

THE HIGH COURT
FAMILY COURT

[2012 No. 49 M]

BETWEEN**J.K****APPLICANT****AND****R.K.****RESPONDENT****JUDGMENT of Mr. Justice Keane delivered on the 8th July 2014****Introduction**

1. In these proceedings, commenced by way of special summons on the 26th of November 2012, the applicant wife ("the wife") seeks a decree of judicial separation, together with various ancillary reliefs. In a replying affidavit sworn on the 5th of April 2013, the respondent husband ("the husband") seeks the same decree and a number of ancillary reliefs.

Background

2. The parties were married to each other in 1996 in another EU member state, of which the wife is a national. Both are now in their mid-forties. There are no children of the marriage.

3. The husband works as a highly placed executive in a large corporation. The wife, who has a degree in communication, stopped working in the corporate world some time after the parties' marriage. Since then, she has obtained several qualifications in creative and therapeutic disciplines, and has utilised that knowledge in various part-time jobs and enterprises. She is currently resident in another EU member state where she is embarked on a two-year degree course in a socio-economic discipline.

4. The parties acknowledge that their marriage ended in July 2011, at the husband's instigation. From the evidence before me, I am satisfied that a normal marital relationship has not existed between the spouses for at least one year immediately preceding the date of the application and that the marriage has irreparably broken down. I am also satisfied that both the solicitor for the applicant and the solicitor for the respondent have complied with their obligations under ss. 5 and 6 of the Judicial Separation and Family Law Reform Act 1989, as amended ("the 1989 Act"). I will, therefore, grant a decree of judicial separation in respect of the parties on the ground referred to in s. 2(1)(f) of 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 Family Law Act 1995 ("the 1995 Act") to endeavour to ensure that proper provision is made for each spouse concerned 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."* It is one of the central factors in this case.

8. The husband, who has recently been appointed CEO of the company for which he works, receives a very substantial salary and has a significant performance based bonus entitlement. He is likely to retain a similar or greater earning capacity in the foreseeable future.

9. The wife is currently pursuing a course of study prior to which she was unemployed for some time. It is the wife's case that, in facilitating the husband's career, her own career prospects suffered, as demonstrated by the fact that she has not had full time employment at any time during the marriage, with the result that her employment prospects are substantially curtailed and she has accrued no pension fund. The wife also asserts that she has a debilitating medical condition, referred to in more detail below, which further limits her future employment prospects.

10. The parties own two properties, one in Ireland and one in the wife's home country. Both are held free from encumbrance and the parties agree that, by coincidence, each is currently valued at approximately €275,000. The parties have further agreed that, subject to the order of the court, the husband should transfer his interest in the foreign property to the wife and the wife should effect a similar transfer to the husband of her interest in the Irish property. The husband has agreed to pay the conveyancing fees of the transfer to the wife of his interest in the foreign property, such liability to be capped in the sum of €15,000.

11. The parties have further agreed that, subject to the order of the court, the aggregate of the monies, shares and investments held by them jointly or severally should be divided equally between them (presumably, net of any tax and disposal costs). In his most recent affidavit of means, sworn on the 7th March 2014, the husband acknowledges various shareholdings amounting in value to approximately €188,000, and a number of bank accounts holding funds totalling approximately €231,000. In her affidavit of means, sworn on the 19th March 2014, the wife avers to funds at bank of approximately €6,000. As against these assets, the husband has a car loan of approximately €30,000 and the wife has an outstanding loan of approximately €17,000 in respect of improvements to the foreign property.

12. The husband has two pension funds. One relates to various former employments of the husband and has a current value of approximately €305,000. The wife contends that this is a consolidated fund and represents, in some part at least, pension contributions that she made while employed until shortly after the parties' marriage. The husband disputes this claim. In either event, since the relevant employment has ceased for both parties, contributions to that fund ceased some time ago. The husband's second pension fund is associated with his current employment and he is still contributing to it. It had an approximate value four months ago of €900,000.

13. The wife submits that she is entitled to 50% of the accumulated retirement benefit in each of the two funds to the date of the decree of judicial separation. The husband contends that the necessary order(s) should be made to adjust in favour of the wife the entirety of the first fund and such portion of the second fund as may be necessary to bring the value of the pension fund available to her up to €500,000, which sum equates to approximately 40% of the current value of the two funds, rather than the 50% of that value that the wife is currently seeking.

14. Next in relation to this factor, it must be noted that the wife is entitled to a contingent, or "death in service", benefit offered by the husband's current employer, whereby, in the event of the husband's death, she is to receive a sum equivalent to four times his salary plus the value of his retirement account. The wife seeks to retain 50% of that benefit, whereas the husband submits that she should retain 25% of it.

