THE HIGH COURT

FAMILY LAW

[2023] IEHC 748

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996 (AS AMENDED)

2023 65 CAF & 2023 66 CAF

Between:

R.

APPELLANT

-AND-

M.

RESPONDENT

JUDGMENT of Mr. Justice Jordan delivered on the 20th. December, 2023.

1. This is an appeal from a decision of the Circuit Court which was given on 06 October 2023.

2. The applicant/appellant has been diagnosed with a serious illness, and the prognosis for the future is bleak.

3. The appellant sought and received an early return date of 04 October 2023 for the hearing of a notice of motion seeking to have the terms of settlement reached between herself and the respondent ruled by the Circuit Court.

4. This motion was ultimately heard by the Circuit Court judge on 06 October 2023 and the Circuit Court judge refused to rule the settlement and to make the consent orders.

5. The appellant wishes to bring these proceedings to an early conclusion with a view to putting her affairs in order and to take steps to safeguard the future of the dependent children of the marriage.

6. The applicant and the respondent were married in 2004 in Ireland. They commenced living separate and apart in July 2017 although continuing to live within the same dwelling house – the "family home".

7. There are two children of the marriage – both now teenagers and both dependent within the meaning of the Family Law (Divorce) Act 1996. Both of the children are healthy and happy and neither of them has any extra needs.

8. The family law proceedings were issued in July 2022 under the Family Law (Divorce) Act 1996, as amended.

9. The applicant and the respondent reached a compromise of all matters at issue between them both and this compromise is recorded in an agreement signed by them both on 19 July 2023.

10. Both the applicant and the respondent agree that the agreement is such as to make proper provision in all of the circumstances, as required by the Act.

11. On the evidence, the Court is satisfied that;

(a) at the date of the institution of the proceedings, the spouses had lived apart from one another for a period of, or periods amounting to, at least two years during the previous three years;

(b) there is no reasonable prospect of a reconciliation between the spouses, and

(c) such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses and the dependent children.

12. Although living in the same house, the Court is satisfied that the applicant and the respondent ought to be considered as living apart from one another since July 2017

because the Court is satisfied that the applicant and the respondent have not lived together as a couple in an intimate and committed relationship since July 2017.

13. The terms of settlement dated 19 July 2023 provide that the parties agree by consent to compromise the proceedings on the basis that the following decrees and orders are granted to them (with the balance of terms being received and made a rule of court) subject to the ruling of the Court; -

(1) A decree of divorce pursuant to the provisions of s.5(1) of the Family Law (Divorce) Act, 1996.

(2) An order pursuant to s.13(a) of the Act directing the respondent to pay the weekly sum of €100 per child to the applicant's bank account for the benefit of the dependent children until the children are no longer dependent within the meaning of the Act. The respondent further agrees to pay 50% of the net uninsured necessary and agreed medical, dental, optical, back to school, and educational expenses for the children within 14 days of provision of receipts/estimates for such expenses.

(3) An order pursuant to s.13(6)(a) of the Act attaching the earnings of the respondent to secure such payments under the aforementioned order made pursuant to s.13(1) of the Act, at para. 2.

(4) An order pursuant to the provisions of s.14(1)(a) of the Act transferring the ownership of the former family home ……. from the within parties as joint tenants to the within parties as tenants in common, the shares or parts to be apportioned with 6/10 the applicant and 4/10 to the respondent.

(5) An order pursuant to s.14(5) of the Act authorising the County Registrar ……. to execute deeds and/or instruments and take all such steps as are necessary to give effect to the property transfer orders of this honourable Court

within 14 days of being requested to do so in the event that the applicant or respondent refuses and/or neglects to comply with the terms of the said order.

(6) An order pursuant to s.14(6) of the Act directing that the costs of effecting the orders pursuant to s.14(1)(a) be borne by the applicant herein.

(7) An order pursuant to the provisions of s.15(1)(a) of the Act directing the sale of the former family home……by 30 June 2029, which said date coincides with the expected completion of third level education by the parties' youngest child. Should both of the children not undertake and/or complete third level education, the parties agree that the former family home shall be sold as soon as reasonably possible unless and except the parties agree otherwise.

