Neutral Citation Number: [2007] IEHC 197

THE HIGH COURT

[2006 No. 17M]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

BETWEEN

C.O'D.

APPLICANT

AND

W.A. OTHERWISE KNOWN AS T.H.

RESPONDENT

Judgment of Mr. Justice Henry Abbott delivered on the 16th day of April 2007

The applicant and the respondent had a relationship and lived together for a period claimed by the applicant to be upwards of ten years prior to 2005. The applicant and the respondent are not married to each other. The respondent had, prior to the relationship between the applicant and the respondent, been married (but is now separated from) to another person and has children by that marriage. There are two children of the relationship between the applicant and the respondent, A.A. born on 29th June, 1997 and B.B. born on 7th September, 2000 – two boys. The parties continued the relationship until in or around the end of March, 2005. The applicant issued a concurrent special summons on 1st March, 2006, returnable before the Master on 17th May, 2006, in which she claimed as mother of the children of the relationship, *inter alia*, that the respondent had substantial moneys and capital available to him, that he was the main provider of the *de facto* family of the relationship formed between the applicant and the respondent and that the applicant believed and understood that the parties were proceeding to create a family, whereby her role would be to cater for the children and household matters and that the respondent would be the financial provider, in particular towards the future of their children in the manner that he had done in the previous years.

In the summons the applicant claimed the following reliefs:

> 1. An order pursuant to s. 11 of the Guardianship of Infants Act 1964, providing custody of the dependent children of the applicant herein with access to be exercised by the respondent on such terms as the Court shall deem fit.
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> 2. An order directing the respondent to pay maintenance of such amount as the court shall deem fit to the applicant in respect of the dependent children of the relationship.
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> 3. An order requiring and/or directing the respondent to transfer such assets into the name of the applicant herein for the benefit of the children in order to provide security for their maintenance into the future.
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> 4. Further and/or in the alternative an order directing such lump sum and/or capital sum payment by the respondent to the applicant for the benefit of the dependent children as the Court shall deem fit.
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> 5. Further and/or in the alternative an order directing the respondent to execute and/or put in place such life insurance policy or policies to secure for the benefit of the children of the relationship (lump sum payment in the event of the respondent's death during their dependency).
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> 6. Such further and other orders and/or directions as the Court shall deem fit.
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> 7. An order as to costs.

An affidavit to ground the application by way of special summons was sworn by the applicant on 18th March, 2006, and a replying affidavit was sworn by the respondent on 11th July, 2006. An affidavit of means and welfare was sworn by the applicant on 18th January, 2007. The matter was transferred to the Judges' List in the High Court for 9th February, 2007, by the Master of the High Court. An interim motion for maintenance for the dependent children was issued on 25th January, 2007, returnable before the High Court on 9th February, 2007. An application to adjourn the motion and the substantive action was made by counsel for the respondent and an open offer of €300 per week maintenance was made by the respondent.

It was indicated in court on 9th February, 2007, that the respondent would be bringing a motion to remit the case to the Circuit Court. The Court indicated at that stage, that the case was one for case management.

A motion to remit was issued returnable for 28th February, 2007, and all matters were adjourned to allow the applicant to consider the application and deliver a replying affidavit. An affidavit of the respondent was sworn on 14th July, 2006, which while criticised by the applicant, indicates that the applicant has assets of somewhat over €2 million. The applicant in argument alleges that the respondent has assets of approximately €8 million and that she intended at the hearing of the action to call eleven witnesses, many of whom are solicitors who may give evidence in relation to the concealment of assets by taking or giving conveyances or transfers of property in the names of parties other than the respondent. When the matter first came before the Court with a view to remitting the proceedings in time for a Circuit Court sitting on 21st March, 2007, Ms. Anne Dunne, S.C., counsel for the respondent delivered and filed written submissions on behalf of the respondent submitting that:

> (a) The Circuit Family Court has concurrent jurisdiction with the High Court to hear and determine proceedings pursuant to the Guardianship of Infants Act 1964.
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> (b) The originating jurisdiction of the Circuit Court imposes no financial limit on the making of an order for the payment of a periodical sum towards the maintenance of a child pursuant to s. 11 of the Guardianship of Infants Act 1964, in contrast with the limit of the jurisdiction of the District Court for such periodical sum at a rate greater than €150 per week.
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> (c) The legal issue in this case is the appropriate amount of maintenance the court should direct the respondent to pay towards maintenance of two non-marital children aged nine years and six years.
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> (d) The applicant is not entitled to a lump sum – only periodical payments.

