

THE HIGH COURT

[2015 No.12 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW ACT 1989 AND THE FAMILY LAW ACT 1995

BETWEEN

C.O.S

APPLICANT/RESPONDENT

AND

B.M.

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Abbott delivered on the 18th day of December, 2015

1. This is an appeal by the respondent/appellant (husband) against an order made by the Circuit Court, pursuant to s. 3 of the Domestic Violence Act 1996, restraining the respondent from attending at or in the vicinity of the family home situation at XXXX, Dublin or entering that same premises until further order.

2. The background of this case is that the parties were married in June, 2005, and they have three children born in 2002, 2003 and 2004 respectively. All of the children reside with the wife in the family home. By notice of motion dated 29th December, 2014, the wife applied to the Circuit Court for relief set out in the order. In her grounding affidavit in respect of the said motion the wife deposed to a history of violence and physical abuse of the husband against her in the family home, resulting in a successful application to the Dublin Metropolitan District Court seeking a barring order in January, 2014. The District Court made a barring order on the 22nd January, 2014, for a period of some one year wherein the respondent (husband) was prohibited from entering the family home until the 21st January, 2015, without leave of the Court.

3. The wife says that she feared that the respondent would return to the family home on the 21st January, 2015, the date of expiration of the barring order. Her affidavit sets out the litigation history of the case and a history of violence. She averred that when the husband has any contact with her children he is continuously questioning them as to whether they had seen him hit her and that if they say they have he becomes extremely angry with them. She says that on the 24th November, 2015, Judge Gearty in the District Court provided a variation in the access order applicable to the children, having met the children and noting their extreme anxiety and fear made a direction that the children could have access to the husband if they wished and also recommended that the parties during the applicant should explore the possibility of counselling and/or family therapy for the family. She averred that the husband was constantly recording the children in the house before leaving; it was claimed that the purpose of that constant recording was to ensure that every party in the house remained silent and was in such fear that no communication would take place in the family home. The wife stated that she suffered numerous assaults.

4. The wife exhibited in her affidavit a written undertaking giving by the husband dated 24th July, 2013 which reads as follows:-

"I, (husband), provide a written guarantee that I will not be returning to the family home at XXXX, to live or enter, unless agreed to by (wife) in advance, either by text, email or in writing.

And that in return (wife) will not pursue her application for a barring order against (husband)".

Husband's Affidavit

5. In his replying affidavit sworn on the 16th February, 2015, he refers to the fact that there was a District Court order made on the 21st January, 2014, for a period of one year which was affirmed on appeal, by the Circuit Court and is expired as of the 21st January, 2015. He says that the application by the wife herein is either for a continuation of the District Court barring order, which has now expired or a fresh barring order. He says that on the occasion of the matter subject to this appeal being first listed on the 20th January, 2015, he agreed, on consent and without prejudice to his right to oppose the barring order, that the barring would continue pending the outcome of the hearing in the Circuit Court, and this appeal, and accordingly he has not sought to move back into the family home during that period. He said that the initial barring order made in the District Court on the 15th January, 2014, was made as a result of the heavy influence of evidence of an assault charge made against him and that it was regrettable and misleading for the wife to rely on that sworn information for a new barring order without putting matters straight and advising the Court that the assault charge was dismissed.

6. He says that he has not broken the terms of the barring order, and has acted in complete compliance with same. He said that the allegations of assault are many years old and are intended to mislead the Court in the same way as the "pending charge of assault" subsequently dismissed were used to mislead the District Court in relation to the old barring order, on the 15th January, 2014.

The Evidence

7. The wife gave evidence affirming her affidavit. She concentrated on incidents that occurred before the granting of the barring order. She was cross-examined by the husband (who by then was appearing personally) and issue was taken by him in relation to an assault alleged to have taken place that involved a door being shut on the wife's face. It was put to her that the shutting of the door was accidental but she insisted that the husband shut the door knowing that she would be on the far side, and injured thereby.

8. The husband took issue with much of her allegations in relation to the recording of the children and put it to her that he has excellent relations with the children, and that they attend access with him on a voluntary and extensive basis. He did put it to her

that he had recorded certain conversations with gardai in Dolphin House in relation to matters surrounding earlier court proceedings. When he challenged the wife about not reporting the various assaults and misbehaviour of which she was complaining in the proceedings, she stated that she did report matters to the gardai, but that his overbearing attitude was such that he intimidated many of the younger gardai who called to the house to investigate, and that, in addition, he had a propensity to make complaints to the gardai authorities about investigating garda's, including unfounded complaints to GSOC.

