

THE HIGH COURT

[2013 No. 47 CAF]

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

IN THE MATTER OF THE FAMILY LAW ACT 1995 (AS AMENDED) AND IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN:

C.Q.

APPELLANT

AND

I. McG.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 17th day of December, 2014 and Approved on the 13th day of January, 2015.

1. The respondent was represented by Ms. Karen Ruddy B.L., instructed by Sean Gallagher & Company Solicitors. The appellant availed of his right to self-representation and is a lay litigant. There was no cross-appeal by the respondent, but under Order 61, rule 5 of the Rules of the Superior Courts 1986, this permits a variation in favour of the respondent. This point was made at the start of this appeal and the appropriate pleadings served relying on same. Notice of Appeal was served on the 21st May, 2013.

2. The decree of divorce is not under appeal. Therefore, it is accepted by both parties in the context of this appeal, that at the date of the institution of the proceedings, the spouses have lived separate and apart from one another for at least four out of the previous five years. It is further accepted by both parties that there is no reasonable prospect of reconciliation between them.

3. The Court, in exercise of the jurisdiction conferred upon it by Article 41.3.2° of the Irish Constitution 1937, granted a decree of divorce in respect of the marriage contracted between the parties on 7th October, 2000. The appellant contends that proper provision has not been made and he raises objections to the scheme of access and custody set out in the Circuit Court Order. Thus, this appeal addresses the issues of proper provision, access and custody.

4. This Court is satisfied that, in the context of this appeal, the provisions of s. 5(1) of the Family Law (Divorce) Act 1996, have been complied with, namely:

"(a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,

(b) there is no reasonable prospect of a reconciliation between the spouses, and

(c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family, the court may, in exercise of the jurisdiction conferred by Article 41.3.2° of the Constitution, grant a decree of divorce in respect of the marriage concerned."

Custody and Access.

5. Regarding para. 1 of the order of Judge Lindsay dated 9th May, 2013, the appellant confirmed that he was not appealing the joint custody order made in relation to the three children, namely, "E", "A", and "S". The said order granted primary care and control to the respondent with liberal access to the appellant, which was set out in the said order. However, this Court has varied the custody and access provisions, having heard the evidence of the parties and, in particular, the evidence of clinical psychologist, Dr. Anne-Byrne Lynch.

6. In the early years of the marriage, the respondent was undertaking a Ph.D. In 2002, the respondent had to put a lot of research on hold because the infant, "A", was in bad health. The respondent worked around this by working eight to ten hours a day from home by completing a fellowship at University College Dublin. During that period, the respondent considered herself the primary carer of the children.

7. This Court had to dispense with the consent of the appellant, to enable "E" obtain such medical and/or psychological assistance as her medical advisers deemed appropriate because "E" had developed an eating disorder. The appellant refused to sign the necessary consents for "E" to be seen by the appropriate medical personnel. This Court found it necessary to grant sole custody of "E" to the respondent to enable her to make the appropriate arrangements for "E" as necessary. A complaint is outstanding by "E" of a physical altercation between herself and the appellant, and this incident is the subject of a separate investigation. This investigation has not been concluded by the HSE.

8. Based on the evidence of the parties, and the psychologist who interviewed "E", it is the view of this Court that "E" is of sufficient age and degree of maturity to elect when she wishes to have access with the appellant. "E" is free to initiate arrangements for access with the appellant at vacation times into the future. Thus, should "E" decide that she wants to spend part of her summer holidays with the appellant, she is free to contact him and make those arrangements. Moreover, "E" is at liberty to arrange to travel to Munster to see the appellant and spend time with him during any school holiday period. In that regard, this Court includes both Christmas and Easter vacations as well as summer holiday access times. Access shall be at her own election and shall be arranged by herself with the appellant. This arrangement is subject to para. 32(I) herein, placing a stay on all custody and access orders, pending the appellant undertaking a course of psychotherapy numbering six counselling sessions with independent verification to be heard by this Court, and further orders given permitting access. There is nothing to prevent "E" from having liberal telephone/Skype access with the appellant.

