

THE HIGH COURT

[2009 No. 2624 P.]

S.D.

APPLICANT

AND

M.L.

RESPONDENT

THE HIGH COURT

[2009 No. 21 M.]

IN THE MATTER OF THE GUARDIAN OF INFANTS ACT 1964 AS AMENDED

AND IN THE MATTER OF THE FAMILY LAW

MAINTENANCE OF SPOUSES AND CHILDREN ACT 1976

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

S.D.

APPLICANT

AND

M.L.

RESPONDENT

JUDGMENT of Mr. Justice Michael White delivered on the 30th July, 2012

1. The applicant by Plenary Summons of the 20th March, 2009 has issued proceedings seeking a declaration that she is the owner of certain property in South West Ireland (hereinafter called "the property") She also seeks damages for the conversion and detinue of a BMW motor car.

2. The applicant also issued a special summons on the 1st April, 2009 pursuant to the provisions of the Guardianship of Infants Act 1964, the Family Law Maintenance of Spouses and Children Act 1976 and the Family Law Act 1995 seeking maintenance and lump sum payments in respect of their son C.

3. By order of the High Court of the 12th July, 2010, the proceedings were consolidated. The proceedings were heard by the High Court Family Court on the 6th, 7th, 8th, 26th and 29th March, 2012. Written submissions were received on the 1st May and judgment was reserved.

4. By order of the High Court of 18th July, 2008, in previous proceedings M.L., applicant and S.D., respondent Record No. 2007/70M it was ordered as follows:-

(1) That the applicant be appointed as a guardian to the infant C.L.

(2) That the applicant and respondent have joint custody.

(3) That the infant continue to reside with the respondent at her present address and in the event of the respondent moving from her present address it should not be any further distance from the school attended by the said infant, than the present distance, and in these circumstances the court doth deem the respondent to be the primary carer of the said infant.

(4) That neither the applicant or the respondent shall remove the said infant from this jurisdiction without the consent of the other party such consent not to be unreasonably held

(5) That at least two weeks notice of any trip abroad to be given to the other party.

(6) That the said infant's passport be retained by the applicant.

5. The court did further declare that the habitual residence of the infant is Ireland, and that the arrangements for access as between the parties herein do continue, and the said infant do spend alternate weekends with the applicant from Friday evening to Tuesday morning and on the other week the applicant do have one night overnight access with the infant the applicant to collect the infant from school on Monday and return the said infant to school on Tuesday morning.

A Brief History of the Relationship

6. The parties met in January 1999 and commenced a relationship. The applicant lived in Dublin and the respondent resided in South West Ireland. The parties discovered in March 1999 that the applicant was pregnant and they agreed to cohabit in the South West. The parties have not married each other.

7. The parties commenced living together in the respondent's property in the South West. C. their son was born on the 17th November, 1999.

8. The parties' relationship was volatile, and on a number of occasions the applicant moved out of the respondent's residence, to rented property, the rent being discharged by the respondent. The court is satisfied that the relationship ended in July 2006.

9. Because of the volatile nature of the relationship, the applicant and C regularly moved house. This instability became a matter of concern to the respondent

10. When the property was purchased in 2005, the parties were living apart from each other. The applicant was living with C. at rented property and the respondent was living in a substantial property in his ownership.

11. The respondent is a businessman of substantial means.

12. The applicant is not engaged in gainful employment and during the relationship did not work, except for a short period of part time work on Saturdays at a jewellers.

13. Although the proceedings have been consolidated it is appropriate to deal with the issues in each set of proceedings separately. The court will deal first with the dispute over the legal ownership of the property.

Undisputed Facts in Respect of the Acquisition of the Property

14. The property is a four bedroomed semi detached house. At initial purchase the dwelling house had not yet been constructed. The parties viewed the site in March 2005. The respondent paid a booking deposit of €3,000. There were two separate agreements, a contract for the sale of the site for €70,000 which was signed on the 7th March, 2005, by the respondent. That contract was made between Ger O'Rourke the registered owner and the respondent. A separate building agreement was completed on the same date between Chieftain Construction Limited and the respondent. The contract price was €170,950. The booking deposit had already been paid and there were then stage payments of €18,984.50 on execution, €40,000 on completion of the wall plate and €108,965.50 on the closing date.

15. A deed of transfer dated the 8th June, 2005, was executed by Gerard O'Rourke the registered owner and the respondent was the named transferee, but did not execute the document.

16. A letter of loan offer issued from the Bank of Ireland on the 26th September, 2005, to the applicant. The loan approved was €200,000 repayable over 25 years. The respondent signed a separate letter of the 27th September, 2005, confirming that he was gifting an amount of €50,000 to the applicant which was not repayable and that he was waiving any interest in the property on foot of making the gift. The applicant signed the deed of mortgage on the property which remains undated.

17. The title to the property has not yet been registered, and the mortgage has not been registered as a burden.

18. Apart from the mortgage, the other funds for the purchase including the deposit and fees, have been discharged by the respondent. The respondent has discharged the monthly mortgage repayments paid outgoings on the property and has been responsible for the maintenance and upkeep of the property.

