

THE HIGH COURT

[2011 No. 22 AP]

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

L.D.

APPELLANT

AND

C.D. (NEE M)

RESPONDENT

JUDGMENT of Mr. Justice Michael White delivered on the 30th October, 2012

1. This is an appeal from an order of the Circuit Court Northern Circuit made on the 8th April, 2011.
2. On the 5th October, 2011, at the High Court on circuit the appeal was transferred to the High Court in Dublin and was listed for directions on the 13th January, 2012.
3. The appeal was heard on the 30th April, 1st, 2nd, 8th May and 20th June, 2012, when judgment was reserved, and some further documentation sought.
4. Further documentation was sent by the solicitors for the respondent on the 18th July, 2012 and the appellant sent further documentation on the 25th September, 2012.
5. Circuit Court proceedings were commenced on the 2nd April, 2008. The case was set down for trial on the 26th October, 2010 on the Northern Circuit. While the proceedings were commenced pursuant to the Judicial Separation and Family Law Reform Act 1989, the Court granted a decree of divorce, I presume pursuant to the provisions of s. 39(4) of the Family Law (Divorce) Act 1996.
6. Prior to the issue of Circuit Court proceedings there had been a long history of applications to the District Court.
7. A barring order was granted on the 17th November, 2005, for a period of three years against the appellant. On appeal to the Circuit Court on the 15th December, 2006, the barring order was vacated on certain undertakings given by the appellant. The appellant has denied giving those undertakings, but this court is satisfied that those undertakings were given by the appellant to the Circuit Court on the 15th December, 2006.
8. Various access orders were made due to ongoing difficulties between the parties in respect of all their children.
9. Maintenance orders were also made in the District Court, the first on the 8th February, 2006, when the appellant was ordered to pay the sum of €170 per week together with payment of €150 per month contribution to a loan. An application was made by the appellant to vary the maintenance which was refused in the District Court on the 9th May, 2007. The matter came before the Circuit Court on appeal on the 3rd July, 2009, when the maintenance was varied to €100 per week. The maintenance order was again varied as part of the ancillary order in the divorce proceedings when the appellant was ordered to pay the sum of €200 per week, and €6,750 arrears of maintenance being the non payment of the loan contribution of the maintenance order from the 7th July, 2007 to the 8th April, 2011.

History of the Marriage and Breakdown

10. The parties met in Boston, when both were working there in 1993. They returned to Ireland at the end of 1993 and married on the 16th April, 1994.
11. The respondent had inherited from her father her old family home and 26 acres of land. The parties extended and renovated the old family homestead, and it became the family home of the parties.
12. The parties have four children L born on the 6th July, 1996 aged 16, E. born on the 30th October, 1997 aged 15, A. born on the 11th October, 1999 aged 13 and M. born on the 30th June, 2004 aged 8.
13. The appellant and the respondent are school teachers and both have been in gainful employment since their marriage.
14. There is conflicting evidence as to the reasons for the breakdown of their marriage, and when it ran into difficulties, but by January 2005 the marriage was in serious difficulties. At that time the appellant decided not to operate the finances of the marriage jointly and refused to lodge his salary into the joint account, which began to cause serious difficulties in respect of the party's joint commitments by way of mortgage and loans with the National Irish Bank.
15. The respondent alleges that the appellant was verbally abusive to her from early on in the marriage and alleges a number of incidents occurred culminating in her applying for a barring order which was granted on the 17th November, 2005.

16. The appellant disputes that he was abusive or violent to the respondent. I do not intend to revisit this matter only to state that I have no doubt that the respondent was in fear of the appellant during the latter part of their marriage in 2004 and 2005. The parties have been living apart since November 2005, but unfortunately have been engaged since in conflict which has led to extensive litigation. The saddest and most difficult part of the breakdown of the marriage has been ongoing conflict about custody and access to the four children. There have been various reports prepared on the welfare of the children. Deep differences remain between the parties in respect of the welfare of the children, which the court will examine in some detail.

17. There is also conflict about financial matters.

The Welfare of the Children

18. Subsequent to his departure from the family home the first access arrangements put in place by court order was a an order of the District Court of the 21st December, 2005, when interim access arrangements were put in place, until further court order on the 11th January, 2006, when access was granted to the three older children every second weekend from Friday to Sunday and a further three hour period to all four children. This was revised by court order on the 14th February, 2007, to access every second weekend Friday to Sunday to the three older children and every second Monday and Thursday to all 4 children between 4.30pm and 7.30pm.

19. This was changed by a District court variation order of the 15th April, 2008, when the appellant was granted custody and access from Wednesday to Saturday each week to all four children. The respondent appealed but the appeal was not heard until the 3rd July, 2009 when the order was varied to every second week, Thursday to Sunday, in respect of all four children, and has again been varied by the order of the court under appeal.

20. While the order required variation in April 2008 as the appellant was not seeing M, for long enough, and the older children's time with their father needed to be extended, this Court is very surprised at the nature of the dramatic change in the arrangements particularly for A, and M,, who were aged 8 and 3 respectively. The judge's order was made contrary to expert recommendations at the time.

