

**THE HIGH COURT
CIRCUIT COURT APPEAL
FAMILY LAW**

[2014 No. 103 CAF]

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

BETWEEN:

S. B.

APPELLANT

AND

J. B.

RESPONDENT

JUDGMENT of Mr. Justice Abbott delivered on the 20th day of March, 2015

1. This is an application on foot of a motion returnable on the 21st November, 2014 on behalf of the appellant wife appealing the refusal of the Circuit Court Judge Her Honour Judge Petria McDonnell to grant a stay of execution on a decree awarded in favour of the respondent husband ordering the appellant to vacate the property located at B., Co. Dublin and the refusal to grant a stay on an order of costs made against the appellant wife. These proceedings are initiated on foot of a dispute regarding the ancillary orders in the context of a decree of divorce granted by Her Honour Judge Berkeley in the Circuit Court dated the 19th July, 2012.

2. On the 19th July, 2012 the Circuit Court made ancillary orders in the above entitled proceedings in which the appellant wife was the respondent in proceedings by the husband as follows:-

1. An order pursuant to s.18(10) of the Family Law (Divorce) Act, 1996 that neither party shall on the death of the other party be entitled to apply for an order under this section for provision out of the other party's estate.
2. A decree of divorce pursuant to s.5 of the Family Law (Divorce) Act, 1996 (hereinafter 'the 1996 Act').
3. An order pursuant to s.13 of the 1996 Act directing the applicant to pay to the respondent maintenance in the sum of Canadian \$1,000 per month.
4. An order pursuant to s.15(1)(a)(i) of the 1996 Act directing the sale of the property at B.S., Canada on the following terms and conditions:-

a. the respondent is to deliver up vacant possession of the said premises within six weeks of the date hereof;

b. the proceeds of sale are to be applied in the discharge of the mortgages upon the said B.S. premises, any outstanding loans in respect of the renovation of the said premises, any outstanding property tax obligations in respect of the said premises, any sums necessary to be expended in relation to putting the said premises on the market for sale (if deemed appropriate by the auctioneer selling same) and the legal and auctioneering costs of sale. If there is any excess from the sale proceeds same are to be applied in the discharge of the mortgage on B., Co. Dublin.

5. On the basis that the respondent has taken the steps necessary to comply with para. 3 hereof, an order pursuant to s. 14 of the 1996 Act directing the applicant to transfer to the respondent his interest in the premises at B., Co. Dublin, the applicant having to discharge the mortgages upon the said B., Co. Dublin, premises.

6. In the event that the respondent does not vacate the B.S. premises, an order pursuant to s.14 of the 1996 Act transferring the premises at B., Co. Dublin to the applicant and he shall be the full legal and beneficial owner thereof and he shall be responsible for the mortgages thereon and the applicant to secure the release of the respondent from the said mortgages. If such release cannot be secured by the applicant, the B., Co. Dublin, premises to be sold and the applicant to be entitled to the net proceeds of sale. In these circumstances, an order pursuant to s.14 of the 1996 Act transferring the B.S. premises to the respondent free from encumbrances.

7. An order pursuant to s.14 of the 1996 Act transferring to the applicant the entirety of the respondent's legal and beneficial interest in the premises at B., Co. Tipperary for his sole use and benefit absolutely.

8. Liberty to apply in relation to the F.I. loan account no. noting that F.I. does not appear to be pursuing the recovery of the loan.

9. Mortgages to be maintained by the applicant in the interim so that the properties are not put in jeopardy.

10. Nil pension adjustment order. The court notes that the applicant has acknowledged that the respondent shall not be entitled to any spousal benefit arising in respect of the said pensions in the future.

