

**THE HIGH COURT**

**[2009 No. 3 M]**

**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**

**BETWEEN**

**E.S.**

**APPLICANT**

**AND**

**D.S.**

**RESPONDENT**

**JUDGMENT of Mr. Justice Michael White delivered on the 7th December, 2012**

1. These proceedings were commenced by Special Summons on the 28th January 2009, and originally heard in the High Court on the 13th, 14th, 15th and 27th April, 2010 by Abbot J. who delivered judgement on the 12th July, 2010. The substantive orders were pronounced on the 3rd November, 2010.

2. The respondent appealed some of the orders to the Supreme Court, which delivered judgement on the 12th January, 2012 and remitted the issues concerning maintenance, mortgage repayment, provision and payment for a motor car to the High Court for final determination.

3. The remitted action was heard by this court on the 6th, 7th and 19th June, 2012 and Judgement reserved.

4. On the 29th June, 2012 Mr. Anthony Donaher, solicitor for the applicant was present in the Bank of Ireland, Smithfield, Dublin 7, when he witnessed the respondent conducting a transaction at the cashier desk. Mr. Donaher became concerned as the respondent had not disclosed any bank account with the Bank of Ireland.

5. A number of applications were made to this court, which revealed that the respondent had withheld material information about his financial affairs from this court when it originally heard the case, from the Supreme Court on appeal and from this court on the rehearing.

6. Because of the failure of the respondent to comply with the various maintenance orders made in the course of these proceedings, the applicant has applied, for orders beyond the parameters of those remitted to the High Court by the Supreme Court Order.

7. The applicant seeks a transfer of the family home in Castleknock, Dublin 15 subject to the mortgage in favour of National Irish Bank Limited.

8. She also seeks the transfer of three rental properties subject to the mortgages thereon at:-

(i) Tallaght, Dublin 24.

(ii) Newmarket Square, Dublin 8.

(iii) Castleknock, Dublin 15.

9. The applicant had also sought to have transferred to her the shares in a company Pr,FI Mn Limited, but is not now proceeding with that application, nor is she seeking an order of attachment directed to that company.

10. In addition the applicant is seeking a maintenance order in her favour and to maintain the existing order for the two children of the marriage.

11. By order of the 22nd August, 2012 this court directed rental payments on a property unit at Ballymount, Dublin 22 in the ownership of the respondent be diverted to the applicant in lieu of maintenance. The court is aware by letter of the 22nd November, 2012 that Danske Bank a mortgagee of the property has appointed Mr. Paul Grimes as a fixed charge receiver over the property. This Court has no longer jurisdiction to make orders in respect of this unit and has directed that the rental should no longer be diverted to the applicant.

12. Various ancillary orders were made as a result of the original High Court order of the 5th November, 2010, which are not to be varied.

**Brief History of the Marriage**

13. The parties married on the 5th May, 1995 and have two children F. born on the 5th February, 1998 aged 14 and S. born on the 17th January, 2004 aged 8.

14. The applicant before and following the marriage was employed as a manager of a fashion retail concern, and the respondent was

involved in the motoring business in which he developed a number of successful businesses.

15. The applicant discontinued her own employment when the eldest child was two but continued to assist the respondent in the conduct of his business affairs.

16. There does not seem to have been any great marital disharmony, but in 2008 the respondent commenced an extra marital relationship and informed the applicant on the 26th September, 2008 that he was leaving the marriage. Since that date the marital relationship, and cordial communication have broken down, and the proceedings commenced on the 28th January 2009, have been difficult and complicated because of the ongoing failure of the respondent to cooperate in full disclosure of his financial affairs.

17. The respondent has behaved very badly and irresponsibly, abandoning his family in a financial morass.

#### **The Original High Court Order 5th November, 2010**

18. The court granted an Order that the respondent pay to the applicant €50,000 gross per annum maintenance and in addition €400 per month maintenance for each child together with a sum subject to a maximum of €2,000 per annum for his daughter's school fees. In addition he had to discharge the first years treatment of their daughter's orthodontic work.

19. The court further ordered that if the respondent failed to provide a vehicle to the applicant he was to discharge a further €500 per month maintenance to the applicant.

20. The family home was to remain in joint names and a sale was directed when the youngest child of the marriage finished education or attaining 23 years and the proceeds to be divided equally. An option to purchase was granted to the applicant for the sum of €150,000 within five years. If the respondent defaulted on maintenance the applicant was permitted to credit the amount due against the sum designated for the option to purchase, and also a further credit of €50,000 being her share of the funds in the joint account of the parties transferred by the respondent to a company under his control.

