

O'K v O'K

High Court

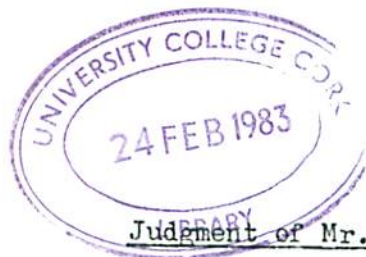
1983

424, 58

MARY O'K

.v.

MICHAEL O'K



Judgment of Mr. Justice Barron delivered the 16th day of November 1982.

The parties in this case were married in 1970. They have two children. Michaela born on the 30th January, 1971 and Emily born on the 19th December, 1972. Following their marriage they originally went to live at 3 Margaret Place, Sandymount. They subsequently moved to 85 Meadow Park, Churchtown and in December, 1976 they moved to 45 Deleford Avenue, Templeogue. The parties have been separated effectively since in or about the month of September, 1979.

I have to determine two issues:

- (1) the share or shares in which the premises 45 Deleford Avenue is owned beneficially; and
(2) the amount of maintenance payable by the defendant to his wife and children.

It is common case that the home in which the parties lived when they first married was the property of the plaintiff's father. When they decided to move from these premises, 3 Margaret Place, Sandymount, the plaintiff's

father made it clear to his daughter that she could use the sale proceeds towards the purchase of a new house. In fact, he went further than that. He provided the deposit for the new house and all the finance required for the balance of the purchase money, for stamp duty, solicitors fees etc in so far as these costs were not met by the proceeds of sale of 3 Margaret Place.

He had given each of his children a home on their marriage and he made it clear to the plaintiff that in like manner he was giving the new house, 85 Meadow Park, Churchtown, to her. If it had gone into her sole name, no question would have arisen as to its ownership. The house would have become the plaintiff's absolutely both legally and beneficially. However, the defendant was anxious that his name should also appear on the title deeds.

The defendant's reason for wishing this to be done seems probably to have arisen from a belief that if this was done he would have acquired a beneficial interest in the property. His counsel puts his case on the basis that there was an express agreement between himself and his wife that the house would be put into joint names so that it would be owned beneficially between them. His own evidence on this issue was unconvincing. The evidence of the plaintiff is that her husband wanted his name on the deeds and that she asked her father to arrange it so as to please her husband. She denies that there was any agreement between them. Her father's evidence is that he told her

that the house was a present for her and advised her not to put it into joint names. However, he acceded to her request to do so.

For the defendant to succeed in his claim he must show that his wife gave him a gift of half the house. The house was put into the names of two trustees by the person putting up the money and he did so with the intention that his daughter should be the beneficiary. Once this had been done, then the gift was completely constituted in favour of the plaintiff. The evidence on behalf of the defendant does not purport to suggest any gift of any part of the property so given to the plaintiff after the trust in her favour was created. No gift could have been made by her before that date because until the gift to her was completely constituted she had no interest in the property. Even if there had been a promise to transfer part of the beneficial interest to the defendant once it vested in her, such promise would not have been enforceable. For these reasons, I do not accept that any beneficial interest in the premises ever passed to the defendant.

The premises 85 Meadow Park, Churchtown, was subsequently sold. The proceeds of sale amounting to the sum of £8,000 together with a loan of £4,500 were used to purchase the present family home 45 Deleford Avenue, Templeogue and the furnishings for it. This home and the mortgage obtained

to finance part of the purchase were taken in joint names. Having regard to the fact that the parties agreed to share the furnishings, I will treat the house as having been purchased as to £8,000 by the proceeds of sale of the premises in Churchtown and as to the balance from the loan of £4,500. The total price of the new house excluding stamp duty and expenses was £10,350.

Applying the principles established by the judgment of Finlay P. in W. v. W. an unreported judgment delivered on the 9th March, 1981, I regard the equity of redemption to have been owned beneficially entirely by the plaintiff. I hold that this interest represented 75% of the value of the property.

Since the purchase of the property, payments have been made on foot of the mortgage. The effect of such payments on the ownership of the equity of redemption is dealt with by Carroll J. in Containercare (Ireland) Limited v. W and Another an unreported judgment delivered on the 25th November, 1981.

