Neutral Citation: [2011] IEHC 557

THE HIGH COURT

FAMILY LAW

[2010 No. 44 M]

BETWEEN

E. L.

PETITIONER

AND

S. K.

RESPONDENT

JUDGMENT of Mr. Justice Abbott delivered on the 18th day of February, 2011

1. By petition dated the 2nd July, 2010, the petitioner husband has claimed a decree of nullity in respect of a ceremony of marriage between the himself and the respondent wife on the 14th May, 2004. In prior proceedings bearing Record No. 2009 5M, the respondent wife has claimed judicial separation pursuant to the Judicial Separation and Family Law Reform Act, 1989, and the Family Law Act, 1995, by special summons issued on the 12th February, 2009.

2. The respondent wife, by notice of motion dated the 10th November, 2010, applied for security for costs in terms of the paras. 1 and 2 of the said notice of motion as follows:-

> 1. An order pursuant to O. 70, r. 75 of the Rules of the Superior Courts directing the petitioner to pay to the respondent her costs of the cause up to the date hereof and her further costs *de die in diem* to the trial of the action herein and directing the Taxing Master to tax such costs.
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> 2. Further or in the alternative, an order pursuant to O. 29 of the Rules of the Superior Courts directing the petitioner herein to provide security for the respondent's costs in the above entitled proceedings.

3. By order of this Court dated the 8th November, 2010, prior to the issue of the said notice of motion, the said proceedings seeking judicial separation were stayed pending the outcome of the nullity proceedings herein on condition that the petitioner husband would do all acts which would be reasonably necessary to bring on the nullity proceedings for hearing in an expedited manner.

The Respondent Wife's Case

4. The respondent wife set out her case grounding her application for security for costs in her grounding affidavit sworn on the 10th November, 2010.Therein she also relied on the averments contained in her replying affidavit to the petition for nullity herein, sworn on the 29th October, 2010. The respondent wife summarises the grounds upon which the petitioner husband seeks annulment of their marriage. These are as follows:-

> A. There was no consummation of the marriage.
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> B. The psychological inability on the part of the respondent wife or the petitioner husband to engage in sexual intercourse with each other.
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> C. By reason of the state of mind, emotional development and/or immaturity of either of the parties herein that either or both or them were incapable of entering into and forming and sustaining a lifelong marital relationship with each other.
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> D. The petitioner husband's agreement to enter into their marriage was not a fully independent exercise of his will and was not based on his true consent.

5. The respondent wife averred that there was, in fact, consummation of the marriage and set out details of a visit to a gynaecologist, the results of which she claimed would corroborate this. She also queried the genuineness of the claim about non-consummation as the affidavit of the petitioner's solicitor seeking a stay in the judicial separation proceedings averred that it 'emerged' that there was non-consummation only after the petitioner husband had consulted a psychologist in relation to the issue of nullity. She queried the psychological inability on the part of herself or the petitioner husband to engage in sexual intercourse and asserted that, after the ceremony of marriage, the parties had intimate sexual relations. As regards the state of mind, emotional development and/or immaturity of either of the parties such as to render either or both of them incapable of entering into or sustaining a lifelong marital relationship with each other, the respondent wife claimed that the averment of the petitioner husband caricaturing himself as being a simple man and the respondent wife being much too sophisticated for him was entirely untrue as the petitioner husband was a man of considerable financial and technical achievement. As regards the petitioner husband's averment that his agreement to enter into their marriage was not a fully independent exercise of his will and was not based on his true consent, the respondent wife referred to the long relationship between the parties, their courtship, long engagement and dealings subsequent to the marriage. The respondent wife claimed that after unhappy differences had arisen between them, the petitioner husband sought, with the threat of further 'consideration', the execution of a statutory declaration that the property sought to be charged by the petitioner husband was not a family home within the meaning of the term in the Family Home Protection Act, 1976, and a further similar supplemental statutory declaration was referred to. She stated that in his replying affidavit to the judicial separation proceedings the petitioner husband did not allege non-consummation of the marriage.