9. This Court also finds it appropriate to grant sole custody to the respondent in respect to the two younger children, "A" and "S". This Court takes the view that it is appropriate that "A" and "S" enjoy three periods of access per year in Munster, namely, Christmas, Easter and summer. Each period of access may include half of each holiday period. "A" and "S" are to travel, in accordance with paras. 8 and 9 of the Circuit Court Order which I affirm herein. At Christmas, "A" and "S" are to enjoy a one-week period of access with the appellant, said access is to run from the 26th December onwards, with "A" and "S" returning no later than the 3rd January of the following year. Times are to be agreed between the parties. If times cannot be agreed, liberty to apply is granted. Easter access shall take place during Easter week each year. For summer access, "A" and "S" shall be able to spend three weeks during July with the appellant each year. In the event that either "A" and "S" wishes to spend a further period with the appellant during the summer, they are to give notice to the respondent, and in default of agreement of the period of time, liberty to apply is given. All of the aforementioned access arrangements are subject to the terms of para. (32)(l) of this judgment concerning a stay on this order on the terms set out herein. Liberal telephone/Skype access is to be available between all three children and the appellant at all times.

10. This Court hereby affirms the terms of paras. 8 and 9 of the Circuit Court Order herein.

11. This Court considers it appropriate and necessary that the respondent keep the appellant aware of the children's progress at school, to be informed if they are ill, and to attend any special events.

12. This Court finds that the appellant was abusive and threatening to a professional witness on the 28th November, 2014, and showed complete contempt in the face of the Court on that day. He showed extreme contempt for all persons present and was continuously abusive for an hour and a quarter of Court time.

13. On the 28th November, 2014, this Court heard the evidence of Dr. Anne Byrne-Lynch in relation to her incomplete s. 47 report. Dr. Lynch's report was incomplete due to the appellant's refusal to take part in the said report.

14. This Court takes the view, that in the opinion of the consultant clinical psychologist, the appellant does not have adequate insight into the needs of "E", nor is he in a position to know or to decide what is in "E's" best interests. This is a grave concern for the Court given "E's" particular needs.

15. This Court finds that the respondent has been a truthful witness throughout this appeal and is doing her best for her children, who are her primary concern in the context of this marital breakdown.

16. This Court has observed the extreme stress occasioned by the appellant's behaviour during the entire hearing of this case. The fact that an incomplete s. 47 report is only available to the Court is something for which the appellant must bear responsibility, given that he absolutely refused to take part in same. The overall value of this report is therefore limited by the appellant's failure to engage with the s.47 process.

17. This Court notes that Dr. Anne Byrne-Lynch has stated that she would not see the appellant in a professional capacity without another person present. This reluctance on behalf of Dr. Lynch is occasioned by the appellant's behaviour towards her in and around the environs of the Court on the 28th November, 2014. Dr. Lynch gave evidence that while she was in the environs of this Court, she had to sit beside another professional witness, whom she knew, for her own protection.

18. This Court heard evidence from the respondent that the appellant was and continues to be a violent person. The respondent gave a number of examples of this violent conduct. This Court accepts her evidence as truthful in that regard, and accepts that the respondent is in fear of the appellant.

19. It is the view of this Court that prior to the commencement of any further access, the appellant should undergo six sessions of psychotherapy with a psychotherapist to be recommended by Dr. Anne Byrne-Lynch. The Court would then require the psychotherapist to confirm to the Court that safe access could take place. It is only if this is possible, on testing the evidence, that the access orders can go ahead.

Proper Provision.

20. In the course of this hearing, an order was made directing both parties to update and vouch their affidavits of means for the last twelve months, and to give all bank statements, credit card account statements, rental income, payslips, all tenancy agreements, any title documents regarding the foreign property, and any list of expenses concerning upkeep of the said property were to be furnished. The appellant did furnish the title deeds of the foreign property but did fail to make full disclosure as directed by this Court regarding his income and assets.

21. The respondent has a degree in business communications and a post-graduate degree in export management from "L" University. The respondent gave evidence that the parties met in 1994 when both worked in the IT sector. In 1995, the respondent bought the "Leinster" property in her sole name. In 1998, she became pregnant with her first child, "E". The parties got married in the year 2000 and lived in Leinster. In 2002, the parties moved to the family home in Munster.

