

THE HIGH COURT

2014/113 CAF

(Record No. 610/2008)

AN CHUIRT TEACHLAIGH CHUARDA

THE CIRCUIT FAMILY COURT

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

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

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

B. McN.

APPLICANT/RESPONDENT

AND

J. S.

RESPONDENT/APELLANT

JUDGMENT of Ms. Justice O'Hanlon delivered on the 22nd day of January, 2016

1. The respondent appealed the order of the Circuit Court by notice of appeal in relation to the judgment of the Circuit Court made on the 8th December, 2014. On the 8th December, 2014 Her Honour Judge McDonnell directed the respondent to issue and serve divorce proceedings to deal with divorce and any outstanding judicial separation issues and the Circuit Court noted that the matter might need to be progressed by a judge due to the allegations set out by the respondent in that order.

2. Specific grounds on which the respondent wished this Court to consider the matter were confined to the following seven points:

1. The respondent claimed that the applicant had filed two false affidavits of means to the court and alleged falsehoods include a secret bank account, hidden assets, false liabilities, a hidden €50,000.00 cheque, a hidden pension, understated income, overstated expenses, a failure to assign values to her properties and money laundering.
2. The respondent wanted to make the point that he did not drive a motor vehicle and that he did not drive either a Lexus car or a Mercedes Benz and that his wife drives a 2007 Mercedes Benz.
3. The respondent wished the court to take into account that he was long term unemployed and in receipt of social welfare payments.
4. The respondent wished to refute that he molested two of the children of the marriage of the parties and alleged that this was a false accusation on the part of his wife.
5. The respondent pointed out that he was reliant on two registered charities (including a soup kitchen) to survive.
6. The respondent contended that the applicant was deliberately delaying matters for tactical reasons.
7. The respondent made the contention to the High Court as one of his seven points that he has had a formidable adversary.

3. Section 16 of the Family Law Act 1995 indicates the various factors that should be taken into account when determining what proper provision may be put in place for both parties and the dependent children in a separation:-

"16.—(1) In deciding whether to make an order under section 7, 8, 9, 10(1)(a), 11, 12, 13, 14, 15A, 18 or 25 and in determining the provisions of such an order, the court shall ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper 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,
- (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),
- (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,
- (d) the age of each of the spouses and the length of time during which the spouses lived together,
- (e) any physical or mental disability of either of the spouses,
- (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,
- (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,
- (h) any income or benefits to which either of the spouses is entitled by or under statute,
- (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,
- (j) the accommodation needs of either of the spouses,
- (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,
- (l) the rights of any person other than the spouses but including a person to whom either spouse is remarried."

Section 16(5) of the 1995 Act specifically states that the court shall not make an order under a provision referred to unless it would be "in the interests of justice to do so". In regard to s.16(2)(e) both parties have medical difficulties. In relation to s.16(2)(f) it should be noted that there have been no financial contributions from the respondent/appellant to the family and it is highly unlikely that he will make any contributions in the future. In reference to s.16(2)(k), the Court notes that both parties have been provided with pensions and proper provision by the Circuit Court.

4. The Circuit Court heard the judicial separation hearing on the 23rd July, 2009. Both parties were represented by solicitors and counsel at that stage. Extensive orders were made, a certified copy of which is appended hereto.

5. By letter dated the 18th March, 2014 the solicitors disciplinary counsel considered a number of documents furnished by the Circuit Court case and his representation and he submitted that his solicitor was at that time guilty of misconduct as a solicitor and set out a number of reasons for his contention, the contentions made and result of the solicitor's disciplinary tribunal are set out and numbered 1-3 (VI) as follows:

1. Regarding the contention that there was a failure to come off record, the response to that allegation was that it did not disclose misconduct.
2. Regarding a claim of overcharging no evidence was found to have been adduced to support that allegation.
- 3(I). Applicant's (ex-wife's) order for a new Lexus when his (ex -wife) was pleading poverty to the Court. The tribunal found that no evidence had been adduced to support this allegation.
- 3(II) The applicant's inheritance (€189,975.00), which [his] wife now has, this allegation was found to be adequately rebutted by the applicant's own affidavit of means sworn on the 10th June, 2009 and the affidavit of a solicitor sworn on the 23rd August, 2013.
- 3(III) "The tax bill on the applicant's inheritance of (€29,676.00), left for [him] to pay" the response of the tribunal was that this allegation had been adequately rebutted by the applicant's own affidavit of means sworn on the 10th June, 2009 and the affidavit of a solicitor sworn on the 23rd August, 2012.
- 3(IV) "[The Applicants] ex-wife's false/perjured affidavit of means"; the tribunal found there was no evidence to support this allegation.
- 3(V) "Not requesting details of deposits into her secret bank account". The reason this was not upheld by the solicitor's disciplinary tribunal was they found these are matters which should or could be canvassed in a forum other than the solicitor's disciplinary tribunal.
- 3(VI) "Not challenging the applicant's ex-wife's claims that her mortgage payments exceeded her monthly rent role"; The tribunal found that there was no evidence to support this allegation.