6. The respondent wife also relied, in addition to the petitioner husband's non-residency, on his lack of assets in the jurisdiction through indebtedness and the averment of property being held in a trust outside the reach of judicial separation proceedings or a decree of costs in the nullity proceedings, and referred to his unwillingness to answer further financial queries in the judicial

separation financial disclosure process which impasse seemed to have sparked the nullity litigation.

The Petitioner Husband's Case
7. The petitioner husband sets out his grounds for resisting the notice of motion herein principally in his affidavit sworn on the 23rd November, 2010. He avers that the respondent wife unsuccessfully opposed the application granted by the court for a stay on the judicial separation on the same grounds as are now relied upon to found the motion for security for costs. He also said that the issue of consummation had been met by the respondent wife with a contradiction which, in itself, did not amount to a 'substantial defence' and rebuttal of the petitioner husband's claims. He averred that there was no reason or justification for the respondent wife to seek security for costs on the basis of his tax residency, and the issue of his tax returns were introduced by the respondent wife to paint him in a prejudicial and unflattering light to the court, as if to imply that by virtue of his non-residency he somehow would seek to avoid the consequences of the litigation. The petitioner husband stated that he had never sought to disengage from any proceedings and that he remains a passport holder and is domiciled in the Republic of Ireland. He stated that several debts of his had been transferred to the National Asset Management Agency, a process which requires his continued involvement with assets, banking loans, and necessitates his continued presence in the State. He stated, as he claims will be seen from the affidavit of means sworn by him in June, 2009, that he has many assets within the jurisdiction and admitted that while his overall debt asset ratio is sizeable (in common with many litigants currently seeking relief in the family courts) he suggested that this should not make his access to the courts more difficult by having to underwrite the respondent wife's costs. He stated that it was noteworthy that the respondent wife was apparently or seemingly content to incur legal costs and to force the petitioner husband to incur legal costs when pursuing provision from him in this Court in the context of judicial separation proceedings, notwithstanding his tax domicile or residence being elsewhere. He also averred that it was apparent from a reading of the respondent wife's affidavit of means sworn on the 27th February, 2009, that she had many assets in her own name, and that she had sufficient separate estate to meet the legal costs of this action and the proceedings instituted by her for judicial separation from her own resources.

The Law
8. Order 70, r. 75 of the Rules of the Superior Courts provides as follows:-

> '75. After directions have been given as to the mode of hearing of trial of a cause, or in an earlier stage of a cause, where special circumstances are shown, the Court may, on the application by motion of a wife who is a petitioner or who has entered an appearance (unless the husband shall prove that the wife has sufficient separate estate or show other good reason) make an order directing him to pay her costs of the cause up to the date of such application, and her further costs de die in diem upto the trial or hearing, and directing the Taxing Master to tax such costs and at the time of such taxation (if directions as to the mode of hearing or trial have been given before such taxation) to ascertain and certify what is a sufficient sum of money to be paid into Court or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing or trial of the cause.'

9. O. 29, rr. 1, 2, 3 and 4 of the Rules of the Superior Courts in relation to security for costs provide as follows:-

> '1. When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the Court for an order that the said party do furnish such security.
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> 2. A defendant shall not be entitled to an order for security for costs solely on the ground that the plaintiff resides in Northern Ireland.
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> 3. No defendant shall be entitled to an order for security for costs by reason of any plaintiff being resident out of the jurisdiction of the Court, unless upon a satisfactory affidavit that such defendant has a defence upon the merits.
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> 4. A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction.'

10. In Hilary Delaney and Declan McGrath, *Civil Procedure in the Superior Courts*, 2nd Ed., (Dublin, 2005) at p. 346, the authors state as follows:-

> 'O. 29 of the Rules of the Superior Courts makes provision for the making of an order requiring a plaintiff to grant security for costs to a defendant where the plaintiff is resident outside the jurisdiction. As noted above, the rationale of the order is to protect defendants from spurious claims, which may be brought against them by plaintiffs who reside out of the jurisdiction of the court and who, for this reason may be able to evade any subsequent order as to costs made against them.'