22. In March 2008, a protection order was sought in the District Court by the respondent and an undertaking was given by the appellant that he would be of good behaviour. Notwithstanding the fact that the appellant denied a breach of this undertaking, it is clear that there were many incidents of friction, tension and violence. This Court accepts the evidence of the respondent that she had to flee with her children from the family home in Munster.

23. The respondent submits that three sites were purchased in Munster with planning permission and that she sent a considerable amount of money, at least €90,000.00, to assist with the building of the family home in Munster. The respondent asserts that the building expenses were approximately €170,000.00. During that financial year, the respondent did consultancy work and minded the children. The respondent says that the parties earned collectively €100,000.00 during that year and her contribution was €70,000.00.

24. The family home is situate in Munster. This is a property that was inspected by an engineer, "F.C.", on behalf of the appellant. He described the property as a four-bedroom house, located on three acres of land approximately. "F.C." set out that on this site, there was planning permission for three houses in all, but that this planning permission had since lapsed. Although an engineer, "F.C.'s" evidence was to the effect that because that property is located within a Secondary Amenity Area adjacent to a river, and that the zone is a protected area in the current County Development Plan, he did not feel it would be possible to get the same planning for the site in the future which had been available in the past. His valuation of the property was in the region of €205,000.00. On the other hand, the respondent held that the family home in Munster was worth between €350,000.00 to €400,000.00. This Court adopts a midway valuation for the family home of €300,000.00.

25. The respondent is the sole owner of a property situated in Leinster, which she purchased prior to the marriage and said property is in her sole name. The respondent values same at €360,000.00 and the appellant suggests that the property is worth at least €420,000.00. This Court feels it appropriate to adopt a valuation of €390,000.00. The appellant sought to have the "Leinster" property sold and divided in equal shares between the parties, or, in the alternative, to be transferred to him in its entirety.

26. The parties are joint owners of a "foreign" property, which was purchased with a considerable lump sum, which the respondent procured on foot of a redundancy. The respondent felt that a total of €310,000.00 was spent in the acquisition of the said property. In addition, the respondent set out in her evidence that €93,000.00 was paid in construction fees. The respondent's direct contribution towards the said purchase was in the region of €217,000.00. She felt that she had contributed €235,000.00 to that property in total. The respondent outlined the "foreign" property was purchased by her as a form of pension following her redundancy, even though it was placed in joint names. In both the Circuit Court and High Court, the said property was valued at €350,000.00 by agreement of the parties.

27. The appellant's evidence was to the effect that he had paid the mortgage on the "foreign" property since 2005. Although the appellant claimed not to be earning, he had been able to spend four weeks on holiday in Australia in the spring of 2014. He stated that this was using budget flights. The appellant's family own a fish farming business but he denied, under cross-examination, that he worked in the said business. The appellant had shown grave disregard for the physical needs of his children when he cancelled his own health insurance on the VHI policy, even though his daughter, "A", was ill and was named on that policy at the time. The appellant has also cancelled his own house insurance for the "Munster" property. The appellant has a good IT qualification but showed no evidence to the Court of any efforts to obtain employment, yet, he has a credit limit on an MBNA credit card of €18,000.00 as appeared from his documentation. The appellant was found by Dr. Gerard Byrne, who carried out the first s. 47 report in this case, to be obsessive. The appellant prosecuted this appeal vigorously over a number of days. This Court found his approach to this litigation to be quite unreasonable and relentless and, in turn, causing the respondent to enter her seventh summer of litigation. At present, the respondent is a second level teacher with a net monthly salary of €2,082.00, and was obliged, because of court appearances, to take numerous days off work.

28. This Court finds that the respondent is the appropriate parent to be the primary care giver of the children. This Court grants sole custody of the dependent children to the respondent. Moreover, this Court notes that there has been erratic payment of maintenance on behalf of the appellant and arrears of maintenance have been allowed to accumulate. These arrears persist at this time. Furthermore, this Court notes the significant direct and indirect contributions toward the purchases of properties held both solely and jointly by the parties. On consideration of these factors, this Court feels it is appropriate that two out of the three properties be vested in the respondent.

29. Therefore, this Court finds that the respondent is entitled to one hundred percent of the beneficial interest in both the "Leinster" and the "foreign" properties. The appellant is entitled to one hundred percent of the legal and beneficial interest in the "Munster" property, which this Court shall now transfer to him.

