

**THE HIGH COURT**

**CIRCUIT APPEAL**

**2010 11 CAF**

**IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996**

**BETWEEN**

**B. H.**

**APPLICANT**

**AND**

**P. H.**

**RESPONDENT**

**JUDGMENT of Mr. Justice John MacMenamin dated the 29th day of July, 2010.**

1. This is an appeal by the applicant against an order of the Circuit Court Judge dated 4th December, 2009. I am satisfied in the light of the evidence that that order be varied so as to give effect to the following findings on evidence as found in this hearing. In order for the appeal to be placed in context it is necessary to set out details of the background.
2. The applicant and the respondent were married on 21st March, 1992 at a church ceremony followed by a faith ceremony in Co. C. There are two children of the marriage namely Ka. born on 18th June, 1995 and Ki. born on 21st June, 1999. Ka. is a member of the B. faith. The two children are residing with the mother in rented accommodation in Co. C. There is no doubt that the respondent who worked as a translator is a highly intelligent and determined woman. She appeared on her own behalf in this appeal. She has previously instructed a number of solicitors. She was well capable of presenting her case and the issues of concern to her.
3. During the course of the marriage the parties resided in this State and in the U.K. They ultimately resided in Co. D. where the applicant worked as a consultant haematologist. The parties ultimately purchased a property in Co. D. to which reference will be made later. They had also purchased a property in Dublin which was let out as a rental property.
4. In or about September 2004, the relationship between the parties broke down.
5. The parties had purchased the property at Co. D. in or about September 2003. It was to be redecorated and refurbished. It is a substantial house. However, the respondent never took up residence there with the children for any significant period of time. It appears that between September, 2004 and May 2005, the husband resided in the property in Co. D. and the respondent and the children lived in rented property, also in Co. D.
6. In 2005 the respondent left Co. D. and moved to Co. C. with the two children. Since that time she has resided there. The two children are attending school. I am satisfied that the respondent is a caring mother and that the couple's two sons are doing well in school.
7. Ultimately the applicant moved from the medical post which he held in Co. D. to a new post in Co. W. He is living there in rented accommodation. He now enjoys access to the children together with holiday access. Both the applicant and the respondent are caring parents and are deeply concerned as to the welfare of their children.
8. The applicant is now involved in a second relationship. His partner lives in another county. This obviously creates a further draw on the finances available to him and, indirectly, to the respondent.
9. It is necessary first to refer to two orders of the Circuit Court. On 8th October, 2007, the Circuit Court granted a decree of judicial separation to the parties. On 4th December, 2009, the Circuit Court granted a decree of divorce between the parties. The ancillary orders which were made on the latter occasion are now the subject of this appeal in two aspects, access and property adjustment.

**Access**

10. By the Circuit Court order of 4th December, 2009, the parties were granted joint custody of the children, their primary place of residence being with the respondent. Access was granted as per a schedule handed into Court. It was directed that the applicant must have two weeks access to their dependent children in July and two weeks access in August. Any travel abroad was to be by agreement or by order of the Court.
11. The access question should not really be in dispute between the parties. I must say that whatever the unfortunate differences between them the applicant and the respondent both appear to be taking steps to ensure that the children enjoy the company of both parents. In the course of the hearing the applicant/appellant handed in a document setting out his proposals in relation to access. There he proposed a number of partial amendments to the question of the access schedule. Such difficulties as have emerged appear to be because of a lack of precision in the implementation of the access arrangements. I will have regard also to what the mother submitted. Accordingly, I will direct as follows:

- (1) That the applicant will enjoy access to the children on alternate week-ends being the first and third of each month, to include Mondays of Bank Holidays.

(2) Access is to be enjoyed between 7.00 p.m. on Friday to 7.00 p.m. on Sunday, or alternatively, Saturday at 1.00 p.m. to Sunday at 7.00 p.m. to be determined in accordance with the applicant's work schedule. The manner in which the applicant is to exercise this access will be identified by him by text message to the mother one week in advance.

(3) In the event that either of the children is unable to avail of the Friday access, the mother is to inform the father of this one month in advance. The father will inform the mother of his availability one month in advance. If it transpires that, for work/schedule reasons the applicant is unable to avail of access as pre-arranged, the respondent will within 24 hours make arrangements for alternative access on the preceding or the following week-end.

(4) All arrangements with regard to access are to be arranged one month in advance and are to be confirmed by text one week in advance.

(5) The father is not limited as to where the children may be brought during access provided it is in this jurisdiction.

