THE HIGH COURT

[2022] IEHC 622

[2020 No. 55 CAF]

BETWEEN:

B

APPLICANT

– AND –

B (2)

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 10th November 2022.

SUMMARY

This is a judgment on how to award costs in particular family law proceedings. Ms B contended that Mr B should pay her costs. Mr B contended that there should be no order as to costs but that if there were to be such an order it should be made in his favour. I have decided to make no order as to costs.

1. I initially gave judgment in this matter in December of last year when I treated with financial matters only. Last June I had to deal with a related custody matter and an application by Ms B to bring the children of the parties' former marriage on holiday to a distant, non-European Union jurisdiction. The question now arises whether costs should be ordered and, if so, against whom.

2. When it comes to where costs would lie, were costs to be ordered pursuant to my judgment of last December, the question as to who would pay costs in that circumstance, is easily answered. As I stated in my judgment, at para.12:

> "*The court's abiding sense, having regard to all the evidence before it, is that, when it came to making proper provision, the Circuit Court essentially and substantially got matters right, not least in the distribution of the properties. The only point where the court respectfully departs from the view of the learned Circuit Court judge is that it is* now *apparent that the monthly maintenance payable by Mr B to Ms B has been set at a level that is financially unsustainable for Mr B (who is presently having to borrow to meet it). The court will therefore reduce the amount of monthly spousal maintenance from €1,500 per month to €750 per month. Otherwise the court will leave the order of the Circuit Court unchanged, save that the reference to a bonus may require to be amended so that reference is made instead to the net dividend payment (if any) received by Mr B from his professional services firm in any one year; however, notwithstanding any change in terminology it is quite clear what the learned Circuit Court judge has in mind in this regard and, for the avoidance of doubt, I respectfully agree with what he determined in this regard.*"

3. It is true that Mr B could have sought a variation of his maintenance in the Circuit Court. But he did not. He came seeking that variation here, he was entitled to do so, his "*principal concern*", as I mention at para.7 of my written judgment, was the amount of monthly maintenance that he had to pay, and he succeeded on the monthly maintenance point, getting the largest reduction in maintenance (50 per cent) that I have ever yet had to order. So Mr B largely won the financial argument. He lost to some extent in that I have left extant the Circuit Court judge's order as to the treatment of the end-of year payment. However, I suspect that it was a very relieved Mr B who left the court last December, with his maintenance payments now reduced to a level that was realistic and affordable. And I do not doubt that there was some disappointment on Ms B's part that I made the order that I did.

4. Ms B contended at the hearing which preceded the judgment of last December that there was no need for a s.47 report. She belatedly agreed to such a report being conducted, the report

was subsequently supplied by Professor Sheehan, and in June I stated myself "*unhesitatingly*" accepting of his very sensible recommendations.

5. At the June hearing there was also a request to take the children of the onetime marriage on holiday to a distant, non-European Union jurisdiction. Mr B indicated that he was satisfied for the children to be brought on holiday anywhere within the European Union but not to the proposed holiday destination. I adopted the approach urged on me by Mr B, indicating that Mrs B could bring the children on holiday to any European Union jurisdiction but that I respectfully would not agree to their being brought to the distant, non-European Union destination for the reasons I identified at that time.

6. I note in passing that every aspect of the Circuit Court order was appealed (albeit that access/custody and maintenance were the only issues truly in play). However, I understand that this ostensible appeal of every aspect of the Circuit Court order was merely consistent with a prevailing sense among family law practitioners (rightly or wrongly) that when appealing a Circuit Court order in a family law case it is best to appeal everything so that the court on appeal undoubtedly has the jurisdiction to treat with all issues arising, even if not all issues are truly in play. (It is very common in Circuit Court appeals in family law matters for a solicitor or barrister to commence by stating something along the lines of 'Judge, it looks like everything is being appealed but in fact we are only appealing X and Y' and the proceedings then continue accordingly).

