

THE HIGH COURT
South Western Circuit
County of Kerry

Record Number: 2009 No. 108 Div.

Between:

BC

Applicant/Appellant

And

MC

Respondent

Judgment of Mr Justice Michael Peart delivered on the 13th day of August 2012:

1. This is an appeal from the order made at Tralee Circuit Court by His Honour Judge James O'Donohoe on the 18th day of January 2012 when he granted a decree of divorce in respect of the marriage contracted between the parties on the 7th October 1982. a number of ancillary orders were made, including that the applicant husband pay to the respondent a lump sum maintenance amount of €50,000 within three months, and in default that *"the weekly maintenance to be increased by €200 per week"*. Previously, under a Decree of Judicial Separation made on the 1st May 1997, the husband was ordered to pay a sum of €200.00 per week, so I presume that by the order appealed herein the default provision means that a sum of €400 per week for maintenance was ordered to be paid in lieu of €200 per week if the sum of €50,000 was not paid within three months, and that if it was paid, maintenance would remain at the sum of €200 per week.

2. The order under appeal went on to provide that either party could in the future apply further to the District Court in relation to maintenance as may be necessary. The order under appeal ordered also that "there shall be a nominal Pension Adjustment Order".

3. In addition, it was ordered pursuant to Section 18(10) of the Family Law (Divorce) Act, 1996 ("the Act of 1996") that neither spouse shall on the death of the other be entitled to apply for an order pursuant to Section 18 (1) of that Act.

4. I should add that pursuant to the Judicial Separation Order made in 1997, the husband applicant transferred his interest in the family home to the respondent, free of any mortgage, and discharged the amount outstanding on the said mortgage, and in addition was ordered to pay a sum of €4000 for repairs to the family home.

5. The parties' two children are now aged twenty nine and twenty six respectively. The husband is now aged 55, and the wife is 47.

6. When the parties separated there was no agreement in relation to the terms of a judicial separation. A court order was obtained in that regard, so it cannot be said that in 1997 there was an agreement between the parties which was in full and final settlement, meaning that on an application for divorce the arrangements which were put in place by way of judicial separation ought not to be revisited. I notice also that the sum for maintenance ordered was in respect of the applicant only, and none has been provided for in respect of the two children. I have heard in evidence that the wife looked after the needs of these two children herself with the help of the childrens' allowance.

7. Having said that, this is not a case in which either party has significant assets. The husband by dint of his own labours, and in the past, assisted by his wife, built up what is by now a successful and profitable caravan park business on land which was owned by his father and which is in his own name. His wife was never named on the title to those lands. But his own hard work and effort has been largely responsible for its success, and there is no reason to suppose that it will not remain successful and profitable, despite the current economic difficulties being endured by all. He is a hard-working man and he clearly takes a pride in the quality of the caravan park which he runs. He is comfortably off relatively speaking, but does not live lavishly. He is able to afford occasional trips each year to the USA to visit a friend.

8. The respondent wife has worked as a carer with the HSE, but with cutbacks her hours have been significantly reduced to, according to her evidence, about 5 hours per week. In former years she was able to work for about 22 hours per week. She sees no prospect of her hours improving in the current climate of cutbacks. In all probability she is correct to think that. She strikes me as a responsible and hard-working lady, who would work more hours if they were available to her. She would even be prepared to do bar work, which she has done in the past, but she has been unable to access any in recent times. Prior to the break-up of the marriage, she worked in a shop on the caravan park.

9. There has been evidence from the husband that he is able to access a bank loan in the sum of €50,000. There are accumulated profits in the accounts of the company which runs the caravan park, but he would be unable to draw down a lump sum from the company profits in order to provide a lump sum to the wife, without incurring a substantial tax liability, hence his exploration of a loan for that purpose. But having said that, he does not consider that such a lump sum payment to his wife is justified. Neither does he consider that an increase in maintenance is justified since the respondent's needs, if anything, have reduced since 1997 since she no longer has to provide for two children. He considers that the figure which he pays his wife currently for maintenance is fair and reasonable.

10. The wife on the other hand considers that in view of her reduced working hours her position is disimproved, and in circumstances where it is accepted that the applicant can afford to increase maintenance he should be required to do so. It is been the evidence that maintenance in the sum of €250 per week, costs the applicant €148 net of tax; that a sum of €300 would cost him €177 net of tax; while a figure of €350 would cost him €207 net of tax. The applicant has not disputed those calculations.

