THE HIGH COURT

FAMILY LAW

RECORD NO. 2016/15M

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

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 (AS AMENDED)

BETWEEN

A. O'M.

APPLICANT

AND

F. O'M

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Binchy delivered on the 14th day of December, 2018

1. In these proceedings the applicant seeks a decree of judicial separation pursuant s. 2(1)(a) and/or s. 2(1)(b) of the Judicial Separation and Family Law Reform Act 1989. The applicant has given me evidence as to the circumstances in which the marriage has broken down and I am satisfied that a decree should be granted. Having heard the evidence of the applicant I am satisfied that the decree should be given pursuant to s. 2(1)(a) of the Act.

2. The applicant seeks orders as to the custody of the two children of the marriage. A. was born on 2nd September, 2004, and F. was born on 15th November, 2006. Having heard the background to the breakdown of the marriage and the fact that the applicant left an Asian country, X., in April, 2016 and the fact that the respondent has, on the evidence of the applicant, completely disengaged from the family since that date and having regard to the reports furnished to the Court by a Dr. [ ] in March, 2017, I am fully satisfied that the applicant should be granted an order for sole custody of the two children and that she should have primary care of the two children. The only engagement on the part of the respondent in these proceedings in that regard was to make an application in November, 2016, which was withdrawn in March, 2017 seeking the return of the children to X. where they had been living with each of their parents until April, 2016. Since withdrawing that application however, the respondent has had no engagement at all with these proceedings and his engagement with the family has been very limited. He did have some engagement with his children by Skype for a period, but according to the applicant that engagement has now ceased.

3. It is clear from the reports of Dr. [ ] that the children have adjusted very well to their lives in Ireland and are happy and stable and this is confirmed by the applicant as of today also. The children clearly know their own minds and while I have considered whether or not I should hear the voice of the children directly in the context of the application before me today, I do not consider it necessary having regard to the report of Dr. [ ] of 1st March, 2017, and having regard to the evidence given to me today by the applicant. Nor do I think any practical purpose would be served by my interviewing the children now aged 14 and 12 years of age respectively in the context that their father has completely disengaged from these proceedings and indeed from the family and there is no order that this Court could make that would have any practical consequence even if I thought it was desirable to interview the children. I am satisfied I have met my statutory and constitutional obligations in this regard by considering the reports of Dr. [ ] and hearing from the applicant today.

4. The next relief sought by the applicant in these proceedings is an order pursuant to s. 8 of the Family Law Act 1995 directing the respondent to pay the applicant such periodical and/or lump sums for her support and/or the support of the two dependent children as to the court seeing fit. In this regard an interim order was previously made by this Court requiring the respondent to pay the applicant the sum of €6,000 per month. I have heard evidence from the applicant that this was paid only for a period of three months with the assistance of the respondent's employer, [ ]. Those months were October, November, December of 2017. I have heard that no other payments have been received from the respondent who was notified of the making of this order pursuant to orders as to service of documents made by this Court. The interim order for payment of €6,000 per month was made on 28th July, 2017. Accordingly, there are arrears due to the applicant on foot of the interim order in the sum of €84,000. I have considered the affidavit of means of the applicant. This shows outgoings of €6,263 and a monthly income of €1,766. Of this income the single parent allowance of €1,126 will cease either if the applicant sells assets which she would receive following upon these proceedings or, alternatively, if she receives maintenance from the respondent. It seems to me therefore that it is appropriate to continue the order of this court previously made in respect of maintenance of the applicant and the children in the sum of €6,000 per month. While the applicant is not paying rent at the moment, when she does have to move to other accommodation with the children it is likely that her accommodation expenses will increase over and above current the rent of €2,000 per month.

5. I have taken into account that at the moment the income earning capacity of the applicant is limited in particular while F. is in primary school, but the applicant has said that she intends to go back into the workforce when F. goes into secondary school. This will be with effect from autumn, 2019. However, it will be necessary for the applicant, in the meantime, to upskill herself and to retrain in order to enter the workforce. Her previous occupation was that of a personal assistant/administrative assistance. Until such time as she starts to generate an income from whatever employment she obtains, it is appropriate to continue the order for maintenance in the same amount as directed by this Court previously. I am also taking into account in this regard that the applicant may have to incur the expense of training to get back into the workplace.

