

THE HIGH COURT

CIRCUIT APPEAL

SOUTH EASTERN CIRCUIT

COUNTY OF WATERFORD

[2024] IEHC 736

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

AND

IN THE MATTER OF THE FAMILY LAW ACT, 1995

Between:-

B. S.

Applicant

AND

S. R.

Respondent

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 25th November 2024.

A. The parties in this matter were married in 2004. There are three children of the marriage, none of whom remain dependent. However, two of the children are in a current educational hiatus and it is likely that they will return to education in the very near future. The second child, it is hoped, will return to education in January 2025 to complete his course but will, in any event, cease dependency in June 2025 when he attains the age of 23 years. The youngest child is likely to progress down the apprenticeship route which probably means that he will have some level of payment while he progresses along his third level education path but, nevertheless, it is to be assumed that there will be a certain degree of financial support needed for him, at a minimum in relation to accommodation. This support requirement will endure for a

longer period than is the case in relation to his sibling. These training and educational advancements are supported by both parents. At the moment, the second child does not have accommodation with either parent (there was some dispute about where he stays when he visits, with the Applicant stating that he stays with her at such times and the Respondent informing the court that he stays with friends). The youngest child is residing with the Respondent and, on the evidence before me, it appears likely that he will continue to do so for the foreseeable future.

B. The Applicant and the Respondent have had a long journey of travel together and both have made their contribution along the way. The Applicant, it appears to me from the evidence, was probably engaged in the care of the children and in home care related activities over the years although she has completed certain courses of study and she has earned income outside the home on occasions over the years. However, her career outside the home has not been as established as that of the Respondent. The Respondent has had a diversity of occupations over the years and was the primary earner for the family. The contribution of both parties to the success of the family and to the achievement of the family's endeavours is without doubt.

C. Both parties are in receipt of social welfare payments linked to disability. The Respondent's social welfare payment is based upon social insurance contributions and therefore enables him to continue in employment with the rate of social welfare receipt varying according to his earned income. This has resulted in him having a combined income of € 2,528.93 per month (Affidavit of Means 24th October 2024) although this will reduce by €140 per month shortly (cessation of child benefit for the youngest child). There was some discussion as to whether the Respondent had other sources of income (he is a trained mechanic and therefore has the opportunity for some additional income from occasional jobs in this regard). I formed the view from the evidence that it is likely that the Respondent has some such income but that this was not very significant. He does, however, have skills and expertise in this regard which may avail him in the future. The Respondent has continued to pay the mortgage on the family home throughout the period of separation although he has resided elsewhere.

D. The evidence relating to the financial position of the Applicant was somewhat less satisfactory. Her most recent Affidavit of Means (4th November 2024) deposed to social protection income only in the sum of €230.20 per week. Her previous Affidavit of Means (26th June 2023) deposed to a weekly income of €452.30 including €150 per week for child minding. The Applicant has worked in the past doing childcare employments. It was clear that she had been in such an occupation up to the week prior to the appeal hearing herein. I further accept the evidence of the Respondent that the Applicant has done child minding on an occasional basis over many years. She has also taken in students and other lodgers and has earned income from this source. The Applicant faces certain challenges and is in receipt of social protection payments reflective of this. These payments are means tested in nature but do allow for some degree of employment (circa. 18.5 hours per week) alongside such payments. I have formed the view that the Applicant is in a position to engage in gainful occupation and I have formed the view that she is a person with expertise in the area of childcare.

E. I found it somewhat unusual that, in circumstances in which she requires to supplement her income with some degree of earnings from gainful employment:

(a) Her evidence is that she is collecting children from school and caring for them for a third party (non-relative) without receiving remuneration. Her evidence was that the person is a friend and that she is happy to do this for her friend. However, it does seem to me to be somewhat unreasonable that a person would be used to carry out regular and repetitive childcare without receiving any payment for this. If this individual is not prepared to pay for this valuable and necessary service, it is to be assumed that there are others who will remunerate the Applicant for such important work.

