R.H v. A.H

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THE HIGH COURT

1980 No. 93 SP 6

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 AND

IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT, 1976 AND

IN THE MATTER OF THE MARRIED WOMENS STATUS ACT, 1957 AND

IN THE MATTER OF L H , K H , S. H. , INFANTS

BETWEEN:-

R H

Plaintiff

-and-

N A H.

Defendant

Judgment of Mr. Justice Costello delivered the 20th June 1983.

Mr. and Mrs. H. were married on the 3rd of October 1963. They have three children, L who is now aged 18, K who is now aged 14½ and S who is now aged 13. The Defendant is an Engineer and is employed by the E.S.R on a consultancy basis earning now a considerable salary. The parties separated some years ago and the Plaintiff now works as a secretary to a Community School. In order to explain the judgment which I am about to give and the conclusions which I have reached, I should briefly refer to the facts of these proceedings.

The Summons was issued on the 5th of February 1980, claiming inter alia an Order for custody and maintenance. Affidavits were filed and the matter was part heard before Mr. Justice Ellis at the end of 1980. The Order of the 1st of December 1980 recites that oral evidence had been heard and the matter was adjourned until March 1981, an Order being made for maintenance payable at the rate of £324.00 per month in the meantime. The parties reached a settlement of the proceedings by a document dated the 19th of May 1981. By virtue of this document maintenance was agreed to be paid at the rate of £357.00 per month, but it contained a variation clause to which I will refer in a moment. Provision for review was

made to take place on the 1st of May 1982 and the agreement made provision for the retention by Mr. H. of the marriage allowance and related children's allowance under the income tax code. By Motion dated the 29th of November 1982 the Plaintiff applied to the Court requiring inter alia the Defendant to carry out the terms of the maintenance agreement and to make payment of arrears of maintenance and for further or other relief. She swore an Affidavit in support of this Motion on the 30th of November 1982 and the Defendant swore an Affidavit on the 16th of December 1982. The Motion was to be heard on the 16th of March 1983 but was not reached and it was then part heard by me on the 25th of March. The Motion was adjourned until the 3rd of May on which date I heard further oral evidence and having done so I decided that I should fix maintenance under Section 5 of the 1976 Act but I adjourned the hearing of the Motion until the 14th of June so that the parties could file Affidavits of Means and also at the request of the parties so that the position in relation to the Finance Act which had then just been published could be ascertained. The Affidavit of Means of the Plaintiff was sworn on the 11th of May 1983 and the Affidavit of Means of the Defendant was sworn on the 10th of May 1983. I propose in this Order t

fix the maintenance which the Defendant should pay to his wife and children but before doing so I must explain the reasons why I feel I should exercise my discretion and powers under Section 5.

On the hearing of the Plaintiff's Motion there were two principal issues in dispute; one, arose because of the loss by the Defendant of the Married Persons Allowances under the income tax code which affected his take home pay and, two, the interpretation of the escalation clause in the contract, which the parties had entered into. Firstly, let me deal with the tax issue that arose.

The settlement agreement provided for a monthly payment as I have stated and notwithstanding the provisions, the Defendant arbitrarily decided to reduce the monthly payment in August 1982 to only £249.00. In September he only paid £100.00 and in October 1982 only £200.00. Now the reason why he did so was explained by his Solicitor. It transpired that the Defendant's net take home pay had been reduced due to the change in his tax free allowance position from that of a married man to those applicable to a single man and the Defendant's Solicitor blamed the Plaintiff for this change. The Plaintiff and her mother and brothers had entered into an

arrangement in relation to the purchase of flats in Oakley Road, Dublin. Under this arrangement, she and her brothers and sisters became partners in a partnership known as Oak and Partners. Under its terms, the Plaintiff apparently became entitled to one fifth of the income from the flats. This has been a source of considerable tension between the parties and I should indicate at the outset my conclusions in relation to it. I am quite satisfied that the Plaintiff receives in fact no money from these flats. I am satisfied that the arrangement which was entered into was in fact a tax avoidance arrangement and by agreement with her mother she is allowing her mother receive the whole of her share of the income from the flats. I am satisfied that the Plaintiff has received no share of the income from these flats nor will she. But of course whilst that is the effect of her arrangement with her mother, the Revenue look on the matter with a different eye, and the Revenue treat her as being entitled to the income from the property and treat this income as her husband's income for the purpose of his assessment.