At para. 12.04 of the same text, the author continues:-

> 'In order for security to be ordered against an individual plaintiff two conditions have to be satisfied.
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> (a) the plaintiff must be ordinarily resident out of the jurisdiction, and
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> (b) the defendant must have a *prima facie* defence on the merits to the plaintiff's claim.
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> However, even where these two conditions are satisfied, the court retains a wide discretion and can refuse to order security where there are "special circumstances". So, where there is no defence to the action or where it is established that the plaintiff has ample assets within the jurisdiction, security may be refused. In addition, where a plaintiff has made out a *prima facie* case that his inability to provide security flows from the defendant's wrong, it is unlikely that security will be granted.'

Under the heading 'Residence out of the Jurisdiction', the text goes on to state:-

> 'An order for security for costs under O. 29 can only be made if the plaintiff is resident out of the jurisdiction. Although it is not spelt out in the order, it would be appear that the test in that regard is whether the plaintiff is ordinarily resident out of the jurisdiction. Rule 4 stipulates that a plaintiff ordinarily resident out of the jurisdiction may be required to give security for costs even though he may be temporarily resident within the jurisdiction. Conversely, it would appear that the

presence or temporary residence in the jurisdiction would not be sufficient.'

Under the heading 'Requirement of a Defence on the Merits' the text continues:-

> 'O. r. 3 stipulates that a defendant will not be entitled to an order for security for costs unless he establishes by 'a satisfactory affidavit' that he has 'a defence upon the merits'. As Budd J. makes clear in *Cohane v Cohane* [1968] IR 176, 181, while this is a mandatory requirement, the rule does not provide that if a satisfactory affidavit of the merits is filed, security must necessarily be given in the case of a plaintiff resident ordinarily out of the jurisdiction. Walsh J. stated in *Power v. Irish Civil Service (Permanent) Building Society* [1968] IR 158,163:-
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> > "What will amount to a satisfactory affidavit that a defendant has a defence on the merits in any particular action must necessarily depend upon the circumstances of the case and upon the nature and details of the claim and the allegations made."
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> The phrase 'satisfactory affidavit' was also considered by the Irish Court of Appeal in *Walker v. Atkinson* [1895] 1 IR 246, 249, in which Fitzgibbon L.J. stated that it must mean "an affidavit that satisfies the court of something" and went on to say that a defendant must give some evidence to satisfy the court that there is a reasonable prospect of his establishing some, more or less, specific or ascertainable defence. Ashbourne L.J. similarly, in *Denman v. O'Callaghan* (1897) 31 ILTR 141, 142, spoke of the need for a satisfactory affidavit "showing grounds on which we can arrive at the conclusion that [the defendant] has merits" and Fitzgibbon LJ stated that "the defendant must make a satisfactory affidavit that he has a specific and definite defence".'

11. In *Salthill Properties Limited & Brian Cunningham v. Royal Bank of Scotland Plc, First Active Plc & Bernard Duffy* [2010] IEHC 31, Clarke J., the development of the law relating to O. 29 of the Rules of the Superior Courts was examined by Clarke J. in para. 5, pp. 14-17 of the judgment in which he examined the comments of Hilary Delaney and Declan McGrath, *Civil Procedure in the Superior Courts*, 2nd Ed., (Dublin, 2005), *Pitt v. Bolger* [1995] 1 I.R. 108, *Maher v. Phelan* [1996] 1 I.R. 95, *Protea v. Neill* [1996] 1 I.R. 100, *European Fashions v. Eenkhoorn* (Unreported, High Court, Barr J., 21st December, 2001), the Brussels Convention and Regulation and in relation to the possible extension of the jurisdiction to cases of a person resident in the jurisdiction but with no assets in the jurisdiction or within the area to which the Brussels Regulation applies, Clarke J. states at para. 5.5 as follows:-

> 'It seems to me, therefore, that in order to determine that there should be a jurisdiction to make an order for security for costs against an individual plaintiff who is resident in the jurisdiction or within countries covered by the Brussels Regulation, it would be necessary to engage in a significant expansion of the traditional jurisprudence. It does not seem to me that it would appropriate to take that step without either legislative or rule change. It is possible to envisage circumstances where there might be some legitimate basis for such a change. Under the traditional jurisprudence persons needed to be both not resident in the relevant jurisdiction and not have sufficient assets within the jurisdiction as well. A case where a relevant person may reside within the jurisdiction but might be found to have placed their assets outside any relevant jurisdiction for the deliberate purpose of causing those assets not to be available in the event of a costs order, is one which would merit some consideration. The underlying rationale behind the rule might be said to cover such a situation. Against that it could be argued that, as long as the person concerned remains within the jurisdiction (or a relevant jurisdiction), then such person is amenable to any appropriate court process which can, at least in many cases, be made to apply to assets wherever situate. There would, in my view, be important policy considerations underlying any decision to extend the jurisdiction to order security for costs to cases involving persons resident in this jurisdiction or in Brussels Regulation countries. Such an expansion would, in my view, if desirable, be properly brought about by a change in the rules or legislative intervention. To embark on what would be a radical change in the relevant law on the basis of judicial decision would be going too far.'

