

THE HIGH COURT

[2007 No. 50 M.]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY REFORM ACT, 1989
AND IN THE MATTER OF THE FAMILY LAW ACT, 1995 AS AMENDED BY THE FAMILY LAW (DIVORCE) ACT, 1996**

BETWEEN**A., B., C. AND D., PERSONAL REPRESENTATIVES AND EXECUTORS OF THE ESTATE OF E.F., DECEASED****APPLICANTS****AND
G.H.****RESPONDENT****JUDGMENT of Ms. Justice Reynolds delivered on the 25th day of June, 2018**

1. This matter comes before the Court by way of notice of motion brought by one of the executors of the estate of the late E.F. with the consent of the co-executors, seeking to enforce the payment of a lump sum order due and owing on foot of the settlement entered into between the respondent and the late E.F. on the 11th June, 2008 and made an Order of the Court on the 12th June, 2008.

2. A subsequent motion was brought by the respondent seeking to discharge that part of the Order dated the 12th June, 2008, providing that neither party shall apply for a variation of the amount of the sums payable on foot of the said Order, pursuant to s. 18 of the Family Law Act, 1995 and further seeking to discharge the balance of para. 4 of the said settlement on terms as entered into and agreed as between the parties to the within proceedings.

Background

3. The respondent and the deceased were married in 1992. There are two children of the marriage: O. aged 21 years and P. aged 17 years respectively.

4. The marriage between the parties broke down and the parties obtained a decree of judicial separation pursuant to the Order made on the 12th June, 2008.

5. The said Order of the High Court provided, *inter alia*, as follows:-

- maintenance for the said deceased and the two dependent children of the marriage;
- a lump sum payment of €7.65 million to the deceased payable in two tranches - €1 million on or about the 31st July, 2008 and the sum of €6.65 million on or before the 15th October, 2008;
- interest payable on the outstanding lump sum at the rate of 4% per annum;
- on payment of the lump sum to the deceased, the transfer of her interest in the family home together with certain lands and premises to the respondent;
- the respondent to have an exclusive right of residence in the former family home of the parties for his lifetime or until its disposal, whichever was the sooner.

6. The first payment of €1 million was discharged by the respondent and the balance of €6.65 million has not been paid, in consequence whereof the proceedings herein have now issued.

7. The late E.F. died in 2008 and the two surviving children are the principal beneficiaries of the Trust created by the Last Will and Testament of the deceased.

8. A grant of probate was extracted in respect of the said Will in 2010.

9. Since that time, the parties to the proceedings have sought to negotiate a resolution of matters between them having regard to the fact that the said sum remains due and owing.

10. It is common case that full financial disclosure was made by the parties with the assistance of financial advisors at the time the Consent Order was entered into.

11. The terms of settlement were premised on an assessment of the respondent's personal wealth which was almost exclusively reliant on assumed property values, both in respect of properties held in corporate structures and those held personally by the respondent.

12. Unfortunately, the said settlement coincided with the beginning of the worldwide economic crash and the collapse of property markets and banking systems, thereby undermining the entire premise of the respondent's assumed wealth.

13. In the circumstances, the applicants have sought to meet their obligations to try to recover the money due and owing pursuant to the said Order. However, it is clear that there is an acceptance by the applicants that the respondent's financial circumstances are not what they were in 2008. Further, it is agreed by all parties that it would be contrary to the interests of the children if the applicants were to rigorously pursue a forced realisation of the respondent's assets to recover the sums due.

14. Following protracted negotiations between the parties, and further in circumstances where taxation and actuarial advice has been sought, the parties have now reached an accommodation (hereinafter referred to as "the Agreement") which provides as follows:-

"The respondent to pay a lump sum of €10,590,000.00 on his 104th birthday, or on the day before his death, if same occurs prior."

15. It is clear that all parties are satisfied that the said Agreement meets the obligations made pursuant to the said settlement and acknowledges the altered financial circumstances of the respondent.

16. Since the death of the late E.F., the respondent has sold the former family home situate in W. and now resides in R. with the two dependent children of the marriage.

17. It was known at the time of the settlement that the deceased was suffering from an illness and that her prognosis was uncertain.

18. The settlement entered into between the parties in 2008 contemplated that their heirs, executors or assignees would be charged with implementing the agreement. Paragraph 17 of the settlement provides as follows:-

"17. In the event of the death of either party prior to the completion of capital payments and consequential property adjustment orders and declarations specified herein, (and in particular paras. 4, 5, 6, 7, 8, 9 and 10 hereof) they hereby irrevocably instruct their executors, heirs and assignees to do all acts and make all payments necessary to fully implement this agreement. The surviving party agrees to take all steps and do such acts and make all payments due under this agreement to the estate of the deceased party as though that party survived."

19. Paragraph 23 further provided as follows:-

"23. The within agreement is accepted by the parties in full and final settlement of any and all claims which either party now advances or may seek to advance in the future against the other. Both parties declare that this agreement makes "proper provision" for the purposes of any further divorce application. These terms shall bind the parties in the event of a future divorce application; no further ancillary relief shall be granted to either party following any such decree save for mutual blocking orders pursuant to s. 18(10) of the Act of 1996 and any orders necessary to continue this agreement in effect without prejudice to the right of either party to seek to review the periodical payments order."

