

THE HIGH COURT

FAMILY LAW

[2012 No. 25 M]

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

BETWEEN

F.LS.

APPLICANT

AND

X.X.L.

RESPONDENT

(FICTIONAL INITIALS)

JUDGMENT of Mr. Justice Henry Abbott delivered on the 31st day of July, 2014

1. The applicant wife and the respondent husband were married on 3rd October, 1998. At all material times they have been domiciled and have an ordinary place of residence within this jurisdiction. They have four children born in 1999, 2001, 2002 and 2005 respectively. A normal marital relationship has not existed between the parties for a period of more than a year prior to the issue of the proceedings herein, and the court is satisfied that an order for judicial separation should be made.

2. During the course of the proceedings orders were made in respect of the welfare of the children and the parties have accommodated themselves around these arrangements.

3. On the basis of the entitlement of the parties to a judicial separation, the court considers provision in accordance with s. 16 of the Family Law Act 1995, subsection (2) in accordance with the criteria set out therein (a) to (l) as follows:-

"(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 applicant is currently a homemaker. She receives €31,200.00 net by way of maintenance from the respondent. She claims children's allowance of €6,344.00 and investment income of €2,500.00, leaving her current income at €40,044.00. This is apart from an approximate "dig out" of €30,000.00 from the respondent in respect of various other family outgoings. This is totally unsustainable on respondent's current or likely income. I deal with it further in para (b). The respondent has a business and some farming. His income was estimated as follows:-

- (i) Business €73,406.00
- (ii) Farming €6,917.00
- (iii) Rental €3,517.00
- (iv) Schedule F dividends €274.00

Total €84,113.00

The property of the parties is as follows:-

- (i) Family home at M. €600,000.00
- (ii) C.H. €265,000.00
- (iii) Land at C. €1,048.00
- (iv) German Investment Fund €61,000.00
- (v) Bank of Ireland Joint A/C €7.00
- (vi) C.S. Deposit Account €1.48
- (vii) Net proceeds foreign property €125,000.00
- (viii) Trade debtors approx €45,000.00
- (ix) Contents of family Home at M. €60,000.00
- (x) Contents of home at C. €18,000.00

(xi) Value of business €35,000.00

(xii) Investment Linked Life Insurance €150,000.00

Of these properties, the applicant is the joint owner of the family home at M. and the home at C., the valuations whereof are agreed. She also is entitled to a half share of the contents of the family home at M., valued at €60,000.00. I have taken the value of the lands at C., of which the respondent is the sole owner, at €1,048,000.00 against the higher value offered by the applicant's valuer. I have already complimented both valuers on the very transparent and professional manner in which they set about compiling valuations. The valuation debate initially centred around the fact that much of the lands at C. have been zoned for residential purposes with the prospect of a road and relief bridge leading out of the town, bringing massive opportunities for development. Initially, counsel for the applicant made the case that the lands at C. ought to be owned jointly with the parties gradually earning out this (theoretically tremendous), potential. However, the examination of this prospect in the hearing showed that the town, whilst solid, had missed out on the major prospects of infrastructural developments in the region and that it had been badly affected by the "slump" and would likely remain so, for any planning period relevant to the needs of the parties. It was thus likely to be quite slow to recover from the slump in property values, and notwithstanding that there were "paper benefits" in the zoning which could be improved on a review of the development plan, the values of the land must, of necessity, be heavily weighted by agricultural values. These would not be necessarily the prime agricultural values of the home county, by reason of the lack of an agricultural hinterland reducing the selection of potential buyers for such land. This is an important conclusion in this case as the lands at C. are the only assets available to be realised to cover the considerable obligations of the family in the near term. This is because the other major assets consisted of family home and also the home now likely to be occupied by the respondent at C. Another major assets, namely the net proceeds of the sale of the Spanish property have, in fact, been distributed by agreement of the parties to provide a motor vehicle for the applicant, and be shared by them in relation to discharge of some of their legal costs. The value of the business at €35,000.00 was at the lowest end of the scale offered by the respondents accountants in evidence, with the applicant's valuation being in excess of €200,000.00. As the only evidence in relation to passing sales of like businesses supported the respondent's valuation, I have preferred the respondent's valuation of €35,000.00. In fact, I consider the same is effectively irrelevant when considering assets available for disposal, to cover commitments and make provision for near or short term commitments, by reason of the fact that the business will be crucial to remain in the respondent's ownership by reason of the absolute necessity of same generating an income for the respondent from which a very substantial sum in maintenance relative to this income will have to be generated. The third schedule of the respondent's affidavit of means indicate that his total liabilities amount to €519,051.00, of which a mortgage to the Bank of Ireland of €150,000.00 and tax owing in the sum of €102,959.00 are the main components. The Bank of Ireland mortgage is on long term finance and creditors of €74,463.00 may be matched somewhat by trade debtors on the other side, so this liability may not be of pressing urgency. Of the liabilities, the most dramatically urgent is the liability of €102,959.00 to the Revenue Commissioners in respect of income tax. The provision made by order of this Court must certainly provide a means by which funds may be raised to discharge this sum, as this course is absolutely necessary for the sustainability of the respondent's business and the underpinning of income/maintenance in the future.

