

**THE HIGH COURT
FAMILY COURT**

[2012 No. 32 M]

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

BETWEEN

S.A.

APPLICANT

AND

B.A.

RESPONDENT

JUDGMENT of Mr. Justice Keane delivered on the 16th July 2014

Introduction

1. In these proceedings, commenced by way of special summons issued on the 24th of July 2012, the applicant wife ("the wife") and the respondent husband ("the husband") both seek a decree of judicial separation and each seeks various ancillary reliefs.

Background

2. The parties were married to each other within the State according to the laws of the State on the 4th of May 1979. There are four adult children of the marriage, two of whom are under the age of 23 years and are still receiving full-time third-level education, such that they remain dependent members of the family as that term is defined under s. 2 of the Family Law Act 1995 ("the 1995 Act").

3. During the marriage the parties operated a farm and raised a family together. They are both now approximately 60 years of age.

4. The parties have been living separately and apart since October 2010. While each has given evidence of alleged incidents that would, if accepted, demonstrate unreasonable behaviour on the part of the other, and while one of the two alternative grounds upon which the wife seeks a decree of judicial separation is that the husband has behaved in such a way that the wife cannot reasonably be expected to live with him, I am not satisfied to grant a decree on that basis. I am, however, satisfied that the marriage has broken down to the extent that a normal marital relationship had not existed between the parties for well in excess of one year immediately preceding the date of the wife's application. In those circumstances, I will grant to the parties a decree of judicial separation on the ground set out at s. 2(1)(f) of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act").

Proper Provision

5. Accordingly, the only remaining issue between the parties is that of the appropriate ancillary orders to be made, bearing in mind the obligation imposed on the Court under s. 16 of the 1995 Act to endeavour to ensure that proper provision is made for each spouse concerned and for each of their two dependent children, having regard to all of the circumstances of the case.

6. Under s. 16(2) of the 1995 Act, in deciding on what order to make and in determining the provisions of any such order, without prejudice to the general obligation just described, the Court is required to have regard to a number of identified matters. I now propose to consider each of those matters in turn.

Financial resources

7. The first such matter is *"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."*

8. The parties occupy a fine farm situated on an old landed estate. The farm is in the husband's sole name and has been in his family for several generations. The husband inherited a half share in the property in October 1993 and a further half share when his mother died in January 1999. The Georgian manor house at the heart of the estate fell into ruin many years ago. It is approached by a long avenue that stands behind an impressive entrance. Adjacent to the manor house are a number of handsome cut-stone and rubble-stone outbuildings, a portion of one of which - having been converted to residential use several decades ago - was occupied by the parties from approximately 1993 onwards as their family home. The wife continues to reside in that property with the two dependent children. The remains of an old walled garden stand beside those outbuildings, in the footprint of which has been erected a substantial cattle shed.

9. The husband now resides in an annex to a modern bungalow on a separate site comprising part of the road frontage of the farm property. The bungalow itself is rented out. A small portion of the farmland, comprising either 8.5 or 10 acres, has been effectively severed from the rest by relatively recent road construction.

10. The farm was operated primarily as a dairy farm during the marriage until, in 2004, the husband decided to move into dry stock, an activity which is less labour-intensive, but also less remunerative, than dairy farming.

11. The farm and the properties situated on it have an agreed valuation of €2.25 million. It is further agreed that, were the husband to sell the farm in its entirety, his capital gains tax ("CGT") liability on that figure would be €489,060.

12. There is also a portfolio of shares, some of which are in the joint names of the parties, more of which are in the sole name of the husband. Those shares were valued on behalf of the husband, as of the 7th April 2014, at €126,140.01. The wife has not challenged

that figure. The parties hold monies in various bank accounts, whether jointly or separately, totalling approximately €140,000.

13. As against those principal assets, the husband has debts associated with the operation of the farm amounting to approximately €23,500, and the wife has incurred debts in maintaining the household of approximately €15,000.

14. The husband holds a personal pension that was worth approximately €65,000 when last valued in July 2012.

15. The most recent calculation of the husband's annual income discloses that it amounted to €31,786, comprising €5,000 in rent on the bungalow and €26,786 in profit from the farming enterprise (in significant part derived from the Single Farm Payment to which he is entitled). The wife currently generates a monthly income of €173.35 from the limited part-time work that she is able to engage in.