(8) It is agreed between the parties that both parties will continue to live separate and apart in the aforementioned former family home pending its sale. The respondent will install within the garden of the former family home a garden room/shed for the purposes of engaging in playing his various musical instruments. The respondent will retain full ownership of the said garden room/shed. The piano shall remain in the former family home.

(9) During this period prior to the sale of the former family home, the applicant will discharge the mortgage sum due in respect of account number…….. and the respondent will discharge the mortgage sum due in respect of account number …… both mortgages which are held in the joint names of the parties…... The applicant will further discharge the household utility bills during this period.

(10) An order pursuant to s.15(1)(f) of the Act and s.11 of the Guardianship of Infants Act 1964, as amended, providing that the parties will have joint custody of the dependent child A.

(11) Nominal pension adjustment orders pursuant to the provisions of s.17(2) and s.17(3) of the Act in favour of the applicant in respect of the respondent's pension together with such order as the court shall deem appropriate restricting or excluding the application of s.22 in relation to the orders.

(12) Nominal pension adjustment orders pursuant to the provisions of s.17(2) and s.17(3) of the Family Law (Divorce) Act, 1996 as amended in favour of the respondent in respect of the applicant's pension together with such further orders as the court shall deem appropriate restricting or excluding the application of s.22 in relation to the orders.

(13) An order pursuant to the provisions of s.18(10) of the Act, excluding the respondent's right to apply for relief pursuant to s.18 of the Act.

(14) An order pursuant to the provisions of s.18(10) of the Act, excluding the applicant's right to apply for relief pursuant to s.18 of the Act.

(15) The parties agree that the terms of settlement herein are in full and final settlement of these proceedings, and that they make provision for the parties and the dependent children of the marriage and have been negotiated and agreed with the benefit of fully independent legal advice.

(16) The applicant agrees to withdraw her application for a safety order against the respondent which said application remains pending before Dublin District Court.

(17) No order as to costs.

(18) Liberty to apply.

(19) Liberty to re-enter.

14. On the face of it, there is nothing remarkable about the terms of settlement except perhaps the provision at para. 8 which provides for and envisages the applicant

and the respondent living in the same dwelling house after the decree of divorce is granted with provision at para. 7 for the sale of the house by 30 June 2029 or earlier if the two children do not undertake and/or complete third level education (in which case the parties agree that the house will be sold as soon as reasonably possible unless and except they agree otherwise). There is also the provision at para. 4 which provides for the severance of the joint tenancy and the registration of the applicant as the owner of six-tenths and the respondent as owner as four-tenths. It itself the latter provision is not remarkable as it is simply a financial adjustment and agreement between both sides in the context of a divorce.

15. The statutory proofs – if they can be so described – are satisfied insofar as Article 41.3.2 of the Constitution of Ireland and s.5 of the Family Law (Divorce) Act 1996 (as amended by the Family Law Act 2019) are concerned.

16. Both the Constitution and the Act (as amended) afford to the Court a discretion on whether or not to grant a decree of divorce if satisfied in relation to the statutory proofs. Article 41.3.2 states that;

> "*A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –*
>
> *(i) there is no reasonable prospect of a reconciliation between the spouses,*
>
> *(ii) such provision as a Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and*
>
> *(iii) any further conditions prescribed by law are complied with."*

17. Section 5 of the Act (as amended) is cited above and provides that on being satisfied in relation to the statutory proofs – "*the court may, in exercise of the jurisdiction conferred by Article 41.3.2 of the Constitution, grant a decree of divorce in respect of the marriage concerned."*

18. In addition to the affidavit evidence the Court did hear oral evidence from the applicant and from the respondent.

19. The Court is satisfied that the settlement and motivation of the parties is *bona fide*.

20. One can envisage that a discussion might ensue in some instances as to the nature and extent of the discretion afforded to the Court if it is satisfied in relation to the statutory proofs. An argument might be advanced that the word *may* in Article 41.3.2 and in s.5 of the Act ought to be construed as *shall* in the event that the Court is satisfied of the matters recited at s.5(1) (a), (b) and (c).