In a letter from the then tribunal registrar of the solicitor's disciplinary tribunal, the technical method of appeal was set out in the final paragraph of that letter within twenty-one days of receipt of the notification in writing of the tribunal's decision, to the High Court. The tribunal's decision was that there is no *prima facie* case for enquiry. This was sent by registered mail to the respondent/appellant at his address at 62 M., B. P. R., Dublin. The said document was made available to the Court.

6. The very same arguments are reiterated in this appeal to this Court by the respondent/appellant. This took two days at hearing in the High Court on the 19th and 20th January, 2016. This Court is mindful that the Dublin Circuit Court proposes to deal with the divorce application on the 4th February, 2016. The respondent/appellant failed, refused or neglected to institute these proceedings. The applicant/respondent instituted the said proceedings and the respondent/appellant has undertaken to the High Court to ensure that his papers are ready for that court and filed with the Circuit Court office no later than 11am on Friday morning the 22nd of January 2016, when judgment in relation to what both parties in this case agree should be an appeal of the Circuit Court order. The respondent/appellant has therefore undertaken to this Court to file an appearance, in the Circuit Court office, as well as defence and counterclaim, an affidavit of means and an affidavit of welfare.

The history of the case

7. Each party has submitted to the court a list of assets with their valuations and a list of the debts on any such assets. These are appended to this judgment in ease of the Circuit Court Judge hearing this case on the 4th February, 2016.

8. The applicant/respondent gave evidence of the history of the case. She state that the extensive difficulties which she suffered and which her children suffered are as a result of sexual abuse by the respondent/appellant of the eldest daughter of the marriage in respect of which a conviction was registered. The respondent/appellant is at present on the sex offenders register and he received a suspended sentence in the Dublin Circuit Criminal Court in respect of this issue. The applicant/respondent takes the view that the respondent/appellant keeps continuing all forms of litigation against her purely to cause her as much financial difficulty and emotional difficulty as he can. In this regard she points to a two year High Court litigation in relation to his late mother's estate as against the applicant/respondent which he discontinued the day before the case was due to be heard in the High Court. Her contention was that this cost her brother in law, who is married to the respondent/appellant's sister, in excess of €150,000.00. The respondent/appellant refused absolutely to contribute any money towards the applicant/respondent because of the hurt and damage he had caused herself and her children.

9. She freely told the court that her own mother had been in psychiatric care for many years during her own childhood and that all of her children suffer from various types of depressive illness, as does she herself. She makes the point that she did not ever suffer from depression or anxiety when she was having her babies but it was the issue concerning the sex abuse incident as against the eldest daughter which caused her to have a reactive medical difficulty of the depression and anxiety type in respect of which she receives treatment continuously herself. She pointed out that her children receive treatment continuously also. A letter was received from the psychiatrist treating the children to the effect that they do have such difficulties and that they do not want to see the respondent/appellant at this time.

10. A complicating factor in this case of a financial nature is the fact that all four children wish to study medicine in university and the two older children are so undertaking medical courses, one as a medical graduate and the other as an undergraduate directly from the leaving certificate. The applicant/respondent describes her second son who is in Trinity College, Dublin in second year in medicine as suffering panic attacks and having quite severe difficulties. A third child is in leaving certificate stage also wishing to study medicine and is described as being very brittle. The fourth child is fifteen years of age and is in private second level schooling and suffering from bouts of depression. From the mother's description the entire family suffer from grave insecurity, that something would happen to her and they display this by showing consistent concern if she is a little bit late back to the house that something might have happened her. The wife herself is on 200mg of centraline and on zanex sleeping tablets. No attempt to refute this evidence was made by the respondent/appellant.

11. The applicant/respondent became exceptionally concerned when she discovered that the respondent/appellant had formed a new relationship with a woman he freely admits he met on the internet who is from Indonesia and with whom he has had two young children. His evidence to this Court was that he gave this lady €3,000.00 and she decided to "winter" in Jakarta. She can come back to Ireland on a limited visa for limited periods of time. On the evidence of the respondent/appellant, they were separated between 2011 and 2014 and this partner is currently not living with him.

