

THE HIGH COURT

[2022] IEHC 268
[2021 No. 32 CAF]

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

BETWEEN:

A

APPELLANT

– AND –

A

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 9th May, 2022.

SUMMARY

This is a failed appeal against an order made by the Circuit Court in divorce proceedings. The focus of the appeal is whether proper provision was made by the Circuit Court in divorce proceedings that followed on judicial separation proceedings in which ostensibly proper provision had been made.

1. On 7th September 2021, Judge McDonnell decided these proceedings in the Circuit Court. Her order has now been appealed to me. The appeal has failed.
2. In the appealed order, Judge McDonnell essentially makes some ancillary provision and continues an order already made in previous judicial separation proceedings on 20th October 2008. The key elements of that order were that
 - custody and primary care of the couple's two children was given to Ms A,
 - one family property went to Ms A as her residence, one family property went to Mr A as his residence, and certain monies were divided between the parties in a manner that Judge McDonnell deemed fair on the facts as identified to her, and
 - there was no order for payment of maintenance.
3. Each of the parties has separate pension arrangements which yield a roughly equal monthly pension payment to them both.

4. In the years since the judgment of 2008, Mr A has regrettably done little, financially or otherwise, to assist in his children's upbringing. In his oral evidence he sought to portray himself as having been benevolent towards his children in financial terms. The evidence of his now-adult eldest child (accepted by me) is that after Mr A left the family home there was no relationship between Mr A and his family and no financial assistance. That changed a little in the student years of the eldest child after that child made some efforts to re-establish contact. Thereafter the two had some meet-ups and sporadic and limited financial assistance was provided by Mr A. To his credit, Mr A paid for one year of postgraduate fees for his eldest child and appears also to have bought that child a laptop computer at some point.

5. For her part, Ms A had a pretty horrible time of things following on the court order of 2008. In the absence of maintenance payments she did any number of jobs, no matter how humble, to make ends meet. I was particularly struck by her evidence that at one point she rented out rooms in her house and slept in the attic so that she could continue to put food on the table and keep a roof over the heads of herself and the children. Credit union loans also helped. Intermittently throughout this difficult time Ms A had to deal with abusive telephone calls from Mr A.

6. Following on the family breakdown, Mr A has regrettably suffered from some nervous ill-health. His medical advisor was called to testify to this fact. Certain drugs were prescribed by that advisor to assist Mr A through his difficulties. The advisor was surprised to learn that separate to these prescribed drugs Mr A had spent many thousands of euro importing drugs from abroad. Additionally Mr A spent many thousands of euro on goods or services from Panama. Mr A was completely vague in his evidence as to what the Panamanian expenditure was for. As a result, I have no idea what he bought from or via that jurisdiction. All I know is that while his judicially separated wife was scrimping and saving to provide for their children, Mr A was dissipating large sums of money on drugs, unknown goods/services obtained from or via Panama, and unknown quantities of alcohol.

7. At some point Mr A entered into a second relationship with Ms B. That relationship was a romantic relationship for a time. Nowadays Ms B, I was advised, acts as Mr A's carer (Mr A suffers from a disability). I do not think it really matters what the precise relationship between them now is – save to note that Ms B appears to avail of borrowings from Mr A which she seems never to repay in any demonstrable manner. The key learning I took from Ms B's evidence is that Mr A appears to have cash to hand when it is needed.

8. In the end, immoderation in Mr A's lifestyle resulted in the dissipation of his capital assets to the point that he even lost the residence ordered to him by Judge McDonnell back in 2008. As a result, Mr A now lives in rented accommodation. There is no doubt from the figures placed before the court that if Mr A had not spent thousands of euro on drugs, unknown Panamanian goods/services, and unknown quantities of alcohol (all things that no-one forced him to do) and if Mr A had better deployed such capital as was available to him, (something that was open to him to do) he would now be the owner of an apartment in an attractive Dublin suburb that would likely be worth a multiple of any (if any) outstanding borrowings on it.