Maintenance.

30. This Court affirms para. 2 of the Circuit Court Order directing the appellant to pay maintenance for the support of the three dependent children in the sum of €100.00 per child per month, payment to be made directly into the respondent's bank account to commence on 31st December, 2014, and on the last day of each subsequent month thereafter. This Court does hold that the appellant, on the balance of probabilities, was earning some monies, given that he has an €18,000.00 credit limit on his MBNA credit card. Notwithstanding this finding, this Court notes that by the 17th December, 2014, the appellant owed €1,800.00 in maintenance arrears. However, the appellant discharged €2,800.00 of maintenance arrears approaching the first day of the hearing of the appeal herein.

31. This Court set aside the morning of 17th December, 2014, for the hearing of any replying submissions on the part of the appellant. The appellant failed to appear in Court. It is clear from the Court record that the appellant was assured that a decision would be given at 2.00pm on 17th December, 2014. Again, the appellant failed to appear in Court on that date.

32. In considering all the evidence and legal submissions submitted by the parties, this Court, taking into account the constitutional requirements and the statutory requirements as set out in s.16 of the Family Law (Divorce) Act 1996, makes the following orders:

(i) An order affirming, pursuant to Article 41.3.2° of the Constitution, a decree of divorce in respect of the marriage contracted between the parties herein at "AC", Leinster, on the basis that at the date of the institution of the proceedings herein, the spouses have lived separate and apart from one another for at least four years out of the previous five years and;

(ii) there is no reasonable prospect of a reconciliation between the spouses, and

(iii) such provision as the Court considers proper, having regard to the circumstances exists or will be made for the spouses and the dependent children of the family including the ancillary orders now to be made:

(a). This Court varies the order set out at paragraph 1 of the Circuit Court Order of Judge Lindsay of 9th May, 2013, in that this Court grants an order granting sole custody to the respondent of three dependent children of the marriage, namely, "E", "A", and "S". Primary care and control to the respondent with access to the appellant as set out herein, subject to a stay, the terms of which are set out herein. The appellant is to be made aware of the children's progress at school and to be informed if they are ill and to attend at special events.

(b). An order affirming paragraph 2 of the Circuit Court order of 9th May, 2013, directing the appellant to pay maintenance for the support of the three dependent children in the sum of €100.00 per child per month, payment to be made directly into the respondent's Bank account and to commence on 31st December, 2014, and on the last day of each month thereafter. The balance of paragraph 2 of the Circuit Court order is hereby vacated.

(c). An order granting a property adjustment order pursuant to s. 14 of the Family Law (Divorce) Act 1996, directing the respondent to transfer to the appellant the entire legal and/or beneficial interest of the respondent in the property situate in Munster for his own use and benefit entirely. All documentation to give effect to the said transfer to be completed within six weeks from the date of this order.

(d). An order pursuant to s.36(2)(a) of the Family Law Act 1995, and pursuant to s.15(1)(b) of the Family Law

(Divorce) Act 1996, declaring that the respondent is entitled to one hundred percent of the entire legal and/or beneficial interest in the "Leinster" property.

(e). An order pursuant to s.36(2)(a) of the Family Law Act 1995, and pursuant to s.15(1)(b) of the Family Law (Divorce) Act 1996, declaring the respondent to be entitled to the entire legal and beneficial interest in the "foreign" property and to all profits and rents arising from the said property. This Court directs the appellant to sign all necessary documents required to transfer and/or to sell the aforesaid property within 21 days of being requested to sign same. All documents to be served by registered post. In default, this Court hereby dispenses with the consent of the appellant to the transfer and/or sale of the said property.

(f). An order directing the appellant and the respondent to do all such acts and execute all such documents to give effect to the aforementioned orders herein and in default of either party failing to sign the necessary documents to give effect to the aforesaid orders and/or declarations herein, the County Registrar of the respective counties where the said properties are situate to complete the said transactions should either party default and/or fail to sign the necessary documents within 21 days of being asked to do so.

(g). An order restraining the appellant from interfering with or obstructing any prospective sale and/or dealing with the said "foreign" property by the respondent.

