Neutral Citation No. [2016] IEHC 381

THE HIGH COURT

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

[RECORD NO. 2014/19M]

BETWEEN

R.L.

APPLICANT

AND

M.S.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 31st day of May, 2016.

1. The applicant and the respondent were lawfully married to one another on the 27th August, 2005. At the date of hearing of these proceedings the applicant was sixty-five and the respondent sixty years of age. He is a farmer and artist and the respondent describes herself in her affidavit as a mother. Both parties had varying professional and business careers. There are no children of the marriage between the applicant and the respondent. The applicant was previously married in 1978 and has a son aged thirty-eight of that marriage in respect of which a divorce was granted in 2004. The cohabitation in that marriage lasted approximately six months. The applicant was also in a long term relationship with one G.H. through the nineties and into the noughties. There was a child of that relationship who, at the date of hearing was 22 and still in third level education and the applicant was in *loco parentis* of a daughter of the said G.H. who is now twenty-four years of age and pursuing her career. The respondent had adopted two children in the United States of America now aged sixteen and fourteen and she has assumed fostering responsibilities of an informal type in respect of a "daughter" in India and that daughter's recently born child to whom she provides regular financial support. The parties ceased cohabiting in 2009 and the marital relationship broke down and no reconciliation between the parties has been possible since then.

Entitlement to Divorce

2. Having considered the affidavits and the oral evidence offered on behalf of the parties at the hearing the court is satisfied that:

> *(a)* At the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years;
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> *(b)* there is no reasonable prospect of reconciliation between the spouses, and
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> *(c)* the court proposes in this judgment to make provision for the spouses as the court considers proper having regard to the circumstances existing.

Accordingly the court in exercise of the jurisdiction conferred by Article 41.2.30 of the Constitution, and s. 5(1) of the Family Law (Divorce) Act 1996 grants a decree of divorce in respect of the marriage of the applicant and the respondent.

Consideration of Provision

3. In deciding such provision as the court considers proper the court is directed by s. 20 subs. 2 of the Family Law (Divorce) Act 1996 to have regard to the matters referred to in paras. (a) to (l) of subs. 2 (without prejudice to the generality of subs. (1) of s. 20). Accordingly, the court proposes to consider the matters referred to in paras. (a) to (l) of the Act of 1996 by setting out the same and considering same seriatim:-

> *2(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.*
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> As per the applicant's affidavit of means his income in respect of work as a self-employed landscape and figurative artist for 2013 was €9,000 per annum. Net profit from farming was €1,705 for the same year and similarly income from forestry resulted in €12,824 (the court notes that income from forestry is tax free). Forestry is also an item which is not dependant on the exigencies of profit and loss being a State subsidy available for the foreseeable future. As a result of the submissions of counsel on behalf of the applicant the question arises whether an imputed income arises as being likely in the future. Counsel submissions were that the applicant could improve his income from work as an artist. Against this the applicant (albeit it late in the day) introduced evidence that he had a physical complaint which inhibited his work in that regard and also that he was now sixty-five and suffering from the usual disadvantages of late-middle age. If the complaints about lateness of notification of medical complaint are to be given any credence then there should have been an adjournment sought to have a medical examination carried out on behalf of the respondent. This did not happen, therefore I am inclined to think that income as an artist may not be significant, - of certainly not more than €9,000 per annum, - into the future.
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> Similarly, counsel for the respondent submitted that the net profit from farming is indicative of the gentlemanly way in which the applicant farmed his fairly significant land holding. It appears that his land is more in the nature of park land and where flat is low-lying and not suitable to intensive tillage or dairying. In ordinary circumstances I would tend to impute a better income from the possibility of renting for con-acre grazing, or (better still), on the tax incentivised long lease system as urged by counsel for the respondent. However, in this case, the court takes notice of the fact that income from con-acre allows little or no chance to offset farm overheads and/or bank interest in respect of tax and the net benefit from renting on that basis accordingly may not be what it seems at first sight. Similar tax problems may arise in relation to the tax incentivised long term lettings arises from the fact that in the absence of a cash injection from these proceedings of a very substantial nature the lands of the applicant must be put up for sale and this sale would be

absolutely prejudiced by not having vacant procession thereof by reason of a recently signed agricultural letting.