16. As regards the present and likely future income earning capacity of each of the parties, I am satisfied that, for reasons set out in greater detail below, it is extremely limited.

Financial needs, obligations and responsibilities

17. The second specific factor I must consider is "*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 share an obligation and responsibility towards their two remaining dependent children. The parties have agreed that a sum of €100,000 from the pool of matrimonial assets should be set aside, or "ring-fenced", to provide for the completion of their children's education.

18. The wife acknowledges that the husband currently pays maintenance to her amounting to €1,083.35 *per* month and that he discharges outgoings associated with the family home in the amount of a further €1,430 *per* month.

19. As regards the financial needs of each of the parties, the wife avers to monthly outgoings (separate from, and in addition to, those discharged by the husband) of €3,398.16 *per* month. The husband avers that he has monthly outgoings of €3,945.60, of which €1,385.60 represents his personal outgoings and €2,560 represents the maintenance that he pays and the family home expenses that he discharges for the benefit of his wife and dependent children.

Standard of living, age of spouses, duration of marriage

20. The third factor to be considered is "*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 agree that they have both enjoyed a reasonable, though never extravagant, standard of living throughout the course of their marriage. However, it is rarely possible after the breakdown of a marriage for either spouse to maintain the standard of living enjoyed by the parties during the currency of their relationship. In that connection the Court is mindful that in *R.H. v. N.H.* [1986] I.L.R.M. 353, Finlay C.J observed:

"The court...must first have regard to the somewhat pathetic fact that upon the separation of a husband and wife and, particularly a husband and wife with children, it is inevitable that all the parties will suffer a significant diminution in the overall standard of living. The necessity for two separate residences to be maintained and two separate households to be provided for makes this an inescapable conclusion."

21. The fourth factor is "*the age of each of the spouses and the length of time during which the spouses lived together.*" In this instance, both parties are approximately sixty years of age and their marriage lasted for just over thirty years.

Disability

22. The fifth factor that I must consider is "*any physical or mental disability of either of the spouses*". That factor is particularly significant in the circumstances of the present case.

23. The husband's general practitioner gave evidence at trial and was cross-examined upon it. He expressed the view that the husband is quite frail from a musculoskeletal point of view; that his right hip requires replacement; that the discs in his lower spine are worn; that he has a lot of "wear and tear" arthritis; that he presents with recurrent pain crises due to lower back spasms; that he wears a back support and uses an orthopaedic mattress; and that he mobilises with a stick. The husband is on daily anti-inflammatory medication to control pain and, at times, requires stronger muscle relaxants for that purpose. The husband's general practitioner summed up his opinion by expressing the view that the husband's spine is that of a man in his eighties.

24. The husband began working on the farm at a very young age and left school to begin working full-time on it when he was fifteen years old. He has known no other life or occupation. It is common case that the husband suffered a very serious spinal fracture due to a farm accident in June 2013, which necessitated immobilisation with a "halo brace" for some time and a lengthy convalescence thereafter. Despite their prior separation and greatly to her credit, the wife cared for the husband in the family home for a significant part of that period.

25. The husband's general practitioner has concluded that the husband has no future prospect of being physically involved in active farming.

26. On behalf of the wife, a number of photographs, taken in recent times and depicting the husband carrying buckets filled with logs and engaging in other physical chores, were put to the husband's general practitioner. It was suggested to the witness that the husband remains capable of active farm work. In response, the witness reiterated his view that the husband should not be doing manual work. It was also put to the husband in cross-examination, and accepted by him, that he had very recently been involved in moving the tyres that are used as weights on the polythene cover of a silage clamp on the farm and that he has been engaged in other physical activity around the farm. The husband's evidence was that he does so through necessity and is conscious that it imperils his health.

27. I accept that, through a combination of perceived necessity and personal obduracy, the husband continues to engage in various physical activities around the farm. However, I also accept the evidence of the husband's general practitioner to the effect that it is foolhardy for him to do so. In short, I am satisfied that the husband suffers from a disability as just described that severely limits his capacity to continue earning his livelihood through any farming activity.