9. Regrettably, I must note that it seems that among the monies dissipated by Mr A was a tax-free lump sum of €75,534.77 received by him on 30th November 2008 following his retirement – a lump sum of which, troublingly, Judge McDonnell does not appear to have been apprised by Mr A when the judicial separation proceedings were in the Circuit Court a month or so previous to that payment being made. I respectfully do not believe that Mr A did not know that

his retirement and the related payment of the associated tax-free lump sum were imminent developments when the judicial separation proceedings were before Judge McDonnell in October 2008.

10. Although Mr A was not ordered to pay maintenance back in 2008, I cannot but note that all of his post-separation financial excesses occurred at a time when Mr A was doing little or nothing to support his children financially or otherwise. I am sorry for Mr A that he suffered nervous ill-health along the way; however, I cannot but note that his separated wife was struggling in her own way with the harsh hand that life had dealt her. In truth, she survived worries and travails (and a period of physical ill-health) that might well have broken another person and – through grit and thrift – arrived at the position in which she now finds herself, with every prospect of paying off her home-loan (as well as a joint liability on the dissipated-away apartment that was ordered to Mr A back in 2008) and living out her days on her pension, doing the gardening she enjoys.

11. Having dissipated his capital and the residence that was ordered to him in 2008, Mr A has now come to court asking for a revision of the proper provision ordered by the Circuit Court that would in effect see him take a stake in the residence that was ordered to his wife back in 2008 (the end-result being that the property almost certainly would have to be sold and the profits split). The law, when applied to the facts presenting, is against Mr A in terms of obtaining the relief that he has sought. In terms of considering the applicable law, it is really only necessary to consider the judgment of Hogan J. for the Court of Appeal in *CC v. NC* [2016] IECA 410 which helpfully cross-refers into the decision of the Supreme Court in *G v. G* [2011] IESC 40, the other key case in this area.

12. In *CC*, a couple had been the subject of an order in judicial separation proceedings in which the Circuit Court sought to make proper provision. The wife went away and through a combination of ill-judgment or ill-luck (or both) ended up living in rented accommodation in London and owing rather a lot by way of tax. The husband, by contrast, remained relatively well-to-do. When they came subsequently to be divorced the question arose as to how proper provision was to be made in the changed circumstances that presented in the divorce proceedings versus the proper provision made in the context of the previous judicial separation proceedings. Of particular note when it comes to the present case are the observations of Hogan J. at paras.29-36 of his judgment in the light of s.20 of the Family Law (Divorce) Act 1996, including the following:

“29. *While...Irish law does not recognise the existence of a formal clean break, the starting point nonetheless is that in the [judicial separation]...judgment O’Higgins J. [of the High Court] sought to make proper provision....This is a very similar – if not, indeed, identical – exercise to that which the High Court was and this Court is called upon to perform in the present divorce proceedings. Furthermore...the very existence of the proper provision order in [the judicial separation proceedings]...is itself a factor which has to be accorded significant weight.*

30. *What, then, was the proper provision to which the wife was entitled in the light of...[the principles posited by the Supreme Court in G v. G]? In my view, the task facing the High Court was to ensure that the wife had sufficient capital monies as would enable her to purchase a large comfortable property as would*

befit the social standing and standard of living which she had enjoyed immediately prior to the separation. Of course, in making this assessment it is necessary to have regard to the totality of the orders made. If the [capital] sum [ordered was]...somewhat on the low side in view of the husband's significant assets, this is tempered by the fact that the order for maintenance...was a generous one....