15. Finally, in relation to this first factor, the wife is currently entitled to full cover under the health insurance scheme provided to the husband by his employer. The wife seeks an order directing that the husband continue her nomination to receive that cover. The husband submits that the cover for the wife under his employer's scheme should cease.

Financial needs, obligations and responsibilities

16. 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 remarriage of the spouse or otherwise).*" According to the evidence, both at present and for the foreseeable future, each of the parties is, and will remain, solely responsible for his or her own financial needs. Neither party has identified any significant obligation or responsibility towards any dependent or third party.

17. In his affidavit of means, the husband has averred to monthly outgoings of €10,463.09. In her affidavit, the wife avers that she has monthly outgoings of €5,771.08.

Standard of living, age of spouses, duration of marriage

18. 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 very good standard of living throughout the course of their marriage.

19. 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 in their mid-forties and their marriage lasted for 16 years.

Disability

20. The fifth factor that I must consider is "*any physical or mental disability of either of the spouses*". During the course of the trial of this action, the wife gave evidence of suffering from a particular medical complaint known as Sjögren's Syndrome, with which she was first diagnosed in 2004. This is an ailment or disease of the autoimmune system. The wife's symptoms include fatigue and dryness of the mouth and eyes. The medical evidence before the Court in that regard was limited to certain medical notes discovered by the wife. The wife's evidence is that the condition is debilitating and has made it difficult for her to work in recent years. She has to carefully manage her condition and, in particular, her tendency to constant fatigue, and finds it very difficult to do any full-time work in those circumstances. The husband's evidence is that, while he accepts that his wife suffers from the condition concerned, he does not accept that it has had, or will have, any significant impact on his wife's ability to work or pursue her education. He instances a two month period that his wife spent in Argentina in 2008, while involved in a number of projects there, and the various educational courses and other activities that she has been involved in subsequent to her diagnosis. It is difficult to resolve this limited conflict in the absence of direct medical evidence, but I have tentatively come to the conclusion that wife's condition is likely to have some limited impact on her future earning capacity.

Contributions

21. 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.*"

22. The wife places significant reliance on the decision of O'Neill J. in *M.K. v. J.K. (orse. S.K.)* (No. 2) [2003] 1 I.R. 326. That was a case in which the parties had six children and the wife had adopted what the Court described as the traditional role of homemaker and child carer. In the present case, the role of the wife was a more modern one: there were no children to care for; the parties paid for domestic help; the husband was expected to do his share of the housework; and the wife was free to pursue qualifications that interested her, and to engage in commercial and voluntary enterprises and part-time work related to those qualifications.

23. In circumstances where there is no evidence before the court of any significant income or resources generated by the wife's activities during the marriage, the wife submits that she gave up her career to support the husband in his. The husband's evidence is that the wife did not like or enjoy the particular employment that she gave up subsequent to their marriage and that, by agreeing to prioritise his corporate career and the income it generated, the wife was thereby enabled to pursue her own interests and educational opportunities. Nevertheless, it is not disputed that the wife did support the husband in his career progression. This occurred, notably, when the wife identified a key early employment opportunity for the husband and, more generally, when she agreed to the various relocations required by the husband's career and took primary responsibility for looking after the parties' home. In those ways, amongst others, the wife undoubtedly contributed to the husband's income, earning capacity and property and financial resources.

Effect on earning capacity

24. 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 remunerative activity in order to look after the home care or care for the family.*"

25. I have already addressed many of the issues relevant to this factor in considering the previous one. The wife contends that, in assuming responsibility for looking after the parties' home, and in having relinquished or foregone the opportunity of remunerative

activity in order to do so and to support the husband's career, she has lost perhaps the most productive years of her own working life. The husband submits that the wife did not particularly like or want the employment that she gave up shortly after the parties married; that she remains a relatively young and very vibrant woman; and that she has, in fact, been facilitated in pursuing educational and employment opportunities of greater interest to her by the husband's assumption of the particular marital responsibility of main family breadwinner.

26. I accept that, to some extent at least, the marital responsibilities assumed by the wife have diminished her earning capacity.

Statutory entitlements and misconduct

27. 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 condition is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.*" Both parties in this case accept that no such issue arises on the facts of this case.

Accommodation needs

28. The tenth factor is "*the accommodation needs of either of the spouses.*" Those needs have already been addressed above, in that the parties have agreed that each of them should have one of the two properties that they jointly own.

Benefits forfeited

29. The eleventh factor that I must consider is another important one in the circumstances of the present case. It 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 set out the parties' respective positions on the husband's two pension funds, his death-in-service benefit, and the wife's current status as a person nominated to receive cover under the health insurance scheme provided to the husband by his current employer.