21. The court further directed that the parties should continue to hold jointly the commercial properties held by them and in the event of sale the net proceeds to be divided equally.

#### **Orders of the Supreme Court**

22. The Supreme Court on the 22nd July, 2011 granted a stay on the maintenance order and substituted in lieu the sum of €2,000 per month pending the determination of the appeal.

23. By order of the 12th January, 2012 the Supreme Court remitted the matter to the High Court for hearing and directed that in the interim the respondent pay the sum of €2,400 per month to the applicant and the sum of €800 per month for the children and a sum up to a maximum of €2,000 in relation to school fees and dental fees. The court also made an Order for costs of €10,000 plus VAT against the respondent/appellant.

24. The respondent did continue to pay the sum of €800 per month but failed to discharge the maintenance payment to the applicant of €2,400. At present he is not paying any of the maintenance payments.

25. When the matter again came before this court for re hearing valuations were agreed on the properties.

- (1) Family home Dublin 15 €632,500.
- (2) Tallaght, Dublin 24 €162,500.
- (3) Newmarket Square, Dublin 8 €121,250.
- (4) Apartment Castleknock, Dublin 15 €218,125.

The three rental properties are in negative equity.

#### **Developments since the Reservation of Judgment on the 19th June, 2012**

26. As previously stated the solicitor for the applicant Anthony Donaher by chance on the 29th June, 2012 at the Bank of Ireland, Smithfield Branch witnessed the respondent withdrawing certain sums of money.

27. Following an order of this court directed to the Bank of Ireland of the 27th July, 2012 to produce any statements held by the respondent, it was discovered that the respondent held an account in the Bank of Ireland, Blanchardstown account number xxxx, which had not been disclosed during the proceedings.

28. On the 29th June, 2012 the respondent obtained a banker's draft in the sum of £14,279.40 sterling having made a cash deposit of €17,150. A draft sum equivalent to the sum of €34,519.39 was withdrawn on the 9th December, 2011. A further draft of €28,140.53 was withdrawn on the 7th March, 2011.

29. A number of orders were made over the vacation pursuant to s. 35 of the Family Law Act 1995, diverting certain rental monies to the applicant's solicitors clients bank account.

30. By further order of this court on the 12th October, 2012, a discovery order was directed towards Pr,Fl.Mn Limited and in an affidavit of discovery. Fineen Kearns a director of the company disclosed that the respondent had been paid the following sums by the company:-

1. 2009 €161,755.61
2. 2010 €85,820
3. 2011 €114,588.30
4. 2012 €74,701.58

31. The extent of these monies paid to the respondent were not disclosed by him in the course of the original High Court proceedings,

the appeal to the Supreme Court and the re hearing by this Court.

32. The respondent has misrepresented sums of money he has been in receipt of over a period of time, and in his affidavit of means has sworn information which was untrue.

33. He is now living in the United States of America and on his past and current behaviour, it is unlikely, he will honour the existing orders of the High Court and Supreme Court or do so in the future.

34. At the conclusion of the hearing in the High Court on the 19th June, 2012 it was agreed that the outstanding arrears and credits due to the applicant totalled €158,694.

### **Legal Principles**

35. The legal issue to be addressed by the court can be posed in the following manner.

36. Can the court vary the original order of Abbot J., having regard to the order of the Supreme Court remitting the issue back to the High Court on maintenance, mortgage repayment, provision and payment for a motor car.

37. The court has been requested to make four separate orders pursuant to s. 9(1)(a) of the Family Law Act 1995.

38. That states:-

(1) On granting a decree of judicial separation, the court, on application to it in that behalf by either of the spouses concerned or by a person on behalf of a dependent member of the family, may, during the lifetime of the other spouse or, as the case may be, the spouse concerned, make a property adjustment order, that is to say, an order providing for one or more of the following matters:

(a) the transfer by either of the spouses to the other spouse, to any dependent member of the family or to any other specified person for the benefit of such a member of specified property, being property to which the first-mentioned spouse is entitled either in possession or reversion;

Pursuant to the provisions of Section 18 (1) (e) of the Act it is open to a court to vary original orders if it considers it proper to do so having regard to any change in the circumstances of the case and to any new evidence, subject to the restrictions as set out in Section 9(2) of the act which states

(2) An order under *paragraph (b), (c) or (d)* may restrict to a specified extent or exclude the application of section 18 in relation to the order.