33. *...[A]ll of [the capital]...paid over on foot of the order of O'Higgins J. has now disappeared....*
34. *This aspect of the appeal certainly presents an unhappy and unfortunate tale. It is impossible not to have very considerable sympathy for the wife....It is nonetheless clear from [the decision of the Supreme Court in G v. G]...that the other spouse should not be visited with the consequences of poor and improvident investment decisions made by the other spouse in the aftermath of the marriage break-up. Looking at this another way, if the capital provision made by the High Court in [the judicial separation proceedings]...was, viewed objectively, proper capital provision for the wife and children, the fact that the wife has subsequently misspent this capital sum is not in itself a reason why further provision should now be made in the course of the divorce proceedings. As Hardiman J. said in W.A. v. M.A. (divorce) [2004] IEHC 387, [2005] 1 I.R. 1, 19:*

'...the conduct of a party in himself (or, of course, herself) bringing about the circumstances giving rise to the alleged need for (further) provision is itself of relevance to considering whether such provision should be made, and in what amount.'

35. *...[T]he fact that the wife needs a further capital injection of cash to compensate her for the improvident investment decisions which she took after the [judicial separation proceedings]...is not in itself a reason why the High Court in [later divorce proceedings]...(or this Court in [an appeal from the decision of the High Court in the divorce proceedings]...should now make an order for further provision."*

13. I will now apply the just-quoted points of principle to the case at hand. I do this by quoting the words of Hogan J. in Bold text and applying his observations to this case:

[1] ***"29. While...Irish law does not recognise the existence of a formal clean break, the starting point nonetheless is that in the [judicial separation]...judgment O'Higgins J. [in the High Court] sought to make proper provision.... This is a very similar – if not, indeed, identical – exercise to that which the High Court was and this Court is called upon to perform in the present divorce proceedings. Furthermore...the very existence of the proper provision order in [the judicial separation proceedings]...is itself a factor which has to be accorded significant weight."***

I note that the proper provision order made by Judge McDonnell in the judicial separation proceedings falls to be accorded significant weight. (There was at one point an appeal against that order by Mr A but he has abandoned that appeal).

[2] ***“30. What, then, was the proper provision to which the wife was entitled in the light of... [the principles posited by the Supreme Court in G v. G]? In my view, the task facing the High Court was to ensure that the wife had sufficient capital monies as would enable her to purchase a large comfortable property as would befit the social standing and standard of living which she had enjoyed immediately prior to the separation. Of course, in making this assessment it is necessary to have regard to the totality of the orders made. If the [capital] sum [ordered was]...somewhat on the low side in view of the husband's significant assets, this is tempered by the fact that the order for maintenance...was a generous one....”***

Here, Judge McDonnell was faced with a situation where there were two residences, the two parties had separate pensions that would be payable to them, and a relatively small amount of free capital. (She appears not to have been told that Mr A would be retiring a month later and would be getting a tax-free lump sum of €75,534.77). In the situation before her, Judge McDonnell gave the parties a residence each and left each party her/his pension to herself/himself. It is not clear from the order why no maintenance was ordered in favour of Ms A. (I suspect it may have been something to do with the value of the respective residences but, to borrow from the wording of Hogan J., the *want* of an order for maintenance seems ostensibly generous to Mr A). Thanks also to the Circuit Court not being told of the imminent tax-free lump payment, Mr A got and appears to have dissipated that payment.

[3] ***“33. ...[A]ll of [the capital]...paid over on foot of the order of O’Higgins J. has now disappeared....34. This aspect of the appeal certainly presents an unhappy and unfortunate tale. It is impossible not to have very considerable sympathy for the wife....It is nonetheless clear from [the decision of the Supreme Court in G v. G]...that the other spouse should not be visited with the consequences of poor and improvident investment decisions made by the other spouse in the aftermath of the marriage break-up.”***

It appears that Mr A has dissipated pretty much all of his capital resources; certainly he has lost the apartment that a more prudent approach to life would have seen him retain in his ownership. I am very sorry for Mr A that he suffered a period of nervous ill-health along the way; however, I cannot but note that his separated wife was struggling in her own way with the harsh hand that life dealt her. I respectfully see no reason why Ms A should now be visited with the consequences of poor and improvident decisions made by Mr A in the aftermath of his marriage break-up, including, for example, his expenditure of many thousands of euro on the purchase of un-prescribed drugs and unknown goods/services that were obtained via Panama.