21. Indeed it is difficult to envisage many circumstances in which a Court could refuse to grant a decree of divorce if the requirements of s.5(1)(a), (b) and (c) are satisfied. Put another way, would a Court be entitled, in such circumstances, to force two spouses to remain married.

22. The Court does not propose to decide the issue of whether or not "*may*" in Article 41.3.2 and in s.5 of the Act ought to be construed or interpreted as "*shall*". The Court does not propose to decide this issue because it is possible that circumstances would arise in a case such that a Court would consider that it had an obligation to exercise its discretion and refuse to grant the decree of divorce sought even if the evidence did appear to satisfy the statutory requirements. It could perhaps happen that issues of lack of capacity might arise - or an intent to conspire to perpetrate a fraud on the Court or on the Revenue Commissioners.

23. The Court proposes to approach the issue on the basis that a discretion does exist – and that the question is whether or not any good reason exists to justify the discretion being exercised in such manner as would result in the decree of divorce being refused.

24. The following observations are pertinent; -

(a) In the ordinary course of events one would expect a couple who divorce to live separate and apart after the Decree. One might say that Clause 8 of the settlement is an afront to the nature and purpose of a decree of divorce.

(b) While section 15 (2)(a) of the Act refers to it not being possible for the spouses concerned to reside together where a decree of divorce is granted this is not to be interpreted as a prohibition. It is rather an articulation of what is the normal position following divorce and in the context of setting out necessary considerations for the Court when exercising its discretion in respect of miscellaneous ancillary orders - including those affecting the family home.

(c) On this point, if a couple can be considered as living apart from one another while living in the same dwelling provided that they are not living together as a couple in an intimate and committed relationship (as provided for in section 5.1A) – and in the context of the requirement in s.5(1)(a) – it is difficult to see any principled objection to a similar arrangement continuing by agreement after a decree of divorce is granted.

(c) In the instant case there can be no issue but that the spouses have not lived together as a couple in an intimate and committed relationship for several years. The Court accepts that they commenced living separate and apart around July 2017 and the proceedings were issued in July of 2022. Where the parties have continued to live under the same roof the court must obviously look at their mental attitude to the marriage for a period of, or periods amounting to, at least

two years during the previous three years. In this case, the evidence is that the applicant has her bedroom upstairs and the respondent has his bedroom downstairs. The evidence is that they stay in their bedrooms mostly except when they have to eat – and they do that separately. There has been no intimate or committed relationship for years and the parties do not spend time together when in the family home. They did go on holidays in 2018 because the children wanted to go. Subsequently the applicant has taken the children separately and the respondent has taken the children separately on holidays. They do not go on family holidays. The evidence is that there is no prospect of a reconciliation – "*no, never*" according to the applicant. Furthermore, the respondent apparently spends a lot of time away – four days in the week he stays with friends – on long weekends or whatever. The evidence is that the applicant and the respondent live their own lives – rarely talk – and effectively lead entirely separate lives although living and sleeping under the one roof. The applicant and the respondent avoid using the kitchen at the same time. The respondent uses the downstairs bathroom. The applicant eats in her bedroom and the respondent eats in his bedroom although one of them might eat in the kitchen with the children if the other is not present. The family members look after their own laundry. There cannot be any doubt but that these living arrangements are difficult and stressful for the applicant and the respondent. Nor can there be any doubt but that these living arrangements are the result, in part at least, of the housing crisis and difficulties in either party securing suitable alternative accommodation at an affordable cost.

(d) In *Courtney v Courtney* [1923] 2 IR 31 it was decided that a couple could enter into an agreement to live apart prior to initiating proceedings for a divorce

a mensa et thoro. If the policy of the law allows spouses to be free to contract that they will not cohabit, how then could it be that former spouses (after a decree of divorce – or in anticipation of a decree of divorce as here) could not contract that they will cohabit (although in a non-marital arrangement).

