



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 255

Finlay Geoghegan J.  
Irvine J.  
Hogan J.

Appeal No. 2017 40

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

IN THE MATTER OF THE FAMILY LAW ACT, 1981, AND

IN THE MATTER OF THE FAMILY LAW ACT, 1995, AND

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

AND

IN THE MATTER OF THE CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT, 2010

IN THE MATTER OF THE COURT OF APPEAL ACT, 2014,

AND IN THE MATTER OF SECTION 38 OF THE COURTS OF JUSTICE ACT 1936, AND IN THE MATTER OF ORDER 86B OF THE RULES  
OF THE SUPERIOR COURTS

BETWEEN

M.W.

APPLICANT/RESPONDENT

V

D.C.

RESPONDENT/APELLANT

**JUDGMENT delivered by Ms. Justice Finlay Geoghegan on the 2nd day of October 2017**

1. This is a consultative case stated of Abbott J. in the High Court pursuant to s. 38 of the Courts of Justice Act 1936 (as amended), in the hearing of an appeal by D.C. from a decision of the Circuit Court in respect of a claim brought by M.W. pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 ("the 2010 Act").

2. The Circuit Court had determined that M.W. was a qualified co-habitant within the meaning of s. 172(5) of the 2010 Act and made orders in her favour. D.C. appealed from that decision to the High Court.

3. As appears from the case stated, the primary issue in the High Court is whether or not M.W. was a qualified co-habitant for the purposes of the 2010 Act in relation to the claim made. The High Court judge heard oral evidence and submissions from the parties. He has indicated in the case stated that he has reached certain conclusions; also that he would take D.C.'s evidence "at its height", but expressed an indicative view that M.W. was a qualified co-habitant within the meaning of the 2010 Act. Abbott J. nevertheless agreed to state a case to this Court with the following questions:

(i) Is the period specified in s. 172(5) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 to be strictly interpreted in that a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that the relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period of two years or more in the case where they are parents of one or more dependent children.

(ii) If the answer to question (i) is yes, can a court overlook periods of separation in a relationship which has ceased and recommenced between the parties.

(iii) If the answer to question (ii) is yes, does it matter whether the relationship ceased between the parties prior to the Act of 2010 and recommenced prior to the Act of 2010.

**Background facts**

4. The background facts which are not in dispute and set out in the case stated and which explain the questions of law referred by the High Court judge to this Court for determination are in summary as follows.

5. The parties are not and were never married to each other. They are the parents of two children who were dependent at the time of the High Court hearing.

6. The relationship of the parties dated from 1996 with what the trial judge refers to as "a few spats from time to time". The trial judge refers to a long relationship with a "history of conflict of expectation and ambition from the parties". He further referred to a greater expectation and ambition of M.W. in relation to marriage preceded by engagement and a lesser commitment of D.C. to avoid engagement and marriage and joint ownership of a property ownership.

7. The disputed facts which have not been finally determined by the trial judge relate to the period between February, 2010 and February, 2011. It does not appear to be in dispute that the parties were living together with the two children in a residence up to

February, 2010. The contention of D.C. is that the relationship ended in February, 2010 when M.W. left the shared property and resided firstly in a women's refuge and then subsequently at a rented premises until June, 2010. M.W. contends that the period during which she left the shared residence and lived separate from D.C. was four weeks from May, 2010 to June, 2010.

8. Both appear to agree that they resumed living in the same residence in June 2010 and did so until February, 2011. There may be a dispute as to the position after the date, but it is not relevant to the legal questions for decision by this Court.

### **The 2010 Act**

9. The purpose of the 2010 Act as appears from its long title is to provide for the registration of civil partners and the consequences of that registration and to provide for the rights and obligations of cohabitants and connected matters.

10. Part 15 relates to cohabitants and a "cohabitant" has the meaning assigned to it by s. 172. That section is central to the case stated and provides:

"172.— (1) For the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

(2) In determining whether or not 2 adults are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:

- (a) the duration of the relationship;
- (b) the basis on which the couple live together;
- (c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;
- (d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;
- (e) whether there are one or more dependent children;
- (f) whether one of the adults cares for and supports the children of the other; and
- (g) the degree to which the adults present themselves to others as a couple.