7. There was much discussion at the costs hearing of how costs typically follow the event in court proceedings, with the 'winner' (my term) taking all. For my part I do not conceive of family court proceedings as presenting the same win/lose scenario that is the hallmark of other court proceedings. That is not what family law proceedings are about. They involve a most serious-minded effort by all involved to resolve sometimes very challenging matters in as best a manner as can humanly and lawfully be done, with children's interests being a paramount consideration when that is required by law. I doubt there are many litigants who leave the family courts feeling that they have 'won'. I suspect most people leave feeling a little dazed by all the emotions that have been at play. In most instances the best that can be achieved in (and by) the court is a state of affairs that is not quite as bad as the state of affairs that pertained when the parties entered the courtroom. The only family law cases when people seem to get genuinely happy (and their happiness is a privilege to see) are adoption/surrogacy cases in

which a much-loved child is further embedded within a loving family. But if this was a Commercial Court case (and it is not) and one was asking who 'won' on the maintenance issue, who 'won' on the custody issue, and who 'won' on the holiday issue, one would have to say that it was Mr B – though again I do not believe that it is appropriate or helpful to perceive of (or even describe) family law matters in terms of a win/lose construct.

8. Counsel for Mr B indicated in her submissions that her client did not come to court seeking his costs. That said, he maintains (and I respectfully agree) that if this was a family law case in which costs fell to be awarded they could only go to him. Yet notwithstanding this, Mr B contends that the most appropriate order in these family law proceedings is the still-typical arrangement that arises in family law proceedings whereby the different sides bear their own costs. I accept that contention. There has been nothing in Mr B's behaviour or in the manner in which these proceedings have been conducted, nor is there any other factor presenting, that would incline me to order that he should pay some or all of Ms B's costs. I accept that Ms B may encounter some difficulty in meeting all of the legal costs that she has incurred in what have been fraught proceedings, and she has my genuine sympathy if this is so; however, that sense of sympathy does not offer a sound legal basis on which to order that some or all of her legal costs should now be paid by her ex-husband.

9. I have been referred to a number of cases on costs in family law cases, including but not limited to *BD* v. *JD* [2005] IEHC 154, *WYYP* v. *PC* [2013] IESC 12, *Sandra Seagrove* v. *Lawrence Sullivan* [2014] EWHC 4110 (Fam.), *MD* v. *ND* [2015] IESC 66, *BR* v. *PT* [2020] IEHC 205, and PM v. EM [2020] IEHC 700. However, I do not see that there is any need for me to consider those cases when (with the effective agreement of the party who 'won' in these proceedings – and again I do not like talk of 'wins' in family court proceedings) I am making no order as to costs. There is no great legal issue at play in this: Mr B is accepting less than he contends (and which I agree) he would be entitled to had he come seeking costs and were this a family law case in which it was appropriate to award costs (and for all the reasons stated I do not see that it is).

10. For the reasons stated, I will make no order as to costs.

TO MS B/MR B:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Mr B, Ms B

I have just written a detailed judgment about who should pay the costs in your family law case. The judgment contains a lot of legal language which can be hard (even boring) to read. In a bid to make my judgments easier to understand by those who receive them I often now attach a note in 'plain English' briefly summarising what I have decided. I thought it might assist for me to add such a note in this case.

In a bid to ensure that people do not know who you are, I refer to you in my judgment and in this note as Ms B and Mr B. This may seem a bit artificial. However, I think it is for the best.

This note is a part of my judgment. However, it does not replace the text in the rest of my judgment. It is written to help you understand what I have decided. Any lawyers that you have engaged or may engage will explain the rest of my judgment in more detail.

As you know, the key focus of this application was who should bear the cost of the proceedings that I heard. For the reasons stated in my judgment I have concluded that you should each bear your own costs.

I wish you both the very best.

Yours sincerely

Max Barrett (Judge)

Date: 10th November 2022.