The second finding of fact that I wish to make is this. I do not think that she and her Accountant, Mr. Kidney, have in fact been negligent in the way in which they have dealt with the Revenue in

relation to this liability. They have been in touch with the Revenue about it and certainly as far as the current situation is concerned the matter has been made clear and has been accepted by the Revenue. The question of arrears payable has not yet been settled, but I am satisfied will be done in a reasonable time. The Revenue wrote on the 7th of May 1982 to the Defendant stating in a postcript to the letter:-

> "It should be noted that you are only entitled to single allowances for 1982/'83"

The attitude of the Revenue to the change in the Defendant's tax free allowances had nothing to do with the Plaintiff's income tax situation in general, and in particular to the Plaintiff's liability to tax and the consequent liability to tax of her husband in relation to the income from Oakley Road. The change in the Defendant's tax free allowances arose by operation of law because the parties were separated and took effect notwithstanding the parties agreement to the contrary. I am satisfied therefore that the Defendant had no justification for reducing the maintenance because of the change effected by the Revenue to which I have referred.

So the parties agreement in paragraph 1 sub-paragraph(e)of the Separation Agreement was, as a matter of law, of no effect and it

was an arrangement which the Revenue refused to accept.

The reduction in the Defendant's take home pay was the result of the application of the law and not because of the Defendant's possible liability arising from his wife's legal entitlement to a fifth of the income from the Oakley Road premises.

I come now to the second major dispute between the parties, namely the interpretation of the variation clause in the 1981 Separation Agreement.

By Clause 1(b) the parties agreed that the husband was to pay to the wife the sum of £357.00 per month "which said amount shall be tied to the E.S.B. Index. The first review date shall be the 1st of May 1982."

Now what is the E.S.B. Index? To what were the parties referring? There is in fact no such thing as the E.S.B. Index and I am quite satisfied that the parties were at cross purposes when they put this Clause into their agreement. Their interpretation of it is widely different. Mrs. H said in evidence that she thought that she would get increases in the maintenance in accordance with increases in her husband's salary. I accept her evidence and I accept that that was her belief when she signed the maintenance

agreement. And her Counsel now says that the proper way to approach the variation clause is to see what percentage of Mr. H 's gross salary was payable by way of maintenance under the Separation Agreement and fix now the maintenance by reference to a similar percentage of his current gross salary.

The Defendant's interpretation is completely different. He says that the variation clause has nothing to do with his own salary, but refers to increases generally that take place in all E.S.B. wage levels and he produced a calculation which he had made. His evidence was that increases in salaries on the different grades of the staff of the E.S.B. take place at different times. The percentage increases are different. The increases take account not only of increases under the national wages agreement but also separately negotiated increases which different staff members are able to negotiate and he worked out from the multitude of figures which are available to him that the increase accordingly to the term "E.S.B. Index," as used by him, was a percentage increase of 19.16% and he said that from May 1982 the maintenance should be increased by this percentage, namely to a figure of £425.40 per month. He then explained that by making the same calculation that an increase of 8% would be payable from May 1983 and this would bring

the maintenance to £460.00 per month. In making these calculations Mr. H had available a great deal of documentation which was of course not available to the public which related to internal agreements of different sorts which different grades of the E.S.B. had entered into with management and there was, of course, no way by which the Plaintiff's advisers could check the accuracy of the estimates which Mr. Hickey had made. It will be clear therefore from what I have said that the parties were not ad idem as to their understanding of the meaning of the variation clause in the agreement.

As I have said I heard evidence on the 3rd of May and that evidence included evidence relating to the Defendant's means and this evidence established that the Defendant's means had dramatically increased since 1981. On the 5th of April 1981 his annual take home pay for the previous year had been £13,514.00 gross, net £9,884.00. (In parenthesis I should state that differences arose as to whether or not at the time of the settlement Mr. Hickey had produced his P60 form in relation to the year ended the 5th of April 1981, and I am satisfied that he had done so, but I should add that his P60 form does not disclose the full extent of his means).