It should be noted that the applicant's income is absolutely swamped by mortgage repayments (on an interest only basis) of well over €100,000 per annum to two banks before any personal expenditure is considered. There is a further possibility that the applicant might save some tourist buildings for additional income, but in the absence of working capital it is difficult to see this as likely in the short to medium term. The respondent's income consisting of salary is €53,708 net per annum, deposit interest is €737 per annum and rent receivable net of interest and costs is €84,992 per annum.

As regards the property and other financial resources of the spouses this is dealt with in the *D. v. D.* Schedule based on that submitted by the applicants dated the 11th November, 2015. This *D. v. D*. Schedule presents a picture of the assets of the parties and their respective submissions therein which is very clear and practically the only controversy of significance arises from the difference between the parties in respect of the 40% shareholding in the family company of the respondent (hereinafter referred to as the FC). On the wife's case the valuation of this share after CGT is €1,587,900 and on the husband's case it is €8,000,003. The approach of the two valuers should be analysed to see where the court should decide the value in the FC lies. The approach of the applicant's valuer was to point to the net bank assets of the company being €24,414,000 and using this figure as a base and exploring the possibility of an earnings based p/e basis a valuation of €29,561,000 was obtained. This equated to €12,000,000 valuation for the respondent's 40% of shareholding and on a full CGT deduction at 33% this will result in a net value of €8 million.

The valuer of the applicant took a dual approach. Firstly valuing the company as a multiple of its earnings of a properly weighted average over the last three years using alternative multiples of 4 and 5, and then using an alternative asset base. He criticised the asset based valuation of the respondent's valuer saying that the accounts had not discounted the fixed assets for depreciation and that on a disposal much of the machinery would be of little value on the open market as same were specifically designed for the purposes of the business. In the circumstances of this case, (whatever about the other areas of criticism which may be laid against the applicant's valuer's approach), I cannot accept this proposition that the FC can be viewed only as a saleable proposition in respect of its broken up components. In all but the most exceptional circumstances I could not see the FC being broken up for the purposes of sale in the style of a dismantlers yard, as to do so would be to destroy the management success in coordinating all the physical elements in the business, never mind losing the name recognition and brand name of the products. On the other hand I do not accept the use of the applicant's valuer of profit earnings ratios of between 20 and 45 in so called comparative company sales and PLC valuations mainly in the US, as these relate to companies operating a far wider scale with export markets. One exceptional local comparator was used on behalf of the applicant and this itself was queried insofar as its trade consisted largely of the export market rather than being predominantly confined to the home trade as was the case in the FC. The weakness with comparators of company sales is that it is difficult where the same takes place outside the PLC area to fully analyse the various factors which might be taken into consideration for making a comparison. Nevertheless, the evidence was that the earnings after tax of the Irish comparator were lower than the FC and the sale price on the face of it was more consistent with the applicant's valuation.

While I am more inclined to take the more restrained approach of the respondent's valuer, I cannot accept the absolute pessimism of the assumptions upon which it is based; the range proposed on behalf of the respondent for the respondent's share was in the region of €1.9 million to €3.48 million. I am inclined to consider that the valuation which should be accepted in respect of the respondent's 40% shareholding should be €4.5 million which after tax would result in a sum of €3 million. This is taking the approach of the respondent's valuer to apply a lesser minority discount of 25% by reason of the fact that the new constitution of the FC will have pre-emption rights in respect of share transfers and that the shareholding of 40% may be seen as an influential minority. In deciding this valuation I am conscious that it is still very much below what might be pointed to by the intuitive centre of gravity of the Irish comparison, never mind the plethora of international comparisons offered by the applicant's valuer. However, it must be realised that the company is to be valued on the basis of the respondent's family not necessarily being in the management thereof, and on the basis of the good will only extending to the bare name recognition and brand name of the company. Neither does it factor in the fact that the respondent's family seem to have been modest drawers of salaries (apart from a generous once off pension contribution). Any purchaser of the company may have to recruit staff into its new management structure who would be more costly in terms of salary pension rights and even shareholder options in order to compete in the market to obtain management which might go somewhere near the excellent skills and family dedication of the respondent and her family.

While I have completed the *D. v. D*. Schedule on the above basis together with such minor changes as are self-explanatory, I should emphasise that the valuation issue does not end here in terms of the dynamics and fairness which are expected of the court's judgment in a divorce case. The court is deciding in this case that a lump sum is not appropriate for the reasons hereinafter explained, not least of which is the fact that realising a lump sum from the sale of shares or facilitating same by the transfer of shares to the applicant is well nigh impossible and very much against the interest of the FC, the respondent and her siblings who are shareholders in the company and also, and primarily because the respondent has represented in adamantine fashion that the company will never be sold.

