Neutral Citation No. [2005] IEHC 385

**THE HIGH COURT**
**FAMILY LAW**

**[2005/269 CA]**

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

**BETWEEN**

**J.E.N**

**APPELLANT**

**v.**

**M.E.N**

**RESPONDENT**

**Judgment of O'Higgins J. dated 9th day of November 2005.**

1. This case comes before the court by way of an appeal from an order of the Circuit Court (Her Honour Judge Delahunt) dated the 5th day of July, 2005, refusing the applicant/appellant an order pursuant to the Section 47 of the Family Law Act 1995 directing a report on the welfare of the child in question in these proceedings and also refusing an order restraining the respondent from removing the child from the jurisdiction. The judge held that the matter was *res judicata*.

2. The following are the relevant facts. The applicant and the respondent, neither of whom is an Irish National married on the 25th November, 1996, in the United States of America. They have one child B. born in November 1995. The applicant is an academic and has a tenure as a lecturer in a third level institution in Dublin. The respondent is a water engineer. After the marriage the parties lived in Colorado and moved to Cyprus in 2001. They came to Ireland in September, 2003, and it is clear that shortly after their arrival there were considerable marital difficulties between the parties. The wife instituted numerous proceedings in the District Court including a summons for a Safety Order dated the 5th November, 2003, a maintenance summons and a summons for a Barring Order. On the 4th February, 2004, the parties were both represented by a solicitor and counsel, and orders were made following agreement between the parties granting joint custody of the infant to the parties and also regulating access. The order of the court was, made with the consent of the parties. Paragraph 5 of the consent which was made an Order of the court was "that the respondent/applicant taking the child to Fort Collins in Colorado after June 2004 on the basis that the applicant inform him in advance of travelling and intended place of residence and schooling arrangements". It is common case that the order made in the District Court was one which the court had jurisdiction to make, because s. 9 of the Domestic Violence Act 1996 enables the court to make orders under The Guardianship of Infants Act where appropriate, without the institution of proceedings under that Act.

3. However within a period of about six weeks from the making of the Consent Order in the District Court the father by way of Notice of Motion under s. 11 of The Guardianship of Infants Act brought an application to restrain the removal of the infant from the jurisdiction. He claims that he entered into the Consent under the mistaken belief that he would be able to obtain suitable employment in Colorado. The maintenance was not paid as agreed between the parties and the wife brought an Attachment of Earnings summons dated the 8th April, 2004. The husband in return issued proceedings to vary the maintenance. Subsequently the mother sought the permission of the court to take the child out of the jurisdiction for a holiday. However this holiday did not materialise and instead the husband was given the permission of the court to take the child to Israel for a short holiday. On the 20th October, 2004, the husband's application to restrain the removal of the child from the jurisdiction was struck out by Judge Sean Mac Bride. On that occasion evidence was heard concerning other applications brought by the wife, but I am satisfied that there was no evidence given concerning the merits otherwise of removing the child from the jurisdiction. That application was struck out on the foot of submissions only. It would appear that Judge Sean Mac Bride suggested mediation and also suggested that the child should be taken out of this jurisdiction only by consent. Although the evidence is somewhat unclear it appears that there was at least some mention to the right of the husband to appeal the order. The husband was unrepresented by solicitor or counsel at that hearing.

4. In circumstances where:

> (1) there was an order made in the District Court by consent of the parties in February 2004,
>
> (2) an application was made to have that order varied and application was struck out in October 2004, and
>
> (3) there was no appeal against that order of the District Court the respondent maintains that the matter is res judicata and cannot be reopened.

5. I was referred to the case of *F. v. F.* [1995] 2 I.R. p. 354. In that case proceedings had been instituted for divorce a mensa et thoro. Those proceedings were compromised and were stayed. The Supreme Court held by a majority that it was not open to one of the parties to proceed with judicial separation proceedings. Per Blayney J. at p. 359

> "It is clear from the terms of these two sub-sections that the effect of a decree is exactly the same as the effect of the former decree of divorce a *mensa et thoro*. There is no difference between the two. They are the same form of proceedings giving the same relief. The only effect of the Act of 1989 was to alter the title of the proceedings and to widen the grounds on which the relief could be obtained.
>
> The position, accordingly, is in my view that the question posed by the case stated has to be considered on the basis that the applicant, in her proceedings for judicial separation instituted in 1992, is seeking exactly the same relief as she had sought in her proceedings for divorce a *mensa et thoro* which she had instituted in 1986. She is seeking to bring the same action but under a different name."

6. At p. 369 of the report Denham J. said:

> "The former proceedings for a decree of divorce a *mensa et thoro* were for the same cause of action as the proceedings under the Act of 1989.
>
> The applicant having proceeded against the respondent in that action and having obtained a court order on the matter cannot proceed against him again in the same cause. The initial cause of action is now merged in the court order."

