

THE HIGH COURT

2006 86 M

IN THE MATTER OF ARTICLE 41.3.2. OF THE CONSTITUTION AND IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN

M. S.

APPLICANT

AND
P. S.

RESPONDENT

Judgment of Mr. Justice Garrett Sheehan delivered on the 21st day of November, 2008

1. The applicant wife instituted proceedings in November, 2006, seeking a decree of divorce in respect of her marriage to the respondent pursuant to s. 5 of the Family Law (Divorce) Act 1996, and various ancillary financial reliefs.

Background

2. The applicant and respondent were married on the 14th September, 1985, and lived together until June, 1992 when the applicant and the children left the family home. There are five children of the marriage. J. and D. who are 22, S. who is 21, M. who is 18 and S. who is 16. Both parties live in the South of Ireland.

3. The applicant and respondent both work in the same profession.

4. The applicant previously sought matrimonial reliefs in three separate sets of legal proceedings prior to the institution of the proceedings that are presently before this Court.

(I) In 1992 the applicant instituted proceedings in the High Court pursuant to the Judicial Separation and Family Law Reform Act 1989, which ultimately resulted in a consent order being ruled by this Court on the 5th October, 1993. The applicant was granted custody of the children and the financial arrangements were set out in a document entitled "Schedule B" which was headed:-

"In full and final settlement of all matters in dispute between them, and in compromise of the above entitled proceedings, M. S. the wife and P. S. the husband agree as follows:-

The main provisions of Schedule B related to the respondent paying the applicant IR£70,000 by the 1st December, 1993, to enable the applicant to purchase a home free of mortgage for herself and the children of the marriage as well as monthly maintenance payments of IR£1,000 for the applicant and the children."

(II) In 1996, the applicant issued a second set of proceedings in the Dublin Circuit Court pursuant to the Judicial Separation and Family Law Reform Act 1989, and the Family Law Act 1995, which resulted in a following consent order being made on the 22nd July, 1997, which provided for increased monthly maintenance payments and the establishment of an Educational Trust Fund for the children. The applicant was to furnish the trustees with vouched expenses and the respondent was to be left informed by the applicant about the children's education and development.

In the course of her evidence in these proceedings she stated it was never her intention to so update the respondent.

(III) In 2005, the applicant issued proceedings pursuant to the Family Law (Divorce) Act 1996, which said proceedings were not served and were ultimately struck out.

The agreements are sixteen and eleven years old. I attach no significance to them in respect of the maintenance orders I propose to make relating to the children, and little significance in respect of the orders I propose to make that relate directly to the applicant.

In the present proceedings the applicant represented herself and the respondent was represented by solicitor and counsel.

The Children

5. J. and D. are both 22 years of age and accomplished sportsmen. J. is a university graduate. His twin brother, D. is studying construction at D.I.T. and in his second year there. He is also an accomplished sportsman. On J.'s 21st birthday shares and investments to the value of €32,600 were transferred into his sole name. On the same date a similar number of shares and investments to the value of €32,600 were transferred into the sole name of J.'s twin brother D. S. is 21 and in the final year of a University Arts Degree. N. attends a private secondary school and is now in sixth year. He too has an interest in the same sport as his elder brothers. S. is in fourth year at a private secondary school and also has an interest in the same sport.

6. In 2007, the maintenance was increased to €3,000 per month, and there was also a further court order in summer of 2007, which directed that the applicant receive a lump sum of €5,000.

7. In 1998, the applicant won €243,000 in the lottery.

The Assets

8. The principal assets of the applicant comprise her family home which was valued at €1,000,000 in June, 2007, and at €850,000 on foot of a July, 2008 valuation obtained and produced to the court by her. The applicant also owns a property in Wexford valued at €280,000 in June, 2007, and at €290,000 on foot of a further valuation obtained by the applicant in July, 2008 and produced by her.

9. The applicant has taken out two mortgages on the family home, totalling €92,000 approximately and a mortgage on the property in Wexford which presently stands at just under €200,000. She has personal pensions to the value of €54,345 and life assurance in the sum of €16,712. In addition she has shares and cash in the bank totalling €32,984.