12. In relation to O. 70, r. 75 requiring an order for costs *de die in diem* the judgment of Barron J. in *F. v. L.* [1991] 1 I.R. 40 is informative where he refers to the arguments based on the case *Courtney v. Courtney* [1923] 2 I.R. 31 at p. 41, and refers to the fact that the jurisdiction to award costs in matrimonial proceedings is contained in s. 27 of the Matrimonial Causes and Marriage Law (Ireland) Act, 1870, which practice, he stated, had effectively been continued by the Rules of the Superior Courts 1986, O. 70, r. 75 (in fact Wiley's *Judicature Act 1900* shows that the then Court Rule O. 70, r. 91 was in substantially the same terms as O. 70 r. 75). In any event, he noted that:-

> 'However, times have changed. In particular since the passing of the Married Limit Status Act, of 1957, any fetters which may have existed in relation to a married woman's right to own property were removed. In my view the justification for allowing a wife for costs as against her husband in all circumstances is no longer justified.
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> In each individual case it is the duty of the court to make such order as is just in the circumstances. Save as is recognised by O. 17, r. 75 of the Rules of the Superior Courts, 1986, there is no reason why different principles should be applied in the award of costs simply because the proceedings are matrimonial proceedings. In this case, the petitioner and respondent are both working. Neither would be able, without hardship, to pay the costs of the other. The proceedings have declared the status of both parties. In my view, the proper order as to costs is to require each to bear his or her own costs.'

Neither party in the present application made detailed submissions in relation to how ordinary residence is defined; however, the phrase received some consideration by this Court in *S. v. S.* [2009] IEHC 579, in the context of the Family Law Judicial Separation Act, 1989. In that case it was abundantly clear that tax domicile or residence would not be absolutely determinative of residence for the purpose of the 1989 Act and that ordinary residence would be primarily determined on the basis of the residence to which a person always intended to return notwithstanding regular and sometimes sustained absences. Having considered some dictionary and other examples proposed by counsel, the judgment continued at paras. 37 and 38 as follows:-

> '37. …I do not consider that these definitions establish any further principles by which to analyse ordinary residence. The meaning is more fruitfully analysed by firstly taking a view in relation to how long a person is to stay at the residence. The question should be asked is the stay to be temporary, or is it to be for a fixed term, with occasional absences, or is it to be for an indefinite period in to the future, with occasional absences. I consider the test of residence for an indefinite period resolves the difficulty posed by inconclusive analysis by way of miscellaneous examples of temporary absences used by counsel on both sides in this case. Obviously some type of tenure, however slight, should be associated with the ordinary residence together with an intention to return to it indefinitely regardless of absence. The second question of principle arises from the analysis above in relation to habitual residence, and that is whether the ordinary residence should have an exclusive meaning, that is to say, that there can be only one ordinary residence at a time. I think not. I consider

that on the test of whether a person intends to return to the residence indefinitely allows of two, or even more residences within that test, but obviously this principle must have some limits to be decided in the circumstances of each case defined by the question as to whether the owner of the residence has actually settled in a place to the extent that, the residence in the second place is actually used for nothing more than a holiday home. I find that the description of "ordinary residence for the time being" is consistent with this analysis.

38. In summary, the principles applicable to the term "ordinarily resident" should be as follows:-

1. The residence should be one to which a person intends to return indefinitely despite temporary absences, and

2. There should be some tenure, however slight, of a physical premises – a residence, and

3. The person ordinarily resident in one location has not lost that ordinary residence by reason of his or her settling in another residence to the extent that, the residence in which ordinary residence is claimed is now only used as a holiday home.'

