Neutral Citation Number: [2008] IEHC 341

THE HIGH COURT

2005 No. 437 C.A.

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

BETWEEN

A. K.

APPLICANT/RESPONDENT

AND

J. K.

RESPONDENT/APPELLANT

Judgment of Mr. Justice Henry Abbott delivered on the 31st day of October, 2008

1. This is an appeal from an order made in the Dublin Circuit Court before Her Honour Judge Ryan on the 13th December, 2005.

2. The applicant/respondent was married to the respondent/appellant on the 3rd August, 1974. They have five children born between 1975 and 1990. A decree of judicial separation and ancillary relief was granted by the Circuit Court on the 7th June, 1996, by order of Her Honour Judge McGuinness (as she then was). This order shall hereinafter be referred to as "the order of Judge McGuinness".

3. The manner by which the matters subject of this appeal came before the Circuit Court was by way of notice of motion dated the 10th November, 2004.

4. The order of Judge McGuinness provided the following ancillary orders by way of provision on the granting of a decree of judicial separation of the parties.

> A. "An Order pursuant to section 15 of the Statute directing the Respondent herein to transfer to the Applicant herein his entire legal and beneficial interest in the family situated at [ ] in the County of [ ], for her sole use and benefit and in consideration thereof the Applicant herein shall pay to the Respondent the sum of £10,000 (ten thousand pounds).
>
> B. An Order pursuant to section 16(d) of the Statute and section 4 of the Family Home Protection Act 1976, dispensing with the consent of the Respondent herein to any future sale by the Applicant herein of the family home situated at [ ] in the County of [ ].
>
> C. An Order pursuant to section 16(a) of the Statute conferring on the Applicant herein for her lifetime, the right to occupy the family home situate at [ ]in the County of [ ], to the exclusion of the Respondent herein."

5. The notice of motion of the respondent/appellant seeks the following relief in this appeal:-

> "1. If necessary an Order re-entering the within proceedings;
>
> 2. An Order pursuant to section 10(1)(a)(ii) of the Act of 1995 for the sale of the family home at [ ] and a division of the net proceeds as to this Honourable Court shall seem fit.
>
> 3. An Order pursuant to section 18 of the Act of 1995 varying the order granting the Applicant the exclusive right to reside in the said family home;
>
> 4. Further and/or in the alternative an Order pursuant to section 8 and/or 18 of the Act of 1995 directing the Applicant to pay such lump sum to the Respondent as to this Honourable Court shall seem fit.
>
> 5. Such further or other relief as to this Honourable Court may deem appropriate.
>
> 6. The costs of this Application."

6. This notice of motion was grounded on the affidavit of the respondent/appellant sworn on the 19th October, 2004. A replying affidavit of the applicant/respondent was sworn on the 3rd May, 2005, and, in addition, the applicant/respondent and the respondent/appellant filed affidavits of means dated the 25th October, 2005, and the 3rd November, 2005. The affidavit of means of the respondent/appellant shows that he has a weekly income of social welfare payments of €148.00 and his rental payments to hospital, payments towards meals and miscellaneous expenses of €64.00 exhaust his income and that, he has personal debts to family members of €40,000.00 and he claims to have a joint interest with the applicant/respondent in the family home. The applicant/respondent's means are set out in her affidavit of means as consisting of a weekly income of €77.00 for some part-time employment, lone parents allowance of €188.00 (the applicant/respondent has a young child now aged eight from another later relationship) and childrens allowance of €70.00, totalling €335.00. After catering for her mortgage of €8,500.00 involving weekly payments of €40.00, her outgoings exhaust her income. As regards assets, she claims the entire beneficial interest in the family home.