For the year ended the 31st of March 1983 his gross income for

that period had increased to £24,634.00 which after tax had been deducted produced a net income to him of £14,125.00. But in addition the Defendant was entitled to a car allowance of £101.00 per month.

This very considerable increase was due partly to the fact that the Defendant had apparently obtained promotion in his position in the E.S.B., partly as the result of national wage agreements, and partly, it would appear, to separately negotiated agreements relating to Mr. H. 's own position in the E.S.B.

In the light of the evidence which I heard, I decided that I should fix maintenance under Section 5 of the 1976 Act by reference to the parties' needs and actual means and that I would not attempt to fix it by deciding the dispute between the parties as to the meaning of the variation clause and then apply my interpretation to the second separation agreement.

I reached this conclusion for a number of reasons. As I have said, the parties were not ad idem as to this vital term of the separation agreement. Secondly they had fixed the maintenance on the basis that the Defendant would be entitled to marriage allowances and other tax free allowances based on his being a married man. This

in fact was a mistake of law. The Defendant was not entitled to these allowances under existing legislation. Thirdly, there had been a change of circumstances since the agreement had been signed, namely, and in particular, the promotion which had occurred which had contributed to the fact that the Defendant's salary had been increased. And fourthly, and this of course is the basis on which I propose to make the Order; the Court is required under Section 5 to fix a proper figure for maintenance and I decided that the proper way to fulfil that function was to obtain evidence which was not then available as to the means of the Plaintiff and the Defendant and as to their respective needs; in the Plaintiff's case not only for herself, but also for the three children of the marriage.

Objection was taken to my adopting this course by Mr. Vaughan Buckley on behalf of the Defendant. His submission was that I should apply the maintenance agreement which the parties had entered into, that I should interpret the variation clause as Mr. H had interpreted it and should fix maintenance by reference to the percentage increases to which Mr. H 's calculations entitled the Plaintiff and her children. He submitted that the separation

agreement precluded me from making an Order under Section 5 in the manner in which I proposed to make the Order and he argued secondly, that the Court had no jurisdiction to make an Order under Section 5 of the 1976 Act because of the provisions of the Courts Act 1981. I will deal with these two submissions with which I disagreed, as follows.

The Supreme Court in the case of H.D. .v. P. D. Unreported, the 8th of May 1978 was concerned with the case in which a wife had petitioned for a decree a mensa et thoro and the parties had reached a settlement on the 12th of February 1973 by which the husband agreed to pay the sum of £10,000.00 in settlement of his wife's claim for alimony and in satisfaction of all her claims in the petition. Notwithstanding this agreement on the 24th of March 1974 the wife took out a summons for maintenance in the High Court and the Defendant argued that the wife was estopped by reason of the consent which had been made an Order of the Court from maintaining the claim under the 1976 Act. The Supreme Court held that her claim was maintainable. In the course of his Judgment Mr. Justice Walsh, at page 7 of the unreported Judgment stated as follows:-

"It is clear from the whole structure of the Act that its

> "purpose is to deal with the situation of the parties at the time the proceedings were brought under the Act and that the primary function of the Act is to ensure that proper and adequate maintenance will be available in accordance with the provisions of the Act to spouses and children. The basic question to be decided is whether at any given time there is a failure by one spouse to provide reasonable maintenance for the support of the dependent children of the family of the spouses. (In my view it is not possible to contract out of the Act by an agreement made after the Act came into force)."

Therefore, I will hold that the Defendant is not now prepared to provide proper maintenance within the meaning of Section 5 for his wife and children and secondly I will ascertain what should be proper maintenance I should consider what his means are, what the means of his wife are, what their respective outgoings are, and I should fix it by reference to this evidence and if I conclude that the agreement is one which would assist me in reaching an assessment of proper maintenance under Section 5 I will have, of course, regard to it.

In the present situation however, I do not think that the 1981 agreement assists me to any great extent in fixing maintenance under Section 5. I accept Mr. Kidney's evidence that he was quite appalled when he learnt that Mrs. H[illegible] had agreed to such a low figure for maintenance and I accept her evidence that she agreed to the maintenance which was provided for as a result of the great distress

which she felt at the proceedings and her intense dislike of having to give evidence. I am not for a moment suggesting that there was any undue pressure, or undue influence or that the circumstances are such that the Court would set aside the agreement; I am merely referring to these facts as indicating that the agreement itself gives me not very much assistance in determining what is a proper sum to be fixed under Section 5 of the 1976 Act.