21. This was noted in the report of the Guardian ad Litem for the children Mr. Harry Law in his report of the 2nd July, 2009, when he stated at para 8.2 of his report:

"In my respectful submission Judge Fitzpatrick's order to vary or increase Mr D's access to the children failed to apply the welfare principle as the paramount consideration in such cases. The ruling did not take into account the children's views, individual needs or indeed the potential for further emotional and behavioural disruption given the history of marital discord and the acrimonious nature of the parent's relationship at that juncture."

He went on to state at para 8.4:-

"Having recently revisited this matter I was struck by the clear and unequivocal deterioration in the children's emotional and behavioural presentation during interview. Contrary to the findings contained in my initial assessment L, E and A presented as guarded in their responses and seemingly cautious not to say anything that could potentially upset their father or give rise to changes in his access arrangements. L in particular appears to be tasked with role of peacemaker taking on responsibilities beyond his years ensuring the sibling group are at one in relation to ongoing access arrangements. Whilst it would be the view of the older children that all the siblings should remain together during access periods M's needs require additional consideration given her age and emotional fragility. There is evidence that the sibling group is fragmenting as noted in L's rigid and critical attitude towards M when she chooses to remain in the care of her mother during periods of illness contrary to the demands of Mr. D. Under these circumstances it is extremely difficult to elicit the children's true wishes and feeling in relation to their future care and access arrangements."

22. That is a pattern that has continued. I note from the report of Dr. Anne Byrne Lynch of the 25th April, 2012 and her evidence to the court, that in her interview with A., the child was quite critical of M., and also critical of her mother's leniency with M.

23. The present custody arrangements are reflected in the court order under appeal, where the parties are joint custodians, with the appellant having custody of the children for one continuous week in three. Access to M. is suspended at present due to an incident which took place on the 20th February last. This was unfortunately a serious incident when the appellant punished M. by hitting her in the back with a wooden spoon. I am satisfied that the bruising received by M. on that date was directly from this blow and not from the administration of an ice pack. This was unacceptable behaviour on the appellant's part, for which he has apologised.

24. Both parties deeply love their children and feel they are both doing the best for them in the circumstances that they find themselves in. Unfortunately they do not mutually reinforce their parenting role and the appellant in particular is very rigid and unable to compromise. They have very different approaches to parenting.

25. The court wishes to stress that 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.

26. The appellant has a very forceful personality, with little insight into his own personality traits. He believes himself to be acting in the interests of the children at all times. The parties have now been living apart for seven years, but this period has been marked by ongoing conflict which has not helped the children.

27. This Court's major concern is the undermining of the respondent in her parental role by the appellant. He consciously and unconsciously criticises her in the presence of the children. He has engaged in parental alienation of the children from their mother which is not in the best interests of the children. It is essential that he stops it and begins to communicate a positive image of the respondent to the children. The respondent is a mild mannered person who has tried to act in the best interests of the children at all times. I do not believe that she has consciously undermined the appellant in the presence of the children, but the children are deeply aware of the conflict between their parents.

28. Another issue which is of concern to this court is the difficult relationship the appellant has had with professionals involved with the children. The appellant has consistently used a tactic of making complaints against professionals, who he feels have made adverse findings against him. He has been aided and abetted in this activity, by some of his siblings who should know better and mind their own business. Some of his siblings have been blind to the major contribution the appellant has made to the breakdown of his

marriage. I am very surprised that the appellant who is a professional himself held in high regard by his principal and former principal should treat other professionals in that way. He should stop this behaviour and his siblings should stop interfering. I am directing release of the extract of my judgement in respect of this behaviour by the appellant to the professionals against whom he has made a complaint and against whom some of his siblings have made a complaint.

29. The child M. is in a particularly difficult situation. The older children have criticised her for not being more engaged with her father.

30. The appellant has urged the court to deal with the custody and access arrangements in respect of the children as a unit.

31. In the particular circumstances of this case it is not possible to do that. The court has to look at the situation individually in respect of each child. As already stated in respect of the two older boys, the court is concerned that the appellant has seriously undermined the relationship between those boys and their mother. Sadly, this situation may be irretrievable; the court hopes certainly that it is not.

32. The court has formed the view that the appellant had a particularly difficult relationship with A. when she was a younger child, which caused great concern to the respondent, but that relationship has improved

33. The court believes that it is important that the appellant recommences his relationship with M., despite the events of the 20th February, 2012. The court is concerned that the appellant will attempt to undermine the relationship between M. and her mother. The relationship between the appellant and M. should be fostered on a phased basis over a period of time. It should commence with one visit per week by M. to the appellant's residence for a period of four hours unsupervised, such date and time to be nominated by the court or in consultation with the parties. This should be increased after a period of six months to a day long visit at the weekend, either Saturday or Sunday, from 11am to 7pm, with the proviso that every sixth weekend there shall be no access on the weekend, but a midweek period of four hours in lieu. That is to ensure that the respondent has a free weekend with all the children. The respondent is entitled to nominate these weekends at the same time that she has custody of the other three children. The appellant should have two separate periods of access with M. of four hours duration each of the Christmas period.