The court must have some regard to the possibility that in a future time circumstances may change such that the view of the respondent and her siblings might change. One of these factors which might occur in the future is that the owners of the FC might receive an offer which they could not refuse for the purchase of the FC. The circumstances of such an offer may well be those which occur in the market where strong PLC's seek to acquire small private companies which have developed a good brand together with good will in an effort to acquire not only the physical assets but also the good will and to create synergies across the whole acquiring company which have a benefit to the parties far beyond the normal valuing criteria.

In such circumstances the otherwise whimsical considerations of the applicant's valuers report might come into play. The practical challenge to the court is to consider whether caution should be taken to ensure that the applicant is not left with a basic provision which has been significantly affected by the assurance of the respondent that the FC would not be sold under any circumstances. I propose to deal with this contingency in the final disposition of the case.

2(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).

The financial needs of the applicant are set out in his affidavit of means and it is clear that apart from his interest bill on loans of over €100,000 his ordinary outgoings are hardly met by his income. The respondent's affidavit of means shows that her outgoings more or less match her income net of tax with nothing to spare. I do not accept the submissions made

on behalf of the respondent that the sale of one house and farm by the applicant will leave him in a position where he has another house and farm available to provide income for him. The best scenario would be that he would retain the house which has been partly developed as a house and tourist accommodation and he may have some income from this. He has no pension but may have some contributory old age pension at sixty-eight if he has the necessary contributions made to date. A case has been made that he needs to have pension provision made by reason of his advancing years. There is no doubt that he needs some income to protect against hardship. The respondent has two children at an expensive stage of their careers and she may need to improve her income, but she has the possibility of persuading the FC to facilitate same even in her reduced role.

2(c) The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be.

The family enjoyed a very lavish lifestyle prior to their living apart and the respondent continues to enjoy the same type of lifestyle, but without the additional factor of the excellent company of the applicant. While the parties had a lavished lifestyle their expenditure could not be classified as crude or extravagant. Since the parties have commenced to live apart the applicant seems to have lead a more subsistence type of life but continues to be involved in his cultural and agricultural contacts, but having regard to his interest bills he is nevertheless living widely beyond his means and it is imperative that he takes steps to reduce his indebtedness.

2(d) The age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another.

The applicant is sixty-five and the respondent is sixty and their marriage may be described as a short one as they lived with one another for only four years. On the basis that the parties did not execute mutual waivers in relation to the Succession Act 1965 it is far to say that had the marriage continued the respondent might have predeceased the applicant and the applicant might expect under the Succession Act to be legally entitled to half her estate. The longer the marriage the more of a percentage on a discounted basis half the value of the estate might be expected to be. In addition the length of the marriage might in most circumstances indicate the depth or extent of the dependency of the dependent spouse having regard to other criteria set out in subsection 2.

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

I have commented on the physical complaints of the applicant and where they lie in the litigation. The respondent is in excellent health and intends being active whether in employment or in voluntary work until her ripe old age. Equally the applicant is likely to continue to be active although age seems to have taken its toll on him more than the respondent.

2(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.

