

THE HIGH COURT

2006 679 JR

BETWEEN

D. O.

APPLICANT

AND

HER HONOUR JUDGE OLIVE BUTTIMER

RESPONDENT

AND

M. O.

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered on the 3rd day of April 2009.

1. The applicant seeks an order of *certiorari* to quash the maintenance order made by the respondent in Kilkenny Circuit Court (Family Law) on the 15th December, 2006. The grounds upon which he seeks this order are as follows:-

(1) During the hearings held on the 2nd June, 2005 and the 15th December, 2005, no presentation, discussion or verification of means, income or expenditure was made by either the applicant or the respondent.

(2) On the 15th December, 2005, the respondent made a maintenance order that contradicted both the Judge's own notes of the 2nd June, 2005, as read out by her and the Court Clerk's notes of the 2nd June, 2005.

(3) Owing to the fact that the applicant had lodged judicial review proceedings against the respondent on the 25th May, 2005 with regard to a preliminary ruling in the proceedings, the Judge should have excused herself from the case without making any rulings, because as a result of his commencing judicial review proceedings in regard to this ruling, she would be biased against him.

The background

2. The applicant appeared before Her Honour Judge Olive Buttimer sitting on the Circuit Court at Kilkenny on the 2nd June, 2005. The issue between him and the notice party herein on that day was maintenance for the couple's three dependent children, H, C, and S. Proceedings in connection with the recognition of a foreign divorce had been dealt with by the same Judge on the 5th May, 2005. In respect of this decision of the 5th May, the applicant herein had lodged judicial review proceedings.

3. Following the maintenance hearing of the 2nd June, 2005, the Court made an order described in the Court Clerk's note as follows:-

"From 1st October, 2005 respondent to cover all costs of son H's college expenses, (accommodation etc.). College residence fee for D.C.U. to be paid by August and October if going to that college. Monies to be lodged monthly to H's account.

€1,000 per month for C. and S. and H. when he is at home."

4. The applicant alleges that his understanding of this order was that he would cover all of H's college expenses including fees, living expenses and accommodation and he would pay these directly to H. He would also continue to pay €667 per month in respect of the other two dependants, C. and S. For approximately three years prior to this date, the applicant had been paying €1,000 per month in respect of maintenance for the three above children. It was the notice party's understanding of this order that he was to pay H's college fees and living expenses associated with college and to continue to pay €1,000 per month. This €1,000 per month should be in respect of the two dependent children and H, when he was not at college and was living at home. As a result of this disagreement an application was made for a clarification of the order of the 2nd June, and this was held on the 15th December, 2005. Following this clarification hearing an order of the Circuit Court was drawn up in the following terms:-

"(1) Payments of €1,000 per month to continue to be paid for C. and S. once H. has gone to college. Said €1,000 to include H's living expenses when at home, €333 per child.

(2) That the respondent would make payment of all of H's college and associated expenses."

5. This application is grounded upon the affidavit of the applicant dated the 9th June, 2006. There is a replying affidavit filed herein by the notice party and dated the 19th March, 2009. At the hearing of this application there was no appearance by the first respondent. The notice party and the applicant both appeared on their own behalf.

The Court's assessment

6. The maintenance order made herein was quite clearly made on the 2nd June, 2005. What occurred on the 15th December, 2005 was a clarification made at the applicant's request. The complaint made as to the absence of evidence upon which to found that order is not borne out on the evidence before me. I accept the evidence of the notice party which was not disputed before me that she presented to Court a full financial disclosure on her part. This, she had been advised, was essential because it was three years since the interim maintenance had been fixed. This interim order was still in being at the time of the hearing of the 2nd June. The applicant himself said in his evidence before me that he had his financial documentation with him but was never asked for it. He did, however, submit to the Judge that he objected to the amount being claimed and also indicated his inability to pay. Allowing for a certain measure of informality in the manner in which such hearings are conducted, it appears to me that the applicant's central complaint herein, i.e. that the order was made in breach of fair and proper procedures, is not sustained on the evidence. The order made on the 2nd June seems to me to have been made following a hearing in which both sides were heard.

7. The hearing on the 15th December was a hearing only for clarification purposes of the order made on the 2nd June. The notice party disputes the claim of the applicant that the Judge changed her order or that she contradicted what was in her notes. The applicant bases his belief that the Judge changed her mind and her order on the basis of:-

- (i) His understanding of what the Judge said at the beginning of the hearing of the 15th December;
- (ii) His belief that the Court Clerk's note of the order of the 2nd June supported his understanding of what the Judge said;
- (iii) His interpretation of the meaning of the order that had been made on the 2nd June.

8. On examination of the Clerk's note and the ultimate clarification of the 15th December, it seems to me that the Judge's clarification was in accordance with the Court Clerk's note. That note states that from 1st October the applicant was to cover all expenses of H. in college including accommodation, etc., by paying the costs thereof directly into H's account. €1,000 per month was to be paid for the other two children and H. when he was at home. It seems clear to me that what was intended was that €1,000 per month was to cover in future the cost at home of the three children. All college expenses were to be paid by the applicant. The costs of continuing to maintain him, while he was at home, was covered by that €1,000 per month. The clarified order provides exactly the same, i.e. that the €1,000 per month is to include H's living expenses when he is at home.

9. Since the applicant now clearly understands what this final clarified order means and since it is identical in meaning and only slightly different in wording by way of clarification, I can see no further ground for confusion.

Ground (1)

10. Full evidence was given on the 2nd of June, 2005 by the Notice Party herein of her income, expenditure and maintenance requirements. Her counsel presented this evidence in full according to the uncontradicted evidence of the Notice Party both on affidavit and in her submissions to me. The Applicant also gave evidence to the court explaining his difficulties and according to his evidence before me had all his financial documentation with him but chose not to present it to the court. It is clear the applicant misconceives the nature of the 15th December hearing. The hearing was sought in order to clarify the order of 2nd of June not to amend it. The evidence had already been given – nothing further than clarification was either sought or possible. No evidence was needed on the 15th December, 2005.

Ground (2)

I note in paragraph 13 of the applicant's affidavit that he considers the Court Clerk's note of the day agreed with his interpretation and was contradicted by the Judge in her clarified order. The applicant in this regard, as I have found above, is manifestly incorrect. The Judge's clarification, in my view, means exactly the same as the Court Clerk's note of the day. Such a manifest misunderstanding of the Court Clerk's note calls into question the reliability of the applicant's recollection of what the Judge actually said. I have no doubt the Judge did not contradict herself and that the applicant's recollection of what she said and meant are as manifestly incorrect as his interpretation of the Court Clerk's note of the day.

Ground (3)

This ground is clearly without merit. The Judge was the only person who could hear the case in order to clarify the order of the 2nd June. The fact she discovered in the course of the 15th December hearing that a judicial review had been sought did not alter anything. Her task on the day was to clarify and not to make decisions. Even assuming a risk of bias could arise, and I do not hold that it did since all Judges are well used to being appealed or reviewed, it could not be applicable to a situation where all that was sought was a clarification and what emerged at the end of the hearing was, as I have already held, manifestly the same order.

On these grounds the application herein must fail.

I refuse the reliefs sought.