Any percentage increase in the proportion of the value of the property attributable to an increase in the equity of redemption belongs to the person making such payments. In the present case, all payments were made by the defendant for the first three years. In the period from September, 1979, the plaintiff did have some small earnings, but not sufficient to affect materially the fact that the payments of the mortgage were coming from the

earnings of the defendant. From September, 1980, the plaintiff has been earning more substantial sums, and on the evidence has earned approximately 30% of the joint earnings of the parties. Accordingly, up to September 1980, any increase in the percentage of the value of the property, over and above 75%, attributable to the equity of redemption belongs entirely to the defendant, whereas any such increase after that date belongs as to 30% thereof to the plaintiff and 70% thereof to the defendant. As I have taken these respective earnings into account in determining the amount of maintenance to be paid by the defendant, any further increase in the proportionate value of the equity of redemption will continue to be acquired by the parties in the proportion of 30 as to 70. Since the property is not yet being sold, I do not consider it appropriate to make any declaration as to the proportionate ownership of the equity of redemption as between the parties since the figure will continue to change until the property is sold.

I propose now to turn to the question of maintenance. The plaintiff is at present living in her parents home with her two children. However she has expressed the wish that she would prefer to return to the matrimonial home. This is vacant at present and there is no reason why she should not return there. The defendant is a Printing Compositor and after tax and other deductions earned in the year ending the 5th April, 1982 an average of £112

per week. I have been given no figure for the current year and I am not prepared to assume any particular increase. The plaintiff is working in the family business and earns after tax etc £46 per week. In addition, she is in receipt of £22.50 a month childrens allowances.

The defendant is living with a lady to whom he is not married in a three-bedroomed semi detached house in Clonsilla. She was called as a witness by the plaintiff to give evidence as to her earnings and the manner in which they were used. It is clear from her evidence that the entire of her take home pay apart from approximately £10 per week is used for the joint living expenses of the defendant and herself. The plaintiff has submitted that the earnings of this lady should be taken into account in assessing the defendant's means from which maintenance should be paid. No particular objection has been made to this approach to the matter. However, while I propose in the first instance to approach the question of maintenance on this basis, I wish to make it quite clear that I do so as a matter of practicality only. Neither the fact that the husband is living in an adulterous association nor the fact that the third party is earning or not earning is a consideration which should be taken into account. The wife should not be entitled to any greater maintenance from her husband because he has the

benefit of earnings of a third party with whom he is living nor should the wife suffer because the third party with whom her husband is living is not earning and has to be supported by him.

In the present case the wife has £52 per week, £46 from her earnings and the balance from childrens allowances. The husband has £112 per week and the third party has £78 per week. Out of this latter sum, she pays £5 per week for life insurance and approximately the same amount for bus fares. She can accordingly bring into a common pool with the defendant a sum of £68 per week. Out of these several earnings there are certain items which have to be paid. They are as follows:

The defendant's union dues £3 per week.

His life insurance £6 per week.

Rent on the semi-detached house in Clonsilla £38 per week.

The mortgage on the premises in Templeogue £11 per week.

School fees amounting to £20 per week.

The defendant says that on his earnings as a tradesman that there is no way in which he can pay for schooling for his two children. He says that the only reason that they were originally sent to fee paying schools was that the plaintiff's parents had agreed to assist in the fees. I accept this argument in part and feel that two thirds of the school fees should be paid

out of the joint funds of the plaintiff and the defendant. I feel that the balance is something which the plaintiff's parents in effect promised to provide. Accordingly I will reduce the figure of £20 per week for school fees to £13 per week. This makes the total of these items to be £71 per week. Deducting this figure from the total amount available leaves a sum of £161 per week. It seems to me reasonable that this balance should be divided equally between the plaintiff and her two children and the defendant, having regard to the fact that part of it is being provided by the lady with whom he is now living. This would mean that out of the balance the plaintiff should get £80.50 per week together with the sums of £11 per week to pay the mortgage and the sum of £13 per week towards the school fees. This comes to a total of £104.50 per week. Since she already has £52 per week it means that the defendant should pay an additional £52.50 to the plaintiff to make up £104.50 per week. This is approximately half his take home pay. On the basis that there will have been some increase in his take home pay for this financial year, I would like to indicate that I would regard him as being obliged to pay one half of this increase to the plaintiff in addition to the sum of £52.50 which I have indicated.

If I am wrong in the approach which I have taken to the question of maintenance, then there is an alternative basis which is available. I must



assume that the defendant has separated from his wife and children and that he has £112 per week to provide for them knowing that they have a further income of £52 per week and to provide also for himself. On this basis he would be required to pay £52.50 to his wife and to retain for himself £59.50. While this is more than half his available earnings it does not take into account the fact that he will have to pay rent for accommodation whereas his wife will not have to do so. On this basis also, it seems to me that the figure of £52.50 together with 50% of any increase in take home pay during this financial year would be a reasonable sum to require the defendant to pay. I will direct that the sum for maintenance shall be apportioned as to £20 per week to Michaela and as to £20 a week to Emily and as to the balance to the plaintiff.

*Henry Wilson*