

THE HIGH COURT

FAMILY LAW

[2012 No. CAF 31]

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

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

L.D.

APPELLANT

AND

M.A.

RESPONDENT

JUDGMENT of White Michael J. delivered on the 23rd November, 2012

1. This is an appeal from an order of the circuit court of the 16th March, 2012. A decree of judicial separation was granted together with significant ancillary orders.
2. On application for a stay to this court on the 30th of March 2012, and the 26th and 27th of April 2012, a stay was granted on the order of the circuit court on certain conditions. The appellant was represented by solicitors and counsel in the circuit court but dismissed his legal advisors on the last day of the hearing and has been unrepresented in the appeal to the high court. The respondent has been represented by solicitor and counsel.
3. The appeal was heard by this court on the 2nd, 3rd and 4th of July and 2nd, 3rd and 4th of October and judgement was reserved.
4. The appellant and respondent are medical practitioners. The parties first commenced a relationship in 1993. There was a break in the relationship for some time. They married on the 15th July, 2000.
5. They have three children, C born on the 23rd December, 2001 aged 10, D born on the 4th January, 2004 aged 8, and C born on the 21st April, 2008 aged 4.
6. The appellant works from Monday to Thursday in Belfast and resides in the family home at weekends. The respondent rents a residence in the city, having moved out of the family home as a result of the stay order. The custody and access order of the circuit court is being operated at present pending the appeal.
7. There are issues about other properties, an apartment in Dublin 8 held jointly, a property in Dublin 8, held in the respondent's name upon which there is a mortgage in the joint names of the parties. And a property in London which is in the name of the respondent, but whose ownership is claimed by her father T M, and a share of which is claimed by the appellant.
8. There is property in Northern Ireland held by the appellant and his sister jointly. This property is made up of sites which originally had planning permission, which has now expired. The respondent claims a share of this property.
9. There are also lands and a derelict cottage in Co. Galway. The appellant inherited these lands from a former patient to whom he was very kind. The respondent has requested that this property be included in the marital assets of the parties in equal shares.
10. The respondent has accepted the appellant's right to joint ownership of the Dublin 8 property.
11. I will deal in detail with each property subsequently.
12. There is a fundamental conflict between the parties as to why their marriage broke down and their respective conduct.
13. At the outset of the appeal, counsel for the respondent stated her client did not wish to make an issue out of conduct and was prepared to deal with the appeal on proper provision on financial matters and custody and access. This was not acceptable to the appellant who wished to refer to the conduct of the respondent.
14. The appellant contends that the marriage was happy up to July 2009 when the respondent engaged in a relationship with a colleague working with her in Toronto. The respondent has told the court there were many difficulties in the marriage prior to that. She found the appellant to be a controlling person, who was constantly critical of her. She stated that in Canada he was visited by his brother, who remonstrated with the appellant about his behaviour towards the respondent and in December 2007 she had telephoned her sister and told her "she did not know how much more she could take in the marriage". The respondent stated that the relationship with her work colleague did not come out of the blue and that it was not all happy families prior to this.
15. On the issue of conduct I found the respondent to be a truthful and impressive witness. I found the appellant lacking in insight, about his own behaviour and contribution to the breakdown of the marriage.
16. The major cause of the breakdown of the marriage was the appellant's behaviour and not the respondent's. He was and is a self

referenced individual who has little insight into how his personality affected the marriage. I do not excuse the respondent's behaviour it was a serious breach of trust, but was a reaction to the appellant's undermining of her by constant criticism, and failure to see the consequences of his own behaviour.

17. The court is not taking conduct into account, and intends as far as possible to separate the financial and social affairs of the parties, so that they can proceed to get on with their lives, with hopefully a respite from the serious conflict that has arisen between them

THE CHILDREN

18. The children of the marriage are doing well, despite the difficulties that have arisen. They are all generally speaking healthy. C has had some medical difficulties in his young life, and the respondent is concerned about the possibility of him developing epilepsy.

19. The appellant has been aggrieved by the respondent's application for sole custody in the pleadings, and has stated that the respondent has tried to exclude him from participation in the ongoing life of the children.

20. The learned circuit court judge made an order granting joint custody of the children, with substantial custody and access to the appellant, so insofar as the circuit court order is concerned it is not the case that the appellant has been excluded from participation in the lives of the children.

21. This court regards both the appellant and respondent as loving parents to their children.

22. The court stresses the importance of the welfare of the children in considering how custody and access is arranged.

23. Joint custody and equal parental rights does not mean that the time with each individual parent is divided equally. Decisions should be made in the best interests of the children to provide a stable and secure environment for them and because a court may order a particular regime which does not afford equal time this does not undermine the concept of joint custody or parental equality. It is essential and important for children that they have a constructive relationship with both separated parents.

24. During holiday periods, the children's time should be divided equally between the appellant and the respondent.

25. Because the appellant is free on a Friday on the weekends he has custody, it is appropriate that he takes the children from Thursday evening rather than Friday, and can arrange to collect them after C's football training.

26. The court draws a differentiation between the custody of the children during the week and at weekends. The respondent is employed in a very busy and responsible job. The welfare of all three children dictates that one of the weekends out of four should be a weekend where the respondent has sole custody without any transfer of the children.