The Disputed Facts Surrounding the Purchase of the Property

19. The applicant contends that prior to the initial contract for the sale of the property there had been discussions between the parties in 2004 and 2005, as a result of which the respondent had agreed to purchase a property for her to ensure her financial security. The respondent contends that the purpose of the purchase, was to benefit C. and the applicant would be able to reside in the dwelling. A conflict of evidence also exists about the visit to the site in March 2005 when a booking deposit, was paid.

20. Based on the evidence presented to the court by the applicant, the respondent Michael Kennedy of Bank of Ireland and P.K. an employee of the respondent present at the site on the date it was agreed to purchase, the court is satisfied of the following facts:-

(i) The decision to visit the site in March 2005 was not pre-planned. The applicant was either telephoned by the respondent when he was on the way from his offices to the estate or when he had arrived there. There were three houses left for sale, 184 which P.K. agreed to purchase, no 179 the site in dispute and another in the immediate vicinity of 179. There was a choice of two properties both with large sized gardens.

(ii) I am satisfied from the evidence of Michael Kennedy and the documentary evidence that initially the respondent intended to purchase the property in his own name for the benefit of C., but then changed his mind and intended to put the property in the applicant's name and the mortgage documentation was applied for in her name.

(iii) I accept the motives for this were financial to avail of the first time buyer's grant and other potential financial advantages.

(iv) There may have been a number of conversations between the applicant and respondent in the period before March 2005 about the desirability of purchasing a property rather than renting it. The respondent may well have congratulated the applicant on the day of the agreement to purchase the property, but it is difficult to establish what message was being conveyed to the applicant.

(v) If it was a gift, the court would have expected that Michael Kennedy would have been told about this in his initial discussion with the respondent and that the contract for sale and the building agreement would have either been in the applicants name or signed by the respondent in trust for her. The independent evidence available to the court does not reflect that it was the respondent's initial intention to grant an outright gift of the property to the applicant for her own financial security. It was inextricably linked with the provision of security for C., with acceptance that the applicant would have the right to reside there and that the respondent would discharge the costs associated with the purchase, mortgage and general upkeep of the dwelling house.

(vi) There was a delay between the signing of the contract and building agreement, and the completion of the transaction. The property on completion in 2006 was rented. The respondent received the rent. The applicant did not move into the property until 2007.

Assertion by the Applicant of a Contract in her Favour

21. The contracts for the purchase of the site and the building agreement were between the registered owner of the property, the contractor and the respondent. The applicant was not a party to those transactions.

22. The respondent arranged the mortgage finance for the property through Michael Kennedy of the Bank of Ireland. The respondent had been a long term customer of the Bank of Ireland primarily in commercial lending. Michael Kennedy gave evidence that on occasions when the respondent required to borrow money for personal reasons he would facilitate him by introducing him to persons in the Bank of Ireland, personal lending division. When the contracts for the purchase of the site and the building agreement were signed, the method of financing had not been finalised.

23. When loan approval was granted to the applicant on the 26th September, 2005 and the respondent signed a letter of gift of the balance of purchase monies there was an intention to put the property into the name of the applicant. I am satisfied that the letter of gift was signed to facilitate loan approval.

24. I cannot see how this decision to apply for the loan in the name of the applicant and to sign a letter of gift for the balance of purchase monies of €50,000 and to guarantee the mortgage, can be regarded as a contract between the parties. She had the comfort of the guarantee of a person of substantial means, who has continued to discharge the mortgage since the date of drawdown. The applicant based on her financial circumstances would not have qualified for a mortgage as she did not have savings or employment. She has had the benefit of the property rent free since 2007. A consequence of the decision of the respondent not to proceed with the transfer into the applicants name is that the bank to obtain proper security would require the loan transferred back into his own name. The essential elements of contract offer, acceptance and consideration were absent.

The Law on Proprietary And Promissory Estoppel

25. The doctrines were explained and differentiated by Costello J in *In the matter of J.R., a Ward of Court*: [1993] ILRM 656 at Page 660, when he stated:-

"For present purposes I will use the classification which is now generally accepted (see Snell's Principles of Equity, 28th ed., p.554 and Halsbury's Laws of England (4th ed.), vol. 16, 1071 1072) and refer to (i) promissory estoppel and (ii) proprietary estoppel. A promissory estoppel will arise where by words or conduct a person makes an unambiguous representation as to his future conduct, intending that the representation will be relied on, and to affect the legal relations between the parties and the representee acts on it or alters his or her position to his or her detriment the representor will not be permitted to act inconsistently with it (see Snell's Principles of Equity, 28th ed., 556). If the subject matter of the representation is land, no right or interest in the land results from this estoppel – a personal right is vested in the representee which will preclude the representor from enforcing a title to the land. A proprietary estoppel is different in a number of ways. When it relates to land it may result in the creation of rights in or over the land. It has been explained as follows:-

