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THE HIGH COURT

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

Record No. 186/188/85

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT 1976
THE MARRIED WOMEN'S STATUS ACT 1957
G.H. AN INFANT M.H. AN INFANT AND G.H. AN INFANT

BETWEEN:

A.H. (THE WIFE)

APPLICANT

AND

A.H. (THE HUSBAND)

RESPONDENT

Judgment of Mr. Justice Lynch delivered the 19th day of December 1985

This is an appeal from an Order of the Circuit Court made on the 13th of May, 1985 dealing with custody of and access to the infants: with maintenance of the wife and infants: and with ownership of property.

The hearing of the appeal before me was confined to the issues of ownership of property, the right to maintenance and its amount and the sufficiency of access to the infants.

Before dealing specifically with the issues argued before me there are a few general facts first to be stated.

The husband was born on the 4th of April 1944. The wife was born on the 29th October 1947. The husband and wife intermarried on the 1st of August 1970 in a Roman Catholic Church. There are three children of the marriage: a son, G.H. born the 8th of August 1971: a daughter, M.H. born the 21st of March, 1974 and a son, G.H. born the 3rd of March 1977.

Apart from about three months immediately following their marriage when they lived in a flat awaiting completion of a dwellinghouse, the husband and wife have lived all their married lives in a dwellinghouse known as No. 16 and this is the matrimonial home. There was a voluntary trial separation from about the 21st of April to about the 21st of July 1984 when the husband lived apart from the wife and children but in the same neighbourhood. Following the husband's return to the family home in July 1984 there was a serious quarrel between the husband and wife which involved some physical aggressiveness by each against the other. Following this incident the wife served an application for a Barring Order on the husband effecting service herself personally on the husband on their wedding anniversary the 1st of August 1984.

The application for the Barring Order was heard in the District Court on the 4th of September 1984 and was adjourned for three months to the 4th of December 1984. During this period of three months the husband at the request of the District Justice but not by way of Order again voluntarily lived apart from the wife and the children within the neighbourhood. On the 4th of December, 1984 the wife's application for a Barring Order was refused by the District Court. The husband then returned

to reside in the family home with the wife and children but there was little or no communication between husband and wife. Each blamed the other for this lack of communication.

On or about the 12th of February 1985 the wife left the family home taking with her the three children and she took up residence in a rented house in the neighbourhood where she has resided ever since. The wife also took with her a motor car provided for her by the husband through his business company and some of the furnishings of the matrimonial home. On the 29th of March 1985 the wife's notice of application to the Circuit Court was issued and on the 18th of April 1985 it was served on the husband. The husband's answer was delivered and filed on the 8th of May 1985 and as already stated the matter was heard and dealt with by the Circuit Court on the 13th of May 1985.

PROPERTY OWNERSHIP

I shall first deal with the question of the ownership of property in dispute between the husband and wife. There are two types of property in issue, the first being the family home No. 16 and the second being moneys on deposit with the Irish Permanent Building Society and now in the name of the wife's sister as trustee for the wife. These moneys are not specifically within the pleadings but it has been agreed that I may deal with the ownership thereof.

The family home was purchased in 1969/70. An initial booking deposit of £500 was paid in October 1969 and the

final deposit was made in November 1970. The balance of the moneys payable to the builder was obtained by way of a County Council loan secured by a mortgage on the property repayable by monthly payments of £23.65. These monthly mortgage repayments have ever since been paid by the husband by way of standing order on his personal current account with Allied Irish Banks.

The wife claimed that before her marriage she had been earning substantial weekly amounts from employment at dressmaking, from freelance dressmaking and from assisting at Stillorgan Bowling Centre at night time. The wife claimed to have saved about £500 from these activities before her marriage and that she had given £400 of this to the husband to assist him in paying the booking deposit of £500 and that the remaining £100 of her saving had been spent on her wedding clothes and the wedding.

The wife claimed that she had been earning £20 to £22 per week before her marriage. It may be that on one week or perhaps a few weeks she earned as much as this but I am satisfied that on average she earned before marriage no more than £7 to £9 per week at the most. The wife produced no corroborative evidence whatsoever of a payment of £400 out of savings which she said were on deposit and totalled £500. On the other hand, the husband produced his own personal deposit account for 1969 showing a withdrawal of £500 at the appropriate time. The wife accepts that the sum of £1,500 being the final deposit paid in November 1970 was provided solely by the husband. The husband was adamant that he also provided the whole of the £500 booking deposit.