It was submitted that the fact that the parties had never married is relevant having regard to the matters discussed in the cases of *J.K. v. V.W.* [1990] 2 I.R. 437; *W.O'R. v. E.H.* [1996] 2 I.R. 248; and *Keegan v. Ireland* [1994] 18 E.H.R.R. 342. The submissions relied on the judgment of McGuinness J. in *D. v. D.* (Unreported, Supreme Court, 5th December, 2003) as a binding authority indicating that the Court should in this type of case remit the case for hearing to the Circuit Court relying on the following statement of law in the

judgment of McGuinness J.:

> "It does appear that it is the policy of the law in the legislation that family law matters should be in the main dealt with in the Circuit Court, certainly family matters such as separation and divorce. There is concurrent jurisdiction in the High Court for cases of considerable complexity but it does not appear to me that the matters involved in this case are of such complexity that they require a hearing in the High Court. The asset is of considerable value but nevertheless I would agree that the Circuit Court has considerable experience of dealing with property to this nature in the Landlord and Tenant jurisdiction."

It was submitted that the County Registrar for the County of "C" had advised this Court that if this application was remitted it could be listed for the next sittings of the Circuit Family Court on 21st March, 2007. It was indicated that at the callover of the list at 10.30 a.m., the circuit court judge directs the running order of the cases. An application for maintenance for two children would usually be disposed of on the date listed for hearing. In the unlikely event that the case was not disposed of on 21st March, 2007, it would automatically be put into the list for hearing in July, 2007. In addition to the regular family law day, additional hearing dates are scheduled from time to time as on 1st and 2nd February, 2007, when the list so requires. In the event of this matter remaining in the High Court it will go into the next list to fix dates in or about May, 2007 and it is unlikely to obtain a date prior to Michaelmas Term.

At the first hearing of the remittal motion counsel for the applicant filed written submissions which dealt with issues of non-discrimination of non-marital children and, in particular, set out the basis for claiming a lump sum and similar non-periodical financial provisions as being s. 11 of the Guardianship of Infants Act 1964 as used by Budd J. in the judgment *Y (M) v. Y (A)* (Unreported, High Court, 11th December, 1995) where the Court made provision for payment of maintenance to provide for a dependent child, including the provision of a lump sum for the purchase of a suitable house, as stated in the case. At this juncture, I became concerned that on the basis of the reliance by the applicant on the case of *Y (M) v. Y (A)*, and in the light of the judgment of Carroll J. in the *L.M. v. His Honour Judge Liam Devally and D.W.* [1997] 2 I.L.R.M. 369 the Court would have to exercise caution to ensure that the considerations of the European Convention of Human Rights would be brought to bear in interpreting the Guardianship of Infants Act 1964, so as to ensure that the interpretation of same would be consistent with the Convention and, in turn with the Constitution. The Court was apprehensive that, in examining this matter, it might have to have resort to the appointment of an amicus curiae pursuant to the Act of 2003 – a course available only to the High Court and the Supreme Court. In other words, I was apprehensive that the case would be, in the expression of McGuinness J. in the *D. v. D.* case, "of such complexity that they require a hearing in the High Court".

