

THE HIGH COURT

[2006 No.76 M]

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

BETWEEN  
BY ORDER

X EXECUTRIX OF THE ESTATE OF Y (DECEASED)

APPLICANT

– AND –

Z

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 5th October 2020.

I

**The Motion Brought**

1. This is an application for enforcement of an order for the sale of a family home made in the context of judicial separation proceedings between a male-female married couple. The wife has, sadly, passed away in the years since the judicial separation order was made and the proceeds of the sale of the family home, when sold, will fall to be distributed in accordance with her will. The executrix (Ms X) is not satisfied with the pace of the house-sale by the husband of the separated couple (Mr Z) and wants her solicitor to be entrusted with sole carriage of the sale.
2. A number of reliefs were originally sought in the originating notice of motion. These have been narrowed down so that only the following reliefs are now being sought: (i) an order providing for the applicant's solicitor to have sole carriage of the sale with respect to the family home known as [Stated Name and Address]; (ii) an order providing for the applicant to appoint a sole auctioneer; (iii) directions as to how the sale of the family home is to take place; (iv) such further directions and/or relief as the court sees fit; and (v) costs. A further order that the order of 2008 is valid and subsisting was also sought and no objection was taken to this.
3. Given the breadth of the matters raised by the respondent at the hearing, it is important at the outset of this judgment that the court respectfully emphasise that what is being sought by the applicant is, in truth, but enforcement of an order which accompanied an order of judicial separation made in respect of Ms Y and Mr Z on 29 October 2008, which, *inter alia*, granted:

*"to the Respondent [Mr Z] an exclusive right of occupation in the...family home of the parties until the [Stated Child]...shall have attained the age of 18 years, subject to the property being sold no later than the date of [the Stated Child]...attaining 18 years with the Applicant [Ms Y] to be entitled to 17.5 % of the gross sale price [as Ms Y is now deceased that sum goes to the estate and falls to be divided among the beneficiaries] with the Respondent to be entitled to the balance[,] the Applicant's said share to be held for her benefit by the Guardian ad Litem...or such person appointed by him or by the Court in default of same..."*

4. As mentioned, Ms Y is now, unfortunately deceased; however, she has made a valid will and once the family home is sold, her children are the principal beneficiaries under the will.
5. The family home, a fine property, has been on the market since June 2018 for a particular sum. It was valued for Ms X in 2019 at about 87 per cent of the price currently being sought by Mr Z.
6. Ms X does not accept that Mr Z has any real intention of selling the house and considers that he has been obstructing the sale. So she has come to court seeking to enforce the order of 29 October 2008.
7. It emerged at the hearing that Mr Z has conducted some viewings, and that there was even an offer for in or around the valuation that the estate has placed on the house – which suggests that Mr Z has not been quite as inert as Ms X initially maintained, though it suggests also that the valuation placed by Mr Z on the house is too high and is impeding a sale.
8. It is clear to the court from the pleadings and the hearing of the within application that Mr Z wishes in effect to be a *de facto* executor in the sense of having exclusive carriage of the sale of the house, which will be sold at his pace and at his preferred price. But that, with every respect to Mr Z, is for him to ignore the fact that Ms X is the executrix, with duties incumbent upon her under law that cannot blithely be disregarded.
9. Historically, Ms X has shown a laudable willingness to allow Mr Z to have carriage of the sale provided certain reasonable conditions are met (*e.g.*, as to the provision of a solicitor's undertaking); however, Mr Z has not met those conditions, time is marching on, the house requires to be sold at a saleable price, the assets of Ms Y's estate require to be gathered in and distributed, the administration of the estate needs to be finalised (and the costs of administration will continue to rise to the detriment of the beneficiaries until it is), and doubtless Ms X, a woman who has suffered ill-health of late, wants to be freed of the slings and arrows that have been coming her way (not least from Mr Z) since she took up the reins of acting as executrix.
10. The court respectfully does not see how a gentleman who has been levelling all manner of allegations, including in effect that the estate has been looted by a solicitor, who raises all the difficulties that he raised at the hearing of this application (and which are unfortunately irrelevant to *this* application) can expect that the court would accept that nonetheless he is actively progressing a sale of the house at a reasonable price and should see a sale close in the near future. His actions to date, his persistence in seeking a sales price some 13 per cent or so above current market value, just do not sit well with the sense that Mr Z wishes to facilitate the sale of the family home and has been doing, and will do, all he can to progress it.
11. The foregoing being so, there is only one way that this application can go, and that is in favour of the applicant.

