

Judgment Title: S. -v- S.

Neutral Citation: [2011] IEHC 122

High Court Record Number: 2010 112 & 131 CAF

Date of Delivery: 25/03/2011

Court: High Court

Composition of Court:

Judgment by: Abbott J.

Status of Judgment: Approved

Neutral Citation Number: [2011] IEHC 122

THE HIGH COURT

CIRCUIT COURT APPEAL

FAMILY LAW

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

2010 112 CAF

2010 131 CAF

CIRCUIT COURT RECORD NO. 1507/2008

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

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

4. An order that the applicant to have sole custody of the child, such order to be stayed pending further order of the court and the child to continue to reside with the respondent in the meantime.

5. An order directing access to the child to his father the applicant as follows (details given).

6. Unless otherwise specified, the child will be brought to Dublin by the respondent or third party on her behalf and shall be returned by the applicant and collected by the respondent or her agent at Gatwick Airport, London on the return day.

7. That the court will require a s. 47 report to decide on the long term arrangements for custody and access, the existing report being regarded as insufficient for that purpose given the lack of proper contact between the applicant and Paddy James at a time when the report was carried out. The parties have agreed to appoint Professor Sheehan, subject to his time availability to report to the court and directs that he be given a copy of Dr. Byrne's report.

8. The matter is adjourned to 29th November, for the purpose of updating the court regarding the s. 47 report and to fix or agree such further access as necessary pending the further hearing of this matter.

9. The remaining issues including those concerning the family home and maintenance be deferred to a later date.

10. Liberty to apply to the court at any time.

11. No order as to costs.

3. By notice of appeal dated the 20th October, 2010, the wife appealed against the whole of the above order.

4. It appears that the wife also appealed what she claimed was a further order of the Circuit Court made on the 22nd November, 2010, by notice of appeal dated the 22nd November, 2010. The wife subsequently swore an affidavit on the 23rd November, 2010, setting out the difficulties which she had with her pregnancy, the fact that she is a stay at home mother with zero income and that the husband did not take up the access which she offered for the child, which she claims was in accordance with Dr. Gerald Byrne's recommendations and where she says that there were no changes in the child's circumstances to warrant another s. 47 report. It appears that in fact the Circuit Court refrained from making any order on the 22nd November, 2010, as it considered in all the circumstances that as the matter was under appeal by the notice of appeal dated the 20th October, no further action should be taken notwithstanding that there was no stay on the order of the 15th October, 2010. She also took issue with the referral letter to Professor Sheehan for purpose of s. 47 report although she agreed to Professor Sheehan carrying out the report. The referral letter is

unobjectionable.

5. To say the least, the situation in regard to these two appeals (which may be regarded as the one appeal for the purpose of this application) is confusing. On the one hand the appeal dated the 15th October appeals the whole of the order, much of which deals with the financial and property arrangements between the parties on a judicial separation, especially the postponement of a decision by the Circuit Court in relation to arrangements affecting the family home in Dublin, and on the other hand, the notice of appeal dated the 22nd November, 2010, and the affidavit filed subsequent thereto and sworn on the 23rd November, 2010, by the wife, concentrates only on custody, access and s. 47 report arrangements to the exclusion of any issue relating to the family home. The wife has never caused to be placed before the court any order of the Circuit Court made on the 22nd November, 2010, nor has she taken any steps to prepare a book of appeal in respect of her general intention to pursue an appeal in the High Court, nor has she taken the trouble to attend the High Court in person or through any agent. Instead, she has continued to correspond with the High Court by a series of emails pointing out variously that she is unable to travel and seeking an adjournment. In one of her penultimate emails she suggested that she would not travel but invited the court to decide her appeals on the basis of her affidavit. The appeals are somewhat lacking in that they purport to appeal issues relating to the family home – which themselves have not been decided but postponed for decision by the Circuit Court. There is a risk that such a course if followed up, could amount to an attempt to illegally circumvent the right of appeal on that issue.