7. In his affidavit the respondent/appellant explained that he did not initially wish to enforce payment of the sum of £10,000.00 (now €12,700.00) by sale of the house after the order of Judge McGuinness, as it would have rendered his children homeless. He says that he believes that since the applicant/respondent had another child in or about 1997, her partner has been living in the family home, and that he believes that he is employed. He said that he himself was unemployed for many years and at the time of the making of the order in 1996, he was residing in his mother's home but this arrangement fell down arising from difficulties with his brother. As a result, from in or about early 2003, he lived rough for a number of months, then lived in a shelter and subsequently in the hostel accommodation where he now resides. He deposed that at the date of the order of Judge McGuinness, the family home had a value of around £45,000.00, with an outstanding mortgage of about £14,230.00, leaving a net value of £30,770.00. He said that he believed that in accordance with the order of Judge McGuinness he was entitled to approximately one third of the equity in the family home, if it was sold in the future. He said that he was living in the family home discharging the mortgage from 1988 until 1995 when he was barred from the premises on an interim order. The applicant/respondent however, deposes that his contributions to the mortgage were not as a result of his own efforts, but from social welfare assistance in relation thereto, and that he did not work to generate the income thereby produced. However, Judge McGuinness seemed to be of the view that both parties generally used their good offices to secure payment, (albeit from the State) for their mortgage and that the respondent/appellant was to be given credit for that.

8. In his affidavit the respondent/appellant explained that in or about September 2003, the applicant/respondent attempted to enforce the order of Judge McGuinness in respect of the family home, seeking to have the respondent/appellant transfer his interests therein to her for the payment of €12,700.00. He said that he opposed the application, and that it was refused by the Circuit Court on the 23rd February, 2004. He claims that it would be just and equitable, having regard to the circumstances of the parties, that the family home now be sold and that the respondent/appellant receive a fair share of the equity therein, and seeks in the alternative an order directing a date by which the family home is to be sold and the proportion of the net proceeds that each party should receive.

9. The applicant/respondent in her replying affidavit states that, initially, she was not in a position to discharge the £10,000.00 that would be paid to the respondent/appellant in accordance with the order of Judge McGuinness. She was refused mortgage finance for this purpose, but she commenced saving and had accumulated sufficient funds by in or about December 2002, to discharge this sum. Correspondence from the applicant/respondent's solicitor eventually seems to have prompted the respondent/appellant to indicate that he was reconsidering his consent to the transfer given in accordance with the order of Judge McGuinness on an earlier occasion. This change of mind seems to have occurred in or about April 2003. The applicant/respondent deposed that at no time between 1996 and 2003 did the respondent/appellant indicate that he wished to have the order of Judge McGuinness enforced, nor did he during this time put any time limit on the payment of the lump sum of £10,000.00. She deposed that the youngest child of the marriage was only fourteen years of age at the time of the swearing of her affidavit and a sale of the house would render him homeless. She deposed to the fact that throughout the course of the marriage the respondent/appellant refused to obtain any employment and failed to make any contributions towards the household budget. She says that she does not know why the respondent/appellant continues to be unemployed as she is aware that he is healthy and well capable of physical work. She says that any lump sum received by the respondent/appellant will not enable him to purchase a home and he will not be able to obtain mortgage finance as he is unemployed. On her calculations, based on an agreement of values at the time of the order of Judge McGuinness, the equity in the family home was agreed at £38,800.00 and that £10,000.00 represented approximately a quarter of the equity in the family home, and not one third as claimed by the respondent/appellant. She says that if the court were now to sell the family home, this would render her two children homeless. She says that her current partner lives in rental accommodation, is unemployed and is not in a position to support their child, now aged eight. She prayed an order of the court that she be permitted to remain in the family home for life and that she be permitted to purchase the respondent/appellant's interest therein for the sum of £10,000.00.

