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THE HIGH COURT

Record No. 1985 827 Sp

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
 AND IN THE MATTER OF C. McD AND N. McD INFANTS
 AND IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES
 AND CHILDREN) ACT 1976

BETWEEN:-

M. McD.

and

P. McD.

Judgment of Mr. Justice Mac Kenzie delivered the 22nd day of April
1986

The first question I have to deal with is the access by the husband to the children.

A measure of agreement has been arrived at between the parties and they appear to be capable now of discussing arrangements for the access by the husband to the children in a calm and reasoned fashion.

It is my opinion that the access by the husband should be as follows:-

- (a) For the summer holidays which for the older child amount to three months and for the younger two, four weeks should be spent with the father, not necessarily a continuous period of four weeks but in all four weeks by arrangement between the parties.

- (b) Christmas. One week access by the father including alternative Christmas days. 1986 to be spent with the wife.
- This is to enable the children to have a family day with their respective grandparents.
- (c) Easter. One week to the father. I feel they are capable of mutual agreement about the commencement and conclusion of the period.
- (d) Weekly access. One evening per week with the father including an overnight stay, preferably this should be on the father's half day. If this is inconvenient or impossible another day by mutual arrangement and one week-end per month Friday to Sunday by arrangement.
- (e) Yearly bank holidays. Every alternative bank holiday to the father. The June bank holiday to be with the mother.

Maintenance of wife and children.

This causes great difficulty.

A short history of the facts are as follows:-

The parties married in 1971. Of the marriage there are two children, the older now aged thirteen, the younger eleven. In 1984 the marriage was on the point of breakdown and there were great difficulties experienced in maintaining it. Eventually the parties decided to separate and the husband finally left the family home in February 1985. No separation agreement has been drawn up between the parties.

The husband by profession is a medical doctor, the wife is a social worker. She was vague as to the nature of her employment which ceased on marriage.

After practising in the West of Ireland the husband eventually acquired a practice five miles from a good provincial town where he had a practice of G.M.S. patients and private patients. This was in 1977. The practice was conducted from a surgery attached to a dwellinghouse where the wife now lives. The wife described her husband as a capable diagnostician and having heard him I came to the conclusion that he was intelligent, energetic and the type of practitioner who would do very well in his profession and that his prospects in the future are good. Having acquired two other surgeries mainly for G.M.S. patients who composed a large part of the practice combined with private patients he eventually in 1984 purchased a property in a provincial town to facilitate his private patients, the dwellinghouse and surgery already referred to being some five and a half miles from that town.

He employed his first assistant in 1983 and presently has another assistant.

I heard evidence on behalf of the wife. In addition to her own the husband's secretary, the wife's brother and an Accountant. For the husband in addition to his own testimony I had the evidence of an Accountant.

It is impossible for me to make a finding as to what the husband's income was based on the testimony of either of the Accountants.

The book which I will describe as the appointment book was the principal method of record. In that book all appointments were made and all visits recorded. The patients were noted either as G.M.S. patients or private patients. Usually the private patients paid cash or if they had been attending for several

visits on the termination of a particular visit could pay for all their treatments. According to the husband's secretary she collected the cash and handed it at the end of the day to the husband. The husband maintained that certain of these private patients were seen and treated by his assistant and that he allowed his assistant to retain for himself the money referable to such patients.

However, another book was kept for the benefit of the Accountants. This is the book upon which the Plaintiff's Accountant based his estimate of the husband's income. A considerable number of the private patients visits and treatments were omitted. Taking into account the records of the book and the other matters he calculated in round figures that the Plaintiff's income would be £15,000.

On the other hand, the Plaintiff's Accountant calculated that over and above £12,000 approximately which were the figures appearing in the second book which I have mentioned, the husband's income would be an additional £17,500.

Unfortunately, the husband destroyed the original book without giving any satisfactory reason as far as I can see and the wife's Accountant had to work upon photographs taken by the wife's brother of the pages of the original appointment book which he managed to do in part before this record was destroyed.

Unhappily, the Accountant, who made this estimate did not attend Court but sent a colleague of his who claimed that he had rechecked the photographed pages and came to the same conclusion. He maintained that he was able to do this in two hours but on cross-examination when he was asked to consider just one photographed page he fumbled and hesitated so much that I could not rely upon his testimony.

I therefore consider that the evidence of the Accountants to be of no value.

The only estimate I can make of the Plaintiff's disposable income in the year 1984 was the lifestyle described by the wife which was not really contradicted by the husband.

She mentioned a high standard of living, referring to two holidays a year, one in winter and one in late summer. She described skiing holidays with the children. She described outings which are not unusual to people in a comfortable and prosperous way of life going to Dublin each to see a show, having a meal afterwards though not necessarily to an expensive restaurant, various weekends, visits by the husband to the Galway Races, visits to a Jazz Festival and she said to use her own words "that there was always money available."

Most dealings went on in cash. She had home help and each day they discussed what was necessary to be purchased and £20 on average was given to her. She had a car. If she wanted a dress £100 or £150 was given to her in cash and each day £20 was given to her for the household expenses. If more was required she knew where her husband kept it and by agreement she was entitled to go up and take what she required.