Third party rights

30. 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.*" However, 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.

Conclusion

31. I found both parties to be truthful and sincere witnesses. The conflict between them appears to me to arise from the manner in which their individual perspectives have altered since the commencement of their marriage. The husband's view, as I understand the evidence he gave, was that, as time went on, he became more focussed on a mainstream corporate career whereas the wife continued, perfectly understandably, to value a different work/life balance. The wife's view is that she has given up the best years of her life to supporting the husband and unsuccessfully attempting to start a family with him, with the result that her career and pension prospects are now, she believes, weak.

32. Each of the parties has made an open offer to the other. The parties agree on the following reliefs, subject to the order of the court:

- (a) A decree of judicial separation on the ground set out at s. 2(1)(f) of the 1989 Act.
- (b) Appropriate property adjustment orders whereby the wife and husband attain sole ownership of the foreign property and Irish property respectively.
- (c) Appropriate orders declaring the parties entitled to half each of the aggregate funds and investments held by both as of the date of trial.

33. In addition to those reliefs, the wife seeks:

- (d) An appropriate pension adjustment order or orders granting the wife 50% of the accumulated retirement benefit fund in each of the two pension schemes held by the husband as of the date of the decree of judicial separation.
- (e) An appropriate order granting the wife a 50% interest in the death-in-service benefits provided to the husband by his current employer.
- (f) An appropriate order directing the husband to pay the wife maintenance in the sum of €10,000 *per month*.
- (g) An order directing the husband to continue to nominate the wife as a member of the group health insurance scheme provided for him by his current employer.
- (h) An order directing the husband to make a contribution of €60,000 (inclusive of VAT) to the wife's legal costs.

34. In opposition to the additional reliefs sought by the wife, the husband proposes:

- (d) An appropriate pension adjustment order or orders granting the wife the entirety of the husband's first pension fund and so much of the husband's second pension fund as is necessary to bring the overall value of the pension fund available to the wife up to €500,000, equating to 40% of the current aggregate value of those two funds.
- (e) An appropriate order granting the wife a 25% interest in the death-in-service benefits provided to the husband by his current employer.
- (f) An appropriate order directing the husband to pay the wife maintenance in the sum of €6,000 *per month* until the wife attains the age of 55 years.
- (g) The wife to provide her own health insurance cover.
- (h) No contribution by either party to the other's legal costs.

(i) Cross-orders pursuant to s. 14 and s. 15A(10) of the 1995 Act.

35. On the question of the appropriate level of maintenance, I propose to follow the approach stipulated by Finlay C.J. in *R.H. v. N.H. supra*, whereby I must first have regard to the overriding consideration that there will henceforth be two households rather than one. Next, I must ascertain the minimum reasonable requirements of the wife. Then I must ascertain the income earned or capable of being earned by the wife, apart from the maintenance provided by the husband. Next I must consider the husband's net income and lastly, I must ascertain the reasonable living expenses of the husband, bearing in mind the diminished circumstances of the two households, but leaving the husband with a reasonable standard of living.

36. The wife has sworn that her current monthly outgoings are €5,771.08, and that she has been receiving €4,000 per month in maintenance from the husband. While I have concluded that wife's role in the home, while by no means that of the traditional homemaker, has diminished her earning capacity to some extent, as has her medical condition, I do think that a person with the number and range of qualifications held by the wife is capable of earning a reasonable livelihood in the future. The husband acknowledged that, according to his most recent P60, his net income last year was €217,868, which implies a net monthly income of €18,155 per month. His monthly outgoings, as deposed to in his affidavit of means are €10,463.09. In light of these considerations, the Court will order that the husband continue to pay the wife €6,000 gross *per* month by way of maintenance. I do not propose to place any limitation of time on the duration of the husband's obligation to do so, although it is of course open to either party to return to court in the event of a material change of circumstances.

37. In summary then, I propose to make orders in terms of paragraphs (a), (b) and (c) set out above, together with further orders in the following terms:

(d) An appropriate pension adjustment order or orders granting the wife the entirety of the husband's first pension fund and so much of the husband's second pension fund as is necessary to bring the overall value of the pension fund available to the wife up to €500,000, equating to 40% of the current aggregate value of those two funds.

(e) An appropriate order granting the wife a 40% interest in the death-in-service benefits provided to the husband by his current employer.

(f) An appropriate order directing the husband to pay the wife maintenance in the sum of €6,000 *per* month.

38. I do not propose to make any order directing the husband to continue the nomination of the wife as a member of the health insurance plan provided to the husband by his current employer. Nor do I propose to make any order directing the husband to make a contribution to the wife's legal costs. 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.

39. 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.