I am satisfied that both the £500 booking deposit and the final deposit of £1,500 were provided by the husband out of his own moneys and that none of these sums came from earnings or savings of the wife. I am also satisfied that the mortgage repayments made ever since by the husband in the sum of £23.65 per month were made by him from his own earnings and moneys.

The wife, however, claimed to have continued working for some nine or ten months after marriage and even after ceasing to work in view of the impending birth of the eldest child she claims that she received some £6 per week Social Welfare for a year or a year and a half afterwards. It was submitted that these earnings or receipts went into the family pool of finances and assisted in the running of the household and defraying the expenses thereof so as to assist in turn the husband in making the mortgage repayments.

I am satisfied that to some extent at any rate the wife's receipts during the first two years to two and a half years were used to assist in the general running of the household but that they formed a relatively small proportion of the household funds and even if the wife had been in receipt of nothing the husband would still have had little difficulty in paying the monthly mortgage repayments and in discharging the outgoings of the household. The husband is undoubtedly a very energetic and gifted businessman who not only was able to support his wife and children whilst the husband and the wife were living together but also was able to afford to lend substantial moneys to two sisters of his wife. The wife also claimed to have assisted the husband in debt collection and deliveries in connection with his business, but I am satisfied that such assistance was minimal and no more than one would expect any spouse to perform.

There was never at any time any agreement or understanding that the house was when bought to be partly the property of the wife. The house was bought in the sole name of the husband and he and he alone has paid all the costs of its purchase. Reliance was placed on behalf of the wife on a letter written by the husband's solicitor on the 31st of May 1984 indicating that the husband was transferring the family home into the joint names of the wife and himself. This was, however, written at a time when the husband was living separate from the wife by mutual agreement on a trial basis and was written in the hopes of achieving a reconciliation. Nothing came of that and such a letter cannot affect the property rights of the parties when it has never been in fact acted upon. Either the wife had or she had not an interest in the house prior to that letter and she has or has not such an interest now irrespective of that letter.

Various authorities have been cited to me by Counsel in their helpful submissions and I have come to the conclusion that the family home No. 16 is the sole property of the husband. In this regard I reverse the Order of the learned Circuit Court Judge.

I come now to deal with the ownership of the moneys on deposit in the Irish Permanent Building Society. While there were three separate accounts, one is really only concerned at this stage with two of them. The reason for this is that one of the accounts which was in the joint names of the husband and the wife and totalled £2,893 was used by the wife during the period of trial separation from the husband for living expenses at a stage when the husband was not paying any maintenance. The other two

accounts were largely the proceeds of rents received from a flat and from another house owned by the husband and collected by the wife and put on account in her sole name. The bigger of these accounts amounted to £10,282 and the smaller to £3,101 making a total of £13,383. These moneys were drawn out from those accounts and put into another account with the Irish Permanent Building Society in the name of the wife's sister but clearly on trust for the wife.

It is contended on behalf of the wife that in any event these moneys being put into her sole name with the consent of the husband would be hers by reason of the presumption of advancement. It should be noted however that the presumption of advancement is relatively easily rebutted in cases where the property rights of a husband and wife are being determined on the break-up of a marriage. See Gissings case and Pettits case and also the judgment of the Supreme Court in R.F. .v. M.F. 24th October, 1985.

The wife herself said in evidence that from time to time she drew the interest earned by the moneys on account with the Irish Permanent Building Society but that she never touched the capital. The moneys were transferred from her own name into the name of her sister when the Barring Order application was pending in the District Court in November 1984. The fact that the wife never thought fit to draw against the capital of the moneys and felt it necessary to take the moneys out of her own name and put them into her sister's name would suggest that she did not regard herself as the absolute owner of the moneys but that the husband still had a claim on them and would tend to

rebut the presumption of advancement. However, the husband has agreed in the witness box that he will not make any claim for the repayment of these moneys and that they may now be regarded as the sole property of the wife.