Hence, I invited counsel for the applicant to make further submissions in relation to these and any other matters arising. The application to remit was adjourned on that basis to the 27th March, 2007, and on that date further submissions were delivered and filed on behalf of the applicant and the hearing resumed. The extensive supplemental submissions (prepared by Ms. Inge Clissman, S.C., and Ms. Sarah Bartley B.L., Counsel for the applicant) not only dealt with the Convention aspect but also dealt with the abolition of discrimination against non-marital children by the Status of Children Act 1987, and also, (and perhaps more importantly), set out more extensively the basis upon which lump sums and other like non-periodical financial orders allegedly could be obtained for non-marital children. It was submitted that the Family Law (Maintenance of Spouses and Children) Act 1976, as amended by Part IV of the Status of Children Act 1987, (and also by ss. 41, 42 and 43 of the Family Law Act, 1995 and s. 53 of the Family Law (Divorce) Act 1996), makes provision for a parent (who is not married to his or her dependant child's other parent), to bring proceedings against the other parent to obtain financial orders for child support. It was submitted that s. 5A of the Act of 1976 (as inserted by s. 18 of the Act of 1987) provides that where it appears to the court that the parent of a dependent child has failed to provide such maintenance for the child as "is proper in the circumstances", the court may order that parent to make periodical maintenance payments for the child's support. It was also submitted that the court may make provision for the payment of a lump sum or sums (s. 21A of the Act of 1976 as inserted by s. 21 of the Act of 1987 and also ss. 41 and 42 of the Family Law Act 1995). It was submitted that the provisions of the Act of 1995 were not brought to the attention of the High Court in its consideration of the *Devally* case.

It was further submitted that the Supreme Court in the case of *M.W. v. D.W.* [2000] 1 ILRM 416, held that the Court has a discretion whether to remit a case under O. 70A, r. 5 of the Superior Court Rules and that the onus is on the person seeking to remit to convince the court that it is in the interests of justice to do so. However, reference was not made in that case or any of the other cases relied upon by the respondent to the Courts of Justice Act 1924, and the Courts of Justice Act 1936, which are the statutes which regulate this area of the law. Order 70A, r. 5 of the Superior Court Rules derives from these statutes. The submissions in particular referred the court to the decision of Morris J. (as he then was) in *O'Shea v. Mallow UDC* [1994] 2 I.R. 117 in which he stated at p.p. 119 and 120 as follows:

> "The provisions of s. 11, subs. 2(a) of the Courts of Justice Act, 1936, were enacted so as to provide for the circumstance where an action involves issues which are capable of being resolved in the Circuit Court and fall within the jurisdiction of that Court but, for valid reason, should properly be dealt with in the High Court. The subsection removes from the High Court the obligation to transfer an action simply because the subject matter of the action falls within the Circuit Court jurisdiction. The subsection provided for a circumstance where, notwithstanding the fact the subject matter falls within the jurisdiction of the Circuit Court, it is nevertheless reasonable and proper to retain the action in the High Court. If such circumstances exist then the High Court has the power to retain the action and not transmit it to the Circuit Court."

During the course of the oral submissions, Ms. Monica Lawlor, B.L., Counsel for the respondent, indicated to the Court what the timetable in the Circuit Court might be. It is instructive to quote the material part of her very words as follows:

> "The last day we were in court your Lordship suggested that such an application would certainly be dealt with in a day and there was no objection to that. And we understand that subsequently the solicitors for the applicant wrote to the County Registrar and said 'can you advise the judge that this will take three days and what is his attitude towards it'. Now we haven't seen the reply but from speaking with the County Registrar, he indicated that the judge's view was anything that could be dealt with in the High Court could be dealt with by him. There is no backlog because over the two days sittings on the 1st and 2nd days of February, ten lengthy cases were cleared out of the list in their entirety. So a matter of maintenance for two children would always be dealt with, well usually, within certainly within one hour and it is difficult to see why this case has ballooned to this extent that it would take not one day as was suggested the last day in court but now perhaps three days. And the difficulty is the solicitors that it is proposed to call in evidence will be attending "C" Family Law Day for their own family law cases and will be there anyway. But if it is envisaged to bring them up to Dublin … (here Counsel assured the Court that solicitors were regularly cross examined in equity, probate and specific performance cases before their own Circuit judge) she continued:
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> "The only other thing I can tell your Lordship is the next family law date scheduled is 18th July. And then the appeals, if

there were any appeals (they are usually dealt with in early October). There are very infrequently appeals in the Circuit Court. There might usually be about six listed, many of which settle and one judge rather than the scheduled two ends up coming to a formal call over to the list and then returns to Dublin. But there is absolutely no difficulty with an appeal with High Court on the Circuit in C. … it is one day and then it goes to (another town) and if something does not finish the practitioners simply go down the road to (another town) and deal with it the following day.