11. A great concern to the wife is her security in the event of the applicant's death. In effect, in view of the 'blocking order' made under Section 18 (1) of the Act of 1996, she sees a situation where upon his death she will have no maintenance, and no right to any share in his estate in order to provide her with any financial security. She is hopeful that upon the death of the applicant their son would take over the business, but cannot know that with any certainty. But even if he were to take over the business, she could not necessarily expect that he would look after her from the profits of the company. Similarly, she fears a situation whereby even now, or in the years ahead, the applicant might simply close down the business or sell it, leaving him in a position of not having an income out of which to pay her any sum for maintenance. These matters give her cause for concern into the future.

12. The wife seeks an increase in maintenance to the sum of €350 per week gross, together with a lump sum now in the sum of €50,000, as well as some sort of partial blocking order under section 18 of the Act of 1996, whereby she would, upon the death of the applicant, still be entitled to make a claim against his estate in order to receive or secure her maintenance. As I understand it, that is what she means by a partial blocking order. She also wants to be able to register a caution in the Land Registry so that in the event of the applicant selling his land upon which the caravan park operates she would be put on notice of such a sale, so that she could make such application to court as may be possible in order to seek some security in relation to future maintenance.

13. It has been urged upon the Court that as far as an increase in maintenance is concerned, the Court should not simply consider whether or not the husband can afford to pay an increased sum, but should consider rather whether it is shown by the wife that her needs have changed for the worse since the judicial separation was ordered in 1997. In that regard, it is urged that if anything her needs have reduced given that she no longer has to provide for the two children. As against that she has stated that she did so from the childrens' allowance, and that of course is a sum of money which she no longer receives.

14. I believe that the respondent's need for maintenance has increased in the sense that her own earnings have decreased through no fault of her own. Her own personal needs will not themselves have increased since 1997. But her earnings have reduced in recent times. I have heard her evidence and I am satisfied that this is not a lady who does not wish to work or would prefer not to if that were possible. I believe that she is genuine when she says that she would do all the work she could get, and I am satisfied that she has made efforts to get work but without success. In circumstances where the husband can, I am satisfied, without any great difficulty provide an increase in maintenance in such circumstances, he should be required to do so. I believe that a reasonable sum to be paid is in the sum of €300, which having made allowance for tax thereon, will cost the applicant the sum of €177 per week. The order will provide that this sum will be increased or decreased annually in accordance with the Consumer Price Index. That is not unreasonable in my view, given the current profitability of the applicant's business. If there is some alteration in his fortunes which may warrant a decrease in that sum in the future, or indeed a decrease in the respondent's need to rely upon his maintenance, further applications may be made in the District Court to adjust the sum in either direction.

15. Unlike the learned Circuit Court judge, I prefer to consider the question of a lump sum not in substitution for an increase in maintenance where the husband is currently well able to pay a reasonable sum in that regard, but rather in the context of future security.

16. It is reasonable for the wife to have fears around what is to happen to her in the event of the applicant's death, whenever that should occur. The current maintenance being ordered will necessarily cease upon his death for obvious reasons. If it were possible now to have some lump sum provision of sufficient size to enable the wife to have some security or means of maintenance after his death, the Court might readily make an order in that regard. If the husband's employment carried with it a pension upon retirement or upon death, or if any other pension plan existed, the Court would be in a position to make some form of Pension Adjustment Order in order to secure a part of it for the benefit of the wife. But there is none. As things stand, the wife would have no maintenance once the applicant has died.

17. Under the Circuit Court order, if the applicant chose to make a payment of €50,000 within three months, that would provide a modicum of comfort for the wife in as much as she would have a lump sum which hopefully she could save and maybe invest wisely so that come the rainy day when her maintenance ceased upon the death or retirement of her husband, she would have something to fall back upon. Though it has to be said that given that the payment of €50,000 was under the Circuit Court order under appeal only in substitution for an increased maintenance payment, it is likely that the wife would probably have eaten into that nest-egg from time to time to make ends meet, depending on what unforeseen expenses she might over the years incur. It is not such a large sum as to be able to substitute for or provide any maintenance after the applicant's death. The reality also is that she will inevitably, I suspect, be required to discharge some legal costs to her legal team, which will deplete this fund too in all likelihood.

