

**THE HIGH COURT
FAMILY LAW**

[2005 No. 61M]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989 AND IN THE MATTER OF THE FAMILY LAW
ACT, 1995**

BETWEEN

C.D.

APPLICANT

**AND
P.D.**

RESPONDENT

Judgment of Mr. Justice O'Higgins dated the 15th day of March, 2006.

1. In this case which comes before the Court by way of special summons dated the 21st July, 2005 the applicant seeks a judicial separation and ancillary relief. In his replying affidavit, dated the 1st November, 2005 the respondent also seeks judicial separation and ancillary relief.

2. The parties met in 1986 when the applicant worked as a legal secretary and the respondent was a solicitor's apprentice in the same large Dublin firm. The applicant was 21 at the time. The parties became engaged in 1990. The respondent qualified as a solicitor in the late nineteen eighties. After qualifying he moved to London and the applicant joined him about a year later. The parties were married on the 24th May, 1991. They have three children, R. born on the 23rd October, 1995, J. born on the 25th August 1998 and D. born on the 28th January, 2000. After their return from London, the parties bought a home and some time later bought the present family home. The respondent was an extremely successful solicitor and became a partner in a large Dublin firm at the age of 33. However, approximately seven years ago, the respondent left the partnership and went into a business partnership. Both parties worked extremely hard. The respondent in particular worked very long hours and was frequently away from home.

3. It is necessary to analyse the reasons for the breakdown of the marriage. However it needs to be said that the parties impressed the court as being decent and honourable people and that the failure of the marriage was not due to any wrongful act or misconduct of either party. There is little doubt but that the sheer pressure of work was a very significant factor in the deterioration of the relationship between the parties. The marriage was under severe pressure for a number of years and I have no doubt that for at least twelve months prior to the bringing of the special summons on 21st July, 2005 a normal marital relationship did not exist between the parties. There is no hope of reconciliation in this case and the requirements for the granting of a decree of judicial separation have been fulfilled subject to the making of proper provision as required by the Act.

4. There has been a of laudable degree of cooperation between the parties and their legal advisors with the result that a number of matters have been agreed.

5. The net value of the assets is set out in the schedule of assets prepared by Mr. Browne the accountant for the respondent. The net assets are agreed to be €6,284,983. The assets consist of the family home, another house in Dublin, an apartment in London which is being sold and a mobile home. There is almost €50,000 in bank balances and the partnership investments of the husband have a net value of €2,334,241 subject to Capital Gains Tax of €373,224. In a partnership capital account there is a sum close on €46,000 and there are shares with a net value of €285,104 and the value of the company is €197,813.

6. At the commencement of the hearing, both parties helpfully told the court what they considered might be proper provision. Both the applicant and the respondent had proposals as to what might constitute proper provision and I will comment on these later.

7. Happily there is a degree of agreement concerning the children. It is agreed that the parties should have joint custody of the children, but that the applicant should be the primary carer and that the children should reside with her. Access is agreed as follows:-

1. The respondent to have access to the defendant children every second weekend from Friday after School to Sunday at 6p.m. The respondent shall be responsible for collecting and returning the children to their home.

2. On the weekend that the respondent does not have overnight access to the children, he shall have access to the children from 9.30 on Saturday to 2p.m. on Saturday and/or any additional weekday overnight access to be agreed in advance, acknowledging that the respondent will look after the children on some Saturday afternoons in accordance with paragraph 17 of the this agreement. On every sixth weekend, the applicant shall have exclusive access to the children, and the respondent will have no access.

3. The respondent shall have one overnight access midweek every second week from after the children's school time and the respondent shall collect the children from school, and return the children to school the following morning. This midweek access is to take place on the week after the weekend during which the respondent has no over night access.

4. The midterm breaks will be shared equally between the parties, such arrangements to be flexible and to be agreed in advance, in that in the event of the applicant having the midterm break in October, the respondent shall have midterm break in February, and to be alternated accordingly.

