

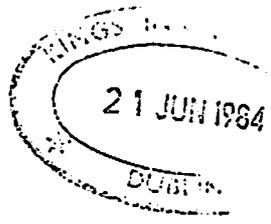
1983 / 19 C.A. 1573

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Judgment of Mr. Justice Murphy delivered the 18th day of
November 1983.

The Applicant and the Respondent inter-married on the 10th of January 1957. There were 7 children of the marriage, 3 boys and 4 girls. In the year 1973 differences arose between the parties as a result of which a separation agreement was executed. At that time the children were between 2 and 16 years of age. The separation agreement provided in clause 5 thereof for the payment by the husband to the wife of the sum of £1,400 per year subject to annual adjustment by reference to the official cost of living index. It was an express term of that agreement that the payment should be reviewed only when the last of the children attained the age of 21 years. On the face of it, therefore, the payments are to continue until 1992 notwithstanding the fact that all of

the children will have attained the age of 16 years by 1987 and many of them at a very much earlier date. The agreement provided that the husband should pay to the wife a salary of £20.00 per week for the management of the business in which they were then engaged. There was no provision for the payment of maintenance as such to the wife.

The financial affairs of the parties are complex. The wife continued for some years an employment agency which she had previously carried on with her husband. It was subsequently replaced by a secondhand clothing business. Increased costs rendered it impracticable to carry on that business and the tenant's interest was disposed of in April of this year. It appears that the wife obtained possession of a further part of the family home in Monkstown which had previously been let to tenants and she has recently commenced a children's playschool there. As she has not yet completed one full year of that enterprise it would be extremely difficult to make any estimates of the likely profit and a figure of, say, £100-00 per week would perhaps represent a picture of what might be expected rather than any reliable estimate. In accordance with the terms of the

separation agreement the wife has custody of the children and all of them with one exception reside with her. In addition she also provides a home for one daughter-in-law. Some of these children make a contribution to the maintenance of the home. The total of those contributions amounts to approximately £50.00 per week. As against that the weekly outgoings are estimated at £276.00. On what might be described as the capital side the wife did have certain house property and investments which she disposed of over the years for a total of some £60,000.

The financial position of the husband is almost equally complex. He accepts that subsequent to the separation he sold premises in Baggot Street for a sum of £141,000. After discharging certain liabilities he was left with a sum of £70,000/£80,000 approximately. The husband moved to England and there he purchased a valuable residential property. Those premises are currently let at a sum of £165 per week and accordingly yield more than £8,000 per annum. The husband contended that virtually the entire of his income is required to meet mortgage repayments; agents fees; bank interest; and repairs. In fact in his answer filed in the Circuit Court he showed an annual loss of

£80.00 sterling on the transaction. However on the figures which he provided in evidence according to my calculations he would have had a surplus of nearly £2,000 sterling per annum, but it must be accepted that evidence of this nature does require a closer examination and it would be perhaps unfair to the husband to reach any firm conclusion without detailed investigation of all of the payments and vouching documents. It can, however, be said that the premises do constitute an asset the precise value of which would depend upon the market for the premises and the amount outstanding on the mortgages. The husband moved to Germany where apparently he set up a business of his own. Again it was his evidence that business failed and he returned to Ireland in 1980 with no monies at all. Here he established a business for which he incorporated a company known as Mr. Wash Sales and Services Limited. Unhappily that business too failed and the venture for which it was formed has now been discontinued. For the greater part the accounts of that company which have been prepared for the three years up to the 30th of April 1983 are of historical interest only. The income of the husband consists of the sum of £500 per month paid to him (or more correctly his

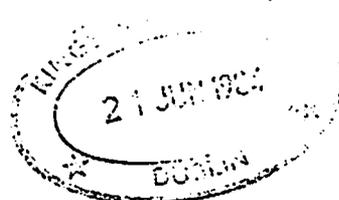
company Mr. Wash Sales and Services Limited) by the National College of Art and Design. Apparently the College preferred to engage the Company on a consultancy basis than to undertake the burden of engaging an employee. In any event the payment of the emolument to the company is a mere device and for practical purposes the sum of £6,000 may be seen as part of the emoluments of the husband. In addition the husband teaches in the Vocational Education Schools for which he is paid the sum of £480 per month. This continues for a period of only some 30 weeks per year. It would seem, therefore, that his annual income (apart from any surplus which he may obtain from the London property) amounts to approximately £10,000 per annum.

The husband lives in the south city of Dublin with a lady friend with whom he has formed a long standing relationship. It is his evidence that his weekly expenses amount to £100.00 but no part of his income is applied for the benefit of the lady living with him. In the same context it may be mentioned that the husband contends that his wife was guilty of adultery and that on that basis an Order of Divorce was made in England. The evidence of the wife was that no such adultery was committed but

that she permitted evidence to the contrary to be given in the case in England so as to facilitate her husband in obtaining the divorce.

