.R. 354.

It is a matter of some speculation whether a wife, the subject of impecunious separation provisions, may hope to succeed in a claim against a parents estate under s.117 of the Succession Act 1965 and, indeed, it is a matter of even further speculation as to whether a family court could force a wife in that situation to initiate s.117 proceedings to beat the very short time limitation now available to bring such proceedings. The Court, therefore, rejects any attempt made by counsel on behalf of the husband to have the court "increase the pot". This is because of the dicta of the Supreme Court in *F. v. F.*, and the speculative aspect of any development of the law to a further extent. For the moment, the view of the Court reflects the old proverb that "they who watch dead man's shoes long go hungry".

*(k) The value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring,*

Unless the wife gets the benefit of a pension adjustment order in respect of the husband's pension, the wife will lose the possibility of acquiring this pension or part thereof and vice versa for the husband in relation to the wife's modest pension. This Court considers that to have a balancing factor against the greater risk and insecurity posed to the wife by becoming a renting occupier, as distinct from the position envisaged by Nolan J.'s order in the Circuit Court, the Court should make no order in respect of the wife's pension and make a 80/20 adjustment order in respect of the husband's pension in favour of the wife. This outcome exacerbates the "break or bust" outcome for the husband in the provision made by this Court on appeal, but it highlights the dilemma the Court faced, as, if the Circuit Court order was left in place, the husband would have little to provide for negotiation of debts and interim living accommodation to the extent that it was a certainty that he would not survive commercially, or even physically. However, if he does not take the opportunity presented by the adjustment in this appeal (which are reluctantly undertaken by this Court, in view of the worthiness and unblemished record of the wife), then the husband will meet a sorry end. However, at least the husband's choice (by reason of his decision) is to avoid it and to work towards avoiding such an outcome. Divorce proceedings often follow separation proceedings and with Judge Nolan's decision in the Circuit Court, it would almost be a certainty that divorce proceedings would be

precipitated, not so much as to obtain the formal divorce, but to ensure that the husband would have a second bite and cause the house to be sold for maintenance. The decision of this Court is designed to ward off that outcome, even if the Court is not in a position to say whether divorce proceedings should ensue at the appropriate time at the option of one or more of the parties.

#### **Submission in relation to insolvency and creditors.**

6. Counsel for the wife submitted that the decisions of this Court in *X.Y. v. Y.Z.* [2010] IEHC 440 (unreported 14th July, 2010) and that the Court should follow its own decision in *K. v. K.* [2009] I.R. 814, in opting for provision for the wife who has provided a home for the children and to fail to allow an equal division to husband, who had not been historically contributing to the family. While these decisions are helpful to provide an overall context in which to consider the factors at influence in this case, the Court is of the view that this case may be distinct from *X.Y. v. Y.Z.* where bankruptcy or now, personal insolvency, proceedings are unlikely and undesirable from the husband's point of view but that it is likely that he will be in a strong position to negotiate settlement of his many debts, as was instanced by his ability to settle with Mr. B and Mr. G in relation to a reduction of the full amount of the sums claimed to be due and owing under the purported judgment relating thereto dealt with in terms by the interlocutory order of White J. This Court has always informally encouraged parties and provided adjournments for the purpose of discussions to settle outstanding debts owed to third parties by compromise prior to the decision and judgement of the Court, as was done (unsuccessfully) in *C. v. C.* [2012] IEHC 615 (unreported 2nd March, 2012). Now, this approach seems to be officially and expressly encouraged by government and the Central Bank, so it is concluded that the informal approach of this Court, as exemplified in the *C. v. C.* case, has a more formal public policy sanction as long as it is dealt with prudently and without seeking to oppress any party or creditor. In the light of this conclusion and for the purpose of encouraging further similar actions, this Court directs that the compromise sums agreed between the husband and the creditors concerned be paid directly, by the wife's solicitor, to the creditors concerned, Mr. B and Mr. G., prior to any distribution of the new proceeds held by her in respect of the sale of the family home, and taken out of the husband's share.