The parties have life policies maturing in 2018, with a net encashment value of €152.00. These policies did not receive must attention in the heat of battle over development land values, business accounting, and administration, but they do represent a significant fallback (at least to cater for the contingency of children's third level education, giving rise to a bump in educational expenditure). They also may represent the opportunity for renewal without much complication of the life cover in these policies. The respondent has separate full life cover in the region of €120,000.00, but this does not represent any current asset value. The respondent also has two small pensions of total value €22,000.00.

The husband's earning capacity was the subject of much debate during the course of the hearing, both from the point of view of his organising on a more efficient and traceable basis his accounting practices and on the basis that currently he suffers the incapacity of being sidelined from a considerable tranche of public work, which he must carry out engaging the services of professionals agents acting independently of him. This is a cost to his business. During the hearing it was thought that when later in the year he returns to this business on his own account, that the income of his business will improve. The respondent countered that this apparent prospect might not come into fruition, as he would be inhibited from pursuing other work in covering the resumed public element of his business. In making orders in relation to maintenance I am, therefore, not inclined to stray too far from the income basis which the respondent has presented to court. However, on the basis that the husband has more clarity in relation to matters relating to the Revenue Commissioners, accounting policies and is likely to get the benefit of a resolution of these proceedings in the orders made herein, his income might reasonably be expected to improve in the region of 20%. As his business takes up practically all of his time, the only other earning capacity which the respondent might have may arise in the medium to long term from developing such remaining lands as he has after judicial separation in accordance with better zoning and the long term prospect of a new road/bridge emanating through his property onto the major road networks. I do not propose to quantify this aspect as the likelihood of same becoming a reality is so far in the future, as not to be relevant to the needs of the family, especially during the course of the minority of the children.

The applicant worked in various capacities in office and administration, and she has in the earlier years assisted the respondent in his business on the accounts and debtor/creditor control side of the business. She also shared in their activities of buying properties for occupation as the family home, and repairing/refurbishing same. She also assisted in relation to the progressing of the planning status of much of the respondent's lands through organising rezoning submissions to the local authority, and more spectacularly, took a hand in the final negotiation of some of the respondent's property for a multi million pre slump price, and the subsequent expenditure of a significant part of the proceeds of such sale in the construction of the family home at M. While the applicant is fulsome in claiming the determinative influence she has had in the latter activities, apart from her employment, the respondent has argued that she did not play such a leading role. The court can decide, however, that in terms of her capacity to work, administer, develop and negotiate, she is certainly a formidable person and this conclusion does not undermine the role of the respondent acting in partnership with her in relation to these activities. She now has acquired a degree in IT. Without doubt, she could return to an accounts type office job at say a remuneration of €15,000.00 to €20,000.00 per year, but having regard to the expense of turning out to work and the inevitable tax wedge involved in employment, this course might not be worthwhile for her. However, her newly acquired IT skills should give her an opportunity to engage in better employment, the remuneration for which should be at least in the region of €30,000.00 per annum gross. The obtaining of such employment in the short term is an absolute necessity and this, of course, will be subject to any health issues she has to deal with beforehand. Like her husband, the applicant will have to fall back on the possibilities of development/sale of such land as may be left in her sole ownership as a result of the judicial separation, as any conceivable income arising

in the future from both parties may not be sufficient to cover the likely expenditure on the family, involving (as it does) four children whose educational needs and entitlements reach out into the longer term of their adulthood. As I have stated in relation to the likelihood of the wife hitting any bonanza in terms of rezoning and development of major road works, is not likely 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),

