

THE HIGH COURT

FAMILY LAW

[2012 No. 39 CAF]

CIRCUIT COURT RECORD NO. 01577/2010

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

BETWEEN

F.

APPLICANT/RESPONDENT

AND

F.

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 7th day of December, 2012

1. The applicant (wife) and the respondent (husband) were lawfully married to one another on the 29th May, 2002, in the other jurisdiction of C. The parties had met while they both worked in C. in or about November, 2001 after which the husband returned to Ireland for some time before the marriage and their courtship and engagement was continued at long range by phone and email until the wedding. Both had been teaching in C. and after the wedding both took up employment in Ireland, with the husband having the more lucrative employment in the business sector, and the wife being also employed, not as a teacher but in the services sector at a lesser remuneration. The parties lived with the husband's mother for a while, then rented a flat and ultimately acquired an apartment in D. with loan finance and some small assistance from the husband's mother. They also acquired jointly an apartment in C. with loan finance of €25,000.00. The parties became dissatisfied with their living conditions and future in the D. apartment and decided to sell same and purchase a house in T. This house could be best described as being situated in the furthest reach of the commuter belt on a very poor route to D. The D. apartment was sold, leaving a significant profit which was used to pay down the loan on the apartment in C. and provide some finance/deposit for the house in T., which was also financed with a mortgage of somewhat more than €270,000.00 which importantly was a tracker mortgage.

2. The house at T. was bought on a building contract, and it took some considerable time for the house to be ready for occupation. In the meantime, the wife moved to the vicinity of T. and rented a flat, and later a room to facilitate her taking up employment in the vicinity of T. in anticipation of having her employment secured and ultimately, moving into possession of the house at T., with her husband.

3. At this time unhappy differences arose between the parties and by August, 2006 the parties had separated. Also, the wife had not seen the inside of the house being purchased, a disadvantage which she has suffered up to the hearing and to date. Thereafter, the wife made her way back to D. to live and work, and unfortunately suffered some ill health requiring an operation. She was generously assisted in relation to housing for her recuperation by the husband's mother, but was actually nursed back to health by her own mother who had travelled from C. to be with her in Ireland.

4. On the 12th March, 2007, the husband and wife both signed an agreement which, in redacted form, reads as follows:-

"Whom it may concern,

Myself (wife) and my husband (husband) declare in this document that we have been separated since August, 2006 and we had agreed to share our goods and savings as follow:

1. The C., apartment will remain totally owned by (wife) as part of the payment for the house in T., which will remain with (husband).

2. Husband will be the total owner of the house in T. after the payment of €11,400 (€1,400 already paid) to wife. Husband will be given three months until the 30th June, 2007, to finalise either the cancellation of her name from the mortgage or sell the property. After receiving €11,400 from husband she will have no rights to the property or will receive any financial gain from the sale of the property. Wife will not be liable for any debts from the property. Wife will receive €5,000 before the middle of March and a further €5,000 after the closing of the SSIA account.

3. The SSIA savings will be shared equally in the end of April, 2007 when the account is due to be closed.

4. Wife and husband will pay a set amount of € on the end of every month to cover loans taken out during the marriage.

We agreed the above terms and conditions.

(husband) (wife)"

5. The house at T. unfortunately has fallen into serious negative equity and the apartment in C., has increased significantly in value on any view. There were no children of the marriage. The husband has entered into a new relationship and has an eleven month old

child.

Litigation History

6. The Family Law Civil Bill was issued on the 17th March, 2010. The pleadings in the case seem to have proceeded at pace and a case progression hearing took place on the 1st March, 2012, before the County Registrar. The quite exhaustive order made in consequence of the case progression hearing is set out as follows:-

"It is noted that:-

(a) The Legal Aid Board has now come on record for the (husband).

(b) The parties confirm the case is ready to proceed. (Husband) seeks details of the rental income of the property in C., and the wife's solicitors will ask the applicant for same.

(c) The notice of trustees will be served on the (husband's) pension provider and an affidavit of service will be handed in to the Court on the hearing date.

(d) The original marriage certificate duly translated to be lodged in the Circuit Court Family Office ten days before the hearing date.

(e) Parties to attempt to agree valuation of the C. and Irish properties and in default call their own evidence.

IT IS NOTED THAT THE ISSUES ARE AS FOLLOWS:

- Property Adjustment Order regarding family home at T. and property in C.
- Duration – two hours.
- Witnesses – the parties and a valuer if necessary.

IT IS HEREBY ORDERED AS FOLLOWS

(a) The parties shall update their affidavit of means and vouch any new material within four weeks of the hearing date.