5. All bank holidays (other than the midterm break holidays) shall be alternated between the parties.

6. Each party shall be entitled to two weeks holiday access separately with the children. In the first year, being the summer of 2006 the two week access to be in separate weeks. Exact times and dates are to be agreed between the parties, taking into account the children's wishes and plans. In addition, the respondent shall have extra access during the summer holidays being an extra day during the week or by extending a weekend by one day.

7. Christmas Eve / Christmas Day are to be alternated and St Stephen's Day and New Years Day on a year on year off basis, with the Applicant commencing in Christmas 2006 having acknowledged that the respondent exercised Christmas Day access with their children in 2005. The remainder of Christmas holidays to be divided equally between the parties. The non access parent will have access to the children for a few hours on Christmas Day between 12 and 2p.m. or such

time as may be agreed.

8. Easter holidays will be divided equally between the parties, taking into consideration the children's arrangements and plans.

9. In the event that the child's birthday falls on during in an access period with either party, the other party shall be at liberty to see that child on their birthday.

10. The children shall spend Father's day with the respondent and Mother's day with the Applicant notwithstanding the remainder of the terms of this agreement.

11. Liberal telephone access is to apply.

12. Each parent will give adequate notice to the other parent of any proposed trips / planned excursion of the children which necessitates a change in existing arrangements.

13. Neither party to take the children out of the jurisdiction without prior consent of the other party, such consent to not unreasonably be withheld. It is agreed that each child shall have their own passport in their own name, and the Applicant shall have custody of the said passports.

14. Such further access as may be agreed.

15. It is agreed that family therapy will continue.

16. The applicant and the respondent will endeavour to be flexible in respect of access.

17. Where one parent is unable to care for one or more of the children for any period of time (say for example, of the need to attend an activity of one of the children) that parent will seek the assistance of the other party in an about caring of the other children.

8. In considering an application for judicial separation the Court is obliged to endeavour to ensure that such a provision exists or will be made free to spouses concerned and for any department member of the family concerned as is proper with regard to all the circumstances of the case. While the Court is obliged to have regard to all relevant circumstances in making the decision but the Court is specifically obliged to have regard to the factors set out in s. 16(2)(a)-(l) of the Family Law Act 1995 Act which govern judicial separation proceedings. I propose to go through these matters seriatim.

(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."

The applicant and the respondent are joint owners of the family home in Dublin and another property in Dublin as well as a mobile home. The net value of the applicant's interest in these after disposal and capital gains tax costs is agreed to be €1,762,368 being the value of a half share in those properties. The applicant has no other significant assets. In addition to his half share in these properties, however the respondent has very significant outgoings including a monthly expenditure of €75,000 for servicing of debts in the last year for which figures are available. The respondent has an apartment in London which after sale would leave him a sum of somewhat over €220,000. His net property assets are valued at €1,984,585. The respondent also has partnership/investments in excess of €2,334,241 and a capital account of nearly €46,000 and shares and a share in the company. The net value of the assets of the parties is €6,283,893.

The applicant is not working outside the home and is dependent for her income on the respondent. She has no income other than what she receives from the applicant other than the children's allowances at €428.50 per month. The applicant was employed as a legal secretary prior to the starting of a family by the parties. Since then she has not worked outside the home. She told the Court that she thought that she may return to work on a part-time basis in the future and possibly even on a full time basis, in about ten years or so. The Court has not been furnished with a detailed of the likely earnings of the applicant in this regard but in the overall context of the case it would be wrong to attach too much significance to that. The respondent's net income was close to one million euro net on the last year for which figures are available. It is reasonable to expect that he would have a similar income in the years ahead prior to his retirement although it is difficult to be certain about this because of the nature of the business in which he is engaged. He told the Court that it had been his ambition to retire, perhaps before the age of 50, with sufficient capital to generate an income of €250,000 to €300,000 per annum, and to cut back very much on his business activities at that time. He still has the ambition and expectation of early retirement but he now considers that his retirement date might be postponed until he is in his fifties. He will need very considerable earnings to achieve that goal but there is no reason to believe that he will not succeed.

