

**THE HIGH COURT**

**FAMILY LAW**

**CIRCUIT APPEAL**

**[2012 No.13 CAF]**

**[2012 No. 22 CAF]**

**DUBLIN CIRCUIT**

**COUNTY OF DUBLIN**

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

**BETWEEN**

**K.A.**

**RESPONDENT/APPLICANT**

**AND**

**L. T. A.**

**APPELLANT/RESPONDENT**

**JUDGMENT delivered by Mr. Justice Michael White on the 7th day of February, 2013.**

1. This is an appeal from an order of the Circuit Court of the 7th February, 2012, when a decree of divorce was granted together with ancillary orders. The matter was heard in the Circuit Court on the 31st January, 1st, 2nd and 3rd February, 2012. Subsequent to the substantive order of the 7th February, 2012, separate orders were made by the Circuit Court dealing with difficulties arising from custody and access. K.A. was the applicant in the Circuit Court proceedings and shall be described as the respondent in these proceedings. L.T.A. was the respondent in the Circuit Court proceedings and shall be described as the appellant in these proceedings.
2. The substantive hearing on appeal to this Court was heard on the 27th, 28th, 29th November and 3rd and 4th December, 2012, and judgment was reserved. There were also a number of interim applications to the High Court and interim orders granted at the substantive hearing.
3. The respondent is an airline pilot presently in employment with a company based abroad in H. He resides in the town of C. in Ireland in rented accommodation. The appellant is a full time housewife and mother, who has worked part time but is not presently in employment. She has some medical difficulties at present. She lives with the two children of the marriage in the town of B. in Ireland in rented property.
4. The parties met in 1990 and married on the 31st August, 1995. There were difficulties in the marriage in 1996 and at that time the respondent transferred the family home at L. in Ireland to the appellant for a consideration of €25,000. The parties reconciled in 1997. Their first daughter L. was born on the 26th August, 2001, and is now aged 11. L. was born in Ireland.
5. After the parties reconciled they bought a family home in Pin Ireland. The respondent started work as an airline pilot with his present employers in March, 2002 and moved abroad to H. The appellant and their daughter L. also moved abroad to H. in September, 2002.
6. The family home in P. was sold and the proceeds used to purchase a property in H.
7. The party's second child A. was born on the 14th July, 2004 in H. and is now aged 8.
8. The marriage irretrievably broke down in 2005 and the respondent moved out of the family home in H. This property was sold in July, 2007. The appellant purchased a property abroad in I. and went to live there with the children. The respondent visited the property in I. and was an invited guest there on a number of occasions.
9. The Court has no reliable evidence that a separation agreement dated 17th May, 2005, was concluded abroad in H.
10. While the parties were estranged from each other and their marriage at an end, they were able to maintain a cordial relationship. The respondent had continuing access with his daughters in I. until an incident that occurred there on the 23rd December, 2009.
11. There is a conflict of evidence about this incident. The appellant alleges that when she visited the separate apartment where the respondent was staying on the evening of this incident, to retrieve some Christmas presents for the children, the respondent attacked her, by grabbing her by the collar, dragging her by the hair, punching and kicking her and kneeling on her chest and attempting to strangle her. The respondent alleges that the appellant refused to leave the apartment, and approached him aggressively and a struggle developed when he tried to push her towards the door. The Court is satisfied this was a very upsetting incident for the appellant, that she was very traumatised by it and the respondent has downplayed its gravity. It was not a premeditated assault but was certainly a serious over-reaction by the respondent resulting in violence being inflicted on the appellant,

which had the effect of severing the relationship between them. The appellant returned to Ireland from the property in I in January, 2010 and has established permanent residence in Ireland since and has not returned to I. on a permanent basis.

12. Thereafter the appellant applied to the District Court in Ireland for a safety order and insisted that any access between the respondent and the children be supervised. This led to a fraught situation leading to two other incidents, which were the subject of District Court proceedings and a criminal prosecution. Those incidents took place on the 11th March, 2010, and the 16th June, 2010. The Court does not wish to dwell on these incidents, but is satisfied that they occurred in the context of difficult relations between the parties over ongoing difficulties with access to the two children.

13. The incident on the 11th day of March, 2010, took place in the dwelling house of the appellant's friend A.R, who was supervising access at the time. A dispute arose over the whereabouts of mobile phones and the appellant and the respondent became involved in a physical fracas. I accept the respondent acted irresponsibly, as a safety order was in place, and he should have acted with much more restraint.

14. The second incident on the 16th day of June, 2010, occurred at the family home of the respondent's brother B.A. at D. in Ireland and also involved the respondent's spouse G.W.P. These were not premeditated vicious assaults as alleged by the appellant. I do not wish to comment otherwise as these matters are the subject of separate legal proceedings.

