

Open and transparent financial disclosure is vital to building trust between parties and advisers in family law ancillary relief cases, and will determine the ease with which a settlement can be reached, says Ann FitzGerald

Full financial disclosure by both sides in family law ancillary relief cases is central to enable the parties reach a consensual negotiated settlement or to be ready for a court hearing.

It is abundantly clear that, in order to advise a client on what may constitute 'proper provision' for a spouse in a judicial separation or divorce case, the extent of the assets and liabilities must be centre stage – 'the size of the pot' – and until this has been determined with some certainty, it is impossible to advise a client on what would constitute a reasonable outcome.

Double entry

The *Circuit Court (Case Progression in Family Law Proceedings) Rules* (SI 358/2008) came into force as of 1 October 2008 and apply to almost all family law proceedings issued after 1 October 2008. Motions for directions and certificates of readiness are likely to become obsolete, and substantial powers have been granted to the county registrar to case manage and speed up the process between date of issue and date of hearing.

The purpose of 'case progression', according to sub-rule 38(3) of rule 4, is "to ensure that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings and that the time and other resources of the court are employed optimally". The new rules are very extensive and introduce a whole new layer of litigation, designed to filter and manage proceedings in an effort to make better use of court time. Whether the rules will have the desired progressive effect of reducing delays and cost remains to be seen, and it will probably take at least 12 months before any clear trends emerge.

It is hoped that the new rules may reduce delays where discovery requests and orders for discovery are not honoured, in that the county registrar has



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been granted new powers (by virtue of the amended sub-rule 37(21) of rule 4). Firstly, the registrar has now the power to make an order for costs (under rule 4(38), paragraphs 21 and 22); and secondly (under sub-rule 38, paragraph 17), where the county registrar has concluded that there has been undue delay or default in complying with any order made or direction given, the registrar may list the case before the court and furnish a report to the court setting out the delay or the default concerned.

Bottom line

In family law litigation, valuation of assets is a crucial part of the dispute between the parties, and a large amount of court time can be taken up in hearing



You'll need to be able to know your assets from your elbow

DIVISION

evidence from the respective valuers. Time will tell whether this will be reduced with the advent of the *Case Progression Rules 2008* at Circuit Court level. This development is very welcome to busy practitioners. The expectation and hope is that it will have the effect of identifying and narrowing issues at an early stage, pre-trial. Up to now, certificates of readiness have been an imperfect means of doing so and frequently allowed a party to delay compliance, thereby forcing the other side to go down the slow and expensive route of a motion for directions to the court.

As the duty of the court is to ascertain the value of the assets at the date of the trial and thereafter decide what provision should be made out of these assets for the respective spouses, it is absolutely essential that

the court be in a position to form a view as to value. Disputes in relation to the value of assets generally centre around property valuations and the valuations of shares in private companies.

Valuations should be updated right up to trial date although, at present, evidence of valuers has largely become surplus to requirements when no buyers can be found at any price. Difficult challenges now arise in dealing with valuations in a falling market. There have already been cases of settlements being revisited where properties were to be transferred from one spouse to another at a certain value, and the value has dropped considerably prior to implementation (see also 'Go your own way' in last month's *Gazette*, p22).

MAIN POINTS

- 'Proper provision' for a spouse in a judicial separation or divorce case
- Extent of the assets and liabilities
- *Circuit Court (Case Progression in Family Law Proceedings) Rules*

LOOK IT UP

Cases:

- *C v C* (2005 IEHC 276, Mr Justice O'Higgins)
- *F v F* (unreported, June 2002,
- *MK v JPK* (9 February 2006, Supreme Court, Mr Justice McCracken)
- *P v P* (2005, Mr Justice McKechnie, *ex tempore*)
- *SN v FN* (unreported, 8 December 2003, Mr Justice Abbott)
- *T v T* (2002 3IR 334 at 383, Supreme Court, Mrs Justice Denham)

Legislation:

- *Circuit Court (Case Progression in Family Law Proceedings) Rules* (SI 358/2008)
- *Family Law Act 1995*, section 18
- *Family Law (Divorce) Act 1996*, section 22

In the pre-recession case of *P v P*, a Cork couple had settled their dispute in relation to the family home, which was to be sold based on a value of Y and the husband to receive X from the proceeds of the sale. In the event, the property sold for a multiple of Y prior to ruling, and the husband's lawyers sought to reopen the settlement and allow the case return to a full hearing. In an *ex tempore* judgment, Mr Justice McKechnie declared that the principle of fairness and 'proper provision' must apply and that his jurisdiction was to rule the case only if he was satisfied that there was 'proper provision' in place for both spouses. If not so satisfied, the judge was of the view that the settlement should be renegotiated.

Percentage settlements are often the safest approach, so as to avoid the necessity of a return to court. As values drop, many cases will now be about the allocation of debt, not equity, and who will bear the burden of such debt. In cases where a party has, for example, availed of a 100% mortgage on an interest-only basis, the wriggle room open to the court is severely curtailed. Extremely difficult, intractable disputes will become even worse as credit dries up and bankruptcy looms. It is best to seek the protection of a court order (as opposed to a separation agreement) and to allow the case go to a hearing where an acceptable settlement cannot be achieved.

In the pink

Banks will have to come on board in cooperating with a settlement in many instances, although banks may not be willing to reassign an existing security in order to bring a deal over the line. The banks are now regularly approached to facilitate a moratorium on a mortgage for six or 12 months in order to give a spouse time to sell a property in these challenging times. Where sales cannot be concluded, a settlement whereby the parties retain

'cross interests' in each other's properties may have to be agreed or a formula where the other party has a right to share in any uplift on sale in the next three to five years. The courts will not balk at orders for sale of properties, yet this may be meaningless where no buyers can be found. Fire sales by auction may yet become options unheard of even up to six months ago.

It seems clear that the fall in the value of assets, together with the virtual impossibility currently of a sale of any asset, will make it more difficult for parties to conclude a full and final settlement in the current climate. At present, the parties are faced with putting in place short-term solutions in the hope that when economic conditions improve, more permanent arrangements can be finalised and a final settlement concluded. It is important, therefore, that practitioners are guarded in their approach to 'full and final settlement' clauses, particularly if the settlement does not reflect a reasonable final outcome for the client. Issues may also arise on whether a 'full and final settlement' clause agreed at judicial separation will hold good on divorce where there has been a radical downturn in the economic fortunes of one or other party at the time of divorce.

In some cases, where spouses have run a business or farm together, it may be necessary for the parties to continue their business relationship to reflect the commercial reality that the assets cannot presently be sold and that borrowing ability is severely curtailed. In the case of a company, a shareholders' agreement or other suitable partnership agreement may need to be considered. Equally, it may be that an agreement drawn up in settlement may have to be contingent upon finance being made available in order to implement an agreement, as further dispute may arise in the event that a party cannot secure the required finance. Parties may have to remain joint owners of assets for far longer than is desirable.

It has now become more common for cases to be re-entered, both in the High Court and in the Circuit Court, in circumstances where agreements put in place six or 12 months ago cannot now be implemented. Applications to vary pursuant to section 18 of the *Family Law Act 1995* or section 22 of the *Family Law (Divorce) Act 1996* may also be required. These sections deal with the possibility, in limited circumstances, of variation of previous court orders.

While there has been no Irish case law on these to date, there is substantial British case law on similar provisions. It is likely that the judiciary will have regard to these sections shortly, and a written judgment is awaited during 2009. **G**

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