10. The principal assets of the respondent comprise his home which is valued at €300,000 and is subject to a mortgage of €17,000 and his 50% share in the building occupied by his professional practice. His half interest in this property is valued at €1,250,000 which gives the building a total value of €2,500,000. The said building is charged with mortgages and loans in excess of €2,000,000.

11. The respondent has pensions valued at €483,713 and life assurance valued at €42,736.

12. In addition the respondent has shares valued at €105,346 in July, 2008 and a sum of €160,000 in the bank.

13. The net asset value of the respondent's share of his legal practice was agreed by the forensic accountants to be €544,710 as of March, 2008, and a further sum of €180,000 in respect of goodwill, leaving this business asset with a present value of €724,710. Finally the respondent has a further legal costs liability of €85,000 in respect of this case and a projected tax liability of €104,785.

14. Apart from these assets there is also the further asset in this case referred to as the "children's fund" which the respondent maintains.

15. The total value of these shares and investments stands at €75,299 and includes an education fund valued at €13,431.

16. The two eldest children received investments worth €32,600 on attaining their 21st birthday. The third child is now due a payment and the youngest two children will have their particular investment funds transferred to them when they reach 21 years of age.

17. While I must look at the assets of the parties at the time of the hearing, I equally cannot ignore the fact that the applicant has weakened her financial position in the two years prior to this hearing by considerable spending and also, by entering into a work contract that appears to reduce her own earnings.

18. I now propose to review the evidence in light of s. 20(2) of the Family Law (Divorce) Act 1996:-

(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 respondent's projected income for 2008 was agreed at €256,000 and the applicant's at €127,500. This latter sum included maintenance payments of €36,000 and a projected practice income of €80,000.

Shortly before the hearing of this case the applicant entered into an agreement whereby she will receive €50,000 per year, with commission of 25% in respect of fee income earned by her in excess of certain targets.

It is clear that the respondent's future earning capacity is significantly greater than that of the applicant. The applicant also gave evidence of certain health problems which she maintained limited her earning capacity. I accept the evidence of the applicant's psychiatrist who stated "I have been seeing the applicant for a number of years for management of stress and symptoms of depression and anxiety and, specifically insomnia. And over the years there are times when things go quite well. But then she relapses. But the effect of having to return to court proceedings is always a major stressor. It will be very beneficial for her overall health not to have to re-engage with court proceedings".

I hold that the applicant's earning capacity will improve when these proceedings conclude, notwithstanding the fact that shortly before these proceedings commenced she entered into an agreement which appears to have reduced that capacity.

(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 spouse or otherwise),

There was no evidence by either party of an intention to remarry. The respondent lives with his partner and her 20 year old son, and makes a modest contribution to his educational expenses, which is irrelevant in the context of these proceedings. I hold that the primary financial obligation of both the applicant and the respondent is to ensure the completion of their children's education.

The applicant, in the course of her evidence, sought considerable financial support from the respondent for the children's sporting interests. While the applicant's practical support of the children's interest in this activity is commendable, I hold that the respondent has no special obligation in this regard.

In her affidavit of means the applicant averred that her annual financial needs amounted to €193,556. This figure included a sum of €26,808 for sports related expenses, €17,388 in respect of education expenses and a sum of €16,800 in respect of pocket money for the two eldest children, both of whom also had part time jobs.

The applicant's evidence on these expenses was unsatisfactory. Her accountants report was primarily based on information provided to him by the applicant, and it was unclear to me if the applicant had spent €193,566 the previous year or if this sum was her best projection of her needs. Either way, this level of expenditure is not sustainable.

The applicant also sought to establish that she had incurred medical expenses of €47,281.25 between 2001 and June, 2008. While these expenses were itemised in an affidavit sworn on the 17th July, 2008, the said expenses were not vouched and the applicant did not indicate whether or not she had received any tax deduction in respect of these expenses. Furthermore, as the respondent pays V.H.I. premiums for the family it is not clear from the affidavit whether the V.H.I. policy would have covered any of the said expenses.

I found the applicant's evidence on the question of medical expenses to be unreliable.

