

**THE HIGH COURT
FAMILY LAW**

2004 No. 88M

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989, AND IN THE MATTER OF THE FAMILY LAW
ACT 1995, AND IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996**

BETWEEN

M.F.

APPLICANT

**AND
A.F.**

RESPONDENT

Judgment of Mr. Justice Garrett Sheehan delivered on the 23rd day of May, 2008

1. Introduction

1.1 The applicant husband instituted proceedings for judicial separation and various ancillary reliefs in December, 2004.

1.2 As the statutory requirements for the granting of a decree of judicial separation have been met and there are no dependant children, this Court's function is to ensure proper provision for the applicant and the respondent.

1.3 In the course of this judgment I will refer to the parties as the husband and the wife.

2. Background

2.1 The husband and the wife were married in 1976 in Belgium.

2.2 There is one child of the marriage, a daughter who is now 26 years of age and financially independent.

2.3 The husband is a chef and the wife is a care worker.

2.4 At the time of the breakdown of the marriage, in or about the autumn of 2004, the husband was in a stressful but well paid job from which he subsequently resigned.

2.5. There were difficulties between the parties prior to their separation in September, 2004, and the wife's refusal to vacate the family home which she and her husband had occupied as caretakers as part of her husband's employment package contributed to his having to resign from his job.

2.6 In July, 2004, the husband obtained a protection order against the wife as a result of the wife's violence towards him. In 2005, the wife vacated the home they had been caretaking following court proceedings taken against her by her husband's former employer.

2.7 The wife concedes that she was very angry prior to the parties separating, but contends that this was prompted by her husband's infidelity and a sense that she was not being treated fairly.

2.8. Following his departure from the family home the husband paid the wife €1,400 per month for three months in respect of maintenance for herself and his daughter who was then a university student.

3. The Assets

3.1 The principle asset in this case is a parcel of land jointly owned by the parties. In October 2007, this land was valued at €1m. In 2006, there had been an offer of €1.4m but this offer was refused.

3.2 This land was purchased for IR£65,000 circa 1992. The purchase was funded by IR£20,000 from the proceeds of sale of a family home and a bank loan of IR£45,000. This bank loan was repaid out of the husband's salary over a four to five year period.

3.3 The husband owns a two bedroom apartment which is presently valued at €280,000 and is subject to a mortgage of €240,000.

3.4 When the parties separated there was a share portfolio valued at €150,000 which was controlled by the husband. He has since used this fund to support business ventures and the purchase of an apartment. The husband's most recent business venture was unsuccessful and he has secured a judgment in excess of €200,000 against a former business partner. He is confident that he will recover this sum but his solicitor is not so confident. There are bank debts due of circa €100,000.

3.5. The wife retained valuable household items and a collection of porcelain statues. The husband suggested a total value of all the items retained by her were worth up to €100,000. The wife valued them at less than €30,000. Two small shareholdings also remain.

4. Section 16(2)(a) to (l) inclusive - Family Law Act 1995

4.1 I now propose to review the evidence in light of the above sections of the Family Law Act 1995:-

"(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,"

At the time of the hearing the husband was not working and was due to go into hospital for a hernia operation. In the past he has commanded an annual income in excess of €120,000 as a chef and has also worked as a food consultant earning approximately €5,000 per month. He is presently seeking work and it is reasonable to assume that he will command a salary or achieve an income in excess of €50,000 per annum.

The wife is presently earning €34,000 as a care worker and owns a car valued at €18,000. The husband also has a car of similar value. The property and other financial resources of the parties have been referred to under the heading of "Assets".

"(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),”

According to her affidavit of means the wife has an annual personal requirement of approximately €27,000 which includes a sum for rent of approximately €15,000.

The husband has monthly outgoings of just over €5,000 per month. His mortgage repayments come to €1,766 per month and there is figure of €1,606 being a monthly repayment due on foot of a term loan from the Bank of Ireland which was at circa €103,000 in October, 2007. This latter borrowing relates to a 2007 business failure in respect of which the husband has successfully sued his former business partner.

There was no evidence that either party has financial responsibilities to anyone else save in respect of legal costs.

“(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 family enjoyed a comfortable standard of living when the parties lived together. Since they separated each of them has had a reduced standard of living.

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

The husband is 54 and the wife is 57. They lived together for 28 years and have been married for almost 32 years.