(b) Liberty to the husband to file an amended defence within 21 days.

(c) Adjourn for hearing to the 17th April, 2012.

(d) Liberty to apply.

(e) Reserve costs.

(f) Certify for counsel."

7. The matter came on for hearing in this Court in November, 2012 as an appeal from the order of O'Donoghue J. made in the Circuit Court on 17th April, 2012. It appears that the hearing in the Circuit Court concentrated to a great degree on fault issues, which are certainly absent in the case progression order. The order of the Circuit Court had been stayed by an order of White J. in this Court on the 20th April, 2012. Although it was clear that the husband wished to attain a significant distribution of the capital towards him, neither party carried out a professional valuation of either the property at T. or in C. Whereas, the husband's counsel complained that the discovery and disclosure of the wife was deficient, it transpired that the wife's solicitors, by letter dated the 8th August, 2011, set out an extensive disclosure with documentation amounting to 16 paragraphs which by all appearances was either not produced by the husband or not seen by his legal advisers. There was thus a considerable change to the litigation background in this case when it headed towards an appeal hearing in the High Court. Whereas the amended practice direction in the High Court allows parties to Circuit Court appeals to bypass the practice direction, they are at liberty to apply to the High Court for case management either through simple applications for directions in the direction list or through specially fixed case management hearings. Such a step would no doubt have shortened the time for hearing considerably through attaining agreements or understanding in relation to valuation and enforcement of valuation disciplines in the event of valuers being retained or called. Case management would also assist in isolating the issues and enhance the prospects of an early settlement. It is noted that at some stages at least on the husband's side, and at all stages on the wife's side, the parties were legally aided. The inefficient case management of the appeal by the parties is a timely warning to all in receipt of the very scarce resource of legal aid to ensure that the parties and the Legal Aid Board get the very best value for the funding concerned by the avoidance of time wasting and unnecessary expenditure of resources.

8. The Court should not hesitate to penalise parties who have not been alert to their duties to have their Circuit Court appeals case managed appropriately and not to pursue the litigation in a manner which may amount to litigation misconduct. The Court is, however, constrained by the concept of proportionality in relation to imposing such penalties and insofar as this Court has penalised the husband as the party responsible for the pursuit of the appeal through the use of case management, it has only done so through the failure to allow an "earn out" provision based on a percentage gain on the sale of the apartment in C., the event of same exceeding the Court's valuations.

The Hearing

9. Having heard the evidence on appeal, I am 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

B. There is no reasonable prospect of a reconciliation between the spouses, and

C. Such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses on any dependent for the spouses. Accordingly, the Court in exercise of the jurisdiction conferred by Article 41.3.2.° of the Constitution grant a decree of divorce in respect of the marriage of the husband and wife.

Consideration of Provision Pursuant to Section 20

10. The Court has considered all the circumstances of the case pursuant to s. 20 and, in particular and without prejudice, to the generality of subs (1) of s.20 of the Act of 1996, the Court has considered the following matters in accordance with paras. (a) to (l) inclusive herein, the Court sets out its consideration of proper provision pursuant to the said paragraphs by setting out the same seriatim and the considerations and findings associated therewith.

Consideration and Findings

(a) [T]he 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 current monthly income of the husband net of taxes is €3,802.00 per month. The wife's net wage per month is approximately €1,880.00. She has further rent of approximately €250.00 per month from the apartment in C., but says that this money is used for upkeep, maintenance, tax and to fund annual trips to C.

The husband's employment includes a short term contract which will end in December, and this will reduce his net wage by €822.03.00 per month. His employment is somewhat at risk through international tax changes affecting the demand for the product which he sells, for his employer. However, I consider that both his employer and the husband have a proven record of success and a flair for the sector, it is therefore likely that his employment will continue, if not prosper in the future. Even if the current business of the husband fails outright, as the husband has sufficiently established himself in the sales/management area he has a very good prospect for employment elsewhere.

The wife's employment is not so secure as her company has announced extensive withdrawals from this economy and she fears that she may be in the list of redundancies. However, she did not show any evidence of the likelihood of being included in such list. Even if the wife is made redundant she has, through her employment in this jurisdiction, shown that she has multi-lingual skills and a significant track record in sales. She presents well, and is likely to be in the upper range of the persons made redundant in the fight to secure new employment.

The husband has no pension but the wife has a pension in her current employment with approximately four reckonable years so far amounting to the sum of €9,000.00 approximately.