(3) For the avoidance of doubt a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature.

(4) For the purposes of this section, 2 adults are within a prohibited degree of relationship if—

- (a) they would be prohibited from marrying each other in the State, or
- (b) they are in a relationship referred to in the Third Schedule to the Civil Registration Act 2004 inserted by section 26 of this Act.

(5) For the purposes of this Part, a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period—

- (a) of 2 years or more, in the case where they are the parents of one or more dependent children, and
- (b) of 5 years or more, in any other case.

(6) Notwithstanding subsection (5), an adult who would otherwise be a qualified cohabitant is not a qualified cohabitant if —

- (a) one or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else, and
- (b) at the time the relationship concerned ends, each adult who is or was married has not lived apart from his or her spouse for a period or periods of at least 4 years during the previous 5 years."

11. As appears, a cohabitant is defined for the purposes of Part 15 of the 2010 Act in section 172(1) and the Court is obliged to take into account all the circumstances of the relationship and in particular to have regard to the matters specified in s. 172(2) in deciding whether or not a person is a cohabitant.

12. However, s.173 only permits a qualified cohabitant to apply to the Court for relief pursuant to the Act. Section 173(1) and (2) provide:

"(1) A qualified cohabitant may, subject to any agreement under section 202, apply to the court, on notice to the other cohabitant, for an order under sections 174 , 175 and 187 or any of them.

(2) If the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that

the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied that it is just and equitable to do so in all the circumstances, make the order concerned."

13. Part 15 of the 2010 Act came into force on 1st January, 2011. The claim made by M.W. is on the basis that the relationship of cohabitation with D.C. ended in February, 2011 after the commencement of the Act. Section 206 provides:

"206.— An order for redress referred to in section 173 shall only be made if the application for it is made with respect to a relationship that ends, whether by death or otherwise, after the commencement of this section but the time during which two persons lived as a couple before the commencement date is included for the purposes of calculating whether they are qualified cohabitants within the meaning of this Part."

14. Section 195 provides a two-year time limit for the commencement of proceedings "save in exceptional circumstances" from "the time that the relationship between the cohabitants ends, whether through death or otherwise." No issue arises in relation to this particular two year period.

15. It would appear that the claim made by M.W. is upon the basis of a relationship which ended in February, 2011 (or possibly later, but still in 2011). She is limited to making that claim by reason of s.206 and the commencement date of 1st January 2011 in respect of the 2010 Act. The first and primary legal question relates to the proper interpretation of s. 172(5) by reason of the fact that the parties lived separate and apart for a period in 2010. It matters not for the legal question of interpretation whether this was a period of four weeks or longer, as contended by D.C.

16. The first interpretive issue, having regard to the submissions made, is whether the two-year period referred to in s. 172(5) is a single period of two years immediately prior to the ending of the relationship in respect of which the claim is made or whether the period of two years may be made up of periods aggregating or amounting to two years immediately prior to the date upon which the relationship ended.

17. The applicable interpretation principles were not in dispute between the parties. The Court was referred to the well known quotation by Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 at p. 151 from Lord Blackburn in *Direct United States Cable Company v. Anglo American Telegraph Company* (1877) 2 App Cas 394:

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."

18. It was also agreed that the court must construe the Act in accordance with the requirements of the Interpretation Act 2005 ("the 2005 Act"). Counsel for M.W. relied in particular upon s. 18(a) of the 2005 Act which provides:

"18.—The following provisions apply to the construction of an enactment:

(a) *Singular and plural.* A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular;"

19. Whilst counsel for D.C. accepted the above provision applies, he correctly submitted that it was subject to s. 4 of the 2005 Act which provides:

"4.— (1) A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made.

(2) The provisions of this Act which relate to other Acts also apply to this Act unless the contrary intention appears in this Act."

