

**THE HIGH COURT
(CIRCUIT COURT APPEAL)**

2007 308 CA

**IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AND
IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT 1976, AND IN THE MATTER OF THE
FAMILY LAW ACT 1995**

BETWEEN

E. McE.

APPLICANT

AND

J. O'S.

RESPONDENT/APPELLANT

AND

G. O'S.

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Sheehan delivered on the 5th day of February, 2009

1. This is an appeal by the respondent/appellant father, against orders made in the Circuit Court on the 26th November, 2007, directing the respondent to pay to the applicant mother, the sum of €1,200 per month for the support and maintenance of their son P., born in October, 2000, and that such sum be expended on health insurance, speech therapy, books, clothing and other necessities for the said infant.

2. A second order directed the respondent to pay to the applicant the sum of €500,000 to facilitate the purchase of appropriate accommodation for the applicant and P.

3. In the course of this judgment I refer to the mother as the applicant and the father as the respondent. The respondent's wife also participated in these proceedings as a notice party.

4. The applicant instituted proceedings in July, 2004 in the Circuit Court and sought, *inter alia*, the following orders pursuant to the Guardianship of Infants Act 1964 and the Family Law Act 1995.

1. An order pursuant to s. 11(1) of the Guardianship of Infants Act 1964, directing that the respondent, in the best interest and welfare of the infant P., provide the funds required to purchase a house in the joint names of the applicant and the infant, P., and that he also establish a trust fund to be operated for the benefit of the dependent child, P.

2. An order pursuant to the provisions of s. 11(2)(b) of the Guardianship of Infants Act 1964, directing that the respondent shall pay such weekly or other periodical sum as the court deems appropriate and/or an order pursuant to the provisions of s. 5(A)(1) of the Family Law (Maintenance of Spouses and Children) Act 1976, for the provision of financial support by the respondent by means of periodical payments for such period during the lifetime of the applicant/parent of such amount and at such times as this Honourable Court may consider proper for the support of the dependent child of the parties having regard to the income and earning capacity and the financial resources of each parent.

3. An order pursuant to the provisions of s. 42 of the Family Law Act 1995, for the provision of a lump sum payment of such amount or amounts at such time or times as may be specified by this Honourable Court to be discharged by the respondent to the applicant for the benefit and support of the dependent child, P.

5. The applicant is 31 years of age and a professional singer by occupation who resides with her parents in her own family home.

6. The respondent is 45 and lives apart from his wife and three dependent children in his own house. He has another dependent child in respect of whom he presently pays monthly maintenance in the sum of €400.

7. The respondent is a plumber and a property developer by occupation. His sole business at the time of this appeal was a property company which he jointly owned and managed with his wife. The rental income from this property company provided the respondent and the notice party with their income and comprises properties with a net value of circa €3,000,000. The parties agreed a 10% reduction in the value of these properties in October, 2008 in light of the current economic climate.

8. The applicant and the respondent lived together from late 1999 to August, 2002 and from August, 2003 to June, 2004.
9. It appeared from the evidence that the respondent's excessive alcohol consumption contributed to the breakdown of the parties' relationship. During the twelve month period when the applicant and the respondent lived apart, the applicant resided in rented accommodation with P.
10. I have heard evidence over five days in July, 2008 and October, 2008 from the applicant and the respondent as well as the notice party and the applicant's accountant and an expert in relation to the infant's speech difficulties.
11. I regard the following matters which emerged in the course of the evidence as significant.

A. The respondent is a married man with three dependent children and the father of two other non-marital children. He runs a property business with his wife and at the time this appeal was heard, his sole source of income was the rental income from the properties he jointly owned and managed with his wife. He previously worked as a plumber.

B. The applicant is a professional singer who has demonstrated considerable responsibility, effort and ability in progressing her own career while at the same time devoting considerable time to her child.

While she presently shares a room with P. in her own family home, I hold that this decision of the applicant to live with her parents in her family home is not dictated by financial necessity.