Ms. Anne Dunne S.C. countered the arguments of the applicant by submitting that all the case law cited dealt with marital children.

Conclusions

1. This is an infants' case, and time is of the essence in relation to resolution of all matters regarding their welfare including the making of financial provision, whether by way of periodical payments or other form of order such as lump sum order, as might be decided by the Court.

2. While I accept that many circuits outside Dublin may not be suitable for ensuring the element of expedition and possible continuity of hearing over a number of days, the position appears to be different on the circuit concerned in this case, as shown by the attendance of the County Registrar in court, prepared to give evidence, if necessary, on the first occasion of the hearing of the remittal motion and of Ms. Lawlor's account of her enquiries in regard to the possibility of dealing with a three day case in the "C" Circuit Court.

3. Having regard to the fact that there will be eleven witnesses for the applicant at the hearing (apart from the witnesses for the respondent), and, having regard to the fact that the legal issues raised in the excellent and extensive legal submission placed before the Court may have to be resolved, the case runs the risk of lasting more than three days unless subjected to the most rigorous case management. Notwithstanding that the case may run for over three days I am satisfied from the whole attitude of the County Registrar and judge from the circuit concerned that there is a willingness to take on this type of work, and, if necessary, to draw in the judicial resources to ensure that it is done in a manner consistent with the other business of the circuit being disposed of. The Family Court of the High Court in the last year, and certainly until the end of the Trinity Term has operated only on the basis of the availability of one judge save in exceptional circumstances, and this provision which contrasts from the position of recent years of a second judge being available to hear cases on a list fixed for two judges. The listing procedure in the High Court does not guarantee a hearing date for this case prior to October, 2007. On the basis of an assessment of the application from the point of view of urgency and the balance of resources available remittal of the case to the Circuit Court would seem to be the better option. This would not be so if I were on a position to say that a second judge would be available to take the family law list in the High Court from early this term or even next term in October, 2007.

4. As regards the case giving rise to matters of complexity I am satisfied that my initial worries about the concerns arising from the European Convention on Human Rights and also arising from the possible reluctance of the Circuit Court to decide the case in a manner other than dictated by the decision of the High Court in *Devally*, have been considerably abated by reason of the fact that the applicant's submissions have indicated that there is a substantial island of statute law in existence to enable the Circuit Court to distinguish *Devally* (if the Circuit Court were to hold with the applicant on her view of the effect of that statute law).

5. Having regard to the foregoing conclusions I consider that I am bound by the authority of the decision of McGuinness J. in *D. v D.*, and I do not find any refinements that might be brought to that decision on consideration of the decision of Morris J. in *O'Shea v. Mallow U.D.C*. regarding the difference in wording between the Courts of Justice Act 1936 and O. 70A to be helpful.

6. On balance most of the witnesses may seem to be from "C" and while there is a personal difficulty for the solicitor for the applicant in coming from a far distance, this does not override the overwhelming balance of convenience from a witness point of view of the "C" Circuit Court. This reason of convenience is all the more compelling of the Circuit Court judge wishing to hear the voice of one or both of the children who are resident in "C".

7. By reason of the foregoing conclusions, I have decided to make an order pursuant to O. 70A of the Rules of the Superior Courts remitting the action to the Circuit Court County of "C" with the condition added that the parties would undertake to inform the presiding Circuit Court judge assigned to the Circuit Court in the County of C, that the action has been remitted so as to give him an opportunity to decide in his own discretion whether he might put in place in early course arrangements for case management of the case to ensure the efficient and speedy disposal thereof.

8. I adjourn all other matters to the Circuit Court on the remittal including the application for interim maintenance.