

HIGH COURT

[2014 No. 105 CAF]

BETWEEN

R.S.

APPLICANT/RESPONDENT

AND

I.S.

RESPONDENT/APELLANT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 11th day of December, 2015.

1. This is an appeal from an order of the Circuit Court (Judge Lindsay) dated 19th November, 2014, whereby an order for judicial separation was made.
2. The parties were married on the 8th September, 1990, in the U.K. The parties have three children a son D. born in 1997, a daughter B. born in 2001. and a son A. born in 2004.
3. The respondent (husband) aged 56, works in a high paid role and was the main provider for the family during the marriage. In addition to this high paid employment the respondent received a bonus of €12,000- €20,000 annually for the past three years. The applicant (wife) aged 48, worked within the home for the duration of the marriage, but has commenced part time employment since the relationship with her husband ended.
4. The parties purchased a 4 bedroom house in 2012, for €464,500, and the relationship between the parties ended soon after. The balance of €171,702.29 remained on the mortgage of this property at the date of hearing. The respondent continues to live in this property with the two youngest children. The applicant lives in rented accommodation with the oldest child, in the same locality as the wife.
5. The respondent submits that he suffers from numerous health difficulties including chronic pain and depression.
6. The wife has no pension fund available to her. The husband has accumulated pensions funds in both Ireland and the U.K. The Irish pension fund [hereinafter referred to as the "T. pension fund"] has a capital value of €248,000 and a value of €22,500 per annum, this fund also contains a spousal contingent. The first U.K. pension fund [hereinafter referred to as the "K. pension fund"] has an estimated capital value of £220,000 and is valued at £19,987 per annum, and this fund does not have a spousal contingent. The second U.K. pension fund [hereinafter referred to as the "E.L.P fund"] has a value of £36,176 that is to be paid at age 60.

Summary of the Circuit Court Decision

7. It is accepted by the parties that numerous mistakes were made in the drafting of the Circuit Court order and that the text of the order did not sufficiently reflect that which was decided by Judge Lindsay in the Circuit Court.
8. It was set out in the Circuit Court that the oldest child, D., was to live with and be in the care and custody of the husband. The two younger children were in the care and custody of the wife. This order sets out that the wife would receive €2,000 in maintenance payments from the husband per month, which was divided into a payment of €1,500 for her own maintenance and €500 in maintenance for the two children residing with her. The husband was also to pay all of the household utilities for the wife, all medical and dental expenses of the children and maintain a health insurance policy for the wife and children. Additionally the husband was to provide €500 on two separate occasions throughout the year to cover additional expenses relating to Christmas and summer holidays.
9. When the youngest child reached the age of 23 the family home was to be sold and the proceeds of this sale divided equally between the parties. The husband was to continue to pay the mortgage on this property up until this time and mortgage protection insurance would be taken out in the wife's name.
10. The Circuit Court order outlined that the K. pension fund was to stay with the respondent in its entirety. The respondent appealed the said judgement to this Court.

Consideration of the Case

11. Section 16 of the Act of 1995 sets out:-

"In deciding whether to make an order under section 7 , 8 , 9 , 10 (1) (a), 11 , 12 , 13 , 14 , 18 or 25 and in determining the provisions of such an order, the court shall endeavour to ensure that such provision is made for each spouse concerned and for any dependent member of the family concerned as is adequate and reasonable having regard to all the circumstances of the case.

(2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters,...

(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 husband earns a sum between €9,000.00 and €10,000.00 per month, and receives a bonus of up to €20,000 per year, but submits that this upper limit will be difficult to reach given his advancing age, despite the improving financial climate, and that his good income is ever threatened by his indifferent health.

The wife earns €600.00 net from employment, €270.00 from children's allowances and could pursue income from students to €400.00 per month.

The husband's income will fall dramatically when he reaches retirement age of 65, at which time any pension income he may have will be much lower than his current earnings. He will need a cash injection from the sale of the house much earlier than envisaged by the Circuit Court to cater for the threatened fall in income.

(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),

The parties have a substantial income between them, but they are really in a hand to mouth situation, which is contributed to by their failure to economise after separation. A short term mortgage and the high cost of rent for the husband's house puts a substantial dent in the monthly income from the outset. The parties feel obliged to pay back relatives, however their expenditure pattern is more generous and varied than is strictly necessary. A glaring under-provision now and into the future is the lack of funds for the education of the children, which seems to culminate in the lack of motivation of their eldest child, who is in his leaving certificate year

(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 lived in rented accommodation prior to buying their home in 2012, in a suburban area. The purchase of this property was a bargain but necessitated a loan of €200,000.00 payable over 15 years. The parties had savings and the proceeds of the sale of a property abroad and had a good lifestyle. They do not seem to realise yet that now with two homes to maintain, less the sharing of expenses, and threatened third level education fee they will not be able to maintain their current lifestyle.

