Neutral Citation [2012] IEHC 461

THE HIGH COURT

[2011 No. 10255 P]

BETWEEN/

L.B.

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

AND

P.B.

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 9th November, 2012

1. In these proceedings the plaintiff seeks various declarations and makes a claim for damages in the wake of the various sets of family law proceedings involving himself and his former spouse. These family law proceedings have resulted in the making of court orders which have variously resulted in the exclusion of the plaintiff from his family home, made provision for the sale of that property and the division of the proceeds and the making of a pension adjustment order. The plaintiff's case is that these assets were essentially expropriated by State action and that he is entitled to compensation in respect of this transfer of assets.

2. The plaintiff is a retired professional person who currently lives some 30km. distant from what he considers to be his principal place of residence. He married the third defendant in 1964 and there were five children of the marriage. All of the children are now adults and not financially dependent on their parents.

3. Mr. B. represented himself in person. It is only fair to record at the outset that both his pleadings and submissions (both written and oral) were models of clarity of expression and thought. His former spouse is the third named defendant, but she elected not to take any part in these proceedings.

4. The evidence before me suggests that Mr. B. purchased and paid for the family home entirely out of his own resources and that the property was unencumbered. The present proceedings trace their origins, however, from the fact that the plaintiff and his former wife had become estranged. Mr. B. had been detained on three separate occasions under the Mental Treatment Act 1945, on the grounds that he was suffering from schizophrenia and paranoia. He has always maintained that these periods of detention were entirely unlawful and that the diagnoses were contrived. In fairness to the plaintiff, it should be said that the legality of this detention has been the subject of extensive litigation in respect of which he has had some significant success.

5. In June, 1998 Ms. B. commenced judicial separation proceedings against the plaintiff pursuant to the Judicial Separation and Family Law Reform Act 1989. This culminated in a judgment of this Court in July 1998 which directed the sale of the family home and directed that each side was to receive 50% of the proceeds. For reasons which are presently unclear to me, that sale did not proceed at the time.

6. Mr. B. then commenced proceedings in the Circuit Court seeking a decree of divorce and other ancillary reliefs. These proceedings culminated, in a decision of this Court following an appeal from the Circuit Court. This Court again ordered that the family home be sold with the proceeds being distributed 40% to Mr. B. and 60% to Ms. B. A pension adjustment order was then made granting Ms. B. 25% of the plaintiff's pension entitlement for the reckonable period 30th December 1964 to 10th June 2004. Some further consequential orders were also made

7. Mr. B. then commenced High Court proceedings (2004 No. 19745P) ("the 2004 proceedings") sought to challenge the constitutionality of ss. 12 to 21 of the Family Law Act 1995, a variety of sections of the Family Law (Maintenance of Spouses and Children) Act 1976 and ss. 13, 14, 15 and 17 of the Family Law (Divorce) Act 1996 ("the 1996 Act"). These provisions provide the legislative basis whereby both property and pension adjustment orderscan be judicially ordered.

8. In those proceedings Mr. B. also maintained that s. 2(1)(f) and s. 3(1) of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act") were unconstitutional as amounting to a failure by the State protect with special care the institution of marriage as guaranteed by Article 41 of the Constitution. These contentions were rejected by MacMenamin J. in *L.B. v. Ireland* [2006] IEHC 275, [2008] 1 I.R. 134. That decision was affirmed on appeal by the Supreme Court in July 2009.

9. In this decision MacMenamin J. upheld the constitutionality of the legislation, stressing that both the 1989 Act and the 1996 Act reflected fundamental constitutional values relating to the family itself. This is perhaps especially reflected by Article 41.3.2 of the Constitution, which provides the very foundation for the decree of divorce which Mr. B. sought and obtained:

> "A Court designated by law may grant of a dissolution of marriage where, but only where, it is satisfied that:
>
> i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
>
> ii. there is no reasonable prospect of a reconciliation between the spouses,
>
> iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and

iv. any further conditions prescribed by law are complied with."