(b) It appears that the Applicant has two adults, both of whom are in gainful occupation, living in the family home without receiving any monies from them for this residence. If these people were not in the house, the Applicant would be in a position to take in students or lodgers as previously. However, I was told that (save for some sporadic contribution towards utilities) nothing was being received. This was all the more unusual given that one of these lodgers, it appears, is minding children in the property. Therefore, without paying any money to the house owner, these two people seem to be living Scott free in the property and additionally

running a business from it. While generosity is to be admired, the Applicant's financial circumstances are constrained and it seemed to me that the evidence given was most likely understating or misstating the financial circumstances or, if not so doing, I do not see how it is fair or reasonable for the Respondent to pay maintenance when there are sources of income which ought to be available to the Applicant and which are not being pursued.

F. Both the Applicant and the Respondent are in new relationships and their partners both have alternative residences in which they (the partners) reside. I formed the view that there was probably more intermingling of funds between the parties and their partners than was being disclosed in evidence. This I find to be particularly so in relation to the Applicant. I note that it was asserted in cross-examination (and not denied by the Applicant) that some €11,000 (approx..) was lodged to her account by her partner over the past 12 months. This together with the child minding income came to approximately €19,000 over a 12 month period, none of which income was evident from her up to date Affidavit of Means. There was likewise a lack of transparency in this regard on the part of the Respondent and I note, in particular, that there was an undisclosed account. The Respondent also appears to be residing in rental accommodation in respect of which he is discharging a most favourable rental payment. The precise circumstances of this arrangement remain unclear to me. I also found the explanation of lodgements to the Revolut account (disclosed only post-hearing) as being from the sale of chattels (I refer to correspondence between solicitors for the parties dated the 7th November 2024) to be somewhat unconvincing.

G. There is an agreed value of the family home. This is €232,500. There are two mortgages (one being the original mortgage and one being a top up mortgage to purchase a second dwelling since disposed of) and these total €116,647. This leaves an equity in the family home of €115,853. It was agreed between the parties that the net value (having regard to sale and related costs) was in the region of €105,000. I find that the net value is probably slightly greater than this as it is unlikely that sale costs in respect of a house of this value would amount to €10,000. Allowing the normal 3% sale costs, the sum would be approximately €7,000. I therefore find, having regard to

the agreed valuation and the mortgage balance, that the equity in the family home is in the region of €108,000.

- H. On the evidence before me, it appears that a sale of the house is appropriate given that the Applicant is substantially residing elsewhere and the Respondent is in rented accommodation. In this regard, I am mindful of the Applicant's evidence that she was uncomfortable residing in the family home property due to the proximity of the home of the Respondent's partner. Her evidence was of intimidating acts on the part of the Respondent and his partner, which acts were denied by the Respondent. Having considered the evidence, I believe that there was likely some negative interplay between the parties in the context of the breakdown of the marriage and the heightened emotions arising in this context but I do not consider that this is the primary reason why the Applicant is, it appears to me, primarily residing elsewhere. The Applicant is in a relationship and she is residing primarily with her new partner while the partner's daughter and her partner reside in the family home of the parties to this litigation. This, it appeared to me from the evidence, was an accommodation arrangement which suited the various people concerned.
- I. While not currently dependent, I am of the view that the accommodation needs of the youngest child in the context of educational training which he is likely to undertake in the very foreseeable future are a circumstance to which I ought have regard under section 20(1) of the Family Law (Divorce) Act, 1996.
- J. The substantial issue which arises in this case is whether the Respondent should be afforded an option to purchase the property. Given that the youngest child is residing with him and is likely to continue to do so into the foreseeable future, I am of the view that the Respondent should be afforded such an option but on the following basis:
- As there is not going to be a sale of the property, the equity should be calculated without deduction of sale costs. If one spouse is buying out the interest of the other in the family home, it does not seem reasonable that the payment received by the disposing spouse is reduced by sale costs not in fact incurred. Therefore, I am valuing the equity at €116,647.