Conclusions on Facts

13. On any view of the case the respondent wife has a *prima facie* defence to the petitioner husband's claim for a nullity, and has adduced some evidence to show this, although the eventual outcome of the case will depend on the conclusions of the court in relation to the evidence and the law. The mere fact of a non-resident tax domicile does not indicate that the petitioner husband is not ordinarily resident in the jurisdiction of this Court for the purposes of O. 29 for the following reasons:-

A. The tax domicile of the petitioner husband is dependent on an absence from the country calculated mathematically on the basis of a minimum number of days absence per year or over a number of years in accordance with the tax legislation. He will be regarded as being resident here for tax purposes in the current tax year if he spends 183 days or more here or if the combined number of days he spends here in the current tax year and the number of days he spent here in the last tax year exceeds 280. In applying this two year test, a period of less than 30 days spent in Ireland in a tax year will be ignored.

B. The petitioner husband has extensive property in this jurisdiction which has now come to the attention of the National Assets Management Agency and will require the *bona fide* attention of the petitioner to ensure forbearance by N.A.M.A. in relation to the many powerful statutory remedies available to it.

C. The petitioner husband said that he is domiciled in Ireland. This averment has not been contested by the respondent wife, which must only mean that the petitioner husband has not taken steps to acquire a domicile of choice and hence must be taken to continue to intend to return to the residence in this jurisdiction which he undoubtedly had during his courtship and marriage to the respondent wife.

D. The petitioner husband has an Irish passport.

Overall Conclusion

14. I am considerably influenced by the dictum of Clarke J. in the passage quoted above from his judgment in *Salthill Properties Limited & Brian Cunningham v. Royal Bank of Scotland Plc, First Active Plc & Bernard Duffy* [2010] IEHC 31, at para. 5.5 relating to the conclusion that a case where a relevant person may reside within the jurisdiction but might be found to have placed their assets outside any relevant jurisdiction for the deliberate purpose of causing those assets not to be available in the event of a costs order, is one which would merit some consideration. In particular, I am influenced by his argument that such person 'amendable to any appropriate court process which can, at least in many cases, be made to apply to assets wherever situate'.

15. Therefore, even though I am satisfied that the respondent wife satisfies the defence test in O. 29, she has not shown that the petitioner husband does not reside in this jurisdiction and accordingly her application for security fails on this ground. Even if I were not satisfied about the ordinary residence of the petitioner coming within the standards of O. 29, I would not propose to exercise the discretion of the court having regard to the fact that this case has all the hallmarks of a petitioner who is likely to be amenable to the processes of this Court through his involvement with N.A.M.A., the banks, the existence of family law proceedings which have the effect of effectively freezing or partly freezing any equity available to the couple over and above bank charges, and his general propensity to engage in the complex sets of proceedings before the Court (even if grudgingly in relation to financial disclosure). Even on a negative equity basis of a N.A.M.A. case, the party in the position of the respondent wife usually makes the case for a share in any speculative gains giving rise to a net equity when the economy 'improves' after some years as exemplified in the residual part of the order in *X.Y. v. Y.X.* [2010] IEHC 440 . There is no reason that the respondent wife may not take this view of the separation proceedings otherwise she might not proceed in the High Court.

16. As regards the application for costs *de die in diem*, this was not seriously pressed except to use O. 70 as an indication of judicial and official policy regarding the sympathetic way in which spouses should be treated in regard to the provision for security for costs in a highly contested nullity application. In view of the admitted assets of the respondent wife indicating a large enough personal estate, I am satisfied that by reason of her significant if not inexhaustible wealth, her application for costs in *de die in diem* could not succeed. However, if a situation arose (which I do not suggest it might in this case) where litigation became vexatious or uncooperative through any form of time wasting, then I would consider that to ease oppression of a financial nature, O. 70 r. 75 might be considered. This course would certainly be consistent with the practice of the court to award costs in relation to non-disclosure under the Practice Direction. I leave for decision in another case the question as to whether O. 70 r. 75 should apply equally to impecunious husbands as it applies to wives.

17. Accordingly, I refuse the reliefs sought in paras. 1 and 2 of the notion of motion herein.