7. In my view the position in the instant case is quite different to that in the case of *F. v. F.*. In the present case it was the wife who instituted proceedings in the District Court. Moreover those proceedings were for protection and maintenance and for a barring order, and were not for judicial separation. Indeed it has not been argued that the cause of action in the District Court is the same

cause of action as that in the Circuit Court. All that is common to the proceedings in the District Court and in the Circuit Court is that an ancillary relief sought in the Circuit Court proceedings is identical to a relief unsuccessfully sought in the District Court.

8. In her judgment of *F. v. F.* at p. 369, Denham J. said:

> "Certainty and finality of litigation are important. Some issues in family law are not capable of a final order by law, e.g., maintenance. However, the fact that some issues in family law courts are not capable of finality, does not deprive this area of the law of the important concepts of certainty and finality. Whereas care for dependants requires that there be no finality in some areas the general law regarding certainty should apply unless excluded by law or justice."

9. It seems to me in that passage Denham J. is specifically recognising that the care of the dependants (in this case the child) may require that there be no finality in this area of family law.

10. Moreover s. 12 of the Guardianship of Infant's Act 1964 reads as follows:

> "The court may vary or discharge any order previously made by the court under this part."

11. It specifically gives the court jurisdiction to vary orders made in guardianship proceedings although it does not lay down the criteria involved in such variation. Those criteria would clearly encompass the history of the proceedings including the time which elapsed since the making of the previous order. However the decision would have to be centered on the welfare of the child.

12. I was also referred to Shatter's Family Law (4th Ed.) (Butterworths, 1997) at p. 567,

> "Any order made by a court under Part 2 of the 1964 Act is not final and maybe varied upon the application of either party establishing that it is in the best interest of the child's welfare that a variation order be made. A variation order is usually made to the court that made the original order. However, where judicial separation or divorce proceedings are brought subsequently the District Court making a custody or access order under the 1964 Act, a new order replacing the District Court order may be made by the court which determines the separation or divorce proceedings."

13. In my view that is a correct statement of the law.

**Abuse of Process – Oppressive Proceedings**

14. The respondent submits that it is an abuse of process for the applicant to pursue these proceedings and the court should decline to hear these proceedings. It is submitted that there is no reason to bring the judicial separation proceedings since the parties are already separated and have no property. The respondent also relies on the fact that it was not until the respondent brought proceedings to have the passport of the child returned to her that the applicant took the judicial separation proceedings, it is submitted that this is an abuse of process and not a *bona fides* judicial separation proceedings. I do not accept that contention. Although these parties had entered into an agreement which was made an order of the District Court and there is no property in dispute, the applicant was quite entitled to seek judicial separation on a formal basis. There are also issues in relation to succession and pension rights which are outstanding. Moreover even the question of maintenance was causing difficulties between the parties.

15. In the alternative the respondent relies on the case of *W (S) v. W (F)* (Circuit Court, 1991/464, 24/11/1994) [1995]1 FLJ 24 a case where Judge McGuinness (as she then was) granted an order to one of the parties requiring the other party to seek leave of the court prior to the issue of further applications in the proceedings. While the respondent does not seek an Isaac Wunder type order in these proceedings the respondent relies on the following passage:

> "I consider that continuing litigation cannot but be damaging to the children in this case."

16. It is submitted that the present application comes, "hook, line and sinker"within that concept. I cannot agree. In that case the litigation had gone on for a protracted period, and most significantly involved a four and a half day hearing in the High Court. In the present case it is of the utmost importance that there has been no substantive hearing directed to the welfare of the child, and no decision has been made on the merits of the application. In my view therefore the case of *W(S) v. W (F)* is of little assistance in this case. In the present case it is also relevant that of the fourteen applications to the court, all but two were brought by the wife.

17. It was also submitted that the court should not entertain the application on the basis that it has been so recently determined.

18. The respondent relies on the part of the judgment in *M.D. v. G.D. Carroll J.* [30th July 1992]. In that case an order was made by the District Court two days after the making of the order there was a notice of application to discharge the order. The District Judge considered that this was an abuse of process. In a consultative case stated the matter came before the High Court, Carroll J. said at p. 8 of her judgment,

> "In my opinion it could be regarded as an abuse of procedure to issue a notice of application to discharge an order of the District Court two days after it was made. Counsel for the wife submitted that no time or special circumstances are specified in s. 12 of the Guardianship of Infants Act 1964.
>
> > This provides that 'the court may vary or discharge any order previously made by the courts under this part. There is therefore no restriction on how quickly or under what circumstances an application to vary or discharge may be made. That is to ignore the system of appeal which is provided for within the courts system and an appeal by way of rehearing is available in the Circuit Court to any person dissatisfied with the decision in the District Court. Section 12 is not expressed to be a substitution for an appeal - therefore it can be assumed that the Oireachtas did not intend to interfere with the appeal system. If a decision has been made on the merits and there has been no change in circumstances, then an appeal is normally the appropriate method to deal with the matter. But there may be cases which even though there has been no change of circumstances an application to vary or discharge may be made. In matters relating to children it is never advisable to lay down stringent practice rules. The matter should remain flexible.'"