27. The normal schedule should be one of four weeks:

Week 1: the appellant to have the children from Thursday evening after C's football training to Sunday evening at 7 p.m.

Week 2: the appellant to have the children from Thursday evening after C's football training to Saturday at 2 p.m.

Week 3: the appellant to have the children from Thursday evening after C's football training to Sunday at 7 p.m.

Week 4: the respondent to have weekend custody of the children.

28. The appellant will have the children for the February midterm break and the respondent for the October midterm break.

29. Christmas, Easter and summer holidays will be divided equally with summer holidays working on a two week alternate arrangement.

30. The parties will alternate the Christmas festival with one party having the children on the 24th December to 1 p.m. on the 25th December and the other party having the children from the 25th December at 1 p.m. to 7.30 p.m. on the 26th December, 2012 these periods to alternate year on year.

31. The court will approve the schedule of custody and access for all of 2013, as there have been difficulties with interchange of dates between the parties.

32. The normal schedule of access is suspended during holiday periods.

33. The children are permitted to go abroad on holidays with either parent during their period of custody provided it is to a country which is a party to the Hague convention, otherwise the consent of the other parent is required.

MAINTENANCE

34. The appellant is seeking an order pursuant to section 8 (1) (a)(i) and 8(1)(c)(i) of the family law act 1995 seeking financial provision by way of periodic maintenance and lump sum from the respondent. The appellant relies on section 16 (2) (g) of the act although as a personal litigant he has not framed it in those terms. That subsection states:

"(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".

35. The appellant states that for the sake of the family he had to return to Ireland from Canada to support the respondent in her career and to take a post in Belfast away from the family on return to Dublin in 2009, and accordingly his earning capacity has been reduced and his expenses have increased due to the fact that he has to rent accommodation in Belfast and return to Dublin to see the children.

36. Both parties have a complicated work history.

37. In order to become a consultant medical practitioner, an individual is required to undergo an extensive training course, which

involves frequent changes of employment, working in different hospitals and different locations, and this was no different for these parties. In 2005 both parties decided that it was in their career interests to pursue fellowships in Canada. Prior to moving to Canada they purchased a family home in joint names in Dublin for the sum of €760,000. The respondent's evidence was that the appellant was insistent on proceeding with this purchase despite her concerns.

38. It was anticipated that this would be the family home on their return from Canada.

39. The parties commenced their fellowships in Toronto Canada from January 2006, and July 2006 respectively. The parties returned to Ireland in the autumn of 2009.

40. I am satisfied from the evidence that both parties intended to return to Ireland. The appellant enjoyed the lifestyle in Canada but the objective evidence is that he did not have a permanent offer of employment in Canada. The respondent had received a firm offer of a consultant post in Dublin and had been offered a full time consultant post in Toronto, but there was never any question of her taking up this post and the appellant did not encourage her to do this.

41. On return to Dublin in the autumn of 2009 the appellant had a number of options. He could have accepted a locum post in Dublin with a view to getting a permanent post or commence private practice in Dublin. He was offered employment in Belfast and in London and decided to take up the offer of a consultant's post in Belfast. I do not accept the appellant's evidence that he relinquished or lost opportunities of remunerative activity in order to look after the home or care for the family. I accept the evidence of the respondent that she was the primary carer of the children, and did most of the work and facilitated the appellant in his work in Belfast, by looking after the children when he was away in Belfast during the week and carrying out most of the household tasks. She was financially supportive of the appellant, generous to a fault, as is apparent from the schedule prepared by her of her contribution towards mortgage repayments, and very trusting of the appellant's operation of the family finances.

42. The appellant is in well paid remunerative employment, he is appointed as a permanent consultant to an important post in Belfast. His application for payment of maintenance from the respondent is without merit.

MAINTENANCE FOR THE CHILDREN

43. The maintenance for the children at present is bound up with other financial matters to be dealt with.

44. Because I am going to direct the respondent to continue to discharge the mortgage on the family home, there should be no maintenance payment by the appellant until the 1st August, 2013 when he should commence paying half the following expenses for the children:

- (a) education fees;
- (b) agreed extra curricular activities;
- (c) medical expenses including doctor's fees, and prescriptions.
- (d) dental expenses;
- (e) school uniforms, including school shoes;
- (f) school books;
- (g) school trips;
- (h) health insurance;
- (i) general insurance;
- (j) counselling if any; and
- (k) an amount for clothing including leisure shoes.

45. These sums are to be discharged by the respondent having received half the expenses from the appellant and if the sums are not agreed the court will apportion the appropriate amounts. It would be appropriate for the parties to try and estimate this amount, to enable the appellant to assess if he can purchase the family home.

46. The general costs of food, housing, rent and child minding should be borne by each party individually when they have the children.

THE PROPERTIES

London Property

47. This property was purchased in London in 2000 when the respondent had moved there to follow her career. She was followed shortly thereafter by the appellant who also worked in London.

48. The purchase price and all the costs associated with same were provided by the respondent's father T M, who gave evidence to the court.