C. The applicant's accountant, Mr. Murtagh, estimated that the respondent had a net asset value of €1,869,000 which said sum included pensions to the value of €366,994 and with a rental income attributable to him of circa €35,000. This evidence has to be considered in light of the agreed 10% reduction in property values.

D. In recent years the respondent has been living primarily from the proceeds of sale of property he jointly owned with his wife, rental income, and the sum of €175,742 being the net proceeds of the respondent's entitlement from the liquidation of a property development company he was involved in.

E. The respondent and the notice party have spent significant sums of money in the past four years relative to their asset base and rental income. This level of spending is not sustainable and it is clear that the respondent will have to return to work.

F. The applicant's income as a professional singer has steadily increased over the years. According to her own accountant, her net income for 2007 was circa €19,000 and it was clear from her evidence that her earnings for 2008 were heading for a significant increase. In addition to her earnings, the applicant is in receipt of a single parent's allowance of €149.30 per week, as well as a child benefit payment of €166 per month. According to her accountant, the applicant's gross income from her singing career in the years prior to 2007 was 2002 (€1,150), 2003 (€6,079), 2004 (€11,250), 2005 (€9,930), 2006 (€15,516).

It is reasonable on the basis of the applicant's evidence to assume that she will have available to her this year the sum of at least €35,000 for the maintenance of herself and her child before payment of any sum to her by the respondent.

G. While it is clearly some time since the respondent worked as a plumber, he is clearly very experienced in that work. And while the evidence before me did not specifically address the question of the respondent's earning capacity as a plumber, I hold that he has income potential as a plumber.

H. Since the hearing in the Circuit Court there has been a marked improvement in the applicant's financial position and a marked decline in the value of the respondent's assets.

12. In approaching the respondent's appeal, I must first address the question of this Court's jurisdiction to uphold the order of the Circuit Court made pursuant to s. 11(1) of the Act of 1964 which directed the respondent to pay the applicant €500,000 to enable her to purchase a home for herself and P.

13. All parties have made lengthy written and oral submissions relating to jurisdiction.

14. Essentially the applicant seeks a property adjustment order in her favour and that of P., and contends that the Guardianship of Infants Act 1964, allows the court to make such an order. The respondent and notice party argue that one can not interpret the 1964 Act in this way, not least because of the States pledge in Article 41 of the Constitution to guard with special care the institution of marriage.

15. In support of her contention that the court has such jurisdiction the applicant relies on s. 3 and s. 11 of the Guardianship of Infants Act 1964, and in particular on the judgment of Budd J. in *M. Y. v. A. Y.* (Unreported, High Court, 11th December, 1995).

Section 3 of the Guardianship of Infants Act 1964, states:-

"Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

16. Section 6(4) of the Guardianship of Infants Act 1964, provides that the mother of a non-marital infant shall be guardian of the infant, and s. 11(1) of the said Act provides that any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such orders as it

thinks proper.

17. In the course of his judgment in *M. Y. v. A. Y. Budd J.*, stated at p. 19:-

"I accept that this Court has wide powers under Section 11 of the Guardianship of Infants Act, 1964 and in particular this empowers the Court to make orders with regard to the payment of maintenance to provide for the son, G. and also for his mother who looks after him and in whose custody he is. In my view the section is also wide enough to empower the Court to make the orders in respect of lump sum provision for the purchase of a suitable house, which both parties agreed would be beneficial to the son, G."

18. I hold that this case on which the applicant relies for support is distinguishable on the fundamental basis that it concerned parties who were married, and therefore it does not provide support for the applicant in this case.

19. I accept the notice party's submission that there are a number of other matters that I must be mindful of when considering the applicant's submission as to how the relevant sections of the Guardianship of Infants Act 1964 are to be interpreted. These include:-

"(1) Section 5 of the Interpretation Act 2005, which provides as follows:-

(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)-

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of-

(i) in the case of an Act to which *paragraph (a)* of the definition of "Act" in *section 2(1)* relates, the Oireachtas, or

(ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where than intention can be ascertained from the Act as a whole.