It is envisaged that after this case the applicant will reside in the family home and the respondent will be obliged to purchase a new home.

The outgoings of the applicant are set out in her affidavit of means and come to almost €10,000 per month to include holidays for herself and for her children and include a sum of €1,650 per month for meals, take aways and miscellaneous items. She told the court that she enjoyed a reasonably comfortable lifestyle. She candidly accepted that most areas of her expenditure were covered in her affidavit of means and that she was able to live comfortably within that figure and that there was no reason to believe that she would not be able to live comfortably on that figure after the court case. It is true of course that she is likely to be the primary carer for the children for the foreseeable future. It is also true that the educational costs and perhaps other costs of the children will be greater in the future.

(b). "The financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future."

The respondent set out in the fourth schedule to his updated affidavit of means dated 28th February, 2006, his anticipated expenditure on mortgage payments in respect of a new house. He estimates the monthly sum as being €23,000, but over half of which he attributes to anticipated mortgage of €12,500 a month. This sum does not seem to be unreasonable. The Court was told about a suitable home in which the respondent was interested, estimated at a price of €2.4 million. The purchase of that home will involve a considerable extra sum for stamp duty. The servicing of a mortgage on the purchase of that house would involve more than the €12,500 per month which was based on a projected purchase price of €1.8 million.

(c). "The standard of living enjoyed by the family before the proceedings were instituted."

Both parties lived a comfortable lifestyle commensurate with their high income, although it is fair to say that they were savers rather than ostentatious spenders. There is no evidence that they lacked for anything in a material sense. Happily both parties can expect to live in similar material circumstances in the future. The parties still live in the same house but not as husband and wife. The respondent is absent on business for the greater part of the week.

(d) "The age of each of the spouses and the length of time during which the spouses lived together."

The applicant is 40 and the respondent is 42 and the parties lived together from May 1991. They still inhabit the same house. The marriage was in difficulties for some time and it is impossible to put a date on its final breakdown. However it is clear that at least from the middle of 2004 that the marriage was over. Both parties are relatively young. They had however joint aspirations that the respondent would retire probably before the age of 50. There is no evidence that it was expected that the applicant would work after her husband retired. The respondent described a very pressurised punishing and stressful work life and I accept his evidence that it would be impossible to continue such work indefinitely. The likelihood is that he will continue working for perhaps another ten years at which time he will cut down his work commitments. He expects to have earned enough capital to generate an income at that time of €250,000 to €300,000 in present day terms.

(e) "Any physical or mental disability of either of the spouses."

There has been no evidence of any physical or mental disability of either of the parties.

(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."

There has not been any evidence concerning the respective contributions of the spouses prior to the birth of the first child although both parties saved and contributed to the purchase of a house. However since shortly after the birth of the first child the applicant has not worked outside the home and her contribution has been looking after the home and caring for the family. Both parties agreed to this arrangement. This is likely to be the position into the future for many years probably until the children have flown the nest. The respondent on the other hand has been the sole breadwinner since the birth of the first child and that will remain the position for the foreseeable future. Looking after the home and caring for the family has contributed to the capacity of the respondent to earn his income and that contribution will also be there into the future and enable him to continue working in his highly pressurised type of work.

(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 forgone the opportunity of remunerative activity in order to look after the home or care for the family."

The applicant ceased her employment around the time of the birth of the first child. She may well return to the workforce in the future on either a fulltime or a part time basis and that is her intention at present. I am not satisfied however that, should she return to the workforce her earning capacity is likely to be significantly impaired, although it is probable that should she return to work her income would be diminished during the period she would have to bring her skill up to date.