10. The critical words here are those of Article 41.3.2.iii ("....such provision as the Court considers proper having regard to the circumstances...."). This constitutional provision prevents the granting of a decree of divorce unless the court is satisfied that proper provision has been made in the manner it considers appropriate. What will amount to proper provision will, of course, depend on the respective circumstances of the spouses, children and (perhaps) other dependents. As Murray J. noted in *DT v. CT (Divorce: ample resources*) [2002] 3 I.R. 334, 407:

> "The moment a man and woman marry their bond acquires a legal status. The relationship once formed, the law steps in and holds the parties to certain obligations and liabilities. Even where a marriage is dissolved by judicial decree the laws of many if not most states require that the divorced spouses continue to respect and fulfil certain obligations deriving from their dissolved marriage for their mutual protection and welfare, usually of a financial nature. This reflects the fact that marriage is in principle intended to be a lifetime commitment and that each spouse has fashioned his or her life on that premise. If the law permitted a spouse to cut himself or herself adrift of a marriage on divorce without any continuing obligation to the former spouse it would undermine the very nature of the marriage contract itself and fail to protect the value which society has placed on it as an institution. It would give rise for example to a complete disregard for the status of a spouse whose principal role in the marriage was working in the home in support of the other partner who was the principal earner or breadwinner. Hence the constitutional imperative of proper provision for spouses."

11. MacMenamin J. spoke to the same effect in *LB* ([2008] 1 I.R. 134, 150):

> "....proper provision" should be based on a consideration of all the circumstances of the case including the financial resources and needs of both spouses and dependents; their obligations and responsibilities both present and future; the standard of living of the parties before the breakdown of the marriage, their respective ages; the duration of the marriage and terms of any separation agreements; the role of the spouses in relation to the welfare of the family; their contribution to looking after the home or caring for the family; the effect on their earning capacity as a result of the marital responsibilities they assumed; the degree to which future earning capacity was impaired by reason of the spouse having relinquished the opportunity of remunerative activity in order to look after the home or care for the family whether one spouse contributed directly or indirectly to the resources of the other and to the corresponding detriment suffered by that spouse in terms of their own resources. Thus far from the Family Law Act of 1996 being unconstitutional, insofar as it allows the court to make financial provision for spouses the Act is a recognition of the constitutional obligation which the Act of 1996 was passed to serve. Not only are the provisions of the Act of 1996 not unconstitutional but they are in fact mandated by the Constitution itself. The provisions of the 1996 Act with regard to financial relief are in harmony with, the terms of the relief that may be granted by the court under the Act of 1989. Thus insofar as the provision of Act of 1989 are constitutional then, (unless some fundamental distinction in principle is shown) *ipso facto,* the 1996 Act must also be constitutional in its provisions. No such distinction has been urged, identified or established herein."

12. It follows, therefore, that *LB* established that neither the 1989 Act nor the 1996 Act were unconstitutional insofar as they allowed courts to make property and pension adjustment orders as part of either the judicial separation or (as the case may be) divorce process. Indeed, MacMenamin J. stressed that the enactment of such legislation allowing for such proper provision was not simply constitutionally *permitted*, but was rather actually constitutionally *required*. The Supreme Court had, in any event, said almost as much in the context of upholding the constitutionality of the 1989 Act in *TF v. Ireland* [1995] 1 I.R. 321 (a decision admittedly rendered before the new Article 41.3.2 had entered into force.)

13. It is, of course, true that a portion of Mr. B.'s assets were transferred to his wife pursuant to a court order and that this transfer was effected in turn pursuant to the statutory provisions we have just described. Yet by taking these steps the State was doing no more than giving effect to that which is inherent in the nature of marriage. Marriage, after all, involves mutual giving and sacrifice. In practical terms this means the sharing of outgoings, expenses and, in some respects, at least, the capital assets of the parties.

14. It may be true that the State cannot, at least, without compelling reasons, oblige a married couple to divide out their respective assets in a particular way: see *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] IESC 5, [1994] 1 I.R. 305. In the *Matrimonial Homes Bill* reference the Supreme Court invalidated the Matrimonial Homes Bill 1993 on the ground that it involved an unjustified interference with family autonomy, contrary to Article 41.1.2, precisely because, in general terms, it involved the mandatory division of family property on an equal basis, subject only to certain rights of defeasance.