9. Much of the cross-examination centred around the wife's contention that the husband had intimidated the gardai dealing with their family difficulties and the husband's contention that she had exploited family and other connections with the gardai to influence them to lean heavier on him. He outlined the alleged dissatisfaction of the judge hearing the criminal charge in relation to the involvement of gardai prosecuting, and proposed as witnesses in respect of these charges, which were dismissed against him.

10. The husband gave evidence. He dealt with the matters in his affidavit and stated that the wife could not be in fear of him now, as he had "done his time" in relation to the barring order, and abided with its terms. He asserted that his relations with the children were excellent, and that he was in a better position to look after the children in many respects than his wife.

11. Under cross-examination he conceded that on most occasions the Courts had affirmed orders against him to prevent his assaulting his wife or putting his family in fear. He conceded that he had not cooperated with case progression in relation to the substantive proceedings herein claiming the judicial separation proceedings were still pending before the Circuit Court. He stated that he did not want the judicial separation proceedings coming on for hearing before the instant appeal until the barring order was disposed of, as he considered that it would not reflect well on him to have a barring order continuing against him during the course of his judicial separation proceedings. He stated, however, that he was quite willing to deal with the disclosure of his assets (including dealing with allegations that he received some court compensation or had a claim in relation thereto) in due course.

12. He stated that he was very hurt and placed in mortal danger by reason of the confusion between his name and a notorious criminal which received misdirected publicity in the media following his acquittal on the assault charge.

The Law

13. Section 3(3) of Domestic Violence Act 1996 (which relates to the making of a barring order) provides as follows:-

"(3) A barring order may, if the court thinks fit, prohibit the respondent from doing one or more of the following, that is to say:-

(a) using or threatening to use violence against the applicant or any dependent person;

(b) molesting or putting in fear the applicant or any dependent person;

(c) attending at or in the vicinity of, or watching or besetting a place where, the applicant or any dependent person resides;

and shall be subject to such exceptions and conditions as the court may specify."

Conclusions

14. It is clear from the foregoing that if the Court is satisfied that a party to a marriage or relationship puts the other in fear or puts the children in fear that a barring order may be made. This is the alternative test of s. 3(3)(a) referred to above. This Court is satisfied that the husband has experienced enough of these matters not to get involved in violence in a uncontrolled and spontaneous fit of rage, but the Court is satisfied (having observed his demeanour in Court), that he still is full of resentment and anger about the way he has been treated and has no insights into his behaviour of recording, discouraging and threatening gardai, in-laws and other persons anxious to restrain his menacing and controlling behaviour. This attitude might, as it did in the past, result in violent confrontations which in turn will reinforce the fear of the wife engendered from past experience.

15. The Court has great sympathy with the husband insofar as he has suffered very damaging and unnecessary treatment from the media giving rise to confusion about his identity putting him in grave danger from time to time and interfering with his normal social activities.

16. However, it is not sufficient for the husband to say that he has not been guilty of violence, that he has stayed away from the home and that he has "done his time" in relation to the barring order. The fact remains that the wife is still in fear.

17. In reaching this conclusion the Court has had regard to the fact that the wife in her evidence on affidavit and in giving it orally did hark back a great deal to the instances prior to the making of the barring order. However, the Court heard the husband in the witness box and heard his style of cross-examination in relation to his admission that he is refusing to take part in case progression in the substantive proceedings herein, in the hope to manoeuvre a situation in the ultimate hearing in the Circuit Court to his own advantage. As the wife was entirely positive and co-operative in relation to the good working arrangement in relation to access she did not present to me as having the credibility problems she would have if she were alienating in this regard. I therefore prefer her evidence as to her present fear over that of her husband.

18. The Court is satisfied beyond doubt that these proceedings and the experience of the husband of the barring order (although being formally compliant with same) indicates that he has forgotten nothing and learned nothing from his experiences as far as putting his wife in fear, or potentially putting his wife in fear.

19. The Court comes to this conclusion with considerable regret as there are elements in this family situation such as the voluntary and successful participation of husband and children in access as sensitively created and envisaged by Judge Deidre Gearty of the District Court and, by reasons of the fact that the husband is an articulate and intelligent man, who ultimately might be amenable to reason and a meditational approach towards his family problems.

20. Indeed, the Court considers that the position of the Circuit Court in relation to this matter was extremely difficult and finely balanced and that the husband might well have been advised by his legal team to appeal to this Court in the hope that the matter would be dealt with on affidavit and that his participation and oral evidence would be avoided (a course about which the husband complained bitterly). He could have influenced the result on appeal in an entirely different way had he kept faith in his legal advisers, and, (more especially), if he had heeded the gentle admonitions of Judge Gearty in relation to counselling/family therapy. Instead he

chose the alternative of sacking his excellent legal team and more actively entering the fray in Court himself. In so doing he destroyed his chances of success on appeal.

21. Accordingly, this Court affirms the order made in the Circuit Court.