28. The wife also suffers from a number of physical ailments. It is accepted that, as her general practitioner has confirmed in correspondence, she has had problems with her knee joints for many years, and that as far back as 2008 she was exhibiting degenerative changes and signs of early arthritis in that regard. In December 2010, she suffered a bad fracture of her right ankle and has had on-going problems arising from that injury. In consequence, her ability to engage in any physical work that involves prolonged periods of standing on her feet is greatly diminished. I am therefore satisfied that the future earning capacity of the wife is also quite

limited.

Contributions

29. The sixth factor is *"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."*

30. The parties were already married with three children when, in or about 1993, the husband inherited the family farm from his father, subject to his mother's interest, and they moved into the present family home on the farm. The wife had worked in various clerical and sales jobs until shortly after the parties' marriage and thereafter combined the traditional role of homemaker with that of looking after farm students and providing the husband with any necessary assistance on the farm. Indeed, the wife gave evidence that she was an employee of the farm in the 1980s and early 1990s and that she paid tax in respect of that employment (or that it was paid for her by her father-in-law as her employer) for some or all of that time. The work done by the wife, as and when required, included piking silage; feeding calves; stacking bales; suckling animals; and lambing ewes and rolling wool when the farm included a sheep enterprise until approximately 1990. There was some dispute between the parties concerning the precise extent of the involvement of the wife in milking the dairy herd between 1999 and the end of the dairy enterprise in 2004/2005, during which period the husband had leased, and was farming, separate and additional land. I am satisfied that the wife made a full contribution to looking after the home and caring for the family, together with a very significant contribution to the income and earning capacity of the family during the marriage both directly and by allowing the husband to devote himself full-time to his duties on the farm.

31. In this context, I am particularly conscious of the following statement of Murray J. in the case of *D.T. v C.T.* [2002] 3 I.R. 334, (at 407):

"In my view, in ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the courts should, in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner."

Effect on earning capacity

32. The seventh factor the court must consider is *"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."*

33. I have already addressed many of the issues relevant to an assessment of this factor in considering the two preceding ones. I accept that, to some extent at least, the marital responsibilities assumed by the wife have diminished her earning capacity. As I have already stated, I am also satisfied that the future earning capacity of each of the parties is, in any event, very significantly impaired by reason of the physical disabilities from which each of them now suffers.

Statutory entitlements and misconduct

34. The eighth factor is *"any income or benefits to which either of the spouses is entitled by or under statute."* That does not arise in the particular circumstances of the present case. Nor does the ninth factor, which is *"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."* That is because I have concluded that no misconduct has been made out against either party that is sufficiently gross or obvious to engage this provision.

Accommodation needs

35. The tenth factor is *"the accommodation needs of either of the spouses."* I have already described the present accommodation arrangements of the parties. The manner in which their needs in that regard will have to be met in future is discussed further below.

Benefits forfeited

36. The eleventh factor that I must consider is *"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."* I have already referred to the modest private pension fund held by the husband.

Third party rights

37. The twelfth and final factor to which the Court is obliged to have regard under s. 16(2) of the 1995 Act is *"the rights of any person other than the spouses but including a person to whom either spouse is remarried."* There was no suggestion on the evidence before me that the rights of any other person are affected by any of the matters at issue between the parties in this case, other than those of the parties' two dependent children, for whom proper provision will, of course, have to be made. In that regard, as has already been noted supra, the parties have agreed that a sum of €100,000 from the pool of matrimonial assets should be set aside, or "ring-fenced", to provide for the completion of their children's education.

Arguments

38. I found both parties to be sincere and truthful witnesses. The conflict in this case appears to me to relate to their honestly held but opposing views on what constitutes proper provision for each of them in the circumstances in which they now find themselves.

39. The husband's position is simply stated. It is that the farm should be sold in its entirety to maximise the value of that asset and, thus, to enable proper provision to be made for each of the parties in the most substantial and effective way possible by a division of the proceeds of sale between them. The husband feels that he is unable to continue earning an income through physical labour and, in particular, through manual labour on the farm or any part of it. He gave evidence that he moved into the annex attached to the bungalow as a temporary expedient after the marriage between the parties broke down. He has no desire to continue residing there or to retain ownership of either the farm or the separate bungalow property. He gave evidence that the bungalow, which was built in the 1980s, requires €20,000 to be spent on it to bring it up to scratch. The husband wishes to take his share of the pool of matrimonial assets and use it to acquire a separate home for himself, investing the balance in one or two investment properties or in a timber enterprise that he has discussed with a friend of his but which is not one that he proposes to actively work in. He intends to live on the income generated by any such investment. It will be, in effect, his retirement fund or pension.