In these circumstances my task in relation to the ownership of these moneys is made easy and I now declare that the moneys now standing in the name of the wife's sister on an account in the Irish Permanent Building Society and now amounting to £11,005.28 together with such interest as has been earned thereon since the 30th of June 1985 are the sole property of the wife.

MAINTENANCE

The first question to be decided in relation to maintenance is as to whether the wife is entitled to maintenance or not at all. The reason why this question arises is that the husband alleges that the wife by leaving the family home on the 12th of February 1985 deserted him and accordingly by virtue of Section 5 (2) of the Family Law (Maintenance of Spouses and Children) Act 1976 no Order for the maintenance of the wife can be made by the Court.

In support of this it was submitted on behalf of the husband that conduct approaching what would be required to justify a Barring Order would also be required to justify a wife in leaving the family home so that such departure from the family home and from the husband would not amount to desertion. Counsel conceded

that the conduct need not be quite as grave as that which would be required for a Barring Order but it was submitted that it would be something analogous to it.

It was submitted on behalf of the wife that the conduct of the husband was such as to make it impossible for her to continue to live in the family home when he was residing there. Great stress was laid upon the allegation of two assaults by the husband on the wife.

The husband admits that on an occasion in December 1982 there had been a very heated row between himself and a sister of the wife's when they were all together at a party in a night-club. As a result of this row the husband says that his wife would not speak to him and that she also was involved in the row and he admits that he butted her with his head in the face on arriving home. That was an incident which took place in December 1982.

The other physical incident relied upon by the wife as justifying her departure from the family home in February 1985 was that which took place in July 1984 following the return of the husband to reside in the home after the trial period of separation. I am satisfied, however, that in relation to the July incident, the husband's grasping of the wife's right arm was due to the fact that the wife was trying to jab him with at least a cork-screw (which she herself admitted she had taken into her hand) and possibly also a carving knife which the husband alleged she also had in her hand and which he produced along with the cork-screw at the hearings before me. It seems to me that whatever the precise rights or wrongs of what happened

on that occasion neither party can make much complaint against the other arising out of it. This means that in the course of the fourteen years of marriage there was one incident of physical assault by the husband on the wife and that was an incident that took place in December 1982 something over two years before the wife left the house with the children.

The question then arises as to whether the general conduct of the husband was such as to amount to sufficient mental cruelty to justify the wife in leaving the house. The husband is and always was ambitious and a very hard worker. These are admirable qualities in themselves but the husband possesses them to such an excessive extent that he could truthfully be described as a workaholic. This made the husband insensitive to the wife's needs for loving companionship and induced him to devote far less time to her than he ought to have done. It also made him rather unappreciative of the wife's work in the house and less patient with her than he ought to have been resulting in unnecessary tension and strain between them.

The wife for her part did not appreciate the demands which business makes on the life of the ambitious and hard-working self-employed businessman both in relation to leisure and domestic time-keeping. The wife was quite wrong in suggesting that the husband drank to such an extent as to indicate a tendency to alcoholism and this suggestion was flatly rejected by Doctor Meehan the Psychiatrist.

This is a case where there was a want of give and take by both parties. This is most unfortunate because both parties are good people who should have been able to achieve a happy marriage and, dare I say it, might still do so with the help of proper marriage counselling.

Over the year of the marriage from February 1984 to February 1985 the husband was absent from the family home mainly at the wish of the wife for approximately half of that year. He was first of all absent on the trial separation basis between April and July 1984. He then returned to the family home until September when on the 4th of that month at the request of the District Justice he remained absent again from the family home until the 4th of December 1984. On his return on the evening of the 4th of December 1984 I am satisfied that it was not the husband who refused absolutely to communicate with the wife but that it was rather the wife who refused to communicate with the husband who then in turn reciprocated in like vein.

I quote from Barrington J. in P. v. P.:

"When parties marry they marry for better or for worse.

This as I understand it includes accepting quirks and difficulties in the character of the other marriage partner.

To establish just cause for leaving the matrimonial home the partner who has left must establish some form of serious misconduct on the part of the other partner. Such conduct must as Lord Asquith said 'exceed in gravity' such behaviour vexatious and trying though it may be as every spouse bargains to endure when accepting the other for better or worse.

The ordinary wear and tear of conjugal life does not in itself suffice'".