- J. Having regard to the financial circumstances of the parties, I find that the income circumstances of the Applicant are somewhat more challenged than those of the Respondent. However, the difference between them is not at an extreme level. Both are on social welfare. There is no reality to either of them raising money by way of loan to purchase the interest of the other. The Respondent's evidence was that he had family assistance available to him in this regard. The Respondent is gainfully employed such that he has earned income alongside his employment income. I did not form the view that there was any significant undisclosed income. I note that Revolute account was disclosed very late in the day (I directed disclosure of this account during the appeal hearing). There are some limited lodgements to this and other accounts which the Respondent indicates are from the sale of personal chattels or transactions involving third parties (including the children). These sales and transactions were not vouched. The Applicant asserts that the Respondent does other work and that he has income from such source. I have formed the view that it is possible that some degree of additional income is thus derived.
- K. The Applicant is also in a position to supplement her social welfare with additional income from child minding or other work. She clearly has experience in this field of work and the evidence was far from compelling that she was not continuing so to do. It seems to me that she has other sources of income given that she is permitting third parties to reside in the family home and carry on business from that premises without remuneration.
- L. Having regard to the fact that there is some disparity of income as between the parties, I am of the view that proper provision requires that the Applicant receive a larger portion of the family home than the Respondent. I therefore find that the Respondent should be entitled to buy out the interest of the Applicant in the property by the payment of the sum of €70,000 (approximately 60% of the value of the property net of mortgage). If he chooses not to do so and the property is to be sold, I direct a division of the net proceeds (net of mortgage and sale costs) of one third to the Respondent and two thirds to the Applicant.

M. I do not consider it appropriate that maintenance would be payable *inter se* in either situation. Both parties are on social welfare and supplement this with other income from gainful employment. The Applicant has experience and expertise in child minding which I consider to be a marketable skill. The Respondent has an expertise in mechanics and is in a position to earn income from this source. In this context, while I believe the position of the Applicant to be somewhat less secure, I am of the view that this is dealt with appropriately by the significantly greater share in the family home which is being allocated to her.

N. In reaching this decision, I have had regard to all of the applicable factors under section 20 of the Family Law (Divorce) Act, 1996. Of particular relevance in this instance are the lesser earning opportunities of the Applicant going forward having regard to her area of occupational expertise and her neurodiversity challenges. Given the poor relationship between the parties and the current circumstances of their lives, I am of the view that these factors are best addressed by allocating a significantly greater percentage of the equity in the family home to the Applicant rather than through periodic maintenance payments, especially in circumstances in the Respondent is also in receipt of social welfare disability allowance.

O. I find the following to constitute proper provision in all of the circumstances:

1. A Decree of Divorce pursuant to section 5 of the 1996 Act.
2. No Order as to maintenance as between the parties.
3. A Declaration pursuant to section 15(1)(b) of the 1996 Act that the family home is held by the parties jointly as tenants in common as and from the date of this judgment to be held by them in accordance with the percentages set out at paragraph 6 below.
4. An Order pursuant to section 14 of the 1996 Act transferring the family home to the Respondent in consideration of the payment by him to the Applicant of the sum of €70,000 such transfer and payment to take place within such period of months of the date of this judgment (or such further period as is agreed between the parties). I will hear submissions from the parties in this regard. In the event that the Respondent pays

the sum aforementioned within the time provided for herein, the Respondent to have an exclusive right of occupation in the said premises from the date of the payment of the said monies and the transfer which shall be contemporaneous. The Applicant to have an exclusive right of occupation therein until that date.

5. In the event that he buys out the Applicant's interest in the family home, the Respondent to be responsible for the mortgage outstanding thereon, to discharge same as it falls due, to use his best endeavours to have the Applicant released therefrom and to indemnify her in respect of same.
6. In the event that the Respondent does not purchase the property within the timescale referenced herein, the property to be placed on the market for sale within one month of the expiry of the purchase period set out at 3. hereof, with the net proceeds of sale (net of mortgage, auctioneering and legal costs of sale) to be divided as between the parties two thirds to the Applicant and one third to the Respondent. The parties to be bound by the reasonable advices of the auctioneer in respect of such sale with liberty to apply. I will hear from the parties in respect of any other terms and conditions of sale.
7. The contents of the property to be divided by agreement with liberty to apply in default of agreement.
8. Mutual Orders pursuant to section 18(10) of the 1996 Act.
9. Liberty to apply.
10. No Order as to costs as proper provision has been made herein on the basis that the parties each discharge their own costs arising in the within proceedings.