(h). An order pursuant to s.37 of the Family Law (Divorce) Act 1996, directing the Manager of Allied Irish Banks PLC to freeze the sum of €1,275.00 per month from the appellant's bank account, and to transfer the said sums to the respondent's bank account.

(i). An order is granted lifting the in camera rule to identify the said Bank account holders to the Manager of the respective institutions and the making of the orders herein in relation to same.

(j). An order directing that the respondent shall use the first three months rental income from the "foreign" property to pay the outstanding management fees on the aforesaid property.

(k). An order directing the respondent to use the second three month amounts of rental income from the said "foreign" property to pay the outstanding fees of Dr. Anne Byrne-Lynch to date.

(l). The terms of the stay on the said access order are to the effect that the appellant must complete with an independent psychiatrist/psychotherapist, who is to be nominated by Dr. Anne Byrne-Lynch, six therapy sessions which have to be independently verified by the said psychiatrist/psychotherapist to this Court, and there has to be a verification that safe access can be guaranteed by the appellant with his children before the access orders can take effect herein. The appellant shall pay all costs arising from this process. On obtaining the aforesaid verification, the Court shall review this issue.

(m). An Order affirming paragraph 8 and 9 of the Circuit Court Order of 9th May, 2013, directing that on the day prior to any access taking place, the appellant is to text the respondent and ascertain whether the arrangements are in place for the forthcoming access. The respondent is to respond by text. Upon receipt of a text from the respondent confirming the forthcoming access arrangements, the appellant will proceed the next day to County L. On his arrival in County L to collect the children, the appellant is to text the respondent. The appellant is to stay in his car. He is not to enter the property. There is to be no interaction between the appellant and the respondent or any other member of her family. The appellant is then to leave. On the day before access ends, the appellant is to text the respondent confirming the drop time for the child/children. On his arrival to County L, the appellant is to text the respondent. The appellant is to stay in his car and drop the child/children off. He is not to enter the property. There is to be no interaction between the appellant and the respondent or any other member of the family. The appellant is then to leave. These arrangements are subject to para.32(l).

(n). An Order affirming paragraph 10 and 11 of the Circuit Court Order of 9th May, 2013, granting a Nominal /Minimal Pension Adjustment Order in favour of the respondent in respect of the appellant's pension and a Nominal/Minimal Pension Adjustment Order in favour of the appellant in respect of the respondent's pension.

(o). An order is hereby granted pursuant to s.18(10) of the Family Law (Divorce) Act 1996, in favour of the respondent as against the appellant keeping open her Succession Act rights in relation to his estate pending further order.

(p). An order is granted pursuant to s.18(10) of the Family Law (Divorce) Act 1996 to the respondent directing that the appellant shall not, on the death of the respondent, be entitled to apply for an order under this section for provision out of her estate. This order is to take immediate effect.

(q). The respondent's rights are hereby kept open pending further order.

(r). An order vacating the Circuit Court order granting mutual extinction of Succession Act rights pursuant to s.14 and s.15(a)(10) of the Family Law Act 1995.

(s). A fresh order is made herein directing that the share which the appellant would otherwise have as a legal right or an intestacy under the Succession Act 1965, as against the respondent's estate is hereby extinguished.

(t). An order is granted permitting Mr. Brian Maloney with his workmen of Maloney's Pianos to attend and enter the "Munster" property at 10am on 17th January, 2015, for the purposes of removing the Schedule of Items appended to this order annexed at Schedule 1 to include the removal of a piano, the property of the respondent. Neither party is to be present at the said premises when this removal takes place. Ms. "NQ" and/or Ms. "KQ" are permitted to be present on the premises when the aforesaid removal is taking place.

(u). On foot of the submissions received and costings shown to the Court, this Court measures the cost of the respondent in both the Circuit and High Court in the sum of €155,277.00. This Court notes that there are also arrears of maintenance in the sum of €1,800.00 to this date, and there are rental income monies in the sum of €11,500.00, which have been taken into account by this Court owing to the respondent out of the "foreign"

property.

Costs.

33. On the 17th December, 2014, this Court heard submissions on the issue of costs. The appellant failed to appear at the hearing. The costs of the respondent were measured at €155,277.00. This Court grants an order measuring costs in the aforesaid sum in favour of the respondent.