I then turn to the second submission made on the Defendant's behalf by Mr. Vaughan Buckley.

Section 12 of the Courts Act, 1981 amended Section 23 of the 1976 Act by providing that the Circuit Court and the District Court would have jurisdiction to make maintenance Orders under Section 5 of the 1976 Act. Section 33 of the 1981 Act provided that Sections 2 to 17 of the 1981 Act were to come into operation twelve months after the day of the passing of the 1981 Act, but would not apply in relation to proceedings in any Court instituted before that day.

As these proceedings before this Court were instituted prior to the date mentioned in Section 33, Section 12 of the 1981 Act does not apply to them and accordingly this Court has jurisdiction to make an Order under Section 5 of the 1976 Act, which I now propose to do.

Firstly, as to the Plaintiff's means and outgoings. I should make clear at the outset that I accept the Plaintiff as an honest witness and I accept the evidence in her Affidavit of the 11th of May 1983 as corroborated and supplemented by her oral evidence, subject to one or two slight amendments to which I will refer in a moment.

The Plaintiff's net income from the Tallaght Community School is £63.00 per week, or approximately £252.00 per month. In addition she has children's allowances amounting to £33.75 per month, making a total approximate monthly income of £285.75. Her expenditure is as stated in the Affidavit, subject to a reduction of £5.00 per week which had been inserted in error for a babysitter. Let me state that I found the Plaintiff to be a truthful witness and I accept that in filling the form a genuine error was made. This means that the net figure for her expenditure on herself and her children as appears from the Affidavit should be £281.09 per week or £1,124.36 approximately per month. So this means there is a deficit of £839.00 approximately per month. The Defendant is prepared to pay only the sum of £460.00 per month.

In reaching these conclusions I want to make clear the following findings of fact. I find as a fact that the Plaintiff has no income

from the Oakley Road flats. I find as a fact that she obtained a gift last year from her mother which enabled her to purchase a car, but that she has no income from any money resulting from that gift or from any other source. She has no income from the house in which she lives and I cannot, as the Defendant apparently wishes me to do, take into account that she has an asset which could in fact produce an income. No doubt it could, but she must live somewhere with her three children and so there is no income from the house to be taken into account in calculating the maintenance which her husband should pay her. Finally the Defendant produced what was termed a balancing statement from the Revenue, but this does not in any way affect the conclusion which I have reached, namely that the Plaintiff's income is as I have stated it to be.

I turn now to the Defendant's income and his needs. I have regretfully to say that the Defendant has not been entirely candid in the disclosure of his means. As I have indicated, he produced his P60 form for the year ended the 5th of April 1981 and that showed that his gross income was then £13,514.00 and his net income was £9,884.00. He produced that at the time of the settlement in 1981, but he did not inform the Plaintiff or her advisers that he had in

fact a car allowance at the time. He has not produced his P60 form for the year which has just ended and I propose to fix the maintenance on the basis of a letter which was produced, signed by Mr. Harkin, the Section Head of the Salary Section of the Accounts Department of the E.S.B dated the 16th of March 1983. According to this letter the Defendant's gross salary for the year ended the 31st of March 1982 was £21,014.00 and for the year ended the 31st March 1983 would be £24,634.00. The income tax payable was given in the certificate prepared by Mr. Harkin as £10,082.00 which means that net of tax his income to the 31st of March 1983 was £14,125.00 per annum. This means that the Defendant's monthly net-of-tax income for the year to the end of March 1983 was a figure which I will give in a moment; for the year ended the 31st of March 1981 was £826.00 per month, and for the year ended the 31st of March 1983 was £1,177.00 per month. It is clear from Mr. Harkin's certificate that the Defendant is in receipt of substantial expense allowances. I should make clear that in reaching my decision today I have not taken into account any possible profit element that there may be in these expenses. But the certificate makes it clear that Mr. H. is entitled to a car allowance of £101.00 per month. In my view it is proper to add the £101.00 per month to the figure which I have just

given of his net-of-tax income which means that he has what I would term a disposable income of £12,078.00 per month. Out of this he is prepared to pay to his wife and three children £460.00 per month, or approximately one third. I consider that this is obviously too small.