Not only does the applicant receive her maintenance of €600.00 per month net, but she has also had household bills and outgoings in respect of herself and her children discharged by the respondent up to the sum of €30,000.00 per annum. The respondent, in evidence, faced up to the reality that his income was not sufficient to sustain this type of expenditure. It is clear from his running up a tax bill of over €100,000.00 that he was only in a position to maintain this type of expenditure at the expense of keeping his tax up to date. The respondent's accountant has explained in no uncertain terms that while he has been in a position to negotiate with the Revenue and furnish up to date accounts, the Revenue have exercised forbearance on the basis that these proceedings would be brought to a finality in early course, and that the respondent would be in a position to sell some land to pay off his tax liability, and also keep his tax affairs fully compliant and up to date in the future. The significant expenditure currently undertaken by the applicant cannot realistically be reduced too much as there are items such as high heating bills which relate to the fact that her family home is a massive building with extraordinary requirements for heating and electricity. Even with her employment as envisaged above, it is unlikely that this level of expenditure will be met and the obligation is on the applicant to economise as much as possible in the hope that she may be able to develop and realise the land assets which she is likely to obtain from this judgment. The respondent has proposed in an open offer that he would pay maintenance in respect of the children only of €2,500 per month. Having regard to the fact that some increase in the respondent's earning capacity may be anticipated as described above, the most realistic level of maintenance to be paid on a net of tax basis would be €3,000 per month. This approach is to ensure that the respondent has sufficient resources to fund his own living expenses in C.H. which still has a mortgage and to fund ongoing compliant income tax payments. I have considerable sympathy with the pleas of the applicant that special regard should be had to the fact that the children are talented, intelligent and anxious to proceed to third level, and that the financial needs, obligations and responsibilities of the spouses is likely to increase. It was suggested to the applicant during the course of the hearing that she could sell M., valued at €600,000.00, and replace same with a commodious house not too far a distance on the country side of the town for a sum in the region of €295,000.00. While (on paper), this exercise seems attractive to bridge the gap between available resources and the financial needs of the parties, and in particular of the applicant, I would not be enthusiastic about it as a possibility as it cuts off the possibilities of real success in developing the lands around M. by the sale of sites and also the success of such a venture in terms of marketing is not guaranteed in the current illiquid state of the economy in this location. It is, of course, open to the applicant herself to decide whether she is going to make this dramatic move in the short term to provide short term finance, while cutting off opportunities in the future. She should consider that while the family home at M. was a fine investment during and a result of the boom times, it is a heavy burden on family finances in a less prosperous age.

(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 standard of living enjoyed by the family before the spouses separated was comfortable but not profligate by any means. The respondent's evidence in saying that he regretted that they had so successfully sold some of his land in the boom times, probably points to the fact that they became accustomed to a standard of living over the level which is now sustainable by reason of the fact that expectations were raised by the bonanza of the land sale prior to 2008. There is no doubt that the construction of the family home at M. and its continued maintenance and further development requirements, such as finishing of driveway and landscaping, has been a driving force in the high and possibly unsustainable standard of living now enjoyed by the family. That standard of living is, and has become, more and more precarious insofar as cash flow difficulties manifested themselves just before the hearing of the proceedings having a demoralising effect on the family, leaving them in a position where they were not in a position to enjoy their standard of living even though the actual expenditure did not reduce appreciably.

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

Both parties are aged mid fifty more or less and they lived together until 2009. Having regard to the fact that they continued to have a joint responsibility for a young family, the situation is one in which the marriage should be regarded as a long marriage and that there should be no discount for any fitful, or short aspect thereof when making provision.

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

The wife has a short term interest in having an operation which does not seem to be threatening to her ability to work in the home or develop her career in accordance with her ambitious hopes. The respondent husband, (while having a health scare leading to a drama in court, whereby the court threatened in the face of lack of attention of the respondent to his obligations in the litigation, to make an early decree for judicial separation on the basis of the risk of imminent death of the respondent), has recovered from these difficulties and does not appear to be threatened with ill health in the future. He has always been an energetic and industrious professional in his business and there is nothing to indicate that he will not continue to be able to pursue this role in the future. However, having regard to his doleful comments about the possible misfortune of having hit the bonanza of high pre-crash property prices, the respondent is much in need of the certainty and stability of the finalisation of these proceedings with the necessary adjustments which have to be made on both sides so as to allow him to get full motivation to work for himself and his family into the future.