18. It is impossible to predict the future either in one's personal life or in business. It is reasonable in my view that that uncertainty should be of concern to the wife, and that in so far as it is reasonable and fair to do so, she should be given some comfort by way of lump sum provided to her by the applicant now, in addition to the increased sum for maintenance. In my view the applicant should be ordered to make a lump sum payment to the respondent. Given the increase in maintenance which I am directing and what I am proposing later in relation to Section 18(10) of the Act of 1996, I consider that a lump sum payment in the sum of €35,000 not later than three months from today's date is reasonable and should be paid by the applicant to the respondent, and I will give the respondent liberty to re-enter so that in the event that this payment is not made within that period the Court may consider such variation to this order as may be deemed fair and reasonable in that event.

19. It is also fair and reasonable that the respondent should be notified by the applicant of his intention to retire from the business and/or dispose of same and/or the lands by sale, lease or otherwise, such notification to be in writing and to be given not less than one month prior to the execution of any contract in writing, or the completion of any oral agreement for such sale. The Court's order in this regard is to be registered as a caution/inhibition on the folio on which the caravan parklands are registered, so that any purchaser is aware of the applicant's obligation to notify the respondent of any proposed sale of the business and/or the lands. This obligation to notify the respondent of any such proposed sale is not intended by me to create any charge or interest in the lands in favour of the respondent, or to entitle her as such to any share in the business or the lands. It is simply intended to enable her to be aware of any action intended to be taken by the applicant in relation to the land or the business, so that, depending on all the circumstances prevailing at the time of any such intention, she may seek and be provided with any relevant legal advice and be able to take such steps as may be considered reasonably necessary to protect her interests into the future as far as her future maintenance is concerned.

20. It seems to me that proper provision in the context of Section 20 of the Act of 1996 includes proper provision for the period after the husband has died, in so far as circumstances then permit, and not simply during his lifetime. Where a mechanism exists for post-death maintenance to be secured in some reasonable way, or at least protected so that the surviving spouse may take some steps to address those changed circumstances and its effect on her maintenance, it seems appropriate that the Court should not make a blocking order against the wife under Section 18 (10) of the Act of 1996 unless the Court can be satisfied that proper provision has been made for her maintenance after her husband's death. It seems reasonable in these circumstances that I should refuse to make

an order under Section 18 (10) of the Act of 1996. That will enable the respondent in this case to avail of Section 18 (1) of the Act of 1996, should her circumstances justify it, and make an application for provision of maintenance in some form from the applicant's estate, whatever it may comprise at that point.

21. It will of course be a matter for any judge hearing any such application to consider the history of the case, and take into account all relevant circumstances, which would include but would not be not limited to the payment now by the applicant of €35,000 to the respondent, and her needs and own assets at the time of any such application. Without leaving open to the respondent the possibility of making an application under Section 18 (1) of the Act of 1996, it seems to me that the applicant is unable at the present time to make proper provision for any period after his death for which the respondent will need to be maintained.

22. Given the existence of his profitable business now, and the fact that he will give written notice of any intention by him of disposing of the business or the land, and given the availability of Section 18 (1) of the Act of 1996 to the applicant upon the respondent's death, the interests of the respondent are fairly and reasonably addressed so that the Court can grant an order for divorce.

23. In making these orders I have taken into account the case-law to which I was referred, in particular the judgment of Denham C.J. in YG v. NG, unreported, Supreme Court, 19th October 2011. I have also considered the matters referred to in Section 20 (2) of the act of 1996.

24. I will therefore affirm the order of the Circuit Court in relation to the decree of divorce, but will vary the ancillary orders contained therein by substituting the following:

1. The applicant shall pay to the respondent a lump sum of €35,000 not later than 8th November 2012. Liberty to apply in the event of non payment of this sum so that the Court may consider what, if any further order ought to be made.
2. The applicant shall pay to the respondent maintenance in the gross sum of €300 per week commencing on the 1st day of September 2012, such sum to be increased or decreased on each anniversary of that date in accordance with the Consumer Price Index, such payments to be made by Standing Order to the respondent's account.
3. Either party shall be at liberty to apply further to the Circuit Court to vary the maintenance order.
4. There be a nominal pension order.
5. That the applicant shall give to the respondent not less than one month's notice, in writing, of any intention by him to retire from the business, and/or dispose of the land on which the caravan park now operates, and/or the business currently trading as Sandy Bay Caravan Park in any manner whatsoever, whether by sale, lease or otherwise. The respondent to be at liberty to register this part of the Court's order as an inhibition/caution on the folio for the lands in the Land Registry.
6. No order as to costs.