As I have already stated the care of the home and the family by the applicant has contributed and will contribute significantly to the ability of the respondent to earn his income. The applicant stopped working as a legal secretary shortly after the birth of her first child some ten years ago. No doubt should she return to the workplace it would take her some time and training to update the necessary skills. However, there is no evidence that her earning capacity in the future has been impaired by reason of her break from the workforce. However, it was in the contemplation of both parties that the applicant should retire or cut back drastically on his work before he was aged 50. There is no evidence that it was contemplated that the applicant would have to work after that time.

(h). "Any income or benefits to which either of the spouses is entitled by or under statute."

There is no evidence of any benefits under this heading other than the children's' allowances of €430 per month.

(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."

Quite rightly neither of the parties is asking the Court to rely on the conduct of the other spouse. In this case, it is clear that the primary reason for the breakdown of the marriage was the pressures put on it by the work pattern of the parties.

(j). "The accommodation needs of either of the spouses."

The applicant will continue to reside in the family home which is a comfortable house and is well suited for the needs of her and her young children who are likely there for many years. The respondent will have to buy a home for himself which is also suitable for having his family on holidays and on other occasions. He told the court that he was interested in a house with a guide price of €2.4 million which is suitable for his needs. In this regard, his provision for €12,500 per month in respect of mortgage for a new house appears to be conservative because the evidence to the court was that that sum of €1.8 million and would cost €2.4 million.

(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."

There has been no evidence of any benefit of the kind concerned related by this subsection.

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

There is no person coming within that category and there are no persons other than the children to be considered in respect of proper provision.

3. The applicant's proposals

9. The applicant's first proposal was in the context of extinguishing her Succession Act rights. It involved the respondent holding a number of investments in trust for the applicant and sought a declaration that in respect of those investments the applicant be entitled to a 50% share of the respondent's interest. The respondent was to manage the portfolio. Alternative to this the applicant offered the respondent a retainer of 33% entitlement on the same investments and in addition a lump sum of €500,000. The proposal also was an order of maintenance for the applicant of €300,000 gross per annum indexed linked and a sum of €75,000 net in respect of the children.

10. In my view that proposal is unreasonable. First of all, I accept the evidence that were it known that 50% of the respondent's share of these investments were held in trust for the applicant it would have serious implications for his ability to borrow. The capacity for borrowing is essential for him to generate the large income on which the parties are and will be dependent for many years. Secondly, it would involve the applicant having a 50% or a 33% interest in investments without any exposure to the considerable risks involved in those investments. There is evidence that the respondent is jointly and severally liable for debts said to be in excess of €80 million. Although it is unlikely that he will face called on to pay any sum of that magnitude he is exposed and on risk. Furthermore there may be a call-up of certain monies in respect of some of the investments. In my view it could be seen as being unfair to the applicant that without partaking in the risk into the future she should be entitled to 50% of the benefits. Thirdly, any such arrangement has a potential for further problems. In accounting for 50% or 33% interest would involve a potential for a difference of opinion and administrative difficulties and it is easy to envisage further conflict in that context. Mr. Durcan S.C., counsel for the respondent, stated that the €2.8 million for the house plus €100,000 for the contents when added to a 50% interest in the investments involved in her proposal would give the respondent €4.1 million out of €6.2 million which is approximately two-thirds of the joint assets. While accepting that this is a very high percentage indeed, the Court is of the view that that fact in itself would not necessarily render such an award unfair on the respondent. Counsel for the respondent also submitted that in the circumstances where the respondent expends €75,000 per month or €900,000 per annum to service debts, that the gross sum of €300,000 for the respondent is unreasonable and unachievable. I agree with that submission. Even if the sum were more typically likely to be €60,000 per month in respect of debts that would still amount to €720,000 per annum, in those circumstances the sum of €300,000 gross for the wife and €75,000 net for the children unrealistic, unachievable and unfair on the respondent. In *M.K. v. J.P.K.* (Unreported, Supreme Court 9th February, 2006) McCracken J. stated at p. 11:-

"It should be pointed out that in its decision ordering a retrial in this action, this court pointed out that the test for the division of assets was not equality but fairness."

