

THE HIGH COURT

FAMILY LAW

2008 52 M

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

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

D. H.

APPLICANT

AND

G. H.

RESPONDENT

JUDGMENT of Mr. Justice Garrett Sheehan delivered on the 17th day of November, 2009

1. In this case the applicant wife instituted proceedings for a decree of judicial separation in May, 2008 and the hearing took place on the 8th and 9th of October, 2009.
2. The parties were married to each other in 1980, and they have two children, both university graduates neither of whom are dependent though both continue to live in the family home with their parents. Although they continue to share the home the parties have been living separate and apart from each other for a number of years. As the grounds exist for the granting of a decree of judicial separation the question that arises for this Court is what constitutes proper provision in the particular circumstances of this case.
3. Neither party is working and neither party has a pension and the family assets comprise a property portfolio built up primarily by the respondent over a period of 40 years. A significant portion of this property portfolio had been acquired by the respondent prior to the marriage, but as he has suggested that the properties be sold and the net proceeds be divided equally between the parties, it is not necessary to go into this in detail, save to say that close to 50% of the assets had been acquired by him at the time of the marriage.
4. The respondent built up a successful business over the years, which was finally disposed of in 2004, and in the latter years the applicant was involved in the business on a part-time basis. She had also continued in her own job for few years following the marriage in 1980.
5. The applicant, the respondent and a valuer called by the applicant gave evidence. I found all witnesses to be truthful.
6. I propose to review the evidence in light of the provisions of s. 16(2)(a) – (l) inclusive 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,

Neither of the parties has any income. The financial resources consist of the family home and other properties. The applicant to her credit has tried to obtain work, but so far has not been successful. The respondent who is retired may have some income earning potential in the area of property management, but it is difficult at present to see him getting any employment. The only dispute between the parties relates to the beneficial interest claimed by the respondent on behalf of his sister. Counsel for the applicant suggested that as the respondent's sister was not named on the title to either property 3 or property 5 listed hereunder the court should reject these claims by the respondent in relation to his sister's beneficial interest. This assertion of the respondent was contained in his affidavit of means sworn on 20th November, 2008. I accept the respondent's evidence that the initial funding for these two parcels of land was in each case provided by a company in which his sister had a 25% shareholding and accordingly, I accept his evidence in respect of the ownership of these assets.

The applicant's valuer placed the following value on the assets

Property 1 - €200,000

Property 2 - €747,000

Property 3 - €750,000 (the respondent's 75% interest)

Property 4 - €1.390m

Property 5 - €2.750m (the respondent's 50% interest)

Property 6 - €255,000

Family Home - €1.5m

There is also an unencumbered French property which the parties appear to agree is worth not less than €2m. However, leaving aside the French property, the applicant's valuer estimated the Irish property portfolio, at in excess of €7m. That being said, he qualified his valuation in respect of at least two properties by saying the best chance of selling them would be with tenants, that it would take a year to find tenants, and following that another year to sell the properties.

Allowing therefore, the €2m valuation in respect of the French property, the total value of the property portfolio according to the applicant's valuer is in excess of €9m. Charges on the properties including personal guarantees given by the respondent come to circa €2.6m. Notwithstanding the significant equity placed on this property portfolio by the applicant's valuer, the valuations must nevertheless be seen in light of the respondent's failure to raise a further €200,000 in or about July 2009.

(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),

Both parties will need accommodation and living expenses.

As to whether either of them will be able to purchase their own property in the near future will depend on how soon any properties can be sold. The extreme difficulties that both parties face is that at present there is a fear that the electricity will be cut off.

The combined financial liabilities of the parties at present are in the order of €2.6m and this is without a figure for the applicant's legal costs and without a full figure for the respondent's legal costs. The respondent has personal guarantees outstanding in respect of all property loans. The applicant is a joint mortgagee on the family home and has bank borrowings of circa €40,000 as well as obligations in respect of legal fees.

(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 prior to the institution of these proceedings which appear to have been commenced at the same time as the financial position weakened significantly.

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

The applicant is 53 years of age and the respondent 61. They have been married for 29 years and lived together as husband and wife for in or about 26 years.

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

Neither spouse has any physical or mental disability.

(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,

As already indicated the applicant worked for two years following the marriage and was subsequently primarily involved in looking after the home and family. She was involved from 1999 for a few years in the family business on a part-time basis. The respondent is primarily responsible for the property portfolio.

(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,

It is clear that the applicant relinquished her own career opportunities to look after the family.

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

There was no evidence of any statutory entitlement.

(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,

No issue is taken by either party under this heading.

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

While both parties would like to remain in the family home, neither seriously envisages being able to retain the family home. They both presently share the home, albeit living separately. Both will need accommodation.

(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,

Nothing arises under this section.

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

The court notes the interests of the children. Neither are dependent.

7. In the course of his submissions on the question of proper provision for both parties, Mr. Durcan on behalf of the applicant raised the interesting question as to what was the balance to be achieved between proper provision for the parties in the sense of accommodation and money to live on as opposed to the need to deal with debt. He suggested that the reduction and/or removal of debt which is the respondent's priority had to be balanced against the applicant's need for accommodation and money to live on and he expressed the view that an early priority for his client was the purchase of alternative accommodation. He also submitted that the court might consider making an order that the family home be sold immediately as it was the property with the best chance of being sold and realising interim funds for accommodation and living expenses. While I agree that there needs to be some balancing between the need for accommodation and living expenses and the repayment of debt, this should not be done in such a manner that there is any risk to the respondent's ability to discharge all debt.

8. Having considered the evidence, the affidavits filed and the submissions of counsel, I hold that the interest of justice in this case are best met by ordering that all properties be sold and the net proceeds be divided equally between the parties. Counsel for the applicant has asked the court to direct the appointment of an agreed valuer who would be entitled to set the reserve and method of sale for each property and that both parties be directed to co-operate with that valuer in order to achieve appropriate sales. That seems a sensible suggestion with which counsel for the respondent agrees. There is perhaps one proviso to this. According to the respondent's affidavit of means, a rental income of €137,900 was achieved in 2008. Had these rents been sustained in 2009, the family might not now be in the dire situation that presently exists. In the event that the agreed valuation expert proposes that some properties be let before being sold, I will give liberty to apply. Finally, the debts of the parties need at this stage to be quantified. In addition to the debts deposited by both parties there are ongoing legal costs. The importance of quantifying debt at this stage is to put some limit on it to ensure fairness between the parties. In other words, any new debt incurred by either party from now on should be met from whatever funds they receive from asset disposals. I do not regard the claim against the respondent for flood damage in respect of one property as a new debt if that proves to be a successful claim.

9. I will discuss with counsel the form the various orders should take.