(2) The Act must be interpreted in a manner which is constitutional and the court must adopt the interpretation that most favours the validity of a statute only if there is a doubt about the constitutional validity of another meaning (*Colgan v. Independent Radio and Television Commission* [1999] 1 I.L.R.M. 22).

(3) The fundamental rule of statutory interpretation of *expressio unius exclusio alterius* applies. The expression of one is the exclusion of the other.

(4) The court must look at the pre-existing law to see the wrong for which the common law did not provide (the purposive approach) *Western Health Board v. K. M.* [2002] 2 I. R. 493."

(5) The court in applying these principles must note that the common law imposed a narrow obligation on a husband to support and maintain his wife. When the jurisdiction exercised by Ecclesiastical Courts over matrimonial matters was transferred to the Court for Matrimonial Causes in 1871, the substantive law did not change. A father had a common law duty to maintain his marital children, but did not have a similar duty in relation to his non-marital children. The basis for the award of maintenance is founded in statute. The Matrimonial Causes Act 1878, which gave magistrates summary jurisdiction to grant maintenance orders, and the Married Women (Maintenance in Case of Desertion) Act 1886 remained the basis for spousal maintenance until the enactment of the Family Law (Maintenance of Spouses and Children) Act 1976.

(6) Prior to the enactment of the Guardianship of Infants Act 1964, there was no provision whereby a parent could be ordered to pay maintenance for a marital child. This was the wrong which was remedied by the Act of 1964. The provision of maintenance for a non-marital child was provided for by the Illegitimate Children (Affiliation Orders) Act 1930. The Act of 1930 provided that a mother could obtain a court order to require the father of the child to make payments to her towards the maintenance of their child.

The amending legislation contained in the Status of Children Act 1987, repealed the Act of 1930 and amended the Family Law (Maintenance of Spouses and Children) Act 1976, to allow for the determination of maintenance disputes in relation to non-marital children. This Act did not extend the provisions of s. 11(2)(b) of the Guardianship of Infants Act 1964, to non-marital children.

(7) In approaching the interpretation of the Guardianship of Infants Act 1964, contended for by the applicant, the court must consider the constitutional position of the family.

(8) The court must look at the constitutional position of the notice party, who is a wife working in the home and is entitled to special protection by virtue of Article 41. In *Murphy v. Attorney General* [1982] I.R. 241, the Supreme Court stated at p. 286 that:-

"[t]he pledge...to guard with special care the institution of marriage is a guarantee that this institution in all its constitutional connotations, including the pledge given in Article 41, s. 2, sub-s. 2, as to the position of the mother in the home, will be given special protection so that it can continue to fulfil its function as the basis of the family and as a permanent, indissoluble union of man and woman."

(9) In *Ennis v. Butterly* [1996] I I.R. p. 426, Kelly J. stated at p. 439:-

"...notwithstanding the extensive reform of family law which has taken place in this country over the last 20 years, nowhere does one find any attempt on the part of the legislature to substantially enhance the legal position of, or to confer rights akin to those of married persons upon the parties to

non-marital unions, e.g. a right to maintenance.”

In reaching this conclusion Kelly J. at p. 438 found support in the judgment of Henchy J. in the case of *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567. Kelly J. cited the following with approval :-

“For the State to award equal constitutional protection to the family founded on marriage and the ‘family’ founded on an extramarital union would in effect be a disregard of the pledge which the State gives in Article 41, s. 3, sub-s. 1 to guard with special care the institution of marriage.”

20. Taking all the above matters into consideration I am obliged to conclude that the Circuit Court had no jurisdiction under s. 11 of the Guardianship of Infants Act 1964, to make the order it did directing payment of a lump sum of €500,000 by the respondent to the applicant, to provide a home for the applicant and P.