3. By notice of appeal dated the 25th July, 2012 the wife appealed against the whole of the above order of Her Honour Judge Berkeley. In a sitting of this Court, dated 30th July, 2013 it was ordered by consent that the respondent wife's appeal be struck out with liberty to apply. Subsequent to the decree of divorce being granted by the Circuit Court on the 19th July, 2012 on or about October, 2012 the appellant wife initiated divorce proceedings in Canada. The Superior Court of Justice of Ontario, Canada made the following orders:-

1. That parties adjourn to the jurisdiction of the Ontario Superior Court of Justice for the purposes of the herein application and any future application for relief under the Family Law Act and/or Interjurisdictional Support Orders Act.
2. The applicant, S.B., shall forthwith withdraw the notice of appeal to the High Court Sittings in Dublin, in High Court (Dublin Circuit) Record No. filed July 25 2012.
3. The decree of divorce of the Circuit Court of Dublin, in Circuit Family Court (Dublin Circuit) Record No. dated July 19, 2012, is hereby recognised as valid and binding in Canada with the exception of any provisions relating to property situate in Canada that are unenforceable and *ultra vires* of the Irish Court and in particular paras. 4 and 6 (as it relates to the B.S. property), and these paragraphs shall not be enforced by the parties in Canada.
4. The divorce order of Justice Robertson, dated December 21, 2012, is hereby set aside.
5. The respondent, J.B.'s notice of motion, dated March 26, 2013, is hereby dismissed, without costs.
6. The applicant, S.B., shall have leave to amend herein application to seek relief under the Family Law Act and/or the Interjurisdictional Support Orders Act, with such relief to include (but not limited to):-
 - a. an equalisation of net family property located in Canada, pursuant to s.5 of the Family Law Act, and;
 - b. a variation of spousal support pursuant to the Interjurisdictional Support Orders Act.
7. The applicant, S.B. and the respondent, J.B., shall exchange sworn Form 13.1 Financial Statements by July 31, 2013; and
8. The respondent, J.B., shall, within 15 days of the date of this order, provide to the applicant, S.B., his income Tax Return and Notices of Assessment and Reassessment for the years 2010, 2011 and 2012.

5. Subsequent to the Order of the Canadian Courts the appellant received a letter by e-mail from her Canadian legal representatives indicating that the respondent consented to the retention by the appellant of the property at B., Co. Dublin while he retained the property at B., Co. Tipperary. The respondent denies having made these indications. This case has been complicated by the issuance of parallel divorce proceedings in the Canadian jurisdiction on behalf of the appellant of this present case. The attempt by the respondent to enforce the ancillary orders given on foot of the decree of divorce in 2012 has been met with considerable obstacles. These difficulties have in some cases been occasioned by the appellant's psychiatric ill-health which led to the appointment of a *guardian ad litem* by order of His Honour Judge Griffin on 1st March, 2012. This appointment was subsequently revoked due to the non-cooperation of the appellant shortly afterward. The appellant in this present case currently resides in Ireland while the respondent husband resides in the jurisdiction of Canada and discharges the maintenance of the two children of the marriage who are in education in both Canada and the United States of America. The appellant has stated that there is estrangement between herself and her children. The facts of this case are fraught with personal difficulties which, while informative, need not be explored further in order to examine the present application.

Order of the Circuit Court

6. On the 11th November, 2014 the Circuit Court made orders in the above entitled proceedings in which the appellant wife was the respondent in proceedings by the husband as follows:-

1. An order that Clause 6 of the Order of the 19th of July, 2012 be complied with.
2. An order transferring the property situate at B., Co. Dublin forthwith to the applicant on the basis that he will dispose of the property for the purposes of clearing the loans on the said property and on the property situate at B.S., Canada.
3. An order that the property situate at B.S., Canada be transferred immediately into the sole name of the respondent, mortgage free.
4. An order that the respondent deliver up vacant possession of the property situate at B., Co. Dublin to the applicant within three weeks of today's date.
5. An order pursuant to s.14(5) of the Family Law (Divorce) Act, 1996 authorising the County Registrar to sign all necessary documentation to effect the transfer of the B., Co. Dublin property.
6. Refuse the application for a stay in the event of an appeal.
7. An order granting costs to the applicant with a stay for a period of 12 days from today's date. In the event that there is no appeal the no order as to costs.

In light of the International dimension of this case, Her Honour Judge McDonnell made available to this Court her written judgment explaining her reasons for making the aforementioned orders. Judge McDonnell indicated, by way of background to her judgment, that:-

'A number of dates were fixed for the hearing of the divorce proceedings to facilitate the attendance of Ms B.. It seems to have been accepted at all times that she is a vulnerable person as reflected by the frequent adjournments and the appointment of a *guardian ad litem* during the course of the proceedings to protect her interests.'