39. In the case of *C.O'C V D. O'C* [2009] IEHC 248, a judgment of Dunne J. where the court stated at page 18 of the judgement:-

"Despite the fact that I have some doubts about the procedure to be adopted on an application to set aside an agreement or consent order where new events have occurred since the making of the agreement or consent order, I am satisfied that this court has jurisdiction to consider the applications for a further property adjustment order in the context of the events that have occurred. On that basis s. 16(2) of the 1995 Act sets out a number of matters to be taken into consideration in deciding whether to make an order pursuant to section 9(1)(a). It seems to me that the matters set out in s. 16(2) which are of particular relevance for the purpose of this hearing relate to the income, earning capacity, property and other financial resources of the spouses now and in the foreseeable future, the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future and 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. I have also taken into account the income of the spouses and the accommodation needs of the spouses. Having regard to the change of circumstances that has occurred, the applicant wife has now sought an order transferring the family home into her sole name. The respondent sought that the court should make an order directing that the family home be held in the joint names of the spouses. It was also proposed that at the stage that the youngest child had reached the age of 23 that the property should be sold."

40. The complication in this case is the respondent appealed part of the order of Abbot J. ordering spousal maintenance and the Supreme Court by its order the 12th January, 2012 ordered and adjudged:-

(i) That the issues (a) concerning the maintenance including the responsibility for the mortgage repayments and (b) regarding the responsibility of the respondent/appellant for the provision/ payment of a car for the applicant/respondent be remitted for final determination to the High Court.

(ii) That the said order of the High Court be varied only for the purposes of (a) disposing of paragraph 20 of said order and (b) amending paragraph 10 at line 17 to read "she" instead of "he" and the said order of the High Court as so varied do stand affirmed accordingly.

41. It was further ordered that pending the final determination of this issue in the High Court the respondent/appellant do pay to the applicant/respondent the sum of €2,400 per month together with his obligation to comply with the High Court order in the sum of €800 per month and a sum of up to a maximum of €2,000 in relation to school fees and dental fees.

42. While this court is bound by the parameters of the Supreme Court order, it has to take into consideration the failure of this respondent to comply with the order of the Court pending the rehearing. The respondent never complied with the order of the Supreme Court to discharge the sum of €2,400 per month to the applicant. He complied with the Order to pay €800 per month for the two dependant children up to June, 2012. He has also failed to discharge the arrears accruing which as of the 19th June, 2012 were the sum of €158,000.

43. There was an executory element to the rehearing, as by way of motion issued on the 28th February, 2012 originally returnable for the 5th March, 2012 the applicant sought an order pursuant to the provisions of s. 9 of the Family Law Act 1995 and an order pursuant to s. 10 of the Family Law (Maintenance of Spouses & Children) Act 1976 attaching the respondent's earnings from Limited.

44. In support of the motion the applicant swore an affidavit on the 28th February, 2012 setting out the arrears due and further averring that the respondent had emigrated to live in the United States of America.

45. In the circumstances of this case I am satisfied that it is appropriate for this court on rehearing to go beyond the terms upon which the matter was remitted back to the High Court, provided that the court ensures insofar as the circumstances of the case allow, the original intent, balance and symmetry of the orders of the Supreme Court are maintained while at the same time, adopting whatever changes and adjustments and provisions are necessary to ensure fairness and justice.

### **Conclusion**

46. At present the transfer of the three rental properties is not a transfer conferring benefit on the applicant, as the properties are in negative equity, but the applicant has submitted that she may well be able to negotiate with the financial institutions to which the properties are mortgaged, to enable her to get some benefit from those properties.

47. There is a net equity of redemption in the family home when taking the agreed valuation and subtracting the capital sum due on the mortgage.

48. A transfer of the family home to the applicant preserves a home for her and her children. The net equity can go some way to make provision for future maintenance of the family in the likely event of the respondent's continuing failure to comply with the maintenance order.

49. In trying to maintain symmetry, the court will have to adjust the maintenance order downwards.

50. In the unlikely event of the respondent complying with the maintenance, it is open to the respondent at anytime to apply pursuant to the provisions of s. 18 of the Family Law Act 1995 for variation.

51. I am satisfied in the circumstances of this case that this court has jurisdiction to vary the original order of Abbot J. of the 5th November, 2010 in respect of the family home and the three other rental properties, notwithstanding the order of the Supreme Court of the 12th January, 2012.

52. The court has explained to the applicant the consequences of taking a transfer into her own name of the rental properties. The applicant is already a joint owner and therefore has a liability already.

53. It is appropriate in this case to transfer the family home and the three rental properties into the sole name of the applicant, subject to the existing mortgages.

54. There is no reality in the original order of Abbot J. of gross maintenance for the applicant of €50,000 a year and the sum of €800 a month for the children. I will vary the maintenance order to the total sum of €2,400 per month apportioned at €1,600 per month for the applicant and €400 per month for each of the children.