(e) In *MMcA v XMcA* [2000] 1 IR 457 McCracken J. provides an analysis of the "*living apart*" requirement of s.5(1) of the Family Law (Divorce) Act 1996. In that case, in the lead up to the separation of the spouses involved, it was demonstrated that:

> *"The parties slept in separate bedrooms and never resumed sexual relations. They did on several occasions go away on holidays with the children, but again slept in separate bedrooms while on holiday. When they were in the house together, they appear to have had what might be called a civilised relationship, in that they were polite to each other and if both were present at mealtimes would take their meals together. When he was at home, the respondent would tend to go to bed, or at least to his room, early and watch television and he had a separate telephone line installed into his room."*

25. McCracken J. went on to observe;

> *"It must be born in mind that the right to a divorce in this country is a constitutional right arising under Article 41.3.2 of the Constitution, and that the 1996 Act sets out the circumstances under which such a constitutional right may be exercised. In construing the Act, the court must have regard to the context in which words are used, namely the termination of a matrimonial relationship. Marriage is not primarily concerned with where the spouses live or whether they live under the*

> *same roof, and indeed there can be a number of circumstances in which the matrimonial relationship continues even though the parties are not living under the same roof as, for example, where one party is in hospital or an institution of some kind, or is obliged to spend a great deal of time away from home in the course of his or her employment. Such separations do not necessarily constitute the persons as living apart from one another. Clearly there must be something more than mere physical separation and the mental or intellectual attitude of the parties is also of considerable relevance. I do not think one can look solely either at where the parties physically reside, or at their mental or intellectual attitude to the marriage. Both of these elements must be considered, and in conjunction with each other."*

26. In that case, McCracken J. was satisfied that in the same way two people can live apart and still maintain a loving and committed relationship, two people could also live together without being in a marital relationship – it depends on the intentions of the parties.

27. In terms of public policy considerations, it is of relevance that agreement/consensus between spouses in the event of marital breakdown is to be encouraged in order to avoid the adversarial nature of Court proceedings which frequently compounds and increases conflict. The impact of divorce and marital breakdown on children is at least significantly influenced by the level of conflict that exists between both parents before, during and following the breakdown of the parental relationship – quite apart from the actual breakdown itself. In these circumstances, public policy should encourage realistic negotiation and settlement with a view to reducing or avoiding the detrimental impact of the breakdown on the welfare of the

children involved. There is much academic research and writing in relation to the "instability hypothesis." It has been suggested that *"Disruption – and perhaps repeated disruption – of a functioning family structure is more distressing for adolescents than the nature of any particular family structure and reduces their ability to develop normally*"– Kim Bastaits, Inge Pasteels, and Dimitri Mortelmans 'How the Post Divorce Paternal and Maternal Family Trajectories Relate to Adolescents' Subjective Wellbeing?' (2018) 64 Journal of Adolescence 98-108.

28. This academic debate falls outside the parameters of this judgment. However, an observation worth making is that the efforts of the applicant and the respondent can and probably will preserve a level of stability for their children until their children have finished their education. Fashioning the settlement as they did is understandable and worth supporting from a public policy point of view.

29. It is also worth observing that ; -

(a) There is nothing in the legislation to support the view that parties seeking a Decree of Divorce must establish that they will live in separate dwellings afterwards.

(b) The "*spousal autonomy*" described by Hogan J. in *Gorry v Minister for Justice and Equality* [2017] IECA 282 as a "*core constitutional value*" protected by Article 41.1.2 surely indicates that a failure to respect the settlement arrived at by the parties and in particular to respect their right to determine their own living arrangements post-divorce , if they do qualify for a Divorce as here by satisfying the requirements of Section 5 (1)(a), (b) and (c) , would be an affront to their constitutional protections and rights.

(c) The settlement here affords a solution that will minimize stress and upheaval in a family where the mother has a serious illness.

30. The Court is satisfied that the compromise between the parties will help provide stability for the children. The agreement in this regard is an important aspect of the provision which the parties have agreed on insofar as the dependent children of the family are concerned. Consistency and familiarity are very important for the wellbeing of adolescents – and especially so with children of divorced or separated parents.

31. Ultimately, the Court is satisfied that it is correct and proper to grant the decree of divorce sought and to make the ancillary orders in the terms of the compromise entered into by the parties. The actual Pension Adjustment Orders can be made when they are ready and Liberty to Apply exists in that regard.