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be,

The applicant and children have always enjoyed a good standard of living. This is largely due to the contributions the applicant and respondent have made towards the material needs of the children. I accept the evidence of the

respondent that, following the High Court consent order in 1993, it took him some years to re-establish himself on a sound financial basis and that, effectively he was obliged to return to live with his mother for a period of two years following the initial separation. The position of the applicant and the children was also enhanced by the wife winning a sum of IR£192,000 in 1998.

(d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another,

The applicant wife is 53 years of age and the respondent husband is 48. The parties lived together for about 8 years. They have been married for 23 years.

(e) any physical or mental disability of either of the spouses,

While the wife has had some health problems she has been in continuous employment for a number of years. I have already referred to the evidence of her psychiatrist. There was no evidence of any physical or mental disability on the part of the husband.

(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,

Under this heading I take into account the contributions made by both applicant and respondent to the welfare of the family, and the fact that the wife has been looking after the children on her own since 1992.

(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 with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,

Again, under this heading I take into account the undoubted fact that the applicant's family responsibilities have curtailed her earning income.

(h) any income or benefits to which either of the spouses is entitled by or under statute,

Apart from the wife's entitlement to child benefit, this section is of limited relevance.

(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 of the case be unjust to disregard it,

In the course of the hearing before me neither party made conduct an issue.

(j) the accommodation needs of either of the spouses,

Both parties have suitable accommodation. However, I note the applicant lives in a comfortable family home and the respondent in a much more modest one.

(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 divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring,

The pensions of the applicant and respondent are relevant under this section and have already been set out under that part of this judgment headed "Assets".

(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.

While the husband lives with his partner and her 20 year old son and has responsibilities towards them, he did not urge that their rights be taken into account.

Conclusion

19. In her opening address to the court the applicant stated that she wanted to sever all ties with the respondent and wanted the court to order that she receive all the cash in the respondent's bank account, all his shares and all his pensions. The total value of the assets required by the applicant at that stage of the case came to €809,000.

20. In the course of her written submissions in addition to the above requirements, the applicant sought maintenance of €4,000 per month for herself, and €1,500 per month for each of the children of the marriage, backdated to the date in 2006 when the proceedings were instituted.

21. Ms. Clissman on behalf of the respondent opened her case by repeating an offer earlier made to the applicant in open correspondence, to pay €9,000 per annum in respect of each dependent child. The respondent also offered to pay out the remaining sum of €13,300 in the education trust fund over the next two and a half years, and to pay the applicant a lump sum of €60,000 within fourteen days of the decree of divorce. He further offered to transfer two pensions to the applicant with a total value of €101,942. The three youngest children would each receive the shares and investments made on their behalf on reaching 21, with the share to the third child S., being topped up by having the sum of €10,000 added to it.

22. The respondent also offered to pay 20% of a possible inheritance from a family trust fund to his children which will fall due in the event of his mother predeceasing him.

23. I have considered the evidence and the submissions of both parties. In relation to the applicant's submissions I have not taken into account those submissions which were not based on or related to the evidence before me in this case or the applicable law.

24. I hold that in the particular circumstances of this case, proper provision for the applicant and the children of the marriage requires that I make the following orders which are substantially in line with the respondent's offer:-

1. Payment to the applicant of a lump sum of €60,000 within 28 days of the finalisation of the orders in this case.
2. A sum of €10,000 per annum maintenance in respect of each child as long as each child remains a dependent child. Such maintenance to be backdated to the 1st September, 2008.
3. Transfer to the applicant the Canada Life pension with an estimated value of €39,712, the Hibernian Life pension with an estimated value of €62,230 and transfer to the applicant 50% of the Standard Life pension presently valued at €63,237.
4. I direct further that the respondent top up the education fund so that the sum of €9,000 is paid out on the 1st March, 2009. The court notes that the two youngest children attend fee paying private schools and that the second youngest is presently in sixth year. The respondent to top up the education fund, so that the sum of €5,000 is paid out in 2010, and €6,000 in 2011.
5. The respondent to increase the investment fund now, falling due to S. by €10,000 in line with his opening offer.
6. The respondent to maintain the funds presently in place for the two youngest children

25. I will grant a decree of divorce in respect of the marriage entered into between the husband and the wife on 14th September, 1985, and will discuss with the parties the precise form the order should take.