The value of the parties' joint interest in the house at T. was put forward by the wife as €280,000.00 based on online advertisements of houses in the same estate. The evidence of the husband was that the value was in the region of €120,000.00 based on the latest printout of the Property Service Regulatory Authority website relating to the sale of six houses in the T. area, one of which was in the estate of the parties' house at T. ranging from the prices of €85,000.00 to €190,000.00. In addition, the evidence of the husband was that the property had been put up for sale and that while there were some callers, there has not been a bid. He also argued that the sum of €280,000.00 asking price for a similar property on the website had not been reduced in accordance with the general fall of property prices and could not be reliable. Whereas the husband's solicitor had, by letter to the wife's solicitor, agreed to place the house at T. at the disposal of the wife's valuer, for valuation purposes, this opportunity was not taken up by the wife by reason of the fact that the consent did not extend to her personally calling into the property and inspecting same. In the absence of any real valuation evidence the Court must fall back on its recognition of the extent to which property values have fallen and the difficulty of selling property in the furthest reaches of the commuter belt. The Court, therefore, holds that the valuation of the house at T. is in the range of €120,000.00 to €150,000.00. There is a considerable difference between the husband and wife in relation to their estimates of the value of the apartment in C., with the husband relying on the documentation in a power of attorney and measurements of a valuer in C., who purported to do a drive-by valuation that valued the property on a over 40sqm basis, whereas the wife claimed that it was in the 37sqm range. This Court has found that a value of €160,000.00 for the flat in C., would be a value closer to the wife's estimate and this valuation may be offered as a working assumption from which the provision might be made subject to the review of the court, on the basis that this Court has found the wife to be a consistent and credible witness. In the event of the Court ordering a sale of the property in C., the wife will not enjoy the income thereof. However, it must be remembered that the rent of the property in C. does not seem to provide significant disposable income for the wife in Ireland, and this indicates that the property is best sold if the sale may achieve a situation of better overall provision and prospects for the parties in Ireland, as it seems that both parties are likely to remain in Ireland. The mortgage on the house in T. is €254,330.00. This leaves the house in negative equity in the range of €100,000.00 to €150,000.00.

(b) [T]he 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 monthly expenditure of the husband and the weekly expenditure of the wife show that each of them would be living beyond their means if they were to spend all this money every week, but significant features of such expenditure on the husband's side are €964.59 for payments on the tracker mortgage on T., which is net of the directly paid tax allowance together with a sum approaching €388.00 per month in respect of miscellaneous bank and credit union debt, together with a sum of approximately €1,100.00 as contributions to his partner with whom he has an 11 month old child and lives in D. A significant feature of the wife's expenses is a sum of approximately €900.00 per month rent in respect of an apartment in which she lives with her unemployed partner who himself is only in receipt of €65.00 per week. While the husband may continue in the short term to commute from the T. property, his main centre of interest now is D., due to his new commitment to his partner and baby, as well as his employment. He has stated that he wishes to hold onto the property at T. but eventually negotiate with his bank the purchase of a lower priced property in D. and carry with him the negative equity arising and pay off same over the course of his remaining long employment career. The wife is now renting and with a sale of the property in C. she could reasonably be expected to seek to take advantage of current very low prices in D. to purchase an apartment at the bottom of the market. However, if the husband is to share in any of the capital accruing from a sale of the property in C. net of taxes and disposal costs, this housing objective of the wife may not be met unless she is in a position to borrow on a small percentage basis, at least. This capacity to borrow would depend on two factors; the non-redundancy of the wife or early achievement of alternative employment in the event of a redundancy, together with preservation of her credit record by release from her obligations on the mortgage on the T. house.

(c) [T]he 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 standard of living enjoyed by the family before the spouses commenced to live apart is more or less matched by the standard of living enjoyed by them now, having regard to the fact that the wife's earnings were often at the minimum wage level and have

improved modestly since then and the husband's wages have probably improved a pace. There is obviously the extra expense and overheads of separate accommodation for the two parties, but both are able to survive without recourse to each other and without indulging in too many luxuries.

(d) [T]he 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 parties are in their mid thirties and lived with each other for four years during their marriage. This was a short marriage where the parties never had total dependence on each other and where the parties pooled their resources as best they could to accumulate property. The marriage was long enough to establish a pooling arrangement in respect of which the Court has to give careful consideration from the point of view of ensuring as clean a break as is possible under the legislation, which is what the parties' desire.

(e) [A]ny physical or mental disability of either of the spouses,

While the wife had a bad bout of illness for which she required three surgical interventions, I am satisfied that her complaint, while possibly recurring, is not life or employment threatening. The husband appears to be in good health although appeared, while giving his evidence, to be under some strain with the worry of dealing with negative equity while still moving house and loan back to D., to deal with his new found circumstances with less strain.