49. The evidence of both the respondent and her father was that it was always understood that this was Mr. M's property. While the property was placed in the respondent's name, she states that she always held this property for her father and is not entitled to it. The appellant in his evidence indicated that there were discussions between himself and the respondent in respect of the purchase of a joint property in London, I accept that these discussions did take place but am satisfied the appellant did not view the property purchased, was not involved in its purchase, did not provide any of the funds for the purchase, and derived substantial benefit himself financially when T M agreed that the rental on the property, could be retained by the parties. At the time this property was purchased the parties were not married to each other.

50. T M was an impressive witness. In addition to his generosity with the rent from the London property, he provided his daughter with a loan of £180,000 punts plus the stamp duty when the respondent was purchasing the Dublin 8 property.

51. Mr. M was careful in his evidence not to criticise the appellant or to involve himself in the marital dispute between the parties, and the court found him to be a truthful witness. This court has no doubt that the property in London was held on a resulting trust for T M and will grant a declaration that both the appellant and the respondent have no interest in the property but that the property is owned by T M.

THE OTHER PROPERTIES

52. The major problem facing the parties is the debt in respect of the properties either held jointly or in their individual names.

53. The fair approach in dealing with these properties, is to treat all of them as in equal ownership of each party, with both having equal responsibility for the debt.

54. The appellant is entitled to a half interest in the Dublin 8 property, the respondent is entitled to a half interest in the property in the Galway and a quarter interest in the Northern Ireland property. The parties hold the family home and apartment in equal shares as joint tenants.

55. In the interest of both parties and to facilitate the appellant acquiring the family home, the court wishes to approach the property adjustment orders and disposal of these properties in two stages.

56. It is in the interest of both parties that their debts are substantially reduced and that their financial affairs are disentangled.

57. The court will direct the sale the Dublin 8 property and the apartment and the lands and derelict cottage in Co. Galway without delay.

58. The Co. Galway property is to be sold and the net proceeds applied to reduce the joint debt of the parties in the following priority.

1. Dublin 8 property.
2. Dublin 8 apartment.
3. Family home.

59. The net purchase price of the Dublin 8 property is to be applied to reduce the mortgage with the outstanding mortgage debt being divided equally between the parties. The net proceeds of the apartment will be applied to the mortgage with the outstanding mortgage debt divided equally between the parties.

60. The court values the site in Northern Ireland, in its present condition and status without planning permission, at £25,000 sterling and directs that the appellant should pay forthwith to the respondent £6,250 sterling and the respondent is to apply this sum to reduce her share of the overall mortgage debt.

61. The court will make declarations pursuant to section 36(2) of the family law act 1995 that the respondent is entitled absolutely to hold the balance in AIB account number xxxx and AIB sole trader account number xxxx.

62. The court grants an order pursuant to section 36 (2) that the appellant is entitled to hold absolutely the proceeds of the Barclays UK account no xxxx with the exception of the £6,250 sterling already ordered.

63. In respect of the outstanding facility account Ulster Bank account number xxxx the court directs that the mortgage payments on the Dublin 8 property less the rental, and the balance of the mortgage and management charges on the apartment less the rental, be paid from that account until sale and the net proceeds of that account be applied to reduce the joint mortgage debt of the parties.

64. The court will grant an option to the appellant to purchase the family home, at market value at the date of sale, to be credited against the mortgage outstanding. The option is subject to the sale of the other properties. The balance of the debt is to be divided equally between the parties. This transaction is to be completed not later than the 1st December, 2013. The court directs that negotiations are to commence immediately with the Bank of Ireland in respect of the mortgage and detailed proposals should be put to the court by the appellant on the 12th April, 2013 on his option to purchase. If there are any difficulties at that date the court will if necessary join the Bank of Ireland in the proceedings before the court. If the option cannot be exercised, the court will direct a sale of the property, with the net debt divided equally between the parties. If a market valuation cannot be agreed between the parties, this court will assess the market value.

65. The court does not intend to make any pension adjustment order and will direct that the sum insured in the life policy be reduced to the sum of €200,000 on each life and that the premiums on the policy shall be borne equally by the parties.

66. This court will retain seisin of the matter until the orders for sale are completed.

67. For the sake of efficiency the respondent shall have carriage of sale and appoint the auctioneers for the Dublin 8 property and the apartment and the appellant appoint the solicitors and auctioneers for the sale of the property in Co. Galway. Time is of the essence in respect of these sales, and the court will put the matter back for mention to ensure that auctioneers and solicitors have been appointed for the sale of these properties, so that the sales can take place without delay.

68. In the meantime the appellant should continue to discharge the mortgage both capital and interest on the family home.

69. The court will agree the commencement date of the new schedule of access and will give the parties an opportunity to finalise by agreement the schedule for 2013 and in the absence of agreement will finalise the 2013 schedule of custody and access for the children.

70. A general practitioner should be designated by agreement and also a consultant to monitor the ongoing health of C. In default of agreement by the parties, the court will nominate the G.P. and the consultant.

71. The court will permit variation from the "in camera rule" so the order can be produced to any financial institution or financial or legal advisor, to enable the properties to be sold and the mortgage debt reduced.