19. It is clear from the decision of Carroll J. that there are indeed circumstances in which the bringing of an application shortly after another application concerning the same matters could legitimately be regarded as abuse of process. However, she stresses too that flexibility is desirable in cases regarding the welfare of children. It is noteworthy too, that even where there has been a hearing on the merits and here there has been no change in circumstances, while an appeal is normally the appropriate way to deal with the matter, the judge does not preclude the matter being dealt with by other means than appeal. In my view the bringing of the

application in this case does not constitute an abuse of process. In so holding I have regard to the fact that the matter has never been a subject of judicial determination. I also have regard to the fact that if the child is to be removed from the jurisdiction that is bound to have serious consequences for him. In those circumstances the welfare of the child is paramount and an adjudication on the desirability of s. 47 report to primarily be focused on that consideration.

20. The respondent also relied on the case of *Carroll v. Ryan* [2003] 1 I.R. 309 and others which dealt with a claim which could have been dealt with in earlier proceedings the law was stated thus by Hardiman J.

> "There is a well established rule of law whereby a litigate may not make the same contention in legal proceedings, which might have been, but was not brought forward in previous litigation. This rule is often traced to the judgment of Wigram VC in *Henderson v. Henderson* [1843] Hare 100."

21. Hardiman J. went on to say at p. 319 of the report:

> "I agree with what was said by Lord Bingham in *Johnson v. Gorewood and Co*. [2002] 2 A.C. 1 at p. 32 when, speaking of the rule in Henderson v. Henderson [1843] Hare 100, he said 'An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter.' This harassment, in my view may arise whether or not a set of proceedings is pursued to judgment or settlement.

22. This judgment was followed by Hanna J. in the unreported case of Mitchell v. Ireland (Unreported, 18th March, 2005). I also agree that the observation of Hanna J. at p. 2 of his judgment where stated that "This court has an inherent jurisdiction to police proceedings before it and to deal appropriately with any proceedings which it perceives to be an abuse of process."

23. In my view the facts of the present case do not amount to such as would constitute in the abuse of process. Furthermore, there is clear distinction in that, in contrast to the present case, the decision in Carroll's case was based on the failure of a plaintiff to make a claim which could have been made in previous proceedings. In submitting that these proceedings amount to an abusive process it was pointed out that the application of the husband for judicial separation was only made after the application by the wife for the return of the passport. However in this regard it must be noticed that the parties had adopted the suggestion of District Judge MacBride to seek mediation following the striking out of the application for a variation of the order made in the District Court in February 2004. As it has been pointed out the District Judge recommended that the child be not taken out of the jurisdiction without the consent of the parties. The mediation agreement dated 15th November, 2004, stated that "it is preferable, to allow our son … to finish his 2004/05 term in Ireland." That does not imply consent that after such time the child could be taken out of this jurisdiction. It does, however, provide a plausible reason for not appealing the order of the District Court at that time. Unfortunately the mediation did not prove successful. Mr. Shatter for the respondent is also sceptical concerning the explanation given by the applicant for his consenting to the order in February, 2004, namely that at that time he was unaware of the difficulties in obtaining employment in the State of Colorado. Mr. Shatter points out that the majority of the material relied on by the husband and exhibited in his affidavit dated the 17th day of October, 2005, to support that contention did in fact post date the application have the order varied. However, there is at least one email (albeit framed in rather casual terms) which was sent to the applicant on the very day of the consent order which strongly supports his contention that he was interested in employment in Colorado at that time.

24. In my view therefore the matter is not *res judicata*. Neither do the actions of the applicant amount to either an abuse of process nor do they constitute such oppressive conduct as would justify the court in refusing to grant the application. The evidence of Mr. Murphy and Mr. Hanley is shown at least to some extent a change of circumstances in the child. In particular, there is evidence that there has been an improvement in recent times due to counselling and what Mr. Murphy his teacher calls 'the resolve of his parents or the effort of the school'. However there is little evidence concerning change in circumstances between the striking out of the application to vary in 2004 and the institution of proceedings for judicial separation in February 2005. However I have no doubt that the removal of the child from the jurisdiction in circumstances where it seems likely that one of the parents having joint custody is likely to remain in this country would have profound implications on the life and the well-being of the child. Indeed not surprisingly no arguments were addressed to the court specifically to the effect that such an order was itself undesirable. In those circumstances it seems to me that it is highly desirable that a report under s.47 of The Family Law Act, 1995 are obtained. In doing so I am conscious that the obtaining of such report will involve continuing stress on the parties, and a degree of hardship on the mother in particular. I regret this fact.