(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 debate about the contributions which each spouse has made to the family has been touched on earlier in this judgment. Suffice it to say that both husband and wife contributed to the welfare of the family in equal proportions – the husband working all the hours available to him in his business and the wife sometimes in employment and always in the home looking after the children. The element of inheritance of the respondent's property is still a significant item, although

it has been diluted by the fact that the wife took such an active part in developing and sale of the property. I do not propose to be distracted by a residual inheritance element, nor by the fact that I consider that the contributions of the parties have been essentially equal and complimentary in this area. The main thrust of the task of the court in this case will be to cater for a needs driven solution for a family that is in much need of a reasonably high level of current income which will have to be augmented by development, sale or disposal of such property as may come into the hands and ownership of the parties.

(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,

The applicant wife did not argue that her earning capacity had been reduced by living with the respondent or by reason of having relinquished opportunities of remuneration in order to look after the home or care for the family. Quite the contrary, she took every opportunity to talk up her abilities and her capacity to engage in the future. She indicated (in response to a question from the court), that she would be happy to become a property developer herself, if the opportunity presented itself. Nevertheless, the court generally has to consider that she has had a great dependency on the respondent in objective financial terms and the court in considering the need in this case bear that in mind in the provision.

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

No incomes or benefits arise to either of the spouses under or by any statute, although the spouses should take care to ensure that their contribution status for old age contributory pension is watched and kept up to date (if necessary by voluntary contributions in the event of their work business discontinuing for any period or periods).

(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,

The conduct of each of the spouses does not reach the threshold that could be considered by the court to influence provision under para. (i). However, the applicant's submissions pointed to the litigation misconduct of the respondent, reminding the court that the case was ready in the list for hearing on a number of occasions only to find that the respondent was either not prepared or ready to allow the case to go on. This misconduct reached a crescendo when the matter came before the court on the last occasion prior to this hearing when it was punctuated by the respondent's illness which, by reason of the dilatory behaviour on his part, I, (perhaps, unfairly) thought was feigned, but which subsequently turned out to be genuine. However, my view is that the respondent has been redeemed from his litigation misconduct by the following factors:-

(1) The parties have agreed that apart from providing a motor vehicle for the applicant, that the proceeds of the Spanish property would be divided equally less €11,000.00 for the provision of the payment of costs for each party thus, putting in context the application made by counsel for the applicant in written submissions that the applicant's costs should be borne by the respondent, and

(2) By the fact that the respondent gave evidence before the court and was fairly reflective on the malaise in which he found himself, and genuinely impressed the court as a decent man and a credible witness who had hit hard times by reason of the property crash bringing him from such a high level of financial euphoria to a state of financial depression, coupled with his separation from his spouse and the continuing tendency to pay his spouse whatever was needed without regard to the need to run and control his business prudently.

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

The accommodation needs of the spouses are likely to be met in the short term (subject to the wife making a decision to trade down from M. in the event of her getting a convincing buyer). Hence, the provision to be made by the court just has to recognise by way of property adjustment orders the right of both parties to reside in their respective current dwellings.

(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 respondent has small pensions amounting to a valuation of €22,000.00 and the applicant has no pension. It is not proposed to have any pension adjustment order, but the spouse seeks the preservation of spousal contingent benefit in the event of death. Whether this can be done is a matter for further submissions from counsel.

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

No rights of any person other than the spouses arise. The rights of children are never considered under this paragraph but, of course, s. 3 of the 1989 Act is very specific that no order for judicial separation should be made unless it is in the interests of the children.

4. The court bears in mind the command of s. 16(5) that an order shall not be made under a provision furthering subs (1) of s. 16 unless it would be in the interest of justice to do so. The court is satisfied that the provision about to be made satisfies the tests set up in subs (5).

General Approach to Provision in Relation to Land

5. At the prompting of counsel for the applicant the court considers that over and above the open offer of the respondent made at the end of the case, the court should make a property adjustment order in respect of the more obviously apparently development land represented by plots A, B and C on Mr. A.H's summary values at p. 14. This adjustment is made with a view to enabling the applicant to apply for some planning permissions in the same manner as the current owner of the adjacent lands sold for the pre-