In general terms, the parties had the assets which have been described in the *D. v. D*. Schedule when they met, the only difference being that the proportion of debt appearing as a liability of the applicant is now much greater through the accumulation of additional borrowings to which the respondent was not a party and the accumulation of interest. While the applicant did not contribute financially to the respondent he has made the case that he has made a contribution to the family by looking after the two young children of the respondent and also participating in two major ventures in relation to the purchase of a property in France and the building of a second home in Asia. Such was the commitment to the building of the second home in Asia that the children were moved from school to be there while the venture continued. While the actual technical support of the applicant offered in respect of the ventures in France and Asia may not be as great as he suggested in evidence I am satisfied that notwithstanding that the respondent had been hitherto a busy international executive, these ventures were outside the routine and discipline of her previous experience, and the physical and moral support of the applicant important to make them a success. These ventures have now shown up in the *D. v. D*. Schedule as assets on the respondent's side. They were financed out of assets which the respondent had disposed of in Ireland and which she owned prior to the marriage. The applicant also made the case that he looked after the children and this was borne out somewhat by the respondent's concession that an SUV was purchased to facilitate bringing the children to school. I am satisfied on the evidence that the applicant did in fact help with the children and that this arrangement eventually broke down when the SUV itself broke down, and with increasing absences of the applicant while he pursued the development of a spectacular cultural project in his alternative residence eighty miles away from what was then the family home. The respondent said that the number of occasions when the applicant cooked for the family were few and far between, although she was fulsome in praise of his ability and willingness to act as an accomplished chef for dinner parties and meals of celebration. While I have no doubt that the applicant in his dealing with the children was kind and avuncular, - as evidenced by his good relations with them to this day, his commitment and presence with them was a great deal more desultory than the traditional "stay at home housewife". Subject to paid help in the home, the contribution of the respondent was greater and more continuous in relation to the care of the children on a daily basis subject to her employment duties. The respondent made considerable play out of a claim for the repayment of €650,000 which was refined to €620,000 which she stated she loaned to the applicant in various ways but principally in relation to the refurbishment and development for tourist purposes of one of the applicant houses in his home county. The applicant in evidence conceded that she did in fact contribute financially to these endeavours at least up to the level of €500,000. Notwithstanding that the respondent was most adamant in her evidence that the €620,000 constituted loans by her to be paid back by the applicant, I am satisfied that these payments were made as a result of a whirlwind romance and consequent marriage which was marked by a generous abandon of each party to participate in the lives of the other. I accept that the respondent may genuinely view the matter as a loan, but I consider that this view may have become imprinted on her mind as a result of the massive disappointment suffered by her when she discovered in the end that her expectations of the marriage were dramatically different from those of the applicant. In terms of evidence there was no paperwork whatsoever indicating an agreement that interest would be paid on the sums concerned or that they were loans. For a person who had been the ultimate successful business executive dealing in transactions which require close attention to documentation down to the keeping of such things as cash ledgers and returns from many outlets in addition to dealing with suppliers for manufacture, it is inconceivable that she would set up a commercial loan in this regard, without having documentation to describe each and every transaction. Added to this consideration is the fact that I observed her response to cross-examination by counsel where she allowed her obsession with her conclusion about the loan status of these payments to cloud her objectivity in answering the questions being fairly put to

her by counsel. This process was a lengthy one and did not fairly reflect her otherwise fair and even approach to the case, and the marriage. This lapse was most exemplified by her offering to cross-examining counsel, when she had realised the purpose of the exercise, to suggest to counsel that no matter how he might try to suggest to her that the facts pointed towards the absence of a loan status for the payments that her answer would invariably lead to the contrary conclusion. She thus lost what may be colloquially described as "traction" in relation to the cross-examination and her credibility was greatly damaged thereby. Accordingly I conclude that the contribution of €620,000 which she made to the applicant's ventures are not loans. Unfortunately, it is not clearly to be seen that there has been any benefit from these contributions, as the valuation of the house and farm does not support such completed work, nor has any income being shown as a result of the completion of this work. This is a matter entirely outside the control of the respondent and does not reflect well on the contributions which the applicant made even to his own property which he still holds. The farming and tourist activities of the applicant have in the main not being successful nor reached an acceptable level of commerciality and his contributions in that regard are to be looked at as negligible. In some ways his allowing debt to accumulate without taking the advantage of restructuring or write-off opportunities already offered to him, and which arguably in all probability are still available to him, are to be regarded as negative, or more dramatically, as asset burning, which on the submissions of counsel for the respondent should be borne in mind by the court when considering the making of provision in this case. It was argued on behalf of the applicant that his many long vacations and ventures in France and Asia for the purpose of developing/acquiring the properties there meant that his artistic and agricultural activities were handicapped. However, against this the respondent has argued that he was a well-travelled man well before the marriage and took considerable time out to reside with the person in Spain. As his farming activities hardly ever exceeded the selling of grass products when in surplus and only having such animals as might be regarded as pets, I have no difficulty in accepting the respondent's submissions that his farming was not affected by the absences through marriage.

2(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 with one another 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.

I have already dealt with these issues under discussion on para. f above.

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

Any income or benefit to which either spouse is entitled by statute may come as a result of qualifications through contributions for old age pension. As usual in these cases (and regrettably) no information was available to the court in relation to the contribution status of each party, but I assume that the applicant has some contributions at least. The importance of such contributions is to be more emphasised in relation to these cases as recent legislative amendments have raised the number of contributions required.

2(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.

The conduct of the spouses does not arise as a consideration in this case.

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

On any outcome of this case the recommendation of the spouses is assessed, and if the applicant can settle with the banks he may even hold on to his D. home with some acres surrounding it.

2(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 divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring.