His submission is that the wording of s. 172(5) - in particular by the use of the phrase "immediately before the time that the relationship ended" - expresses a contrary intention to the section being construed as permitting the two-year period to be made up of a number of periods which aggregate two years. Further, as was pointed out, even if one replaces the word "period" with its plural "periods" the ordinary and natural meaning having regard to the earlier phrase "immediately..." is of multiple periods, each of which must be of two years or more.

20. Counsel for M.W. correctly relied on a further principle of interpretation that the words used must be considered in their legal context having regard to the entirety of s.172 and the other provisions in Part 15 of the 2015 Act. He correctly submits that s.172(1) defines a cohabitant and the Court should have regard to that definition and the matters to which it is referred in s.172(2) when interpreting s.172(5) and (6).

21. In enacting s.172(5) the legislature clearly intended first (subject to the exceptions in sub-s.(6)) that a person must be a cohabitant of the other person (where there is a dependent child) for a period of 2 years or more in order to be a qualified cohabitant. However, by use of the phrase "immediately before the time that the relationship ended", the Oireachtas has also specified **when** such person must have been a cohabitant for 2 years or more.

22. Counsel for M.W. made a number of submissions in reliance upon the purpose of the Act to give a cohabitant as defined in s. 172(1) a right to apply to the Court for an order under s. 173, albeit acknowledging that the Oireachtas intended that the right only be given to a cohabitant in a relationship for a specified period of time. He drew to the Court's attention the consequences of what is termed the "strict interpretation" for a cohabitant who may have lived in a relationship which qualifies him or her as a cohabitant within the meaning of s. 172(1) for a long period but where there is a break in the relationship and a resumption of the relationship before a final termination.

23. I do not accept that the construction of s. 172(5) in accordance with the ordinary meaning of the words used as requiring a single period of two years immediately before the ending of the relationship is contrary to the purpose or overall scheme of Part 15 of the 2010 Act. It must be recalled that s. 195 permits the institution of proceedings within two years of the time when the relationship in respect of which the claim is made ended. Hence, if there is a longstanding relationship which ends on, say, 1st June, 2017 in the sense that a court considers the relationship to have ceased such that the parties are not cohabitants of each other within s.172, but the parties, following a break of, say, three months, resume a relationship on 1st September, 2017 and that resumed relationship

only lasts for, say, one year, then either cohabitant will be able to make a claim based upon the long standing relationship which ended on 1st June, 2017 on any date prior to 1st June, 2019 (and possibly even after that date, as s. 195 permits of an extension of time "in exceptional circumstances").

24. I recognise that on the facts of the case before the High Court judge it was not open to M.W. to make a claim in respect of the longstanding relationship of cohabitation upon the basis that it ended in 2010. This particular consequence is, however, by reason of the commencement of the 2010 Act on 1 January 2011 and the effect of s. 206 of that Act: it does not otherwise alter the proper interpretation of s. 172(5).

25. My conclusion is that the ordinary and natural meaning of the words used by the Oireachtas in s. 172(5)(a) of the 2010 Act when viewed in the context of the entirety of that section and Part 15 of the 2010 Act is that the relevant period is a single period of two years immediately before the time that the relationship ended.

26. This interpretation is also consistent with the different words used by the Oireachtas in the immediately subsequent subsection, namely, s. 172(6)(b) where, admittedly having regard to similar words in the divorce legislation, the relevant time is expressed to be "a period or periods of at least four years during the previous five years".

27. As the answer to the substance of the first question of law put by the High Court judge is in the affirmative, it is necessary to consider the question of law raised by his second question. In this the judge asks whether "... a court [can] overlook periods of separation in a relationship which has ceased and recommenced between the parties?"