She observes that the financial position of the applicant to those proceedings, Mr B., will have been adversely affected 'by what he

wearily describes as "a fog of litigation". During the hearing of the matter in the Circuit Court, Ms B. 'confirmed that her wish is to have the opportunity to live in both Canada and Ireland and to retain for her use both the properties in Ontario and Dublin to that end.' Judge McDonnell stated that 'the difficulty...is that to retain both properties for her is not financially tenable. Moreover even if the court were minded to do so, which it is not, in circumstances where there is and will continue to be only one income earner and given the existing debt/asset profile, to do so would not be consistent with making proper provision for both parties which a court in granting a divorce decree in Ireland is required to do.' It was upon this basis that Judge McDonnell granted the order sought on behalf of Mr B. to enforce para. 6 of the 19th July, 2012.

7. Counsel for the respondent in these present proceedings submitted that this case bears similarities with the case of *G.S. v. P.S.*, [2011] IEHC 122 whereby the court was minded to strike out an appeal on the basis of the oppressive and vexatious conduct of the appellant. It is correct to state that the court is entitled to protect its own processes and to avoid undue delay on the part of an appellant in attempting to prosecute his or her appeal. The conduct of the appellant in the long course of these proceedings has been less than satisfactory. Specific and primary reference must be made to her attempt to obtain a decree of divorce in the Canadian jurisdiction whilst having already obtained such relief in this jurisdiction by order of Judge Berkley. The appellant has attempted to exploit parallel proceedings in order to benefit in two parallel jurisdictions and achieve her desire to obtain both primary properties of the marriage; namely that located in the Canadian jurisdiction and that located within the Irish jurisdiction. This is a specific attempt to defeat the carefully crafted order of Judge Berkley. Moreover, this case has been subject to aggravated delay, referenced by the judgment of Judge McDonnell in the Circuit Court and witnessed by this Court. In light of the fact that the appellant can be regarded as a vulnerable person this Court has been minded to liberally facilitate adjournments (against the resistance of the respondent who has indicated that he is in financial difficulty) in order to afford the appellant fair procedures to prosecute her appeal.

8. For the avoidance of all doubt, this Court recognises that it possesses no jurisdiction to make property orders in respect of property located outside of Ireland. With some frequency, members of the judiciary, granting ancillary relief as a consequence of divorce proceedings, are required to make proper provision for both spouses mindful of the fact that there may exist some marital property located outside the jurisdiction. Such *contingent orders*, as exhibited by Judge Berkley, are constructed with a view to enabling parties to secure proper provision in respect of property located outside the jurisdiction and the realm of this Court.

Conclusions

9. Ms B. must be admonished for her attempt to initiate divorce proceedings in parallel jurisdictions with a view to obtaining a disproportionate interest in the marital property, thus attempting to deprive Mr B. of proper provision as required under the Family Law (Divorce) Act, 1996 and further, by initiating these subsequent proceedings to obtain a stay of the order of Judge McDonnell specifically ordered to make fair provision for the respondent. Parties to court proceedings are precluded from participating in oppressive and vexatious behaviour which may seek to disrupt the right of one or another to fair procedures. In addition, any delay which this Court may tolerate will be much shorter in the case of an appeal. In light of such, Ms B. has been afforded a generous degree of latitude which must be balanced against the interest of Mr B. to achieve resolution to these proceedings and realise the order of Judge Berkley granted in July, 2012. At the same time, the interests of Ms B. must be taken into account in addition to the evidence given by Mr B. during the course of the hearing of this case in the Circuit Court where he acknowledged that Ms B. will 'continue to be a dependant spouse in need of support.' In light of the personal circumstances of Ms B. this Court does not elect to strike out the appeal on the grounds of the scandalous or vexatious behaviour of Ms B.. In consideration of the submissions of both parties in this appeal, this Court refuses the relief sought by way of a stay upon the order of Judge McDonnell of the Circuit Court enabling Mr B. to enforce para. 6 of the order of Judge Berkley on the 12th July, 2012. It further upholds the refusal of Judge McDonnell to grant a stay on the order of costs made against the appellant.