34. The access to M. should be reviewed after one year from today's date, in order to establish if overnight access can commence. It is essential the other three children are told by both parents they should not become involved in any dispute about M's custody and access. I would request that the child and family services of the H.S.E. continue to be involved with M. It is essential that the all 4 children be offered individual therapy, without interference by either parent. I do not consider it appropriate to order the appellant to undertake a forensic psychological assessment but would strongly recommend that he does.

35. In respect of the three older children L., E. and A., the court will affirm the order of the Circuit Court in respect of the custody and access. I believe it is in the best interests of the children that this arrangement continues until each child reaches the age of 18, and that the appellant should not undermine this order by agitating to have the children come and live with him full time. The children should be informed of the courts view in this matter.

The Family Home and Agricultural Lands

36. The family home is held in joint names and was originally the old family home of the respondent, and was inherited by her from her father. Subsequently, in 1996, the parties obtained a mortgage from National Irish Bank in the sum of €63,000. At that time a separate folio was opened, when the family home site was separated from the rest of the farm. The parties carried out a substantial extension and refurbishment of the dwelling house converting it from a single storey dwelling into a two storey dwelling. The market valuation of the property is not agreed. The learned Circuit Court Judge fixed a market value of €160,000. The respondent's auctioneers in a detailed report of the 25th May, 2012, valued the property at €120,000 and the appellant's auctioneers in a report of the 28th March, 2012, valued the property at €165,000.

37. The price of residential property in the rest of Ireland excluding Dublin has fallen by 12.1% between July 2011 and July 2012 according to the residential property price index prepared by the Central Statistics Office. This Court is of the view that the Circuit Court fixed a realistic market valuation of the property, but that that has to be modified in view of the average decrease in house prices. The court fixes the market value of the family home at €141,000.

38. There is also a separate pocket of land of 26 acres of agricultural land which the respondent inherited from her father and which was transferred into the joint names of the parties without any consideration being paid by the appellant and the Circuit Court judge fixed a market valuation of this property at €95,000. The appellant's auctioneer values the agricultural lands at €116,000 while the respondent's Auctioneer values the property at €80,000.

39. In order to finalise any apportionment in respect of the property the court has to take a number of matters into consideration:-

(1) The respondent inherited the agricultural lands and transferred those without consideration into the joint names of the parties, at a time when the court was concerned that she was under some pressure in the marriage.

(2) The respondent inherited the original family home and its site.

(3) The contribution of the appellant to the refurbishment of the family home.

(4) The responsibility placed on the respondent to discharge the mortgage, the car loan and the furniture loan to National Irish Bank.

(5) The appellant has not had the benefit of the family home since his departure in November 2005 and has had to live in rented accommodation since that date.

40. This Court differs with the Circuit Court in its views as to the apportionment in respect of the family home and the agricultural property.

41. After deduction of the capital due on the mortgage to National Irish Bank the property should be apportioned 60% to the respondent to take into consideration her provision of the original site and original family home and 40% to the appellant.

42. The court does not see why the appellant should retain any share in the agricultural lands. These were lands inherited by the respondent from her father and the court is concerned about the circumstances of the transfer of these properties into the joint

names of the parties without any consideration being offered by the appellant. The court accepts the evidence of the respondent that she was pressurised into transferring these lands to the appellant, and is of the view that these lands should be apportioned 100% to the respondent.

43. There is a dispute between the parties as to contributions made by the appellant between January 2005 and February 2006 to the joint finances. This Court is not able to resolve that conflict, but is of the view that it should fix a specific sum to compensate the respondent for the discharge by her of payments on foot of the joint liabilities, the mortgage to National Irish Bank, the car loan and the furniture loan. The respondent should also be compensated for her discharge of the mortgage protection payments which benefited both parties. The court assesses that amount in the sum of €5,000. It is appropriate that the respondent procures the transfer of the mortgage, the car loan and the furniture loan into her own name.

44. The court will not be interfering with the order of the Circuit Court that the appellant should pay a contribution towards the respondent's costs in the sum of €25,000.

45. This Court also affirms the decision of the Circuit Court, to declare that the appellant owes the sum of €6,750 arrears of maintenance, being the payment of €150 per month in respect of a loan which was not discharged between the 7th May, 2007 and the 8th April, 2001.

46. There should be no Pension Adjustment Order.

47. In view of the amount of time the older children spend with the appellant and his particular financial circumstances, the maintenance order of €200 per week should be reduced to the sum of €100 per week, apportioned equally between each child and that the respondent should retain the child benefit.

48. The calculation of the net amount to be paid to the appellant for his interest in the family home is as follows:-

- €141,000 – €17,243 Capital on mortgage at 25th April, 2012 = €123,757
- €123,757 by 40% = €49,503
- €49,503 – Costs €25000, arrears of maintenance €6750, and €5000 financial compensation to the respondent in respect of the mortgage, loans and mortgage protection. = €12,753

49. I will direct that sum be paid to the appellant by the 1st of November 2013.