The Submissions

Submissions of the Husband

10. On behalf of the respondent/appellant Ms. Barron B.L., submitted that the origins of the present application were established in an application by the applicant/respondent to have the property transfer completed on payment of the lump sum in a motion before Her Honour Judge Ryan in the Circuit Court in 2003. This motion did not proceed when Judge Ryan suggested that the respondent/appellant might have some application to make, presumably along the lines set out in the present appeal. Counsel submitted that the overall consideration in dealing with this matter was that of fairness and equity as directed by s. 16 of the Act of 1995. She conceded that there was no jurisdiction to vary a property adjustment order in respect of a family home but that this prohibition did not prevent her client seeking a sale of the property and a new lump sum order pursuant to s. 8 of the Act of 1995. She relied on the cases *J.D. v. D.D.* [1997] 3 I.R. 64, and on the case *J.C. v. M.C.* (preliminary issue) (Unreported, High Court, 22nd January, 2007, Abbott J.). The allegations made on behalf of the applicant/respondent that she was "badly put upon" in various ways by the respondent/appellant was not borne out by the size of the lump sum, directed by the order of Judge McGuinness, which represented approximately between 25 and 30% of the value of the family home. The right to this lump sum would expire unless enforced within twelve years. She relied on the case *S. (R.) v. S. (R.)* (Unreported, Circuit Court, McGuinness J., 14th December, 1995), in which it was held that an order that contained a provision for the sale of the family home, but not for the distribution of the proceeds as between the parties, where the family home had not been sold, was open to variation pursuant to s. 22 of the Act of 1989, but submitted that this case had the reverse result from that which was required in this appeal insofar as, the lump sum in fact is present in this case but the power of sale is absent. She submitted that s. 18(5) of the Act of 1995 refers to s. 9(1)(b), (c) and (d) as allowing variation of a property transfer order only if parties acquiring an interest under these orders are not prejudiced and this may show some of the rationale behind the prohibition in the variation of a property transfer order contained in the Act of 1989 and the Act of 1995. She submitted that s. 10(1)(a)(i) provided for the grant of a right of residence to a party in the family home and this may be varied by s. 18(1)(f). She relied on the persuasive authority of *Hope-Smith v. Hope-Smith*, [1989] 2 F.L.R. 56, for the proposition that because of change of the circumstances, (for example, the value of the property), it is open to the court to reconsider a situation where a lump sum payment is to be made on foot of a sale. She submitted, and it was accepted that, the order of Judge McGuinness was made under the Act of 1989 and the Act of 1995 did not commence until August, 1996.

Submissions of the Wife

11. Ms. Dearbhla Ní Ghríofa, Counsel for the applicant/respondent, submitted that the order of Judge McGuinness clearly meant that the applicant/respondent was to have a right of residence in the family home for life. The fact that the order of McGuinness J. did not put a percentage on the value of the lump sum payment contained in the order relative to the beneficial interest alleged by the respondent/appellant showed that McGuinness J. did not contemplate a sale. She submitted that s. 18(1)(e) specifically excludes a property adjustment order being varied in a case to which s. 9(1)(a) applied, as in this case, and the respondent/appellant was not disputing that fact. Her Honour Judge McGuinness had to have taken into account in 1996 that property values could rise and, nevertheless, made the order for the payment of the lump sum without time limit. She submitted that it was clear from the order that Judge McGuinness had given due consideration to the fact that the applicant/respondent had to rear the children and pay the mortgage with scant or no assistance from the respondent/appellant for many years. She referred to the English case *Potter v. Potter* [1990] 2 F.L.R. 27, as authority for the proposition that the order for payment of a lump sum could be enforced even after the date for payment of same had elapsed. Finally, she submitted that the effect of the application of the respondent/appellant was to remove the right of residence of the applicant/respondent and, replacing same with an order of sale and a percentage payout of a lump sum would be to effectively vary the property adjustment order in the order of Judge McGuinness – something which was specifically prohibited by section 18.

Conclusions on Status of Application

1. As is clearly set out in the introductory pages of the judgment of McGuinness J. in *J.D. v. D.D.* [1997] 3 I.R. 64, the present application is to be dealt with under the Family Law Act 1995, notwithstanding that the case was initially heard under the 1989 Act.

2. As was common case between the parties, the property adjustment order made by order of Judge McGuinness cannot be varied in an application under s. 18 of the 1995 Act.

3. Neither initially, when the order was made under the Act of 1989, nor subsequently, when the Act of 1995 governed the case, could the applicant have applied for an order for the sale of the family home, as he had claimed he could in his affidavit when he referred to the fact that he refrained from doing so in the interests of the children. For that matter, the

Circuit Court could not have included in the order of Judge McGuinness an order for sale with the right of residence ordered in favour of the applicant/respondent in the family home.

12. This effective bar on an order for sale may, of course, be eliminated in the event of a variation of the right of residence which is possible under s. 18 of the Act of 1995.

13. The effective barring of a right of sale where a life residence in the family home is granted shows the weight the Oireachtas attached to an order granting residence, which I consider to be at the upper end of the scale.