11. Mr. Hegarty S.C., counsel for the applicant, had another proposal for the court. He stressed however that this proposal was in the context of the preservation of the rights of the applicant under the Succession Act. The proposal was for maintenance to include maintenance for the children in a sum of €15,000 or €180,000 per annum net together with a sum of €500,000 in addition to the family home and contents and in return for the transfer of her interest in the other Dublin property to the respondent.

12. The question of extinguishing the rights under the Succession Act arose in this case. Counsel for the applicant argued;

"That the door must be left open to protect her".

13. In this case it must be noted that it is the intention of the applicant to apply for a divorce in the future and that in the event of that divorce being granted the right of a Succession Act and the rights of the parties will automatically be extinguished.

14. Counsel for the respondent brought to the attention of the court that provisions of s. 15(A) of the Family Law Act 1995 (as inserted by s. 52 of the Family Law (Divorce) Act 1996), the provisions of which allow application to be made to the court even after the extinguishment of a Succession Act rights where proper provision has not been made under sections 8, 9, 10, 11 or 12 or any reason other than the conduct of the applicant referred to in subs. 2(1) of s. 16 of the Act. He submitted that this provision afforded sufficient protection if such were needed, in circumstances where he was prepared to pay to the applicant a sum equivalent to the value of her Succession Act rights as of now. He submitted that only in the most exceptional circumstances should the court refuse to make an order of an extinguishing Succession Act rights ancillary to the grant of an order for judicial separation. I cannot agree with such a far reaching submission. I do not think it necessary or even desirable to attempt to innumerate the circumstances in which Succession Act rights might not be extinguished following the making of an order for judicial separation. The extinguishing of rights under the Succession Act is one of the options open to the court on granting an application for judicial separation. It is one of a wide variety of orders available to the court in discharging its obligation to insure that proper provision is made for the parties. Whether or not to extinguish the rights under the Succession Act is not a decision that should be taken in isolation from all the circumstances of the case on from the other orders which the court intends to make. In the present case there are two factors which seem to me of some importance bearing on that question. The first of these is the extremely unpredictable financial position of the respondent into the future. It is likely that the respondent will accumulate a great deal of wealth in the next ten to twelve years. It is to be expected that his financial position will be considerably stronger in four or five years then it is today and that he will have considerably more assets. Although in this case the court must take into account the assets of the parties as they are now, the court is also obliged to have regard to the income and earning capacity of the parties for the foreseeable future. The applicant has indicated that she intends to apply for a divorce in due course. On the granting of which her rights under the Succession Act will be extinguished in those circumstances. It seems to me to be fair and reasonable not to make an order extinguishing the applicant's rights under the Succession Act at this juncture.

15. It is clear to the court from the affidavit of means of the applicant that the €10,000 per month is adequate to meet the expenditure and requirements to include a sum of €16,000 per annum for holidays and a sum of €1,600 per month for meals and takeaway food. The applicant candidly admitted that she is living comfortably on the level of her present expenditure. In the circumstances of this case even having regard to the fact that adequate provision is not the same as proper provision it seems to me that proper provision for the applicant can be made out of the sum of €10,000 per month, at least in circumstances where the respondent is responsible for the further educational needs of the children.

2. The respondent's proposals:

16. The respondent's proposal is that the family home be transferred to the applicant and the other property be transferred to the respondent and that a sum of €250,000 be paid by the respondent to the applicant. Furthermore, the respondent proposes to put in place an insurance policy to protect the maintenance proposed of €10,000. That policy is in the sum of €2 million. This proposal is in the context of the Succession Act rights of the applicant being extinguished.