40. The wife's proposal is that she should be enabled to assume and retain sole ownership of the family home, the farm buildings that surround it (both modern and old), and the avenue and parkland associated with the old manor house adjacent to it, on a plot of land amounting to some 19 acres in total. Under that proposal, the husband would retain the separate bungalow and its annex (although

he has no desire to do so), together with so much of the remaining farmlands, funds and investments as are left after the court has made further proper provision for the wife out of those assets, in conjunction with whatever continuing maintenance payments by the husband to the wife are considered appropriate by the court.

41. Both parties acknowledge that, in 2004, they sought and obtained the opinion of an experienced auctioneer on the feasibility of disposing of almost precisely the portion of the farm that the wife now seeks to retain, on the basis that it might be considered suitable – and, therefore, attractive – for development. However, that proposal arose in the context of the very different economic climate then prevailing. The husband gave evidence that the auctioneer concerned ultimately advised against a sale of those lands and buildings on the ground that to do so would “cut the heart out of the farm.”

42. The parties have joined issue on which of their two competing current proposals would best maximise the farm’s value (comprising, as the farm does, by far the largest part of the pool of matrimonial assets available to the parties), and have also joined issue on the feasibility or viability of the anticipated arrangements which underpin the wife’s proposal.

43. Before considering the expert evidence adduced by both sides on these issues, it might perhaps be helpful to summarise the arrangements that the wife hopes to put in place, were the court to accept her proposal.

44. The wife would like to establish an “art and healing” centre on the part of the farm property that she proposes to retain. The wife studied for a year in art-college, gave art lessons until 2008, and held an exhibition of her work in the library in a nearby town in 2013. She sold two paintings at that exhibition for €200 and €150 respectively. A number of years ago she converted part of one of the outbuildings into an art studio or exhibition space with the husband’s assistance. A single art exhibition was held there in 2008. The wife has done a course in the spiritual practice of Reiki or “hands-on healing”, which is a form of alternative medicine. She hopes to do a course in reflexology in a nearby town and, perhaps, one in aromatherapy. The wife believes that these interests can be intertwined in a viable form of commercial enterprise based on the farm. In addition, the wife hopes that some of the more modern farm buildings could be rented out as warehouse space for shops or businesses in the nearby town and that other farm buildings and the parkland that she proposes to retain could be let out for agricultural purposes and that she could, in consequence, retain a portion of the Single Farm Payment. The remaining unused outbuildings would simply be closed up and secured.

45. On the issue of the effect that the retention by the wife of the farm buildings and 19 acres is likely to have on the value of the remaining lands, the evidence was broadly as follows. The expert agronomist called by the wife expressed the view that the retention by the wife of that property would not adversely affect the price achievable for the remaining lands. Indeed, he suggested, by reference to what he contended were comparator properties, that bare land can achieve a greater price *per acre* than the price *per acre* of farm properties comprising a large listed building with surrounding lands.

46. The expert agricultural economist and valuer who gave evidence on behalf of the husband took a very different view. In his opinion, not to offer the farm to the market as a single unit would be a significant mistake, as such a course simply would not maximise the sale value of the land. He did not accept that the inclusion of the house and buildings could, or would, diminish the overall value of the lands. In his view, good farming infrastructure (as he believes is present on the farm at issue) can only enhance the value of the surrounding farmlands. The property as an undivided whole with the benefit of the existing farm buildings could be brought back to be a very good dairy farm. The potential to convert the outbuildings (and perhaps even reinstate the manor house) might attract a premium from persons considering the use of the lands as an equine stud farm. The division of the farm as proposed would result in the creation of two non-viable units, one without any suitable buildings and the other with an excessive range of farm buildings relative to its limited size.