20. The parties clearly intended that the settlement brought an end to their financial obligations to each other.

21. As already stated, within months of the settlement being entered into between the parties, the global collapse in financial markets and property values occurred, thereby greatly diminishing the value of the assets held by the respondent at that time.

Issues

22. Clearly there is an obligation on the executors of the estate to collect the assets of deceased, one of those assets being the lump sum payment due to the estate on foot of the settlement agreement.

23. However, it is accepted by all parties that the executors are not in any better position than the deceased would have been in to resist an application by the respondent for a variation of the Order made on foot of the consent, despite the full and final nature of the settlement.

24. The law relating to Judicial Separation and Divorce involves the court ensuring a continuance of proper provision for the parties in granting the said Order. However, the structure of the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 and the resultant case law from the Superior Courts make it clear that when asked to review or reassess arrangements which were assumed or imposed in the past, the Court must ensure that the provision is proper in the altered circumstances and if it is not, must move to address that imbalance.

25. Section 18 of the Family Law Act, 1995, being the section that provides for variation or discharge of various orders, specifically provides for the possibility of new or unforeseen circumstances which may arise in the lives of the parties. In providing for the review of past orders, the section allows for new evidence or changed circumstances to be relied upon by a party which were unknown or unanticipated at the time of the making of the original Order.

26. In the instant case, the application being made by the parties is a consent application having regard to the new and unforeseen change in the financial circumstances of the respondent herein. It is submitted that the terms of the consent Order do not oust the right and duty of the Court to enquire whether proper provision exists. Further, it is submitted that it is open to the parties to agree to waive or not enforce against the other, any part of that settlement against the other.

The Law

27. Section 18(2) of the Family Law Act, 1995, provides as follows:-

"Subject to the provisions of this section and s. 16 and any restriction pursuant to s. 9(2) and without prejudice to s. 11(2)(d), the court may, on application to it in that behalf by either of the spouses concerned or, in the case of the death of either of the spouses, by any other person who, in the opinion of the court, has a sufficient interest in the matter or by a person on behalf of a dependent member of the family concerned, if it considers it proper to do so having regard to any change in the circumstances of the case and to any new evidence, by order vary or discharge an order to which this section applies, suspend any provision of such an order or any provision of such an order temporarily, revive the operation of such an order or provision so suspended, further vary an order previously varied under this section or further suspend or revive the operation of an order or provision previously suspended or revived under this section; and, without prejudice to the generality of the foregoing, an order under this section may require the divesting of any property vested in a person under or by virtue of an order to which this section applies."

28. It is clear from the said provision that the respondent herein is entitled to bring a variation application and that the Trustees are the proper respondents to same.

29. The issue which arises is whether the Order is an order amenable to variation pursuant to s. 18 of the Family Law Act, 1995.

30. The Order under consideration in this application is one made pursuant to s. 8(1) of the Family Law Act, 1995. It is a lump sum Order pursuant to subs. 1(c) of s. 8 which is payable in two instalments.

Relevant Authorities

31. In *D.T. v. C.T.* [2002] 3 I.R. 334, Keane C.J. stated as follows:-

"It has not been suggested that the trial judge erred in principle in deciding to approach this case on the basis of the payment of a lump sum to the respondent without any provision for periodic payments by way of maintenance. In this context, it would appear that, having regard to the provisions of s. 22 of the Act of 1996, neither party will be entitled to

a variation of the amount of the lump sum itself, even should circumstances change: the extent of the permitted variation under s. 22(1)(d) would appear to be as to the payment of the sum by instalments. Similarly, it will not be possible for the court on the application of the respondent to provide for a periodic sum by way of maintenance, since the power of the court under s. 22(2) is confined to varying or discharging an order for periodic payments already made."

32. In *M.D. v. E.H.D.* [2012] IEHC 580, White J. in following the rationale in the *D.T.* case ruled that "for a lump sum order to be reviewed the order has to be an instalment order".

33. It follows that a once off lump sum order cannot be varied under s. 18, whereas a lump sum payable in instalments can be. It is clear that what was anticipated was that orders capable of variation are ones which by their nature have the feature of ongoing obligation such as periodic maintenance payments. Once off payments or transfers of property cannot be so easily unravelled once completed.

34. In interpreting s. 18, the court has to be mindful of its obligation to ensure that proper provision remains in place.

35. It is accepted that there is no reported Irish authority where the power of the court to make orders in judicial separation or family law proceedings following the death of one of the parties has been considered.

36. However, there are a number of authorities which consider circumstances where the parties have arrived at a settlement or an order of the court has been made, and unforeseen events occur after the making of the order arising from which an application is made where one party asserts that these events invalidate the entire basis of the order.

37. In *C.O'C. v. D.O'C.* [2009] IEHC 249, the High Court considered an application to vary the terms of a consent order and having considered all of the evidence in the case, Dunne J. was satisfied that the court had jurisdiction to consider applications for further property adjustment orders in the context of unforeseen events.

38. Similarly, in this case it is submitted that the court has jurisdiction to consider an application for the variation of the instalment lump sum payment pursuant to the specific provisions of s. 18 and entitles the court to make orders after the death of one of the parties.

Conclusion

39. Having considered the circumstances of the instant case, I am satisfied that it would be fundamentally unjust and inequitable to seek to enforce the Order of the 12th June, 2008. Further, this Court is mindful of its duty to ensure that adequate and proper provision is made not only for the parties but for the children of the marriage and will therefore grant the Orders sought.