(6) The children are to be collected from their grandparents' house or the respondent's house. When the applicant's car arrives the children should, without delay, be sent to the applicant's car.

(7) For the purposes of access the applicant will collect the children from Co. C. The respondent will collect the children at the end of the access period from the applicant's home in Co. W. or his partner's home or, where necessary, arrange to collect them off a direct bus. The respondent will provide reasonable mid-week access to the children should the applicant be in Co. C. Such notice is to be provided one week in advance and shall not be for a period of greater than two hours.

12. With regard to the school holidays the following shall be the arrangements:

(a) The father shall enjoy access to the children for the February mid-term period including both week-ends commencing Friday at 7.00 p.m at the start of mid-term.

(b) The father shall have access to the children for the second week of the Christmas holidays from 26th December, for one week.

(c) The father shall have access to the children for the first week of the Easter holidays, for one week.

(d) The father shall have access to the children for the first two weeks of July and the middle two weeks of August.

(e) When the boys are in secondary school they shall have access to the father for one week in the month of June, to be arranged one month in advance.

(f) The children should be allowed nightly to their father by skype or mobile phone. Similarly, the children will have phone contact with their mother when they are with the father. Both parties will undertake not to engage in over frequent phone calling to the children.

(g) The children are to have their own passports to be held by the applicant's solicitor. The respondent will be informed two weeks in advance of any intention by the applicant to take the children out of the jurisdiction during holiday periods.

The respondent and applicant will ensure that the children's leisure activities and holidays will not take place during the designated holiday periods when the other party is to have holiday access. In the event of there being any such issue, the parties will give the other four weeks notice and will propose an alternative arrangement. The alternative arrangements shall be such as to ensure that both the applicant and the respondent shall enjoy the same total period of access in each year. Any future application is to be made to the Circuit Court.

#### **The proceeds of the sale of the home in Co. D.**

13. A second issue was the main matter of dispute between the parties. In a Circuit appeal on 18th December, 2007, McCarthy J. made the following directions in relation to the sale of the family home in Co. D. These were:

"... the property in Co. D. is to be placed on the market for sale. Messrs. Sherry Fitzgerald Rainey are appointed as sole auctioneers for the property and Ms. Doreen Levins, solicitor, to have sole carriage of sale. The said property is to be placed on the market for sale at such time as advised by the auctioneers but no later than 1st March, 2008. The reserve price is to be set as per guidance of the auctioneer.

6. The sum of €500,000 is to be paid by the appellant (the husband) to the respondent (the wife). The sum of €250,000 is to be paid to the appellant on or before 31st March, 2008. The balance of the moneys to be paid to the appellant forthwith on the conveyance of the property in Co. D. If and insofar as the property in Co. D. is sold for a sum of less than €525,000 the said sum of €500,000 is to be abated *pro rata*. In the event that the sale of the said property is not concluded on or before the 30th June, 2008, without prejudice to the generality of the order, an application can be made to the Court. By way of a Property Adjustment Order the net proceeds of sale of the property are to be held in the respondent's sole name.

14. At paragraph 8 of Mr. Justice McCarthy's order it was provided:

"8. By way of property adjustment order the property in Dublin is to be transferred into the sole name of the respondent ..."

15. It is also to be noted that the respondent was to continue to discharge maintenance in the sum of €3,300 per month being divided as to €1,300 maintenance per month in favour of the mother and €1,000 per dependent child per month. The maintenance was fixed at that level for a period of one year up to 18th December, 2008. The respondent was to continue to discharge the BUPA payment in respect of the appellant and the two dependent children.

16. One would have thought that these explicit orders which were entirely clear would have provided ample guidance and a road map

to the parties as to how they were to proceed. Unfortunately, matters did not evolve that way. I am satisfied that on a number of occasions a crux arose which, I regret to conclude, was as a result of the respondent's misguided and misconceived actions. Two important years were wasted in an endeavour to sell the family home. An available purchaser from Northern Ireland who would have bought the house for €620,000 in 2007, ultimately declined to proceed because of repeated applications to the Court made by the wife. I am satisfied that the respondent was unreasonable on this issue and ultimately the multiplicity of applications had the effect of delaying matters such that other factors arose and for other reasons the purchasers decided not to proceed. Ultimately after further applications to the court the sale of the home in Co. D. was completed only in January 2010, for a vastly reduced price of €355,000. The fault for this shortfall lies with the mother. There is therefore a shortfall of €170,000 between the stipulated minimum price of €525,000 and the ultimate outcome of €355,000. The figure of €500,000 is to be reduced *pro rata*.