[4] ***“34....Looking at this another way, if the capital provision made by the High Court in [the judicial separation proceedings]...was, viewed objectively, proper capital provision for the wife and children, the fact that the wife has subsequently misspent this capital sum is not in itself a reason why further provision should now be made in the course of the divorce proceedings. As Hardiman J. said in W.A. v. M.A...‘....the conduct of a party in himself (or, of course, herself) bringing about the circumstances giving rise to the alleged need for (further) provision is itself of relevance to considering whether such provision should be made, and in what amount.’”***

For the reasons identified under point [2], I am satisfied that proper capital provision was made by Judge McDonnell for the wife and children. (I might myself have reached a different decision regarding maintenance were I the trial judge but that is an income issue not a capital issue and, as noted at point [2], there may in any event have been a logical reason for Judge McDonnell not to order maintenance when she had regard to the value of what she was ordering to each side property-wise). Regretfully, it does not appear that Judge McDonnell was made aware by Mr A at the judicial separation proceedings of the imminent payment of a tax-free retirement sum to him. I respectfully do not believe that this imminent payment (or indeed his imminent retirement) would not have been known to Mr A within but a few weeks of his retirement. I note the observation of Hardiman J. to which Hogan J. makes reference and would but reiterate what I have said at point [3] in this regard.

[5] ***“35. ...[T]he fact that the wife needs a further capital injection of cash to compensate her for the improvident investment decisions which she took after the [judicial separation proceedings]...is not in itself a reason why the High Court in [later divorce proceedings]...(or this Court in [an appeal from the decision of the High Court in the divorce proceedings]...should now make an order for further provision.”***

The same applies here. Mr A’s possible need for a further capital injection to compensate him for his past improvidence is not *in itself* a reason to depart from the provision made by the Circuit Court. Nor does any other reason present why the court would do so. Indeed, on the facts presenting, it seems to me, with all respect, that every reason presents why I should not do so. In particular, I note that while Mr A’s pension may not support the preposterous level of rents now so often demanded in Dublin – and I *very* much sympathise with him that he may not get to live, for example, where the apartment ordered to him back in 2008 was located or indeed somewhere close by – his pension is such that I respectfully do not see that he will be without (rental) accommodation.

Conclusion

As I indicated at the close of the hearing, I will make an order affirming the order of the Circuit Court. I understand from counsel for Ms A that she may have an application to make as regards costs. I would be grateful if the parties could liaise with the registrar and/or my judicial assistant to pick a morning that suits everyone for any costs application to be heard. If the parties can come to an agreement on costs that will of course spare me also having to order the costs of any costs hearing.

**TO MS A AND MR A:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Ms A and Mr A

In the previous pages I have written a judgment about your case. The judgment contains legal language and you may find it a less than easy read. I am aware that family law judgments touch on important issues in people's personal lives. So I now typically add a 'plain English' note to the end of my family law judgments explaining briefly what I have decided. That seems to me to be the least that you deserve.

This note, though a part of my judgment, is not intended to replace the detailed text in the rest of my judgment. It is merely intended to help you understand better what I have decided. Your lawyers will explain my judgment in more detail to you. I have referred to you as Ms A and Mr A in my judgment. This makes my judgment (and this note) a bit impersonal but it is done to preserve your anonymity.

Mr A contends that proper provision was not made for him by the Circuit Court, that he is now suffering financially and that he wishes in effect to be given a stake in the property ordered to Ms A back in 2008 (which almost certainly would require that that property be sold up and any profits on the sale divided). However, in stark terms what Mr A has come seeking is for me now to visit upon Ms A the consequences of poor and improvident decisions made by Mr A in the aftermath of his marriage break-up. When I have regard to the applicable law I do not see that I can or should do so on the facts presenting. So I will leave the judgment of the Circuit Court unchanged.

I wish you both the best in the future.

Yours sincerely

Max Barrett (Judge)