15. Since those incidents, access has broken down and there is no contact between the parties. I am satisfied there will not be any form of regular contact between the appellant and the respondent in the future, and mutual safety orders are not required. However, the appellant should not contact the respondent's employer for any reason whatsoever.

### **The Difficulties with Access**

16. The Circuit Court made comprehensive orders for access by the respondent to the children, L, and A. There have been many interim orders trying to foster access between the respondent and his two daughters but, unfortunately, contact has broken down. The Circuit Court on two occasions ordered reports pursuant to s. 47 of the Family Law Act 1995, the first one dated the 23rd September, 2010, and the second dated the 11th April, 2012.

17. Both reports came to the conclusion that the respondent was an appropriate person to have access to his daughters, and that the two children were not subject to any risk in his care.

18. Both reports were critical of the respondent's approach to fostering access and concluded there was a form of alienation of the children going on. The appellant has strenuously denied this and has asserted it is the children's own decision not to exercise access to their father.

19. There has been alienation on the part of the appellant, which is very unfortunate. The respondent has had no meaningful contact since the incident of the 23rd December, 2009. He has to take a certain degree of responsibility for that, due to his conduct on the last access date, which caused very fraught relations between the parties, but he has attempted since to re-establish the relationship in vain.

20. A specific access order would be unhelpful at this time but a process of facilitation may help. The Court places the responsibility on the appellant to try and encourage the children to have contact with their father, and not to undermine him in the presence of the children and to try and foster some constructive access between them. The Court will be ordering the appellant to attend the facilitation and to bring the children whenever requested by the facilitator. It is appropriate that any conversations the parties have individually with the facilitator can remain confidential. There will not be an onus on the facilitator to disclose those conversations to the Court. It is hoped the facilitation process can enable the parties to be full and frank with the facilitator and make some progress in re-establishing contact between the respondent and his children. It is in the interests of the children to have this contact. The Court is satisfied the respondent is a fit and proper person to have access, and has no objection to contact between the children and the respondent's spouse. The Court acknowledges that the appellant has been a very good mother to the children, who have been nurtured very well.

### **Proper Provision**

21. The Court does not intend to take any conduct into account, and will endeavour to be as fair as possible to both parties, having at all times due regard for the welfare of the children who are still young and are dependant.

### **The Properties**

22. The original family home at L. in Ireland is in the sole name of the appellant. It was originally in joint names at the beginning of the marriage in 1995 but following their first separation the respondent transferred the property to the appellant for a consideration of €25,000. Subsequently two mortgages were drawn down on the property in joint names, the first with a balance outstanding of €129,116 and the second with a balance outstanding of €300,240.

23. The parties own a holiday home abroad in T., in joint names.

24. Subsequent to the separation of the parties in 2005, the appellant purchased a property abroad in I., which comprised an old dwelling house, together with ancillary apartments in separate accommodation. These buildings required extensive refurbishment. A substantial amount of the proceeds of the sale of the property abroad in H. and the proceeds of the second mortgage on the L. property in Ireland were used for the purchase and refurbishment of the property.

25. This Court agrees with the order of the Circuit Court directing the sales of the holiday home in T. and the property abroad in I. and also the mechanics of the sales.

26. It is appropriate that the respondent takes full responsibility for the sale of the holiday home in T. by appointing the auctioneers and the solicitors having carriage of sale. The net proceeds of that sale should be retained by the respondent's solicitors in their client's account pending further directions by the Court. The Court will fix a reserve of €500,000.

27. The appellant should retain responsibility for selling the property in I. That property's sale may take longer than the sale of the holiday home in T. because of particular difficulties which have arisen in respect of that property. The appellant should appoint the auctioneers and solicitors having carriage of sale and likewise the net proceeds of sale should be held by the solicitors for the appellant in their client's account. If there is any change of solicitors, the new solicitor would have to undertake to the Court that this would be their position also. There should be a property adjustment order declaring the property in I. to be jointly owned, but there is no requirement to vest the title in joint names as the property is being sold. The Court will fix a reserve of €350,000.

28. This Court differs from the Circuit Court on the treatment of the L. property in Ireland. This Court is desirous of providing a family home for the appellant and children that is mortgage free as the children are very young, in order to try and ensure future security for them. To that end the Court is of the view that the property at L. should be the family home and should be, if possible, mortgage free.

29. The basis of the Court's order will therefore be the sale of both foreign properties in T. and I. with the proceeds of those sales to be used to discharge the mortgages on the L. property in Ireland and the balance to be apportioned by this Court when the net proceeds after costs of sale and mortgage redemption are ascertained. The Court reserves the right to apportion the balance as it sees fit once the properties are sold. The maximum apportionment for the appellant will be 50%, but depending on the balance available the apportionment for the respondent may be greater than 50%.