Where one person (A) has acted to his detriment on the faith of a belief, which was known to and encouraged by another person (B), that he either has or is going to be given a right in or over B's property, B cannot insist on his strict legal rights if to do so would be inconsistent with A's belief. (See *In re Basham* [1987] 1 All ER 405 at 410. "

26. In *Courtney v. McCarthy* [2008] 2 I.R. 376, a decision of the Supreme Court Geoghegan J. stated:-

"A major argument on behalf of the vendor which featured particularly in the High Court was based on the old adage that estoppel was a shield and not a sword. Again, some of the modern English case law placed before this court convincingly demonstrates that while there may be a technical truth in that adage, it is largely irrelevant as far as having any operative effect. It certainly does not mean any longer, if it ever did mean it, that estoppel can only be a matter of defence and can never ground a cause of action. Estoppel is regularly raised as a matter of reply to a defence. Thus, in the example of this particular case, insofar as the vendor purports to set up the rescission as a defence to the counterclaim for specific performance, the reply to that defence on the part of the purchaser is that, in all the circumstances, the vendor is estopped or precluded from asserting the rescission. For all practical purposes, therefore, the counterclaim is grounded on estoppel".

27. He went on to quote with approval a portion of the Judgement of Brandon L.J. in *Amalgamated Property Co. v Texas Bank* [1982] 1 Q.B. 84 at pp 131 – 132:-

"In this way, the [Defendant] bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case".

28. The respondent has guaranteed the mortgage and has continued to pay the monthly repayments without fail since the date of purchase. No financial disadvantage has accrued to the applicant. She has had the considerable advantage of living rent free in the property since 2007. She has assumed none of the responsibilities of ownership as all the outgoings on the property are discharged by the respondent. She has not acted to her detriment on the faith of a belief that the property would be transferred to her. Proprietary estoppel does not arise in this case.

29. On the issue of promissory estoppel, I do not accept that there was a promise made to the applicant to gift her the property. I am satisfied that the purpose of the transaction was to provide a secure place of residence for C. from which the applicant would also benefit. To that extent promissory estoppel arises, which has never been denied by the respondent. He has at all times acknowledged the right of the applicant to reside rent free in the property with C. That does not go as far as granting a right of residence for life to the applicant. It remains in place until C. reaches the age of 18 if he is in gainful employment or up to 23 years of age if he continues in full time education.

Resulting Trust

30. As a matter of fact no resulting trust arises in favour of the applicant in this transaction. The respondent apart from the mortgage provided all the funds for purchase of the property, has guaranteed the mortgage and has paid the monthly repayments since drawdown. The reverse would be the case if the legal ownership had been vested in the applicant.

Ownership of BMW Motor Vehicle

31. The applicant had the use of a number of motor vehicles during her relationship with the respondent, provided through his company. The company initially insured the vehicles. The company had this arrangement with other employees and the respondent's father. The vehicles and the insurance certificates were subsequently registered in their individual names to protect the company from higher insurance charges.

32. The purchase of the BMW for €95,000 was financed by the respondent and the loan repayments were paid by the company.

33. The respondent should not have signed the applicants name to the transfer of ownership form, when he took back the vehicle. The vehicle registration certificate is not proof of ownership.

34. If there was a gift of the vehicle as alleged and the respondent reneged on it, the applicant has been compensated by the supply to her in February 2012 of a Renault Megane coupe. The court will grant a declaration in her favour of ownership of that vehicle.

Maintenance and Lump Sum Proceedings

35. A court order is not required for the respondent to discharge his financial responsibility to C., as he has taken these matters very seriously and has always acted responsibly. To date there has been an arrangement that the respondent has paid the applicant a wage through his company and has also provided generous payments for the benefit of C., in addition to discharging the mortgage and other outgoings on the property. The respondent has accepted for the purpose of these proceedings he has the assets to discharge the courts order, and has thus been relieved from the burden of substantial disclosure.

36. The payments should now be made in a more structured manner. A weekly sum of maintenance should be allocated to the applicant for the upkeep of C. rather than a wage from the company. The appropriate sum is €450 per week.

37. The court will also direct that the respondent discharge the following payments:-

- (i) The mortgage on the property, together with house insurance and mortgage protection insurance.
- (ii) Payment for school books, uniforms and extra tuition.
- (iii) School fees if they arise at secondary school.
- (iv) Payment for extra curricular sporting and music activities.
- (v) Car insurance, car tax and periodic service on the Renault Megane.
- (vi) Household charge.
- (vii) Payment for Christmas of €1,000.
- (viii) A holiday payment of €3,000 per annum.
- (ix) Payment for structural and general repairs to the dwelling.

38. The applicant shall be responsible for the payment of utility bills such as gas, electricity, fuel, refuse collection, and satellite TV.

39. The court order of the 18th July, 2008 has placed certain restrictions and responsibilities on the applicant and I am of the view that in addition to the weekly payment a lump sum annual payment of €7,000 is appropriate in the circumstances of that order being in place. That sum should be applied for the benefit of C. but at the discretion of the applicant. It is to be paid in two annual instalments on the 1st March, and 1st September.