6. The evidence has established that the following assets are available for distribution:-

> (1) an apartment at [ ]. This apartment has a gross value of €230,000 but is subject to a mortgage in the sum of €87,085, about which I heard evidence from Ulster Bank. This leaves a net value in respect of this apartment in the sum of €142,915. The apartment is currently let and generating a rent which is paid into the mortgage account. The apartment is held in the sole name of the respondent and was acquired by the respondent by agreement with the applicant as an investment before they left Ireland in or around 2004. The folio is contained in Folio [ ] County Dublin;

(2) The respondent has outstanding share options with his employers, [ ]. It has been estimated that these have a value of €136,700. The respondent also has monies retained to his account by [ ] in the sum of approximately €6,866. The total estimated value of the above assets comes to €286,481. In addition, the respondent has a site in Northern Ireland valued at approximately £40,000 sterling. This property is in the joint names of the parties and is contained in Folio DN [ ] County Down. This equates to about €52,000 as of today's date. The total value of all of the assets above comes to approximately €338,481.

7. But that is not the end of the story as far as the assets are concerned. The respondent has already exercised [ ] share options. I received evidence of this through non-party discovery provided by [ ] which showed that he had exercised share options over 3,524 shares, which according to an internet search handed into court by the applicant are valued today at $142.30 per share which results in a value of €444,257 as of today's date.

8. [ ] also provided details of the respondent's income over the last few years. For 2016 it appears the respondent was paid €314,195 and, for 2017, €225,193. The documentation given by [ ] also suggests that there is a tax deduction during this period of €85,848, but this is not entirely clear and it may be that that sum remains to the credit of the respondent. If not, however, it appears that the respondent could have assets at his disposal of the order of €983,645, although it has to be recognised that he would have had living expenses during the period concerned (2016-2018). The applicant obtained documentation which showed that the respondent has transferred the sum of €320,000 to two bank accounts in Poland, approximately €50,000 of which was transferred to a bank account in the name of his current partner. The applicant gave me evidence in the form of social media accounts that it appears that the respondent is constructing a house with his current partner in Poland. These social media postings also indicate that the applicant has left employment with [ ] since the end of 2017 and it is not clear if he is currently generating an income or is employed elsewhere. From the evidence made available to me it seems possible, if not very likely, that the respondent is currently living in Poland with his partner.

9. All of this being the case it seems to me to be entirely appropriate and fair that I should make the following orders:-

(1) that the apartment in [Dublin] should be transferred into the sole name of the applicant and that the County Registrar of County Dublin should be directed to execute all such documents as are necessary to secure transfer;

(2) that in the meantime all receipts of rental should continue to be paid to the credit of the mortgage account with Ulster Bank, which is in the sole name of the respondent. The *in camera* rule shall be lifted for this purpose;

(3) that the site in Northern Ireland be transferred into the sole name of the applicant. The County Registrar for Dublin shall be directed *in personam* to execute such documentation in the name of the respondent, as is necessary to secure the transfer of this site;

(4) all share options of the respondent with [ ] that have not yet been exercised by the respondent shall be transferred to the applicant to the intent that she shall be entitled to exercise those share options on the same terms as the respondent;

(5) any other monies retained by [ ] on account of the respondent to be transferred to the applicant.

10. In making these orders I have had regard to the factors which must be taken into account by me pursuant to s. 20 of the Judicial Separation and Family Law Reform Act 1989. These factors are as follows:-

(a) the income, earning capacity, property and other financial resources which each of the spouses has or is likely to have in the foreseeable future. I have set out the income of the parties above so far as is known. The earning capacity of the applicant is limited at the moment, but she will have the opportunity to earn some money in the future and I have taken this into account as is appropriate for the time being at least. It is very likely that in making the orders that I have made that the lion's share of the assets to the parties at the moment will remain with the respondent and not with the applicant even though the applicant is responsible for the maintenance and education of the children. It is very likely that if the respondent were before the court and it was demonstrated that the assets at his disposal are indeed as outlined above that I would have directed the transfer of more funds than I have from the respondent to the applicant;