14. I accept, on the authority *of J. D. v. D. D., J.C. v. M.C*. and the majority decision of the Supreme Court in *T. v. T.* [2002] IESC 68 that, the making of further lump sum orders and property adjustment orders is not precluded by the 1995 Act, even in circumstances, as in the present case, where the structure of the order of Judge McGuinness is such as to prevent a variation under s. 18 of the 1995 Act, in respect of these two aspects. Notwithstanding the strong submissions of counsel for the respondent/appellant that such an outcome appears to be overriding the specific provisions of the order of Judge McGuinness (which has not been appealed), and the provisions of s. 18 of the 1995 Act (relating to variation of orders), and, the other legislation the effect of all of which is to ring-fence the right of residence of the applicant/respondent in the family home, it is important to resolve the apparent contradiction between the submissions of the two parties in this case caused by the suggested conclusion posed in the foregoing paragraph. I consider that this is best done by adopting the analytical approach I took to these issues in my judgment in *J.C. v. M.C.,* where I drew a distinction between "fine tuning" applications, such as may be made on an application for a variation pursuant to s. 18 and "strategic" applications as envisaged in at least some of the circumstances where the principle stated in the High Court judgment of McGuinness J. in *J. D. v. D. D.,* relating to the unlimited entitlement to property adjustment order or other relief under the 1995 Act, may apply. Other judicial pronouncements of authority, both in this jurisdiction and in the English jurisdiction, have argued against a clean break occurring as a result of judicial separation or divorce using the example that it would be unfair and unjust if, after a separation or divorce settled or ordered on meagre or limited terms, one of the parties attained windfall gains of incomparably ample or magnificent proportions. On first principles, the reasonable reaction to such an outcome is to conclude that the party eking out the results of a meagre settlement or order, should not, in justice, be denied a right to share in the windfall or similar change of circumstance. Integrating this conclusion on first principles into the framework of the 1995 Act is best and adequately served by observing that the "proper provision" to be made for the separating parties pursuant to s. 16 of the 1995 Act as amended, is to be informed by the test of justice as required by s. 16(5) of the Act of 1995. Hence, I conclude that the test as to whether a change, or changes, in circumstances ought to ground a strategic application going outside the limited circumstances envisaged by s. 18 should be that, ("other things" being equal) if they were of such a fundamental nature that it would be unfair and unjust to ignore such change or changes. The "other things" to be considered before this necessary condition for a further strategic order to be made after a separation order may be made sufficient, must, I conclude, be guided by the statutory framework set out in the provisions of s. 16(1) and (2), with the final overriding test of fairness and justice contained in subsection 5.

15. Using the foregoing test, I find that the monetary value of the lump sum to be paid (even adding a generous amount for 8% courts interest in the region of €30,000.00) bears no relation to the proportion of the beneficial interest in the family home originally represented by the lump sum, (having regard to the fact that the equity value of the family home has increased) and that, (other things being equal), it would be manifestly unfair and unjust to ignore such a change in all the circumstances, without, at least, consideration of a strategic application on a re-entry of the proceedings. In reaching this conclusion it is instructive to note that Judge Ryan, when confronted with an application to bring into execution the order of Judge McGuinness by completing the property transfer order on the payment of the euro value of £10,000.00 in 2003, tended to the same conclusion, but found it impossible to act on it. Obviously, she considered that she was trammelled by the framework of the order and of s. 18 of the 1995 Act.

Examination of the Merits

16. Having regard to all the circumstances of the case and the criteria set out in s. 16(2) of the 1995 Act, I will consider the case within the framework of the paragraphs therein contained seriatim.

(a) The income of the parties is taken up in their own survival. There is nothing to spare and both are dependent on social welfare payments to eke out their day to day existence. The respondent/appellant does not work, and does not seem to intend to work, nor has he attempted to work for many years, whereas, the applicant/respondent has supplemented her social welfare payment by part-time work and has shown a capacity to save, out of her own resources, enough to discharge the monetary value of the lump sum, having been unable to raise same by way of mortgage. Even allowing for the better position of the applicant/respondent, in the event of a property adjustment order in any of the proportions envisaged by the parties in this case, her borrowing capacity, for the purpose of acquiring another home, is likely to be non-existent and the respondent/appellant's position in relation to borrowing capacity would be even worse by reason of his employment record and the total absence of any indication that he is interested in taking up employment save that, a non-proven allegation of medical unfitness was sought to be introduced on his behalf during the hearing of the application. In the context of any proposed adjustment of the lump sum followed by a property adjustment order and sale, it is likely that neither of the parties would be in a position to establish a home and it could be argued that in the event of a mathematical split of resources, the sum of the parts would not equal the original sum insofar as, at least one of the parties (the applicant/respondent) has set up a home, which in addition to its investment value has a significant consumer value for one of them.