21. In the course of the hearing before this Court the applicant further contended that this Court had power to make such a property adjustment order pursuant to s. 42 of the Family Law Act 1995.

22. While many of the arguments applicable to s. 11(1) are also relevant in a consideration of this submission as the notice party has pointed out in her written submissions the claim for housing for the applicant and her son was specified at para. 2 of the Civil Bill to be pursuant to s. 11(1) of the Guardianship of Infants Act 1964, and no application was made to amend the Civil Bill. On this ground alone I would refuse the applicant’s claim pursuant to s. 42 for the provision of housing for herself and the child P.

23. There is no dispute that the applicant’s claim for maintenance pursuant to s. 5A of the Family Law (Maintenance of Spouses and Children) Act 1976, as inserted by s. 18 of the Status of Children Act 1987, is well founded.

24. Section 5A(1) provides that:-

“Subject to subsection (3) of this section, where, in respect of a dependant child whose parents are not married to each other, it appears to the Court on application to it by either parent of the child that the other parent has failed to provide such maintenance for the child as is proper in the circumstances, the Court may make an order (in this Act referred to as a maintenance order) that the other parent make to the applicant parent periodical payments, for the support of the child as aforesaid, for such period during the lifetime of the applicant parent, of such amount and at such times, as the Court may consider proper.”

25. Section 5A(3) provides that:-

“The Court, in deciding whether to make a maintenance order under this section and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters-

(a) the income, earning capacity (if any), property and other financial resources of-

(i) each parent

(ii) the dependant child in respect of whom the order is sought, and

(iii) any other dependant children of either parent,

including income or benefits to which either parent, the dependant child as aforesaid or such other dependant children are entitled by or under statute, and

(b) the financial and other responsibilities of each parent towards,

(i) a spouse,

(ii) the dependant child in respect of whom the order is sought, and

(iii) any other dependant children of either parent,

and the needs of any dependant child as aforesaid or of any such other dependant children, including the need for care and attention.”

26. I have already set out in the earlier part of this judgment a number of matters which I hold to be significant. In considering the monthly payment to be made to the applicant for the maintenance of P., I have taken into account all the circumstances of this case and have had particular regard to the matters set out in s. 5(3)(a) and (b) and I consider the sum of €1,200 per month to be the appropriate maintenance payment. In view of P.’s speech difficulties I also order that the father pay one half of the vouched expense for speech therapy in the event that this becomes necessary. I direct that these vouched expenses be paid monthly.

27. I have considered the applicant’s request for a lump payment pursuant to s. 42 of the Family Law Act 1995, in addition to the monthly maintenance payment. This application is separate and distinct from the applicant’s request for a lump sum payment for the provision of accommodation for herself and her son. In view of the amount of the monthly maintenance, I do not consider any further sum by way of lump sum payment to be appropriate and I refuse the claim on this basis. While a literal interpretation of s. 42 of the Family Law Act 1995, would appear to allow for the making of a lump sum order in addition to a maintenance order in favour of a non-marital child, I have not considered this Court’s jurisdiction to make such an order and simply hold that in view of the amount of maintenance, an additional lump sum order is not appropriate in the circumstances of this case.

28. The applicant also claims the sum of €2,750 in respect of a carers allowance to be incorporated in and added to the monthly maintenance for her son. In support of this claim she relied on a number of English authorities. The legislative, social and constitutional background to the English cases is different to ours in relation to the key issues of this case and I am unable to rely on any of these English cases as authority for the proposition. The applicant is not entitled to a carers allowance in addition to the maintenance paid pursuant to s. 5A of the Family Law (Maintenance of Spouses and Children) Act 1976, as inserted by s. 18 of the Status of Children Act 1987. Accordingly, I allow the appeal, discharge the order of the Circuit Court and order that the respondent make a monthly maintenance payment in respect of the child P. in the sum of €1,200 together with the provision for payment of speech therapy in the event of this being required.