47. On the issue of the viability of the wife’s proposals for the portion of the farm property she wishes to retain, there was a further significant conflict between the parties (and between the agricultural consultants called as experts by each of them). Issues of capital cost; of occupier’s and public liability insurance; of projected overheads and income; of public demand for the activities concerned; and of prevailing market conditions in the agricultural and commercial sector, as they were likely to affect the wife’s proposed scheme, were all canvassed with a number of witnesses at some length. In addition, the husband called an expert engineer who had conducted a structural survey of the converted farm house, and who had concluded that, while overall it is in relatively good structural condition, it is poorly insulated; inefficiently heated; requires some structural repair work; has a roof that will require constant monitoring and replacement of loose slates; suffers from ingress of water; and has a problem with damp. The husband’s evidence was that the family home and the various outbuildings adjacent to it had only remained in serviceable condition in the past through constant maintenance on his part, which efforts have now ceased. The wife very fairly conceded in evidence that the husband is good with his hands and had maintained a significant workshop on the property for farm maintenance purposes. In my view, the perennial conservation and maintenance issues associated with old buildings are, in any event, self-evident.

48. The wife’s proposals also have inevitable consequences for the remaining portion of the farmlands that she is not seeking to retain. A new road would have to be constructed to permit access to those lands. A new well would have to be bored to provide those lands with a water supply. Depending on the use to which those remaining lands might be put, new farm buildings might have to be erected.

49. In the course of the submissions made on the wife’s behalf, it was skilfully argued that she has shown herself to be a practical and pragmatic person over the course of the parties’ marriage and that this should lend credibility to the proposals she now makes concerning the family farm. However, I find myself unable to overlook the fact the wife has prepared no business plan in respect of any aspect of her complex and multi-faceted proposal. There are no projections. There is no market research. The letting of agricultural land and buildings; the leasing of warehouse space; the demand for art studio space, art classes, Reiki healing and reflexology; and the market for art work locally – all of these things remain imponderables – subject only to certain optimistic predictions and hopeful comparisons ventured by the wife or by others on the wife’s behalf. The wife has, at best, a very limited track record in the various commercial areas that are the subject of her proposed venture.

50. Moreover, I have come to the conclusion that the evidence adduced on behalf of the husband is to be preferred to that adduced on behalf of the wife in respect of the question of the effect that the retention by the wife of the relevant property is likely to have on the value of the remaining lands. Accordingly, I cannot be satisfied that directing the course the wife proposes would not lead to a significant diminution in the value of the overall pool of matrimonial assets out of which the court is obligated to make proper provision for each of the parties.

Conclusion

51. In the circumstances described above, it seems to me that this is a case in which the Court should strive to achieve some degree of finality and certainty for the parties, at least as a legitimate aspiration, by ordering a lump sum payment to be made by the husband to the wife, in the hope that justice and fairness between them may be achieved in that way.

52. I propose to make an order directing the sale of the family home, under s. 10(1)(a)(ii) of the 1995 Act, together with an order directing the sale of the entire farm property (to include the bungalow and annex), under s. 15(1) of that Act. Thereafter, I will order the husband to make a lump sum payment to the wife of €800,000, pursuant to the terms of s. 8(1)(c)(i) of the 1995 Act. I will further order the husband to make an additional lump sum payment of €100,000 to the wife for the benefit of the two dependent children of the parties who remain in education, under s. 8(1)(c)(ii) of the 1995 Act. The husband will then be permitted to retain the balance of the proceeds of the sale, subject to the discharge by him of all necessary fees and outlay associated with the sale; and of the farm debts; and of the reasonable household debts incurred by the wife in connection with the family home.

53. Each of the parties will be responsible for securing his or her own accommodation from the funds available to each on foot of the orders that I propose to make.

54. Given the conclusion set out earlier in this judgment that neither party to these proceedings is likely to have any appreciable income earning capacity in the foreseeable future, it appears to me that it would not be appropriate to make any maintenance order in all of the circumstances of this case.

55. For the avoidance of doubt, subject to the orders I have indicated above, I propose ultimately to make any further orders necessary to permit the husband to retain the various shares available to the parties, whether previously held in his own or in the parties' joint names, together with the monies held on deposit at bank, save those held in any account in the wife's sole name. I do not propose to make any pension adjustment order in respect of the husband's private pension fund. I will make any orders necessary to permit the husband to retain the note and coin collection passed down to him by his father, and the collection of vintage farm machinery and traditional farm tools that he has accumulated.

56. I will hear the parties on the issue of whether it is appropriate or desirable to make cross-orders pursuant to s. 14 and s. 15A(10) of the 1995 Act.

34. The Court will hear any submissions the parties may wish to make on the form of Order appropriate to reflect the findings of the Court set out above.