17. In order to abide by the order the applicant re-mortgaged the home in Dublin. The first tranche or payment of €250,000 provided for in McCarthy J.'s order was paid over. Most unfortunately, the respondent does not appear to have taken adequate steps to protect or preserve that sum in the interests of herself or the children. She has spent sums of money on legal fees. This Court was informed that she incurred at least one bill in the sum of €30,000 for lawyers, who, I think advised her regarding an application dismissed by Abbott J. in March, 2010. She has also had to pay other substantial legal bills from earlier hearings.

18. I am satisfied that on any reasonable interpretation of the order there is to be an abatement of the payment which is due to the mother. This is to be calculated in the following way:

(1) From the stipulated minimum payment of €500,000 there is to be deducted the sum of €170,000. This gives rise to a figure of €330,000 which was due to be paid to the respondent.

(2) Of that €330,000, €250,000 has already been paid by the applicant. This leaves a balance of €80,000 to be paid. The applicant has indicated he is prepared to top up to the extent of a further €100,000. This will make available to the mother and the children a total sum of €335,000.

19. In the course of the hearing the mother has made a wide number of allegations suggesting that the applicant has other resources or many sources of income. All of these have been dealt with in previous hearings. In light of the fact that the applicant has undertaken to continue paying the maintenance previously ordered by the Court, the issue comes down to this: can the respondent point to any other area of income which was not disclosed to the Court previously or, which has not been disclosed to the Court at this time. It is not the function of this Court to "go behind" the orders of Mr. Justice McCarthy or any other order. This matter has been in and out of court on too many occasions. Counsel for the applicant said that the matter has been in court up to 40 times. Counsel also pointed out that this is the first occasion that the applicant had appealed any part of an order.

20. Even up to the year of this judgment, 2010, the respondent appeared to have engaged in conduct which, ultimately, had the effect of yet further obstructing the sale. On 15th January 2010, the matter came before the High Court (Abbott J.) where that judge approved the offer of €355,000 which had been made for the purchase of the property. But prior to that time the respondent had purported to make an offer to purchase the house for the sum of €356,000, €1,000 in excess of the third party offer. Abbott J. rejected this. As I did not hear that application I make no other comment.

21. The terms of the order of 15th January, 2010, are important. The order recites that the court was satisfied that the sale of the property had been an issue for some weeks before that court. It had previously been before the High Court on Circuit. It recited the issue arose because the respondent alleged the property was being sold at an undervalue. However no bidder was brought forward who was in a position to bid any higher than the conditional contract price of €355,000. Thus, in order to salvage the property from deterioration or wear and tear Abbott J. directed that the conditional contract whereby Thomas McCafferty had agreed to purchase the house for €355,000 be completed, and that the proceeds of sale after deduction of expenses be thereafter held by the solicitors for the husband to the credit of the matter, pending further order. It was further ordered that the respondent was to execute all documents and furnish all consents and do all things necessary for the urgent completion of the sale in default whereof such steps were to be taken by the county registrar. It will be seen, that the necessity for this order was, unfortunately, also the result of the respondent's unreasonable conduct.

22. The respondent now contends that she should be provided with a house to a value in excess of €500,000 in Co. C. She had identified one or a number of such properties. I am not satisfied that a court should make any order of this type. The consequence of the respondent's own conduct has been to diminish the assets which are available to her and to the children. I am satisfied that it was her conduct which has this consequence. The applicant is not to blame for what has occurred. In those circumstances I will direct that the applicant will pay within a period of three months the sum of €80,000 together with the sum of €100,000 which he has offered to pay to supplement the shortfall. In order to prevent any further dissipation of assets I am directing that the applicant will be at liberty to apply to the Circuit Court the sum of €150,000 of the €155,000 which has been already transferred to the respondent to be paid into Court in order to prevent any further reduction. The Court has an obligation to the children as well as the parties. The sums on offer by the applicant will also be paid into the Circuit Court within three months/weeks. When the respondent has identified a suitable home for purchase application may be made to the Circuit Court for the payment out of that sum *for the purchase of the new home and for no other purpose*. All payments into court should be to the Circuit Court. This is not as a consequence of any error on the part of the Circuit Court judge but as a consequence of the conduct of the applicant and the ultimate outcome of the sale as directed by Abbott J. in March, 2010. I will direct that all further applications shall be made to the Circuit Court on fourteen days notice to the applicant's solicitor.