15. As Finlay C.J. explained in that case ([1994] 1 I.R. 305, 325):

> "It is the opinion of the Court that the right of a married couple to make a joint decision as to the ownership of a matrimonial home is one of the rights possessed by the family which is recognised by the State in Article 41, s. 1, sub-s. 1 of the Constitution as antecedent and superior to all positive law and its exercise is part and an important part of the authority of the family which in Article 41, s. 1, sub-s. 2 the State guarantees to protect.
>
> The provisions of the Bill apply the automatic ownership as joint tenants to every instance of a dwelling occupied by a married couple on or after 25 June 1993 other than dwellings already owned equally. *The interference with decisions which may have been jointly made by spouses with regard to the ownership of the matrimonial home effected by this universal application does not therefore depend in any way on instances where the decision arrived at constitutes something which is injurious to or oppressive of the interests of a spouse or of members of the family or which constitutes a failure on the part of one of the spouses to discharge what might fairly be considered as his/her family obligations*.
>
> The mandatory creation of joint equal interests in the family home also applies to every dwelling occupied as a family home irrespective of when it was first acquired by the married couple concerned and irrespective therefore of the time at which a freely arrived at decision between them may have been made as to the nature of the ownership and in whom it should vest. The provisions of the Bill do not seek to apply to particular categories of cases only, or to particular instances of the acquisition and ownership of matrimonial homes only, but rather are applied to each and every category and instance falling within the time scale provided for in the Bill with a right of defeasance." (emphasis supplied)

16. As Finlay C.J. here stressed, what was objectionable about the contemplated matrimonial property regime envisaged by the 1993 Bill was that it involved what the Supreme Court to be an unnecessary and disproportionate interference with family autonomy, precisely because it imposed a presumptive equal division of assets between the couple which applied to every case. The italicised words in the above passage, however, point to the fact that different considerations would naturally obtain where one spouse had

potentially failed to discharge his or her duties to the other.

17. This is precisely the case here. Mr. B. steadfastly maintains that he purchased and paid for the property himself. That may well be, but it is, with respect, beside the point. Article 41.3.2 permits -indeed, enjoins -the State to enact legislation providing for proper provision to be made for the benefit of another spouse. All of this is no different in principle from legal obligations imposed on parents to support dependent children or from legislation requiring one spouse to maintain the other.

18. These obligations stem from the very nature of marriage and parenthood itself and without them marriage and child-rearing would be all but impossible. By providing for laws of this nature, the State acts to uphold and safeguard the institution of marriage in the manner required by Article 41.3.1. In that sense, therefore, neither the 1989 Act nor the 1996 Act should be seen as involving the taking of any property of a spouse by the State inasmuch as the legislation provides for the intra-spousal transfer of capital assets. But insofar as it does, it is by definition not an unjustified interference with the property rights of the affected spouse for the purposes of Article 40.3.2 since this legislation is designed to give effect to fundamental values cherished by Article 41 and is, in any event, sanctioned by Article 41.3.2.

19. This is not in the least affected by the fact that no compensation is payable to the spouse whose property is transferred in this fashion. If that were the case, it would mean that the State had assumed a responsibility in respect of the financial obligations which one spouse owes to the other. Quite apart from the fact that this would also represent an incentive for spouses to default on financial obligations which they properly owe towards other family members, the fallacy in this argument is that it overlooks the fact that by enacting legislation of this kind, the State is doing no more than providing for an independent resolution mechanism (i.e., by means of the judicial system) of disputes between family members in respect of the extent of such proper financial provision. In effect, the State is sanctioning - to one degree or another - the transfer of assets of the spouses *inter se* following separation or divorce. There is no comparison here with cases of compulsory acquisition of property or the *de facto* sequestration of assets by legislative action without compensation (such as happened in cases *such Buckley v. Attorney General* [1950] I.R. 67 and which legislation was found to be unconstitutional on that account), precisely because for the reasons just mentioned it does not involve the taking by the State of the plaintiff's assets.

Conclusions
20. In conclusion, therefore, since I am of the view that the plaintiff's claim must eventually fail, I will therefore grant the first and second defendants summary judgment on this basis and strike out the claim pursuant to the Court's inherent jurisdiction.

21. Moreover, it must be acknowledged that the present proceedings effectively re-litigate matters already determined by MacMenamin J. and the Supreme Court in the 2004 proceedings, albeit in a slightly different form. Insofar as it was necessary to do so, I would also strike out the proceedings on the ground that they effectively present *a res judicata*.