crash bonanza price. However, the court has to be aware that such expectations may not be borne out when the applicant engages in the planning application process as the promised boom of development through the new road leading from the town could be a disadvantage insofar as planners may prevent planning permission being given in respect of some, or perhaps even all of the land, on the basis that the actual route of the road has not been finally determined. This is a speculative matter beyond the control of the court, but the court must be mindful that the applicant must have a fallback position of having the opportunity to sell/develop some of the lands associated with the family home M., or to dispose of the entirety of M. with the site of same. When making property adjustment orders in respect of lands in favour of one party against the owner of the remainder of the lands, the court must be mindful of ensuring that there are rights of way sufficient to ensure that the value of the remaining lands are not devalued by lack of access. In respect of the front lands in plots A, B and C an adjournment is being afforded to the parties to agree a right of way such as would facilitate housing development in the lands left behind. This right of way may well be following the path of an existing country road or may be a new one, depending on what the parties agreed, and the court should be in a position some time in September to decide on the right of way if the parties have not agreed, but bring evidence of the parameters of possibilities before the court on that date. In order for the applicant to be given full ownership of M. and its site and also leave the respondent with access to the land lying beyond same, a right of way (in this instance agricultural) of maximum 20 feet in width should be provided as discussed in the case. In view of the urgency in reducing the sum owed to the Revenue Commissioners and establishing the business on a sound footing, the lands known as the B lands should be sold with the solicitors for the parties having joint carriage of sale. If the sale does not proceed, then the court would consider adjourning consideration of making a further property adjustment order for the purpose of facilitating that sale, enabling the applicant to sell the property but giving the net proceeds of sale to the respondent.

6. The orders which the court propose to make are as follows:-

1. An order for judicial separation pursuant to s. 2(1)(f) of the Judicial Separation Act 1989.
2. A property adjustment order transferring the respondent's interests in the family home at M. to the applicant, and an order that the applicant shall remain entitled to the sole beneficial use and occupation of the property exclusively.
3. A property adjustment order transferring the interest of the applicant in C.H. to the respondent and an order that the respondent is entitled to the sole use and occupation of the property.
4. A property adjustment order in respect of the lands comprised in the plots reflecting agreed areas in A, B and C as described at p. 14 of the respondent's valuer's reports dated 14th February, 2014.
5. The property adjustment orders relating to M. and plots A, B and C are subject to the reservation of the land necessary for the rights of way as described above with the consequential property adjustment order in the case of the site at M. from the applicant to the respondent.
6. The respondent make period payments in respect of maintenance of €4,000 per month to the applicant on the basis that the applicant has a separate tax registration and on the basis that same will be paid gross, leaving the respondent with the right to offset the same against his tax bill. I do not propose to make any separate order for maintenance of the children, except on a nominal basis subject to consultation with the parties. The maintenance order proposed is on the basis of the applicant being primary carer.
7. A property adjustment order transferring the respondent's interest in the German investment to the applicant, with a clawback payment of 25% to respondent when it matures in 2018.
8. An order that the maintenance order by this Court shall not be reviewed downwards by reason only of the applicant obtaining employment, unless the gross income of the applicant exceeds €30,000.00 per annum on the basis that the maintenance order ordered by the court will not be sufficient without supplementation to cover the current needs of the applicant and children.
9. An order that the B. lands be sold for the purpose of discharging revenue debt with the respondent entitled to retain the balance of net proceeds, with the solicitors for the parties having carriage of sale and in the event of the said lands not being sold within six months of today's date by reason of the failure or neglect of the respondent, the court adjourns the consideration of a property adjustment order in favour of the applicant to facilitate such sale on the same terms. The charging order for maintenance to be lifted to facilitate the sale.
10. A financial adjustment order to be made in respect of investment linked insurance policy in favour of applicant, with a clawback payment to respondent when it matures in 2018. The respondent to continue payments.
11. All applications for extinguishing succession rights pursuant to s. 14 of the 1995 Act refused and, in particular, the parties should address the court in relation to an order for preservation of contingent pension rights, and the steps to be taken by the respondent to preserve same.
12. An order charging all land remaining in ownership of respondent with maintenance obligations until finalisation of property adjustments orders to applicant.
13. Liberty to applicant to use insurance policy as security for borrowings of up to €100,000.00 to tide her over shortfall of maintenance, and costs of land sale/development pending realisation of sale prices for same.
14. Respondent to continue paying VHI.

7. Subject to any further submissions of counsel, I do not propose to make any order for costs on a party/party basis. I adjourn further consideration of the proceedings pending submissions of counsel in relation to the form of order implementing the foregoing judgment, and in relation to such further ancillary orders as may be necessary to implement same securely in the interests of the parties and their children.