In reaching the conclusion as to Mr. H 's income I have rejected the figure for his gross income given in the Affidavit of the 10th of May 1983, namely the figure of £22,622.00. The Defendant has arbitrarily reduced the actual sums he received and which are made clear from Mr. Harkin's certificate by making deductions, and I do not think he is entitled so to do. Mr. H has then taken a hypothetical figure of what his tax in the coming year may be on this reduced figure. In my view this is an incorrect approach to ascertaining his liability to maintain his wife and children. The correct approach is to base his liability to maintenance on the actual figures for the past twelve months. I have no reason to believe that his income will be less in the forthcoming twelve months and indeed there is every reason to believe it will be greater. If, of course, in twelve months time a change of circumstances has occurred, then an application to review can be made by either of the

parties.

The Defendant has said that his expenses for living amount to £618.00 per month. If this is correct, then he could afford to pay his wife and children the difference between that figure and his net take home pay of £1,278.00 per month, namely £668.00. But I think that the Defendant's estimate of his expenditure on his children on the times that he has access to them is somewhat exaggerated. He says that he pays £1,180.00 per annum, or £98.00 per month on average on them, on those days when he has access to them. I think this sum is too high. I also think that his expenses of living in Clane, in his brother-in-law's house, motoring from there to Dublin, which amount in all to £3,280.00 per annum, or £273.00 per month are too high, in that persons in Mr. H. 's situation where a marriage has unfortunately broken up are called on and required to reduce their living standards. So I think that I should fix maintenance at the figure of £800.00 per month. In doing so I do not think that I will cut down Mr. H 's living standards too excessively and I accept that in fixing this sum I am not giving everything that the Plaintiff I think requires for herself and her children, but in the circumstances I think it

is a proper sum. I will apportion this monthly figure as follows:-

To Mrs. H.	£500.00
To L	£150.00
To K	£ 75.00
To S	£ 75.00.

In view of the past history of this matter, I think I should make the following comments. The Defendant is not at liberty to reduce this sum without an Order of the Court. In particular, the question of arrears arising from the income tax situation and the Oakley Road flats is one which the parties will have to agree on or in default of agreement, litigate, but which does not entitle the Defendant to reduce the sum now fixed by the Court. Secondly, it seems to me that in the future Mr. H should forward to the Plaintiff's Solicitor a Certificate from the Salary Section of the Accounts Department in the same form as that given by Mr. Harkin in a Certificate of the 16th of March 1983 and he should in addition forward copies of his P60 Forms. Similarly, the Plaintiff should furnish evidence if requested, of her net take home pay in relation to her earnings. Thirdly, I should indicate that I have fixed maintenance on the basis of the expenses set out in the Plaintiff's

Affidavit of the 11th of May 1983. These do not take into account any extra expenses that Linda may incur if she goes to a University in the Autumn.

I have fixed maintenance at the rate of £800.00 per month. Mr. Vaughan Buckley on behalf of the Defendant has indicated that he wishes to appeal against the Order and wishes a stay to be made. The Defendant will undertake to pay only £460.00 per month, but this sum in my view is completely inadequate.. The present situation has been going on for some considerable time and Mr. H. has enjoyed a very considerable income and been paying extremely small sums to his wife and children. In my view the offer of £460.00 per month is totally inadequate. Had an offer been made of any reasonable sum that might have helped the Plaintiff and her children between now and the hearing of the appeal I would have considered it, but I cannot regard this as a serious offer in the circumstances and therefore I must refuse the request for a stay. The Order will take effect from next Friday and I will Order the payment to be made on a monthly basis on the 24th of June next, and thereafter on the 24th of each month.

I should say in relation to the appeal that Mr. Vaughan Buckley,

very properly pointed out that he would have liked if the evidence had been taken down in shorthand by a Court stenographer. This of course was a perfectly reasonable request and as Counsel knows it is the practice to endeavour in all these family law cases for a stenographer to be in Court to take down the evidence. Unfortunately notwithstanding the best efforts of the Registrar to obtain a stenographer, it was not possible to obtain one for the evidence of this case, so that I will make available to the parties as soon as I can a copy of this judgment and a copy of my note of the evidence.

Approved

SL

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