(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future. I know nothing of the financial needs of the respondent because he has not engaged in these proceedings. It is obvious however that the financial needs of the applicant currently run at in excess of €6,000 per month and will increase in the future as the children progress in their education;

(c) the standard of living enjoyed by the family before proceedings were instituted or before the spouses were separated. It is clear that the parties enjoyed a very high standard of living and that the separation of the parties has impacted substantially on the lifestyle of the applicant and the children. The applicant and the children appear to be managing very well but the orders that I have made do no more than afford reasonable security to the applicant and the children, assuming that the respondent meets his obligations as to maintenance;

(d) the age of each spouse, the duration of the marriage and the length of the time the spouses have lived together. The applicant is 47 years of age and the respondent is 46 years of age. The parties were married in 2003. Nothing significant arises out of these factors;

(e) any physical or mental disability of either spouse. Neither of the parties suffers from such disabilities;

(f) the contributions which each of the spouses may or is likely in the foreseeable future to make to the welfare of the family, including the contribution made by each spouse to the income earning capacity, property and financial resources of the other and any contribution by looking after the home or caring for the family. The respondent is responsible for the generation of all of the family income and assets, to date. The applicant devoted her time to the rearing of the two children of the family since the birth of the first child. This of course impacted upon her ability to earn a living or contribute to the finances of the family. In making the orders that I have, however, I believe that I have taken into account the future income earning capacity of the applicant and the current outgoings of the family and the needs that the applicant will have in the future to secure a family home for the family;

(g) the effect on the earning capacity of each spouse 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 having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care of the family. I think I have already addressed this issue above. The applicant gave up work to look after the children, but expects to be able to resume similar work by the end of this year.

(h) any income or benefits to which either spouse is entitled by or under statute. The only income which either party is entitled to under statute is the Lone Parent Allowance currently being received by the applicant which will come to an end if she receives income or assets arising out of the terms of this decision;

(i) the conduct of each of the spouses if that conduct is such that in the opinion of the court it would in all those circumstances be repugnant to justice to disregard it. Since the respondent has failed to engage in these proceedings I have only the applicant's version of events leading to the breakdown of the marriage and I have no reason to doubt that account.In short the respondent left the applicant for a third party in or about April, 2016. The applicant has compounded his conduct in the breakdown of the marriage by failing to engage in these proceedings or with the applicant or the children, ever since the breakdown of the marriage. While that is a factor that I would undoubtedly take into account if there were sufficient assets at the disposal of the parties to do so, the orders that I have made, in fact, go no further than is necessary to make provision for the basic needs of the applicant and the children;

(j) the accommodation needs of either spouse. While the orders that I have made will, if complied with, provide a measure of security for the applicant and the children it will not in fact secure the accommodation needs of the applicant in the longer term having regard to the cost of housing that is well known to be the case in the Dublin area. For this reason, the orders that I am making in these proceedings will require review in the future if the circumstances enable such review to take place.

11. The applicant also seeks an order pursuant to s. 14 of the 1989 Act, extinguishing the share to which the respondent would otherwise be entitled to in the estate of the applicant by virtue of the Succession Act 1965. Such an order should clearly be made but, unusually, and having regard to the circumstances of these proceedings no corresponding order will be made as regards the entitlement of the respondent in the estate of the applicant.

12. The applicant also seeks orders as to costs. Having regard to the refusal of the respondent to engage in these proceedings in any way which gave rise to very significant difficulties in relation to the service of the proceedings. And having regard to the fact that the respondent made an application for the return of the children to [ ] pursuant to the provisions of the Hague Convention, and later withdrew that, but only at the eleventh hour (the evidence established that the applicant incurred costs of the order of €70,000 in the Hague Convention proceedings) and that the applicant has incurred costs of the order of €125,000 including VAT in these proceedings and having regard to the overall conduct of the applicant I consider it appropriate to make an order that the respondent shall pay all costs incurred by the applicant in the conduct of these proceedings and also in the conduct of the application made by the respondent pursuant to the provisions of the Hague Convention when taxed and ascertained.