7. The case of *K. v. K.*, as was cited and relied upon by counsel for the wife, may be distinguished from the present case insofar as the decision was made by this Court at the end of the boom where the husband had in that case, not contributed by way of employment (although a tradesman) to the family for several years by availing of the manifest demand during the boom years for such services. This is in stark distinction from the husband in this case, who (whatever deficiencies in the recession years), contributed massively during the boom, and has exhibited through his evidence in this Court, a capacity to reinvent himself and to generate income in the future. In the *K. v. K.* case the Court had looked at the prospect of any distribution towards the husband giving rise to, not only one, but two persons falling back on state social welfare, whereas in this case, there is (just on balance) a likelihood that neither party will fall back on social welfare, and most certainly it is unlikely that the wife would, in any event, fall back on such supports.

#### **Case progression and fairness**

8. In recent times this Court has become more active in examining the fairness of the eventual hearing in the context of the case management history of the case so as to ensure justice but also efficiency of time and resources in regard to the hearing. This was an appeal where, apart from the issue regarding judgment mortgages and closing of the sale of the house dealt with by White J., there was not much case management under the High Court Practise Direction needed or required. However, the case was actively managed in the Circuit Court under the case progression system in force in that court. In the case progression report, the Court sees nothing in the items agreed by the parties as being relevant at the hearing apart from the mere mention of "financial matters", which might go towards altering the wife's advisers to the fact that counsel for the husband was about to raise the question of the wife hiding some of the proceeds of the sale of her own house, which the wife claimed was to fund the completion of repairs of the family home. This Court considers that this attempted ambush was not adequately or properly forewarned by the agreed case progression report, mentioning in general terms "financial matters" and if counsel for the husband intended to raise this matter, then case progression or additional case management applications in the High Court could have been availed of to ensure a proper forensic investigation backed up by paperwork by this Court, and also to ensure fairness and the avoidance of waste of time and costs in this Court. Therefore, this Court strongly disapproves of the approach taken by counsel for the husband and if resources were greater in this case, the Court would seek to penalise the time taken up with this unwarranted attempt at ambush by a provision of costs. The incident should, however serve an example to litigants and practitioners that the days of ambushes in the Family Court are well and truly over by reasons of the availability of case progression procedures in the Circuit Court and case management procedures in the High Court on appeal.

#### **The High Court**

9. I propose to talk to the children directly and if the eldest daughter wished to do so, I will speak to her as a matter of courtesy, although not obliged to do so. Having spoken to the children, the Court may decide to extend access for husband to delivery to school on the Monday morning as this Court finds that, the wife's protest that the children were returned with their change of clothes unused after a weekend, is not sufficient to dissuade me from thinking that the father is quite good with his two sons and that all would benefit from a little more enjoyment and public manifestation of their company. As proceedings have to be adjourned, for finalisation of the order and pension adjustment order, notification of trustees ect, hearing the voice of the child may be postponed to coincide with such tidying up activities.

10. Subject to counsel assisting in the finalisation of the order, the order will be as follows:-

1. A lump sum to be paid by the wife's solicitor out of funds held by her in respect of the net proceeds of sale in the sum of €300,000.00 less credit for the sum of €5,000.00 ordered to be paid out by this Court at the conclusion of the appeal hearing to each party.
2. The solicitor for the wife should similarly pay out a sum to the husband as a lump sum to cover all his needs including maintenance representing the residue of the sum in court after payment of the wife, and payment out by the wife's solicitor of the compromised sums due to Mr. B and Mr. G.
3. The husband will be at liberty to sell the furniture at the best price and take the proceeds of same as his sole entitlement.
4. Custody and access arrangements for the children continue until altered or affirmed in this Court following hearing the voice of the child and submissions of the parties.
5. An order pursuant to s.10(1)(a)(i) conferring on the wife the right to reside in the property that she may rent to the exclusion of the husband.
6. An order affirming orders 1 (order for decree of judicial separation).

7. No order as to costs.

8. Liberty to apply.

**Overview**

9. Finally, before a final decision is made, statute enjoins the Court to have an overall look at the proposed decision from the point of view of fairness and justice. A court, of course, has these criteria in mind in embarking on each and every aspect of the decision, but must, in the end, consider the overall combined effect of each of the parts of the judgment. Having engaged in an overall consideration of this aspect of justice and the overall determination the Court is satisfied that although the decision involved tough decisions and plans for the parties, it is overall more just and fair (and indeed viable and sustainable) than the order of the Circuit Court and is as just as may be obtained in all the circumstance.