30. The Court is of the view that the T. property will sell more easily than the I. property. The Court does not want a situation to develop where the I. property remains unsold and the total proceeds of the T. property are used to pay off both mortgages. To that end the Court will not be directing the discharge of the mortgages until both properties are sold. In the meantime the rental from the T. property is to be applied to pay the monthly instalments on the second mortgage on the property in L. in Ireland, and if the T. property is sold before the I. property, the monthly instalments on the second mortgage on the L. property are to be discharged from the proceeds of sale of the T. property until the I. property is sold.

31. This Court will vary the periodic maintenance. Maintenance should be the sum of €3,000 per month apportioned €1,000 for each child and €1,000 for the respondent. Maintenance for the appellant should be time limited for a period of four years to be discharged on the 7th February, 2017. The Court will be directing the respondent to continue to keep in place health insurance for the children but will not be expecting the respondent to discharge 50% of all school fees, school books and school uniforms. If the parties wish to send their daughters to a fee paying secondary school that will have to be agreed between them.

32. The Court will make a pension adjustment order in respect of the respondent's pension from his previous employer pursuant to s. 17 of the Family Law (Divorce) Act 1996. The Court will be making an order pursuant to s. 18(10) of the 1996 Act. The Court will grant a declaration that the respondent is entitled to any pension, loss of earnings or life policy arranged by his employers, and may nominate whoever he wishes to receive any contingent benefit.

33. The respondent acted irresponsibly in engaging in an illegal contract of marriage in the U.S.A. on the 20th of November, 2011. It was appropriate to have the marriage annulled. It was undesirable to marry between the date of the Circuit Court order and the appeal. However the Court will affirm the divorce order as and from the 7th February, 2012.

34. This Court will retain *seisin* until the properties are sold and apportionment finalised.

35. The cost of the facilitation process is to be shared between the parties. The respondent is to pay and recoup the amount when the properties are sold.

36. The respondent is entitled to a refund of any difference between the maintenance paid and the rental payments diverted by the appellant. I have already stated that it was the appellant who was in breach of the interim High Court order by diverting the rental payments on the T. property for her own use. The respondent was thus entitled to divert the maintenance payments to the mortgage.

37. The Court was concerned about allegations made by the appellant against the spouse of the respondent G.W.P. during the course of the appeal hearing when G.W.P. was not a party to the proceedings. The appellant should refrain from this type of behaviour. It serves no useful purpose.

38. The orders of the Court are set out separately in the schedule to this judgment.

## **SCHEDULE**

### **A. v.A.**

#### **DRAFT ORDER**

1. The Court affirms the order of the Circuit Court of the 7th February, 2012 granting a decree of divorce in respect of the marriage contracted on the 31st August, 1995. The said decree operates from the 7th February, 2012.

2. The Court affirms the order of the Circuit Court for the sale of the property in T. The property is to be sold forthwith with a reserve of €500,000. The respondent is to be responsible for the carriage of sale including the appointment of the auctioneers and the solicitors. The net proceeds of sale after deduction of costs of sale are to be lodged with the respondent's solicitors pending further order of the Court. Pending the sale, any income from the property is to be used to discharge the monthly mortgage. If the T. property is sold prior to the I. property the monthly mortgage payments are to be paid from the proceeds of sale subject to a credit in due course.

3. The Court grants an order pursuant to s. 14(1) of the Family Law (Divorce) Act 1996 directing a transfer of the I. property into joint names, without the need to vest the title. The Court affirms the order of the Circuit Court directing a sale of the properties in I. The sales of these properties are to be completed by the 30th September, 2013. The appellant has responsibility for the carriage of sale including the appointment of auctioneers and solicitor. The net proceeds of sale after deduction of estate agents and lawyer's fees are to be lodged into the client's account of the solicitors for the appellant and held to the order of the Court. The Court fixes a reserve of €350,000.

4. On completion of sale of both properties, both mortgages are to be discharged from the joint proceeds of sale.

5. In the event of the successful completion of sale of the T. and I. properties and the mortgages being discharged, the Court will grant a formal declaration pursuant to s. 36 of the Family Law Act 1995 that the appellant is the legal and beneficial owner of the property at L. The Court reserves its position pending that declaration to order a sale of the property if the T. or I. properties cannot be sold.

6. The Court grants a declaration that there should be complete transparency in respect of the sales of the T. and I.

properties, with each party's solicitors being informed on a regular basis of progress, copies of the contract documents and any other relevant documentation should be exchanged.