(b) The respondent/appellant is basically responsible for himself. He has stated in his affidavit of means that he owes his relatives €40,000.00 but this has not been seriously canvassed in the application before this Court. The applicant/respondent on the other hand is responsible not only for herself, but also her two children one of whom, at the age of seventeen, is still of a dependent age and is the child of the respondent/appellant.

(c) The standard of living enjoyed by the parties, now or at any relevant time, is not high, but they survive. By reason of the fact that I do not consider that any possible allocation of resources will put the respondent/appellant in a position where he can purchase housing for himself, there is a risk, having regard to the track record of the respondent/appellant, that any lump sum over and above that to which he is already entitled, under order of the court, might well be frittered away in a short time without any lasting benefit.

(d) Both parties are middle aged but of a working age. The length of time during which they lived together is hardly relevant at this remove to any great degree and I attach little weight, if any, to it.

(e) Neither party has any physical or mental disability, notwithstanding the protestations of the respondent/appellant, although it must be recognised that time has moved on for both of them in the twelve years since the making of the order of Judge McGuinness.

(f) The respondent/appellant has made no contribution to the family in the last twelve years, but I have no doubt that his joining in the initial application for mortgage finance and his good offices of just being present as one who could secure social welfare contributions to assist with the payment of the mortgage was obviously a contribution in the early years. Her Honour Judge McGuinness obviously took these matters into consideration and decided on a lump sum which, if it were to be reduced to percentage terms, would be in the region of between 25 and 30% of the equity in the family home. By reason of the non-existent or negligible contribution of the respondent/appellant in the last twelve years, I see no reason why this notional percentage of the beneficial interest in the family home ought not to be reduced significantly.

(g) The respondent/appellant has foregone nothing in this regard whereas, it is likely that the applicant/respondent might well have retained, or at least resumed, full-time employment having regard to the fact that she has held onto part-time employment in the face of her duties towards looking after the home and the care of one and subsequently, another child.

(h) The income or benefits to which the parties are entitled under statute are social welfare payments and these balance each other in the context of any financial balancing as between the parties but, they do come into consideration from the point of view of ensuring that the State is not mulcted with a burden to pay social welfare benefits when adequate provision could be made in family law proceedings. This is a universal requirement of family law proceedings, it arises from public policy and I dealt with this aspect in my decision in *J. C. v. M. C.* when dealing with the interest of the State as a stakeholder in family law proceedings. In the context of an analysis of the scheme of the family law legislation dealt with.

(i) Conduct does not arise.