While the applicant argued that there is no pension in existence to which the applicant had an entitlement, there is no reason why in the future the respondent could not use her privileged position as a company director to accumulate a significant pension again in addition to and parallel to the pension which she has already cashed in as evidenced by the letter from the pension provider. Indeed the tone of the letter is suggestive there might be further pensions. Hence the applicant may have some lost some prospect of a pension. In any event, it is open to the court to consider the respondent's AMF funds as the source of a potential pension for the applicant.

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

I have considered the rights of the respondent's children whose needs seem to be well looked after and protected by the respondent in relation to their upbringing. I have some sympathy with the respondent's anxiety to ensure an inheritance for her children and possible career through inheriting and obtaining the benefit of her considerable wealth arising from her ownership of shares in the FC. I have also considered the rights of the respondent's siblings who are involved in the FC and recognise that the FC is the result of their combined efforts in addition to constituting inherited property in respect of which the applicant had no involvement whatsoever. These considerations have lead me to conclude that the court should not make an order which would destabilise the company. Even if the court were of a mind to transfer some shares by way of provision to the applicant the court has to consider that such an option is never an easy one, and would have added elements of impracticality leading to a prolongation of hostilities between the parties and also bringing the respondent's siblings unnecessarily into play in relation to such hostility.

Conclusion

4. While there is no doubt that in many respects the applicant is the author of his own misfortune through his stubborn laziness and desultory attitude towards his business affairs, his bad fortune has also been contributed to by the dramatic fall in property prices and his disappointment in obtaining a partial designation of some of his lands for zoned development. Like many of the persons who were doing well in the age of the Celtic Tiger, the respondent seems to have had had a reluctance to confront the new reality that property prices, while rising somewhat, may never catch up with the accumulation of debts and continuously running interest. If the respondent continued in the same financial position of having lands worth €3 million as envisaged by the applicant when first replying to the pleadings herein, then the case might not be one in which the court would feel obliged to make any positive provision for the

applicant. However, contrary to the submissions of respondent's counsel, the applicant may be in a position where he is on the cusp of making a case to have a medical card, at the expense of the tax payer, and possibly when he reaches the age of having a non-contributory old age pension.

5. Of course, this contingency is lessened if he were to take, as the respondent's counsel has strongly urged, the opportunity to make a deal with his bank creditors. I accept that there may now be an opportunity to obtain significant discounts from the bankers concerned or their assignees (the so called "vulture funds"). I find that the combined effect of the applicant's reluctance to make a deal with his creditors so as to leave the way clear for the court to decide where the real balance of the assets in this case lies and the prospect of the creditors "quaffing" the provision to be a severe inhibition on the court in making such provision. The applicant's counsel has warned against the court taking an overly paternalistic view of the matter and, hence, I have decided that the court should make some provision at the risk of same being "siphoned" off as so called low hanging fruit by the banking creditors.

6. However, the court should endeavour to protect as best it can the applicant from any application by the banking creditors for an order attaching any provision of the court made to him for the purpose of payment and/or securing of their debts as happened in other cases. The court takes a guide of the allowance (referred to by the respondent as a "stipend" of €320 a week, as a guide to what a reasonable payment in maintenance ought to be. Allowing for almost the worst taxation scenario, a sum of €500 per week periodical payment ought to be allowed. While this figure does not seem to fit in with the balance of income and expenditure shown by the respondent, I am satisfied that in her position as FC, she may be in a position to increase her income to this extent otherwise she has assets from which the same may be generated.

7. In addition, to provide for some security by way of pension, the court proposes to make a pension adjustment order/property adjustment order in relation to 50% of the AMF fund. In addition, having regard to my comments in regard to valuations of the company and reluctance in this judgment to interfere, in any way, with the FC, the court adjourns the consideration of the making of a lump sum order of not exceeding €500,000, in the event of the FC company being sold and the cash or equivalent value of the respondent's 40% shareholding being realised for a sum equal to or greater than €5,250,000 within a period of five years from the date of the judgment. This latter provision is to avoid the injustice arising from the massive amount of liquid cash being generated against the adamantine assertions of the respondent that the F.C. will be kept within the family. I am satisfied that the proposed provisions are consistent with the requirements of justice required by s. 20(5) of the Family Law (Divorce) Act 1996 and that the financial needs of the respondent's children are adequately catered for without exercise of the powers referred to in subs. (4). I propose that costs should be awarded to the applicant on the High Court scale. I await submissions of counsel in relation to forms of order and any modulation of costs.