28. It is necessary to emphasise that all findings of fact and questions of fact are matters for the High Court judge. With respect, it is not entirely clear what legal question he requires this Court to answer for the purpose of deciding the appeal before him having regard, in particular, to what is stated by him in paras. 14(i) and 15 of the Case Stated in relation to the alleged continuation of the relationship of cohabitation in 2010. That remains exclusively a matter for the High Court judge. It appears that what the High Court judge in substance is asking this Court is what legal question he is required to decide upon the facts before him in relation to the two-year period immediately preceding the ending of the relationship in respect of which the claim is made. In this instance, that is the two-year period immediately before February, 2011. Section 172(5) requires the High Court judge to determine whether on the facts before him M.W. was living with D.C. as a couple during the entirety of the two-year period preceding the termination of the relationship in February, 2011.

29. The concept of "living with the other adult as a couple" or living "together as a couple" as stated in s. 172(1) is a legal concept for the purposes of s. 172. There was considerable debate in the submissions before this Court as to whether the concept of living together as a couple for the purposes of s. 172 required both adults to live physically in the same shared residence at all times. Examples were given of persons in an intimate and committed relationship living together as a couple and holding themselves out as a couple but where either work demands of one or other or ill health and hospitalisation require the couples to physically live in different places or even different countries for periods of time. I conclude that the legal concept of living together as a couple for the purposes of s. 172 does not require two persons to live physically at all times in the same shared premises. Hence, notwithstanding that a couple may not be physically living day by day in the same residence, during the two-year period immediately prior to the end of the relationship s. 172 envisages that a court may decide on all the relevant facts that they, nonetheless continued to live together as a couple during that period.

30. The definition of cohabitant in s. 172(1) is "one of two adults ... who live together as a couple in an intimate and committed relationship..." Subsection (5) in defining a "qualified cohabitant" appears to start with the requirement that the person is a cohabitant as it must be "an adult who was in a relationship of cohabitation with another adult" and then in relation to the two-year period at issue requires that the person "was living with the other adult as a couple". Notwithstanding the slight difference in wording it does not appear to me that the Oireachtas intended anything other than that the person who seeks to be a qualified cohabitant was a cohabitant of that other person within the meaning of s. 172(1) during the two-year period immediately preceding the termination of the relationship. The reason for which I have formed that view is that the claim is being made in respect of a relationship of cohabitation alleged to have ended on a specified date. Accordingly, the relationship of cohabitation must continue up to the date upon which it is alleged to have ended. There cannot be a relationship of cohabitation unless there are two cohabitants.

31. Accordingly, simply put, what a court must determine is whether or not during the two years immediately before the time at which the relationship of cohabitation is claimed to have ended the applicant was a cohabitant of the other adult within the meaning of s. 172 of the 2010 Act during the entirety of that two-year period.

32. By the third question the High Court judge asks whether it matters that the relationship ceased between the parties prior to the Act of 2010 and recommenced prior to the Act of 2010. The substance of this question must be answered by reference to s. 206 of the Act of 2010. As I have already pointed out, the 2010 Act only permits an application to be made in respect of a relationship which ends after the commencement of the section which was the 1st January, 2011. The question as to whether or not an applicant is a qualified cohabitant for the purposes of s. 172 can only be determined with respect to a relationship of cohabitation which ended after 1st January, 2011. Of course, in assessing this question the Court may also look at the time prior to that date during which the two persons lived as a couple or were cohabitants for the purpose of deciding whether they are qualified cohabitants within the meaning of s. 172(5), provided again that the relationship ended after 1st January 2011.

## **Conclusion**

33. I propose that the questions put by the High Court judge be answered as followed:

(i) & (ii) Section 172(5) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 should be interpreted as meaning that, where there are dependent children, a person must be a cohabitant of the other adult within the meaning of s.172(1) during the entirety of the period of two years immediately before the time when the relationship upon which the claim is brought ended.

(iii) Section 206 of the 2010 Act only permits an application to be made in respect of a relationship of cohabitation that ends after the commencement date of that Act, namely, 1st January, 2011. The decision as to whether an applicant is or is not a qualified cohabitant must be made with respect to the two-year period immediately before the time after 1st January, 2011 at which the relationship of cohabitation is claimed to have ended.