(f) [T]he 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,

The spouses pooled their resources with the wife contributing somewhat less than the husband, but each contributed to the extent to which their salaries permitted. The husband obtained €5,000.00 from his mother to start off the property acquisition activities of the parties during the course of the marriage and the wife used her earning capacity as a lever from which the various loans could be obtained to purchase the properties, contributed on an equal basis with the husband in terms of the liability voluntarily taken on by her in respect of joint liability for such funding finance.

(g) [T]he 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,

The parties do not seem to have adversely affected their earning capacity and may actually have been complimentary to each other from time to time.

(h) [A]ny income or benefits to which either of the spouses is entitled by or under statute

The wife has a pension current valued at €9,000.00, approximately, and the husband has no such pension. However, both of them are likely to be in employment long enough to amass a significant but not over generous pension by which the later part of the retirement may be supplemented by contributory social welfare pension.

(i) [T]he 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,

Whereas there was considerable distraction in the Circuit Court on this category, the parties consented to the Court that this factor should not be taken into consideration nor should the Court take up undue time with same on the basis of an explanation of the Court of the law relating to the high hurdle of proof in relation to such matters.

(j) [T]he accommodation needs of either of the spouses,

If the house at T. were situated in D, I am satisfied that the accommodation needs of the husband would be well met by this house, and the occurrence of negative equity would not have a real impact on the case, as the husband would be likely to occupy the house long enough for the negative equity to disappear either by slow price rises or repayment of the principal under the mortgage. However, the negative equity does become a factor of considerable weight on the basis that the Court is satisfied that the husband needs accommodation in D. in the medium and long term. This accommodation need could be met by him renting but that, in itself, would trigger the need to rent the property in T. at what the Court may judicially note as a much lower rent, or he may buy with the assistance of the bank in D. Renting would not only entail the extra expense of renting in D., but also would lose the tracker rent entitlement and the tax allowance he now enjoys, therefore, purchase with the aid of his bank, so that he may carry his negative equity with him, seems to be the much more economic and preferable option. Similarly the accommodation needs of the wife may be met by current renting, but the accommodation would be considerably improved and her general security attached therewith if she could purchase accommodation and get a foot on the property ladder while D. prices remain at or near rock bottom level.

(k) [T]he 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,

The wife has a pension as referred to and this Court does not intend to have the husband share in any of same.

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

I have taken into account the rights of the husband's child by his current partner and given it considerable but not decisive weight in relation to concluding that a move back from T. to D. through repurchase carrying the negative equity with him is an option in respect of which the husband should get some capital help if same may be given by the outcome of the C. sale.

Effect of Separation Agreement

11. While the separation agreement, which has been set out in full herein, was made without legal advice and may not be an agreement which lawyers would draft in the circumstances-, it nevertheless represented a fair attempt by the parties in layman's terms to finalise their financial affairs after their separation. The Court accepts the wife's evidence that the outline of this agreement was made verbally between the parties in or around August, 2006 when they separated, and that they acted on foot thereof by living

their separate lives and taking responsibility for the separate properties designated to each of them in the agreement. Both were getting a good commercial deal from 2006 up to the date of the agreement. It is, therefore, an agreement which on the basis of *Y.G. v. N.G.* [2011] 3 I.R. 717., this Court would have given decisive weight were it not for the fact that, as directed by *Y.G. v. N.G.* and mandated by a consideration of the detailed provisions of s. 20(2) of the Act of 1996, the husband may require some capital help to ensure his move from T. to D. While it was argued forcefully on behalf of the wife that a letter from the customer relations unit in the bank indicating that "the removal of (wife's) from this mortgage will have no effect on the interest rate being charged", that the husband had the agreement of the bank to remove the wife's name from the mortgage without further ado, the Court is satisfied that by reason of the fact that this letter was obtained as a result of the negotiation of the husband with the bank's consequent on obtaining the stay on the Circuit Court order that the husband could not expect the bank to remove the wife's name from the mortgage without "bringing something to the table", either by way of payment of a small lump sum or assurance that he had the capacity to cover the expenses and outlay of repurchasing in D.