If one spouse leaves and lives apart with the consent of the other spouse there can be no question of desertion. It is however quite clear in this case that the husband has never wished the wife to live apart and still wishes that she and the children should return to the family home and live with him. I do not think that in this case the wife has made out her claim that there were sufficiently grave and weighty reasons to justify her in leaving

the family home and living apart from her husband. In these circumstances it seems to me that the wife is and continues to be in desertion of the husband and I am precluded by Section 5(2) of the Family Law (Maintenance of Spouses and Children) Act 1976 from making any Order for maintenance in favour of the wife herself.

There still remains of course the question of the maintenance of the three children of the marriage and the husband accepts his responsibility to maintain them and further accepts that the wife should have custody of them. I quote again from Barrington J. in P. .v. P.:

"Both parties however appear agreed that the wife is the proper person to have custody of the child and both parties are also agreed that this means that she cannot work for some years to come. This in turn means that the maintenance for the child must include a sum sufficient to enable the mother to look after the child."

Section 5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976 so far as material to the circumstances of this case provides:-

"(4) The Court, in deciding whether to make a maintenance order 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

(b) the financial and other responsibilities towards any dependent children of the family and the needs of any such dependent children, including the need for care and attention."

The care and attention required by the children in this case will have to be provided almost wholly by the wife. In these circumstances it seems to me that I must provide a sum for the

maintenance of each of the children which will include a sufficient sum to make some reasonable provision for the care and attention which they will have to be given either by the wife their mother or if she was not available then by some paid help. In these circumstances it seems to me that the proper sum to fix for the maintenance of each of the children is a sum of £50 per week making a total of £150 per week which is to be payable in respect of each week of the year until further Order and irrespective of the fact that during some of the weeks of the year the husband may provide maintenance for the children when he has access to them.

Access

Weekly access

The husband is to have access to the children on each Sunday from 10.00 a.m. to 6.00 p.m. The children are to be left by the wife at the family home No. 16 or allowed walk there weather and circumstances permitting. The children are to be delivered back to the wife's residence or to be allowed to walk from No. 16 to the wife's residence weather and circumstances permitting.

Weekend access

The husband is to have weekend access to the children by having them to stay with him from Friday night at 8.00 p.m. to Sunday evening at 7.00 p.m. once every two months. For Christmas 1985 and to count also as a two monthly weekend access the husband is to have access from Friday the 27th of December 1985 at 7.00 p.m. until Monday the 30th of December 1985 at 7.00 p.m.

Holiday access

The husband is to have access by way of having the children stay with him for a two week period between the middle of June and the end of July each year. The intention is that the husband should take the children to some suitable place for a holiday such as the

seaside or the country. The husband is not to take the children out of the jurisdiction without the consent of the Court or of the wife but such consent is not to be unreasonably withheld by the wife if for example the husband makes suitable arrangements for holidaying with a brother or sister in England or elsewhere.

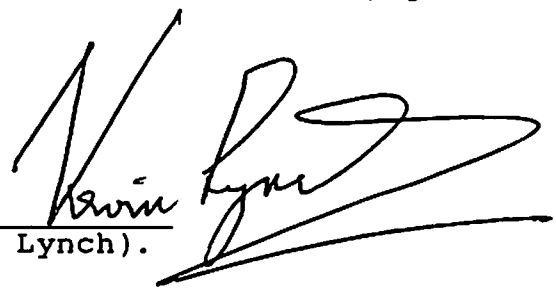
Both the husband and the wife are to encourage the children in their relationship with the other and under no circumstances is either to try to alienate the children from the other partner.

In addition to the foregoing access, the husband is at liberty to talk to his children if he should meet up with them in the neighbourhood or elsewhere and to receive his children into his home if they, acting on their own initiative, should call on him, but any such communications or visits must be limited so as not to interfere with the wife's domestic arrangements, for example, times for meals or homework or bed etc..

The husband and the wife are at liberty if they agree between themselves to alter any of the above provisions regarding access either generally or for any specific occasion.

Liberty to each party to apply to the Circuit Court.

Signed


(Kevin Lynch).

For the wife:- Carol Moran B.L.

instructed by Hanby Wallace & Co. Solicitors

For the husband:- Senator Catherine McGuinness B.L.

instructed by Sean E. McDonnell & Co. Solicitor