Since February 1985 when they separated she has £500 a month but she has built up an extremely large overdraft from one year now standing at £11,000 guaranteed by her brother. She is obviously making no effort to economise. The mortgage on the house is paid by the husband, though this is of course partly referable to the surgery. The home is well furnished. The Voluntary Health Insurance payments are made for the family. The insurance on the house is paid. It is argued on his behalf

that he is in fact providing in real terms £10,000.

The wife has told me that what she requires from the husband is provision for a warm, comfortable dignified life for herself and her children. She suggests that her husband has not cut back in any way and as I see it up to the moment she has not cut back.

Unfortunately, as has been said many times not only in this Court but in the Supreme Court that two households cannot be provided as cheaply as one, and it is necessary for both parties in a dispute such as this to consider their position and try and economise, remembering that their circumstances can never be where two dwellings have to be provided for as comfortable and as easy were the marriage still in existence.

The wife says it will cost her £372 approximately per week to maintain herself and the children. The husband says his out-of-pocket expenses for living without anything else amounts to £116.

I consider that the parties in this case had a high standard of living and had quite a good and substantial income before they parted.

There are one or two strange features in this case. I cannot accept the husband's income is as low as he maintains. If he is correct about the arrangement he had with his assistant in allowing him to retain such fees as related to patients seen by the assistant, according to the Accountant the assistant would be earning more out of the practise than the husband, the principal, received. Again on the separation between the parties, the wife drew from a deposit account in both their names the sum of approximately £10,000 to give to her father who had given the parties shortly before that £10,000 for the advancement of the husband's practice and in enabling him to acquire the premises in

provincial town. Thirdly both parties admit to heavy drinking in the year before the final separation, so much so that the husband was recommended for special treatment in St. Patrick's Hospital and nobody seems to have taken into account the amount of money which must have been thrown away in this manner. And, lastly, the husband drew a cheque upon his bank for £4,000 odd for outstanding income tax and his bank dishonoured this cheque. He too has an overdraft of £12,500.

I consider that the lifestyle that the parties enjoyed hithertofore indicated an income of some £30,000 a year and of this most was disposable, the plaintiff paying in comparison to that sum a relatively small amount of income tax between £4,000 and £5,000.

I feel, however, that that sum owing to the drinking to which I have referred to above, owing to the disruption of the marriage is not now available, but I do feel once these proceedings are terminated that the husband notwithstanding the fact that he says there are other doctors now come to that town in competition with him will increase practice and do extremely well.

There is always competition among professional people. But a profession such as his is one where the results are to be seen and competition from inferiors does very little harm. In fact it could be said that the husband having acquired his new surgery and premises in the town is himself a new competitor.

If I might quote the decision of R.H. and N.H., Judgment delivered by the Chief Justice on the 24th of October 1985 in the Supreme Court. There the Chief Justice said:-

"Certain broad principles are in my opinion applicable to the fixing of maintenance pursuant to section 5 of the Act of 1976 arising from the terms of the section as well

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as from general principles of law. The Court it seems to me in carrying out that task must first have regard to the somewhat pathetic fact that upon the separation of the husband and wife and particularly a husband and wife with children it is inevitable that all the parties will suffer a significant diminution in the overall standard of living. The necessity for two separate residents to be maintained and two separate households to be provided for makes this an inescapable consequence of the separation. Subject to that overriding consideration the Court must of course ascertain the minimum reasonable requirements of in this case the wife and the children for whose upkeep she is responsible. It must then ascertain the income earned or capable of being earned by the wife apart from the maintenance of which the husband is responsible. Its next task is to ascertain the true net take-home pay or income of the husband and lastly it must ascertain the reasonable living expenses of the husband bearing in mind the general considerations of economy affecting all the parties concerned but leaving him with a reasonable standard of living."

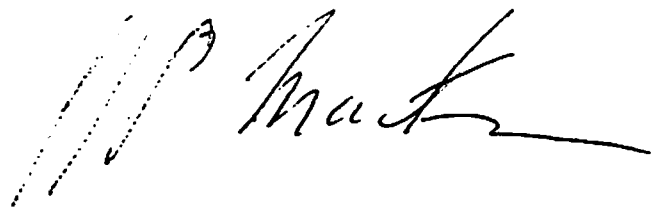
It was not in the present case suggested that the wife was capable of earning and for the purposes of the present decision I ignore this. It does strike me, however, that she is capable of earning if she had to. To ascertain the true net take-home pay or income of the husband is impossible. It should be possible in the future. The reasonable living expenses of the husband have been put for his bare maintenance at £116 a week. But to carry on a profession like that of a doctor, expenditure in upkeep and otherwise must be incurred. I also take into account the

general consideration of economy which the parties must realise and consider. I am in the difficulty that I can only make broad calculations. I consider that in the year 1986 the Plaintiff after tax should have a disposable income of approximately £17,000 at least or at most £22,000.

Bearing in mind that the wife's mortgage, V.H.I. and insurance on the house are paid and the furniture provided I hold that she should receive a sum of £800 a month net of tax. Payments to commence 1st day of May, 1986 and thereafter on 1st day of each month.

Liberty is reserved to both parties to apply.

The wife's costs are to be paid by the husband with this exception that no costs are awarded in respect of any aspect of the Plaintiff's accountancy evidence. I see no justification for the failure of the Accountant who prepared the accounts from the photographed documents to attend.

A handwritten signature in black ink, appearing to read 'Mark', is written in the lower right quadrant of the page. The signature is stylized and includes a long horizontal stroke at the end.