12. The applicant/respondent is of the view that the husband does not live in 62 M but rents out this property although he claims he lives there. The applicant/respondent was obliged by the Circuit Court order to take out a €50,000.00 mortgage in respect of M and she converted this to €100,000.00 mortgage herself although her husband now has full title to that property. She claims it is worth about €460,000.00.

13. When in an open area outside this Court during the last three court appearances the respondent/appellant behaved in a very inappropriate manner. The applicant/respondent's sister, herself a retired district nurse, witnessed the situation and its effect on her sister and felt it was designed to cause maximum stress to them. The Court advised at that time, that the proper authorities being Tusla and An Garda Síochána should be contacted by the applicant/respondent if she had any concerns in that regard before Christmas and she did this.

14. The respondent/appellant indicated that he gets the following income. He gets €2,500.00 quarterly for three car spaces which he owns outright and in respect of which his wife continues to pay a mortgage of €1,795.00 per month. Between February and April he will draw down €34,000.00 from a pension fund. He gets €500.00 a month from the Accountants Benevolent Association as he is a qualified chartered accountant who is not working at the moment. In addition he stated that he spends a lot of his time around the Smithfield area and eats daily at the Capuchin free breakfast and dinner centre for people in need even though his monthly income is quite substantial. The applicant/respondent is convinced that he doesn't live at the address he says he resides at in Terenure because packages have been sent to her by registered post to the former family home of the parties, now a property in her name from Indonesia who otherwise, she felt, should have sent them to the Terenure address had he been living there.

15. The respondent/appellant did work with the British Institute for Learning and Development in Dubai for a three month period but was asked to leave that employment and I accept his evidence in this regard. He denies working as an English teacher in Dubai although he did do a qualification to teach English as a foreign language and he did that work for one summer in Dublin but couldn't find work in that area afterwards.

16. The respondent/appellant was a scholar at University College Cork arising from a first class honours in his second year and his overall degree was a 2/1 degree and he has experience in financial analysis.

17. The respondent/appellant admitted that he never told his present partner that he was on the sex offenders list even though I think it is common case that he did have a reversal of a vasectomy so that he could father two further children. He did contend however that his present partner was aware that there was a conviction in respect of the sexual abuse of his daughter. He pointed to the fact that in July 2014 there was an article in the Sunday World newspaper concerning this however it was pointed out that there were no names, of course, used in that article. In any event the respondent/appellant indicated to the court that his present

partner left this country for Indonesia on December 30th 2015 to spend the winter there and Tusla have been informed of the applicant/respondent's other concerns.

18. This Court heard the allegation and counter allegation each against the other in respect of the alleged financial irregularities of the applicant/respondent. However, this Court is of the view that there is absolutely no merit in these wrongful allegations. The Court took great comfort from the evidence of the applicant/respondent when she went through each of the questions put by the Court to her and by the respondent and explained carefully the situation in respect of each separate item. Further comfort was given to this Court in respect of these wrongful allegations from the evidence of Mr. O'R who is a qualified accountant, member of the Institute of Taxation and ran O'R's accountancy firm which merged with Woods and Partners and he is now classified as a consultant in that new business although he is a partner of same. He has acted as auditor and accountant for the applicant/respondent's company since 2009 by the applicant/respondent. He had been responsible for VAT and tax returns from 2009 on. He was a witness in the Circuit Court hearing in relation to the judicial separation and gave evidence there. He gave evidence to this Court that up to 2008 these tasks were undertaken by the respondent/appellant who was a director of the company until that time and that his firm took over the respondent/appellant's role and became advisors to the applicant/respondent as principal at that time and that his firm were responsible for Tax, VAT, Annual Account and Tax Returns. He stated that his firm would have made sure that everything was in order in terms of the company office regulations, corporate tax regulations, normal tax returns, PAYE and VAT returns and he was happy to confirm to this Court that all of those matters were correct and in order in his opinion and had been dealt with correctly.

19. He explained that coming up to 2009 when difficulties arose between the parties monies were being withdrawn by the respondent/appellant. To keep the business going the applicant/respondent had to operate a personal account which she later converted into a number 2 account and while at that initial stage she did this so that she could pay bills as they fell due as was her own evidence. She did this because money was being withdrawn from the company account and this evidence was given by her herself also. The accountant then pointed out that all transactions were taken into account in relation to the number 2 account that he was not aware of any hidden pension or any underestimation of income nor was he aware of any overstating of expenses that they were within the normal realms of practice. He confirmed formally that there was no secret bank account, no hidden assets and no false liability and that there was no money laundering issue. Ms. McN then later on incorporated the number 2 account into the company.