(j) The accommodation needs of the respondent/appellant could be improved upon over the hostel level which he now enjoys. To a certain extent he is not totally responsible for this outcome by the likelihood of his "falling through the cracks" of the Local Authority Housing Provision System, by reason of the fact that he may never have achieved any status in the housing list through his tardiness in releasing his interest in the house occupied by the applicant/respondent and failure to accept the lump sum in the order of Judge McGuinness, especially in the face of the objective fact (at least in the initial years), that no order for sale could be made under law. If the respondent/appellant receives the money offered, (as topped up by the courts interest at 8%), then he should be in a position firstly, to put a deposit on rental accommodation and possibly have himself assisted in the purchase of a car but also get on the housing list and progress from there. If he showed any inclination towards working and accumulating sufficient assets to purchase mortgage assisted accommodation, then I would give that considerable weight towards increasing the lump sum although, this dynamism would need to be matched by the applicant/respondent. As regards the accommodation needs of the applicant/respondent, she needs a house or large apartment to accommodate her two dependent children, one of whom is the child of the respondent/appellant. This accommodation need seems to be excellently met by her present accommodation. The claim of the respondent/appellant necessarily implies a sale with vacant possession of the family home that she now occupies with her children. This is very often the outcome of separation and divorce litigation. However, it usually follows with the prospect of each party being in a position to "downsize" by purchasing with the aid of mortgage finance other accommodation, or at least, obtaining reasonable rental accommodation for each of them in a non-subvented or subsidised fashion. However, in this case it is clear that having regard to her age and the marginal state of her income, the applicant/respondent would not be in a position to meet her housing needs by way of a purchase assisted with mortgage finance. Quite apart from this bare financial consideration, the court must consider the likely consequences of this move to be a situation where the applicant/respondent would fall into the category of persons seeking housing from the local authority. She would not have an opportunity to invest whatever small equity she might have from her percentage payout in accommodation and the social and emotional trauma of vacating her house and suffering the insecurity of locating a purchaser in these times of turmoil and then seeking alternative accommodation, is a very high price to pay for a claimed percentage payout for the respondent/appellant in circumstances where it has been held in this judgment that the same would be of dubious benefit, (certainly in terms of securing permanent owned accommodation). There is a considerable risk that the outcome of a sale of the family home and the percentage payout, could result in not only one but two of the parties being even more heavily dependent on means related social welfare payments. Such sale would also run contrary to the weight given to other factors brought into the balance of the consideration of other paragraphs at subs. (2). The consideration of the court of the case under this paragraph heading, together with the general matters incorporated therewith, heavily weights the determination in favour of the outcome sought by the applicant/respondent in holding on to the family home, subject to payment of the lump sum to be paid under the order of Judge McGuinness with court interest adjustment. To show the context in which such considerations emerge in court, it is helpful to refer for the sake of comparison, to two cases with similar broad strands involving just a single family home with incomes of the partners based on social welfare payments and little actual or potential earning capacity. The first is *D. v. D.* (Unreported, High Court, Abbott J., 9th July, 2007) and *H. v. H*. (Unreported, High Court, Abbott J., 2nd May, 2008). In *D. v. D*. the husband, who occupied the house, was heavily dependent on social welfare, but could have worked and the wife, who was living in accommodation, also depended on social welfare but also worked like the wife applicant/respondent in this case. The decision of the court in that case was not to sell the house as there was no saleable interest (it being a local authority tenancy), but to transfer the house to the wife on the basis that her occupation and facility to earn a little money coupled with her ability to "keep up" a house presented the best chance of the family to establish an equity in the house, through claiming entitlement under whatever local authority tenant purchase scheme might be applicable. In *H. v. H.* (again, like *D. v. D.*, on appeal from the Circuit Court to the High Court) the court ordered the sale of the family home occupied by the wife where the husband's contributions to the mortgage had been significant in the early years and where both husband and wife might possibly obtain employment or set up in business and where both husband and wife had, during the proceedings, expressed an interest in downsizing as a result of sale.

(k) These matters seem to have been dealt with in the separation and do not seem to apply.

(l) The rights of the two children of the applicant/respondent, one of whom is a child of the respondent/appellant, and their need to have a stable environment, add considerable weight to the argument to preserve the family home and resist the relief sought by the respondent/appellant. Their rights have been considered in conjunction with the decisions of the court earlier in this judgment.

Conclusion

18. Having regard to the foregoing decisions on the facts and on the weight of the various criteria to be applied under paras. *(a)* to *(l)* inclusive of s. 16(2), and the general circumstances of the case added thereto, I am strongly of the view that notwithstanding,

that the value of a 25 – 30% putative share of the respondent/appellant has increased over the years quite considerably, the order of Judge McGuinness should not be varied either under s. 18 or on the basis that a new strategic order would be made on *the D. v. D.* basis. I am satisfied, (having approached the whole issue from the outset as invited by the submissions of Ms. Barron, counsel for the respondent, and as decided by the court on the basis of the question of fairness and justice) that the court is bound to finally evaluate the decision towards which the court is inclined against the provisions of subs. 5 of s. 16 which provides:-

> "(5) The court shall not make an order under a provision referred to in *subsection* (1) unless it would be in the interests of justice to do so."

19. I am strongly of the view that it is manifestly in the interest of justice that the application of the respondent/appellant be refused.

20. I propose to postpone the formal making of the order herein to enable the parties to pay over the lump sum as offered with up to date court act interest, and enable the transfer of the husband's share of the family home and invite counsel to address me in relation to any costs issues arising.

21. In the event of parties not resolving matters between themselves in the adjourned period, I shall be proposing that further applications in the matter be remitted to the Circuit Court.