7. The Court makes an order pursuant to s. 14(5) of the Family Law (Divorce) Act 1996 that, in the event of either party neglecting to sign relevant documents to give effect to the sales of the property in T. and I., the County Registrar for the County of Dublin may sign the documents or in the alternative if required an appropriate legal officer in T. and/or I. can be nominated to sign the documentation.

8. The Court directs that the apportionment of the net proceeds of sale of the T. and I. Properties, after the costs of sale and mortgages are deducted, is to be finalised by the Court, when the properties have been sold. The maximum entitlement of the appellant will be 50% of the net proceeds of sale and may be less.

9. The Court grants an order pursuant to s. 13(1)(a)(i) of the Family Law (Divorce) Act 1996 that the respondent shall pay to the appellant the sum of €1,000 per month taxable in the hands of the appellant. These periodic payment are to cease on the 7th February, 2017. The payment is to commence on the 5th of March, 2013, by direct transfer to the appellant's bank account.

10. The Court grants an order pursuant to s. 13(1)(a)(ii) of the Family Law (Divorce) Act 1996 that the respondent shall pay to the applicant the sum of €2,000 per month for the maintenance of the children L. and A. apportioned equally between them. Payments are to commence on the 5th March, 2013, by direct transfer to the appellant's bank account.

11. The Court directs that the respondent should continue to discharge premiums on health insurance for the children. Any medical fees paid by the appellant for the children, who are covered by the insurance, are to be vouched by her so that they can be reclaimed, and if recovered from the insurance they will be reimbursed to her by the respondent.

12. The Court vacates the order of the Circuit Court at para. 7 thereof, directing the respondent to discharge 50% of all school fees, school books and school uniforms. These payments should be discharged by the appellant from the maintenance payments.

13. In accordance with s. 15(1)(f) of the Family Law (Divorce) Act 1996 the Court grants an order pursuant to s. 11 of the Guardianship of Infants Act 1964 granting joint custody of the children to the parties, with primary care and control to the appellant and the Court directs that the children should reside with the appellant. The habitual residence of the children shall be the Republic of Ireland. The children shall be permitted to go on holidays abroad for not longer than four weeks without the consent of the respondent. Any period of time over and above that or any transfer of permanent residence outside the Republic of Ireland requires the consent of the respondent or the Court.

14. The Court will not make a specific access order at present but will direct the parties to attend for facilitation. The person to carry out the facilitation is to be nominated by the Court in default of agreement by the parties, but it shall not be either of the experts who carried out the s. 47 reports. The appellant, respondent and the children will be obliged to attend these meetings with the facilitator. The confidentiality of the meetings shall be at the discretion of the facilitator, who is free to preserve confidential communications. The cost of facilitation is to be shared between the parties, the respondent to discharge the amount due in advance and recoup the appellant's share on the sale of the properties.

15. The Court directs e-mail, skype and telephone contact between the respondent and the children as recommended by the facilitator.

16. Liberty to apply for any access order.

17. The Court vacates paragraph 18 of the Circuit Court order and dispenses with the requirements for mutual safety orders.

18. The Court grants an order pursuant to s. 17(2) and (3) of the Family Law (Divorce) Act 1996 that the appellant shall be entitled to 50% of the respondent's pension with his previous employer including any contingent benefit for the spouse and children. The Court will direct the preparation of a formal pension adjustment order to be approved by the trustees of the previous employer's pension fund and to be finalised by the Court.

19. The Court declares that the respondent is entitled to designate whoever he wishes to be the beneficiary of any pension or life policy arrangements with his present employer.

20. The Court directs the appellant not to have any contact whatsoever of any kind with the respondent's present employer.

21. The Court declares that it is appropriate for the facilitator appointed to speak to the respondent's spouse G.W.P. and the appellant's friend A.R., or such other party who the facilitator deems appropriate.

22. The Court directs that the following documents can be released to the facilitator:

1. Copies of the court pleadings.
2. Copies of both s. 47 reports.
3. Copy of the Court's judgment and order.

23. The Court makes an order pursuant to s.18 (10) of the Family Law (Divorce) Act 1996 that both parties shall not be entitled to apply for provision out of each other's estate. The Court grants a stay on this order until finalisation of the other orders of the Court.

24. Liberty to apply.

25. Liberty to re-enter.

26. This Court will retain *seisin* of the appeal until such times as the properties are sold and final orders made in respect of the property in L. in Ireland and the apportionment of the net proceeds of sale of the properties in T. and I.

27. Thereafter any further applications in relation to access and custody, or any review of the orders shall be made to the Circuit Court.

28. The Court grants a declaration that the respondent is a fit and proper person to exercise access to his children.

29. Liberty to disclose the relevant parts of this order to give effect to the provisions thereof.

30. Direct the appellant to refund any difference between the rent diverted from the T. property and the maintenance withheld.