17. Counsel for the respondent explained the proposal as follows:

At present the applicant owns €1.722 million of the assets, the remainder of the assets amount to €4.5 million. Under the

proposal the applicant would get €2.8 million representing the house, €100,000 representing the contents and €250,000 over two years. Mr. Durcan S.C. points out that is €3.15 million. That is about half of the current assets. In addition, counsel for the respondent points out that the Succession Act rights at present are one-third of the estate and that would amount to €1.5 million. The offer of €3.2 million represents the realisation now of what would be her Succession Act rights plus the €1.7 which is her share of the assets at present. Mr. Durcan S.C. pointed out that looked at that way "we are giving her what she owns anyway plus her Succession Act rights now". This in my view is inadequate to meet the requirements of fairness. That proposal does not, significantly, take into account the particular circumstances of this marriage, in particular, the huge earning capacity of the respondent into the future. It also fails by a significant margin to recognise sufficiently the value of the ongoing care of the children on a day to day basis by the applicant. This responsibility is likely to rest when the applicant for many years into the future. Putting in place of an insurance policy, albeit a substantial one does not in my view alter the position significantly, because it is essentially a device to protect the maintenance proposal into the future.

The Law

18. It is unnecessary to state the law in any detail. It is clear that the duty of the court is to endeavour to ensure proper provision for the parties rather than equal division of the assets. As has already been stated the court should strive not for equality but for fairness. In attempting to achieve that fair result the factors set out in the legislation must be taken into account, but the importance to be attached to each of the factors will widely vary from case to case and there is no hierarchy of importance to be attached to the various factors. In considering the question of proper provision the percentage of the assets to be distributed may or may not be of importance. As Denham J. stated in *T. v. T.* [2002] 3 IR 334 at p. 384:

"The concept of one third as a check of fairness may well be useful in some cases, however, it may have no application in many cases."

19. In the particular circumstances of the present case and in particular having regard to the very great earning capacity of the respondent it is of little assistance in the present case.

20. I was referred to a passage in the judgment of Thorpe L.J. in the case of *Parlour v. Parlour* [2004] EWCA (Civ) (872) at paragraph 104 where he quoted from Lord Nicholls in *White v. White* [2001] 1 A.C. 596:-

"If a husband and wife by their joint efforts over many years, his directly in his business and hers indirectly at home, have build up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case, where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the cheque against the yardstick of equal division."

21. This passage is of but limited assistance in this jurisdiction where there is no "yardstick of equal division." However, it is of course correct that the proper provision must be assessed on the basis of the assets and that the concept of proper provision cannot be assessed without taking into account the assets.

22. Having carefully considered all the evidence I am prepared to make the following orders.

1. An order pursuant to s. 2(1)(f) of the Judicial Separation and Family Law Reform Act 1989 granting the applicant judicial separation from the respondent on the grounds that a normal marital relationship did not exist between the parties for at least 12 months prior to the bringing of the application dated the 21st July, 2005.
2. An order granting the applicant and respondent joint custody of the children on the terms agreed between the parties and already set out in this judgment.
3. An order granting the applicant sole ownership of the family home and the contents thereof. The respondent is to transfer his interest in the family home to the applicant, I will also make an order dispensing with the consent of the respondent to any future sale of the family home.
4. An order that the applicant transfer her interests in the other property in Dublin to the respondent.
5. An order directing that maintenance to be paid to the applicant in respect of her children in the sum of €10,000 per month net. The maintenance is to be index linked with the consumer price index. I will hear counsel on the question of the distribution on the maintenance as between the wife and the children.
6. An order that the respondent replace the applicant's car every three years with a car of similar standard with the first purchase to be three years after the date of the purchase of the applicant's present car.
7. The respondent is to be responsible for the costs incidental to the education of the children to include school fees and costs. In that regard I notice that both parties in their affidavit of means list certain educational expenses as part of their outgoings already.
8. An order that the respondent maintains health insurance cover on the applicant and the children at the same level as the present cover.
9. An order that the respondent pay to the applicant a sum of €500,000, €100,000 to be paid forthwith, €100,000 to be paid on or before the 1st January, 2007 and the rest of the money to be paid on or before the 1st January in each succeeding year.
10. An order that the respondent put in place an insurance policy to guarantee the payment of maintenance ordered by the court. I will hear counsel as to how this is best implemented.
11. Liberty to apply

23. I will discuss the form of the orders with counsel.