The Law

6. Although the Circuit Court and the High Court on an appeal from the Circuit Court is a tribunal, the jurisdiction of which is conferred by Statute, there arise indisputable implied powers of such a court to regulate its own procedure and protect fair trial process and to prevent steps from being taken that would render judicial proceedings ineffective and unjust, and to take steps to prevent abuse of process. Foremost among these powers is the power to dismiss a claim for want of prosecution or delay. This power is provided by the jurisprudence emerging in cases such as *Primor v. Stoke*, provided *Kennedy Crowley* [1996] 2 I.R. 475, and the earlier and later cases regarding the power of a court to dismiss proceedings in the ground of delay in initiating or prosecuting the proceedings. In this jurisprudence the courts have developed a complex set of (often competing) criteria for deciding whether proceedings ought to be dismissed or be dealt with on a conditional basis to allow a limited time for a party to mend their hand before the proceedings would be dismissed, or in certain circumstances to order an early trial and hearing of the case. These principles have little overlap with the practicalities facing a court in dealing with an appeal in which issues of delay arise for the following reasons:-

1. Firstly, when an appeal is filed in the High Court from a decision in the Circuit Court, the pleadings are closed and a body of evidence has arisen and, therefore, the case is not plagued with the type of pleading delay which arises in the "*Primor*" delay cases.
2. The court has more immediate control of the proceedings

insofar as it is in a position to set an early date for the hearing of the appeal and this is typified by the procedure whereby the High Court sitting in Dublin may transfer a case from Circuit or *visá versa* in cases where delay has become critical or where the case inherently has an urgency arising through no fault of either party.

3. The delay which a court will tolerate in the case of appeal is generally much shorter and, as a matter of practice, the High Court strikes out appeals on a regular basis in the event of the appellant failing or refusing to take steps by way of filing a book of appeal or appearing to prosecute the appeal. In such cases these drastic steps have in the light of the jurisprudence arising in the "*Primor*" case to consider the balance of justice between the appellant who is to have its case struck out by the striking out of the appeal, and the respondent who may seek the benefit of a positive decision in the Circuit Court in early course. The court generally considers this balance in terms of assessing the balance between the prejudice suffered by the respondent by reason of the default of the appellant. In financial terms such prejudice could arise in family law cases between the parties where matrimonial property is subject to heavy debt, giving rise to penal interest payments or is otherwise in danger of deteriorating or where the parties cannot solve a difficult situation of living together without separation until they secure the release of assets to enable them to purchase or rent alternative accommodation.

However, a distinctive and often overriding consideration arises especially in family law delay cases from the fact that in these cases there is considerable urgency in resolving custody and access issues for the children in addition to maintenance payments for them. It has been long the practice of the courts to deal with infants' claims and minor matters with the utmost urgency. While this practice does not have the statutory backing as it might have in other jurisdictions and in Scotland, for instance, (except abduction cases) it has foundations in statute and, indeed, in the Constitution arising from the obligation of the courts to give paramount consideration to the interests of children in relation to issues where they are concerned. Thus, in a delay case the interposing of a child's interest on the competing interests of the parties to an appeal will always give a far greater urgency to the necessity to dispose of the appeal and to penalise delay.

This greater urgency poses a dilemma for the appellate court seeking to solve the problem of delay by reducing considerably the circumstances where the appellate court may appropriately strike out the appeal for failure to prosecute by reason of the fact that such striking out may penalise an innocent child whose interests may not be properly catered for by the order appealed against.

7. The second implied power of the court for the protection of its own procedure is the power to dismiss an appeal which has become vexatious or oppressive or

which is being prosecuted oppressively. Most often the power to strike out an appeal would arise in an instance of oppression or vexatiousness where there is an absence of merit in the appeal. However, the manner of the pursuit of the proceedings by not appearing but issuing emails to the court (as in this case) could be regarded as oppressive, especially where the interest of a child is concerned.

Conclusions

8. The wife has been guilty of delay and oppressive conduct in pursuing her appeal having regard to the following:-

1. The fact that the husband has had no access to the child as a result of her disobedience of order of the Circuit Court which has not been stayed since November, 2010.
2. Notwithstanding accommodation by way of extension of time to allow her birth of her other child the wife has taken no steps to present herself in court or have an agent represent her.
3. The wife proposes to have the appeal disposed of in a manner inconsistent with an oral hearing to which the husband is entitled.
4. Interfering with integrity of s. 47 process by raising spurious points about the referral letter.

9. The delay in resolving issues of the child's welfare in recent times is compounded by the fact that there has been serial delay in the case in relation to the proper resolution of custody issues and punctuated by no less than 15 orders of the Circuit Court from the 16th December, 2008, to the 15th October, 2010.

10. In all the circumstances of the case I consider that it is appropriate to dismiss the appellant's appeals having regard to the foregoing, and the balance of the interests of the parties, most particularly the interests of the child insofar as the structure of the order of the 15th October, 2010, envisages further consideration of access arrangements and a continuation of the judicial separation hearing by embarking on consideration of arrangements relating to the family home. It is, therefore, appropriate that the court protects its own process by dismissing the appeal and strikes out the appeal without prejudice to any claim which either party wish to make in the continuing Circuit Court proceedings.