In the year 1980 the husband discontinued payment of the sums covenanted to be paid by the separation agreement. As the financial position of the wife became acute last May an application to the Circuit Court for maintenance was made under Section 5 of the Family Law (Maintenance of Spouses and Children) Act, 1976. The learned President of the Circuit Court ordered the payment to the wife of maintenance at the sum of £379.40 per month in respect of six of the infant children. The sum of £379.40 per month in fact represented the annual sum of £1,400 agreed to be paid in pursuance of the separation agreement and adjusted upwards in accordance with the revision procedures therein contained.

Essentially the argument in this case by the Respondent is to the effect that clause 5 of the separation agreement in providing that a particular fixed sum would be paid for maintenance was invalidated by Section 27 of the 1976 Act aforesaid which provides as follows:-



"An agreement shall be void in so far as it would have the effect of excluding or limiting any provision of this Act (other than Section 21)."

On behalf of the Applicant it was contended that so to construe and apply Section 27 aforesaid would be to give it a retrospective effect and that such a construction should not be given as this was not the intention of the legislature or at any rate an intention expressed with such clarity as would be required to coerce the Courts into taking the unusual step of giving legislation a retrospective effect. In support of that argument reference was made to the decision of the Supreme Court in Dunne -v- Hamilton 1982 I.L.R.M. 290.

It seems to me that this is not the basis on which I would approach the resolution of the problem.

Section 5 of the 1976 Act, gave to every spouse a statutory right to apply to the appropriate Court for maintenance of himself/herself and any dependent children of the family. However the right of the Court to order the payment of maintenance was subject to the Court being satisfied that the other spouse had failed to provide such maintenance as was proper in the circumstances.

It does not seem to me that the terms of an antecedent separation agreement providing for the payment of a stipulated weekly, monthly or other periodic sum in any way excludes or limits the power of the Court to make a maintenance Order under Section 5. The relevance of such an agreement would be the provision which it makes - and by that I mean the effective provision which it makes - in providing proper maintenance and certainly is one of the many "circumstances of the case" which the Court would properly consider in accordance with sub-section 4 of Section 5 in deciding whether to make a maintenance Order and if so in determining the amount of any payment. I see no conflict between the existence of a contractual obligation and the statutory duty. Indeed I see no reason why a contractual payment would not continue and be supplemented by payments made in pursuance of a maintenance Order if in any particular case the Court regarded that as proper in the circumstances before it.

Apart from any problem in interpreting Section 27 and applying it with retrospective effect it would seem unthinkable that the legislature was prepared to avoid a contractual obligation entered into for the benefit of a number of people who might have

no comparable or corresponding right under the 1976 Act. The present case is a good example of that problem. The contractual obligation may or may not amount to or provide such maintenance for a dependent child as the Court thinks proper and to that extent the Court would, in my view, have power to increase such maintenance but the Court operating the 1976 Act would have no jurisdiction to review payments that are being made or should be made to children who are not dependents. Again it was argued that the wife by invoking the 1976 Act and the maintenance provisions contained therein waived the contractual maintenance rights. In my view that argument is without substance. In the first place the claim to statutory maintenance was not brought as an alternative to the contractual right but only to resolve the problem which was caused by the failure of the Respondent to comply with his contractual commitments. In the second place there would be obvious difficulties in successfully contending that the wife did or could waive any contractual right which she held on trust for the elder children particularly those who had nothing to gain by an application under the 1976 Act.

It is, therefore, my view that the obligation of the

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Respondent is still subsisting and even though the arrangement for its payment seems somewhat unsatisfactory in as much as it is not apportioned between those whose needs might be different the Applicant has not suggested that she would have any need for maintenance provided that the Respondent honoured his contractual obligations. The proceedings before me do not relate to the contractual rights of the parties and I am not empowered to make any Order in relation thereto. The matter in relation to those rights is explored solely because the right to the statutory maintenance arises only because the contractual obligations were not met in the first instance and at the present time have been disputed. It is necessary for me, as part of my decision in the claim brought under the Act to satisfy myself the contractual obligations subsist and that I have done. In my view the monies payable under the separation agreement are indeed due and payable by the husband to the wife together with all arrears thereof.

However in addition I do have jurisdiction under Section 5 of the 1976 Act, to fix maintenance "for such period during the lifetime of the Applicant spouse of such amount and at such times as the Court may consider proper" and I propose to exercise that

jurisdiction by ordering that the Respondent pay to the Applicant the sum of £75-00 per week commencing the day of next for a period of 12 months from the date hereof and that credit for that sum as and when the same is paid be given to the Respondent against the sums which he is contractually bound to pay to the Applicant. The reason for making this Order is in no sense to reduce the liability of the husband - as I say I believe I have no authority so to do - but to determine a sum which is within the competence of the Respondent to pay and will go some way to meeting the needs of the Applicant and more particularly a sum which I would have the statutory powers to ensure the payment thereof.

James S. Hoff