Consideration of the Order

12. On the basis of the most realistic estimate of €160,000.00 for the sale price for the apartment in C. and making a deduction of 40% for taxes and disposal costs, the net sum available to the parties would be €96,000.00 approximately. To allow for the husband to obtain €20,000.00 clear to hand the proceeds should be distributed in the ratio 66/30 or, in the event of the net proceeds being less than €96,000.00 the ratio should be such as to allow that payment to the husband. I estimate the sum of €30,000.00 in costs, on the basis of €5,000.00 for costs in respect of the current proceedings and €5,000.00 in the event of a claw back by the Legal Aid Board in respect of involvement in the case. However, these costs figures are indicative maximum figures and the Court recommends that any legal aid claw back would be minimised by reason of the fact that this sum is intended to facilitate the establishment of a new family home by the husband in D., and on the basis that the taxable costs of the husband's solicitors may be less than €5,000.00. The husband should have the benefit of a balance less than the aggregate of €10,000.00 considered in respect of costs claw back. In order to give the wife an incentive to proceed to sell and obtain the best price for the property the wife should have the benefit of any sum after deduction of costs and taxes in respect of any price obtained over €160,000.00. This Court intends to affirm the Circuit Court decree in relation to the pension adjustment order giving the pension to the wife with a nominal pension adjustment order for the husband. This Court intends to affirm the orders made by the Circuit Court under s.18(10) of the Act of 1996, but to incentivise the parties in relation to further action to be taken consequent on this judgment, the Court proposes that a stay would be placed on same in each case pending discharge of the relevant parties obligations in relation to sale of the property in B., discharge of the mortgage, obligations of the wife and any other obligations required to give effect to this order. This Court considers that the above proposed provision is just in all the circumstances and that, while it does involve a sale of the property in C. with which the wife has some connection, the Court has considered that she has put down roots very successfully in Ireland, has become an Irish citizen and she retains a very substantial part of the good bargains she made and will be protected against the bad bargain she made for T., insofar as she will be saved from the implications of a joint liability for T. arising through negative equity on the mortgage in respect thereof.

Order

13. The order proposed to be made is as follows:-

1. Replace and, where necessary, set aside and affirm the order of the Circuit Court as follows.

WHEREUPON AND ON READING THE PLEADINGS NOTICE OF APPEAL AND DOCUMENTS FILED HEREIN AND ON HEARING THE EVIDENCE ADDUCED AND WHAT WAS OFFERED BY COUNSEL FOR THE APPLICANT/RESPONDENT AND COUNSEL FOR THE RESPONDENT/APPELLANT AND THE COURT HAVING HEARD THE SWORN EVIDENCE OF THE APPLICANT/RESPONDENT AND THE RESPONDENT/APPELLANT AND UPON THE COURT BEING 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 preceding five years.

B. There is no reasonable prospect of reconciliation between the spouses, and

C. Such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses and the Court doth in exercise of its jurisdiction confer by Article 41.3.2 of the Constitution, grant a decree of divorce in respect of the marriage concerned which took place on the 29th day of May, 2002, in the C.

AND THE COURT DOTH MAKE THE FOLLOWING PROVISION IN RESPECT OF SAID DIVORCE:-

1. An order that the parties do sell within six months of the date of this order the property in C., and the proceeds thereof after disposal costs and taxes be paid as to €30,000 to the respondent/appellant and the balance (regardless of the disposal price) to the applicant/respondent.
2. An order that the respondent/appellant take immediate steps to have the applicant/respondent taken off the mortgage on the property situated in T., and to facilitate such steps the respondent/appellant shall be at liberty to apply to the Court for a property transfer order and shall be at liberty to have the in camera rule lifted for the purpose of showing this order to the mortgagee bank for the purpose of negotiating such steps.
3. An order pursuant to s. 18(10) of the Family Law (Divorce) Act 1996, that neither party shall on the death of the other party be entitled to apply for an order under this section for provision out of the other party's estate PROVIDED HOWEVER that this order shall be stayed until such time as the respective parties having the benefit of same shall have complied with their obligations under this order.
4. Pension adjustment orders including a nominal pension adjustment order in favour of the respondent/appellant so that the wife shall effectively have the full benefit of her pension.
5. The applicant/respondent shall be obliged to appoint an agent to sell and have carriage of the sale of the property in C. in the first instance and in the event of failure to sell same, the respondent/appellant shall be at liberty to appoint such agent. In default of either of the parties executing such documents as to effect the sale, application may be made to the County Registrar to execute same.
6. The party having carriage of sale may offer the property on the basis of a reserve not less than €160,000.00 as in respect of which the party may be advised to secure the optimum price for the property and the parties may be

at liberty to apply to the Court for further directions in relation to the carriage of the sale including the fixing of reserve.

7. No order as to maintenance.

6. No order as to costs.