20. Mr. O'R specifically confirmed that he was never contacted by the respondent/appellant in 2010 regarding any alleged defrauding by the applicant/respondent. Mr. O'R, accountant, pointed out to the Court that the parties were invited by AIB to leave AIB in terms of taking their business elsewhere because, as he put it, staff were being intimidated by the respondent/appellant. He said that while he wasn't present at an incident in the bank concerning the wife's niece's attempt to make a lodgement of monies he believed that an incident had occurred which had led to the AIB asking that the parties move bank.

21. Mr. O'R accountant confirmed to the Court that the s. 23 relief in relation to the car spaces the date of crystallization of the final relief to be gained in respect of the s. 23 accounts could be clarified by a letter sent by him on formal headed notepaper in advance of the 4th February, 2106 so that the Circuit Court could then be made aware of the date of crystallization of the tax relief in respect of the said car spaces which have been transferred already to the respondent/appellant by Circuit Court order. The applicant/respondent is obliged to continue to pay a considerable amount of money each month in respect of those car spaces as a mortgage was increased to cover the purchase of same.

22. The wife's contention in this case that well over €200,000.00 was taken from company bank accounts coming up to 2009 and the breakdown of the marriage. In great detail this Court has heard extensive evidence from the parties and can see no basis for contentions raised by the respondent/appellant. The issue of the Lexus car has been raised time and again by the respondent/appellant but the applicant/respondent has explained that her son John had made enquiries in relation to the purchase of a Lexus car at €80,000.00 but she later bought a cheaper car from a north side garage and she drives a car worth about €5,000.00 which she bought and it is a 2007 Mercedes.

23. This Court has asked itself whether or not the respondent appellant could find work. While he has shown some few documents showing small efforts to find employment, this Court is not convinced but that the respondent appellant could not retrain and get proper work. The evidence suggests that he is a very intelligent man although he does have Aspergers and that is accepted. It is not to the extent, however, that he is not well capable of presenting his own case as he has done. He accepts that as soon as his pension money comes in at the end of January, he would not intend taking food from a soup kitchen as he has done to date, twice a day with a food package on a Wednesday.

24. Far from being a "formidable adversary", this Court found that the applicant/respondent is 58 years of age and is suffering from major medical difficulties as a result of this ongoing, continuous and persistent litigation in various forms. She is also suffering considerable stress and anxiety at the thought of trying to educate her four children in their chosen paths which is proving to be very expensive for her. Her evidence was that she is under considerable stress from the banks and that she intends selling two of the properties, in any event. The first of these being C.W. which is on the market, in relation to which the respondent/appellant sought to bring an injunction to prevent the sale and in respect of which this Court allowed the sale to go ahead but asked that the monies be retained pending the outcome of this Court's decision. In any event, no offer has been made and it is on the market for €645,000. If the applicant/respondent could obtain €600,000 that would clear sufficient debt to relieve her of repayments of €3,000 per month.

25. The applicant/respondent also wishes to sell the property at N.B.W., which is worth approximately €425,000. If she were successful it would provide her with a sum of money which would all be needed to educate the children, on the evidence this Court has heard. The major contention this Court would have at this stage is that the financial pressure on the family that has to be reduced to allow this mother oversee and assist with the education of her children.

26. While there was much discussion of pension, this Court has come to the conclusion that the applicant/respondent has done nothing wrong in relation her financial conduct and has tried to keep the ship afloat as it were in very difficult circumstances. She is concerned at the moment because she does not know where she will get the money to pay fees for children in university unless she can manage to sell the two properties she proposes to sell. The M.S. apartment she is anxious to keep for her long term security and for the security of her children.

27. In all the circumstances of this case, it is the view of this Court that the matters raised by the respondent appellant had already been looked at very substantially in the Circuit Court where there was a complete forensic accountants report from Brown and Murphy Forensic Accountants on behalf of the applicant/respondent and that the court heard evidence from the then company accountant. There is no basis for the appeal brought by the respondent/appellant whatsoever. He failed to give anything other than minimal disclosure but at this stage because of the health and well being of the family, it is absolutely essential that all litigation be brought to a speedy conclusion and that the family are not persecuted further by the respondent/appellant with any further false allegations

against the applicant/respondent.

28. I have considered in detail all of the affidavits of means and find that there is absolutely no basis on which this Court could possibly embark on changing the Circuit Court ruling. This Court, therefore, upholds the ruling of the Circuit Court on the terms set out and affirms the orders of the Circuit Court that the additional orders as set out herein.

29. This Court finds that the applicant/respondent should be free to sell properties which she owns and use those proceeds as she finds necessary giving her pressing financial circumstances. This Court is unconvinced of the *bona fides* of the respondent/appellant and feels that at the conclusion of the divorce, it is absolutely necessary for the health and well being of this family that he desists from unnecessary further litigation.