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

The wife is in good health. The husband has suffered ill health in recent years and underwent minor heart surgery. He is also due to undergo a double hernia operation in the near future and likely to be out of work for some weeks following this operation.

“(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 husband has been the main financial contributor to the financial resources and property of the family. However, he has been enabled to do this as a result of his wife being the primary carer of their only child. The wife has also been working for at least the last ten years of the time the parties lived together and she ran her own business for a substantial portion of that time. On one occasion she gave her husband the sum of €10,000 to enable him to purchase shares.

“(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,”

As the primary carer of their daughter the wife forewent some opportunity for remunerative activity. I also note that the husband participated in his daughter's care and upbringing.

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

There was no evidence that this section is relevant.

“(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 wife makes two complaints under this heading. In the first instance she complains about the financial conduct of her husband. At the time when they started to live apart, one of the family assets comprised a share portfolio valued at €150,000. This fund has now been dissipated. The husband used this shareholding primarily to fund what turned out to be a disastrous business venture. I accept the husband's evidence when he says that he invested in this business in good faith believing it to be an opportunity that would have benefited himself and his family. While it turned out to be a foolish investment it was not a reckless one and I hold that it would be unjust to hold this failure against the husband.

The wife alleged that her husband was unfaithful and in particular, attributed the break up of her marriage to her husband's relationship with another woman and suggested that it would be unjust for the court to disregard this. The husband countered this with allegations relating to violence by his wife. Neither side pursued these allegations vigorously. While this Court cannot condone the wife's violence, I hold that it was provoked in this case by the husband's behaviour. It is not irrelevant that the husband stated “My marriage had ended a long time before my wife knew it, I think”. In the course of his judgment in *D.T v. C.T.* [2002] 3 I.R. 334 delivered in the Supreme Court on 14th October, 2002, Keane C.J. stated at p. 370 that :-

“I would agree with the view expressed in *Wachtel v. Wachtel* [1973] Fam. 72, that the court should not reduce the financial provision which it would otherwise make to one of the parties save in cases where the misconduct has been, as the Master of the Rolls put it, “obvious and gross”. The same approach should logically be adopted to a proposed increase in the level of financial support because of the suggested misconduct.”

Insofar as the evidence in this case establishes misconduct by the husband I hold that it does not amount to

"obvious and gross misconduct". Accordingly it would not be unjust to disregard it. I make a similar finding in relation to the wife's conduct.

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

The husband lives in his own two bedroom apartment which has already been referred to. The wife is presently living in rented accommodation with her daughter who is engaged to be married.

The wife recently placed a €5,000 booking deposit on a property she proposes to purchase for €345,000 in an area not far from where her daughter proposes to reside with her future husband. The wife's ability to purchase the said property is obviously dependent on the sale of the jointly owned parcel of land.

"(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 wife has a small pension fund presently valued circa €10,000. The husband has a pension fund valued at circa €150,000.

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

There is no evidence to suggest this section is relevant.

5. Submissions

5.1 Counsel for the applicant husband, Ms. Butler, submitted that proper provision for the wife would be met by allowing her to receive 50% of the net proceeds of the sale of the parcel of land and 50% of the net proceeds of the husband's High Court action.

5.2 Ms. White, on behalf of the respondent wife, initially sought the total net proceeds of the parcel of land together with maintenance and 50% of the husband's pension. However, in the course of her evidence the wife stated that she wanted to be treated fairly and stated that she was not seeking 100% of the net proceeds of the sale of land.

6. Decision

6.1 Taking all the circumstances of this case into account the interests of justice require at the very least that the wife be enabled to purchase a property. Unlike her husband she has been living in rented property since she vacated the family home that they had been caretaking. While I hold that he was prepared to assist her in the purchase of a house shortly after they separated, their relationship had broken down to such an extent that they were unable to communicate and were equally unable to agree a strategy at that time with regard to the sale of the land. I also hold the husband's capacity to earn more than his wife is a factor to be taken into account. Accordingly, the net proceeds of the sale of the land should be divided in such a way that the wife's share of these proceeds exceeds that of her husband's share by €115,000. I also direct that the wife retain her own pension and that the husband's pension be divided equally between the parties. With regard to the property she retained after the separation I direct that she retain that. In the matter of the Vodafone and TSB shares, I direct that they be divided equally between the parties. The husband of course, will retain the full benefit of whatever he will hopefully receive from the court action and retain ownership of the apartment he purchased.

6.2 I will discuss with counsel the form the court order should take.