(d) the age of each of the spouses and the length of time during which the spouses lived together:-

The husband is 56 and the wife is 48. The age disparity means that the husband does not have many years of high earning left to him, whereas the wife has a longer life of dependency ahead, even if she can maintain some earning for herself.

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

The husband is not in good health, which in the past has prevented him from working. A very optimistic prognosis is that he will be healthy enough to continue working until he is 65. This (with other factors) has prompted bringing forward the sale of the family home.

(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,

The husband was a good earner when in good health, during which time the wife was a full time housewife and carer of the children in the home. Very importantly the wife looked after the husband during his illnesses, which strongly contributed to his ability to return to work.

(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 having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family:-

While the wife had to forego some income as a result of being a mother in the home, but she did not lose her career and seems to be able to resume working as her children get older. However, she has not been able to build up a private or social welfare pension to any extent which will impact her income and hence will have an income handicap in the future thereby.

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

Allowing for English contribution it is likely that husband will qualify for an Irish contributory old age social welfare pension at age 68. The wife is not likely to so qualify as she does not seem to have many contributions and does not seem to have made the special arrangements with social welfare to qualify as a career. Nevertheless, it is worthwhile for her to enquire into her widow's pension entitlement.

(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,

Not such as may be taken into consideration.

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

The parties live in separate accommodation. The present family home provides more than what is needed having regard to the present budget of the family, and as the youngest child is aged eleven the need for this accommodation remains. The husband resides in rented accommodation which is probably too expensive, especially in light of threatened and likely rent increases. As the husband's income will decline with age and/or retirement, and his ambition to own and stop renting is prudent, and realistic. The high cost of accommodation and the locking of resources within the family home leaves the family short of resources for higher education, and it is the joint ambition of the parents that the children continue to third level. Accommodation needs would be better met, from a cost-benefit point of view, if the family home were sold and the family traded down and lived further down the DART line without cutting off the possibility of the children remaining at their schools, by using the DART. This points to moving the sale of the family home forward to five years time rather than 12 years time (approx) when child A. is 23 years of age

(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:-

The Circuit Court order did not provide a pension for the wife, and the total pension funds available do not match the current high earnings of the family. If the Irish pension fund is adjusted mainly in favour of the wife, it may be drawn down with an income in excess of €20,000.00 per annum (hopefully) in two years time. In that event the maintenance could be reduced by said figure, leaving more for husband to build up his pension somewhat, until he retires. Furthermore, an early sale of the family home would provide provision to allow the husband to purchase accommodation, met out by met out of 50% of net proceeds.

(I) the rights of any person other than the spouses but including a person to whom either spouse is remarried:-

There are no persons with a permanent claim against the parties, however, it is entirely fair to expect the parties to repay their liabilities to their siblings/parents, although these debts were likely caused by bad budgeting in the first instance.

12. Having regard to the foregoing analysis, and the wishes of the parties to avoid the structure of the Circuit Court order whereby the husband pays for utilities and other outgoings when vouched, the Court varies and affirms the Circuit Court order as follows:-

1. Affirm order for judicial separation.
2. Affirm order relating to custody.
3. Set aside all orders for payment of maintenance and outgoings and replace with the following:-

The applicant (husband) is to pay the sum of €3,000.00 per month to include all school fees and utilities and outgoings, provided however that the applicant (husband) continue to discharge the mortgage of the family home until sold and VHI as theretofore. The maintenance shall be €2,500.00 for the respondent (wife) and €250.00 each for the two dependent children residing with the respondent (wife).

4. That the order for sale of the house be affirmed subject to the following amendment that it shall be sold on or before the 1st February, 2021.

5. Affirm order continuing right of respondent (wife) to occupy the family home until sale in accordance with this order.

6. Confirm order pursuant to s. 14 of the Family Law Act 1995 subject to a stay thereon until the youngest child is 18 years.

7. Confirm order pursuant to provision of s.15(a) provided that death occurs after the youngest child reaches 18.

8. Confirm order relating to K. fund and a similar order relating to small English fund.

9. Pension adjustment order in favour of respondent (wife) in regard to all Irish pensions to include contingency benefit, subject to nominal pension adjustment order from husband subject to the proviso that if the husband takes all steps to facilitate retirement/drawdown of this pension at age 60 or earliest date thereafter, he may be entitled to reduce payment of maintenance by the amount of pension payable after wife has taken the 25% tax free lump (or equivalent under current taxation provisions). In the event of the wife not cooperating with such a draw down/retirement agreement the husband shall be entitled to apply to the Court for a reduction of maintenance calculated in accordance with this order as if the retirement/drawdown occurred in accordance with this order.