## II

### Some Issues Irrelevant to This Application

12. The court is hesitant to deal in any way with the following points as – and it respectfully emphasises this point – they have *nothing* to do with the application at hand. However, they were raised at the hearing and are touched upon briefly hereafter, though all of the court’s observations in this regard must be seen as *obiter* and it makes no findings of fact.
13. By way of general point, if Mr Z and/or his children consider (and they appear genuinely to consider) that they have suffered some form of legal wrong in the manner in which the estate of Ms Y has been administered to this time, or that they have suffered a legal wrong in terms of any legal advice that they have received, then they must seek the appropriate legal redress. That they must do so is not just a matter of form: processes fall to be followed and specific forms of action brought, not because of bureaucratic whim on the part of the courts, but because those processes exist to ensure that everyone gets, if the court might be forgiven a colloquialism, a ‘fair crack of the whip’ in terms of having a case heard. That way, when one party walks away the victor, the other side is left feeling ‘Well, at least the process was fair and my side of matters was heard’.
14. Coming to a fairly straightforward application like the present application and raising all manner of alleged wrongdoings and seeking reliefs that are not available in the context of this application is not the right or best way to proceed. In an application like this, the court either grants the relief sought by the executrix or refuses it, essentially by reference to the strength of the case that she makes out as to whether the sale of the house has been impeded thus far and will proceed more efficiently if sole carriage of the sale is entrusted to a solicitor. It is, with every respect to father and children, a waste of the beneficiaries’ money, *i.e.* the children’s money, for Mr Z (accompanied by his children) needlessly to prolong matters as they have prolonged the making of the within application entering into matters that are not relevant to *this* application and seeking reliefs that are not available in *this* application – for where else is the money to pay the lawyers for their work in such needlessly protracted proceedings to come from, other than from the estate which the children stand ultimately to inherit?
15. Mr Z struck the court as a good father who wants to protect his children. If that is what he wants (and the court does not doubt that it is what he wants) then Mr Z needs, if the court might respectfully offer some counsel, to proceed correctly and to pick his battles. His children’s best financial interests lie in a smooth and swift sale of the home in accordance with the order made in the judicial separation proceedings, a distribution in accordance with Ms Y’s will, and a finalisation of the administration, with the children free thereafter to do what they want with their money. If one or more of the children wish to spend money on legal proceedings in respect of some alleged wrong, so be it – though they would be wise to be heedful of independent legal advice in this regard, and to remember that litigation is a financially risky venture in which even the largest of inheritances may not be long in the losing.

### i. The Guardian *Ad Litem* Matter and the Alleged Agreement

16. Back in 2017, the children indicated that they wanted nothing to do with the estate, and there was some to-ing and fro-ing about getting a waiver and indemnity from them. The youngest child was then under 18 years of age and needed a guardian *ad litem* when it came to the waiver and indemnity. However, the lawyers for the estate told the children that if they waived their inheritance, it would not go to Mr Z but would ascend through the family line by partial intestacy to their maternal grandmother. This was not what the children wanted and the proposal fell through.
17. While all this was going on, the solicitors for Mr Z and his children advised that they would be seeking to appoint a guardian *ad litem*. Remarkably, when they did so, they, despite not being the solicitors for the estate, entered an appearance on Ms X's behalf. Ms X's solicitors objected by correspondence to this being done, turned up in court on the day of the motion to object, were successful in this regard, but, in an ostensibly strange turn of events, had costs awarded against them.
18. An appeal against the substantive decision followed but was settled between counsel before or during the appeal hearing, it being agreed, *inter alia*, that the costs of the trial court and the appellate court should come from the estate. Presumably, though the court does not know this, the reasoning was that if the costs came from the estate then the children would in any event have ended up paying them indirectly (via a reduction in their eventual inheritance) had the court order as to costs gone as one would instinctively have expected. In the end, the solicitors for the estate, for reasons unknown, waived their costs in this regard. (In passing, still unclear to the court is why, if the children do not want some or all of their inheritance, and want their father to get it instead, they do not simply take the entirety of their inheritance and gift to their father whatever they want to gift to him, having first taken independent legal and any other suitable professional advice before so proceeding).
19. Mr Z and his children appear genuinely to believe that there was another agreement made on the day of the above-mentioned settlement. This alleged further agreement sits separate to the settlement agreement that was undoubtedly drawn up between the parties and perfected by the County Registrar. The first the estate learned about the alleged agreement was nearly a year after it was supposed to have been agreed. According to Mr Z and the children, the alleged agreement agreed that the arrangements under the will would be unwound (*sic*), that there would be no more court appearances, and that the children would get their inheritance. However, among the correspondence exhibited in the copious pleadings underpinning the within application is correspondence from the solicitors for Mr Z and his children in which those solicitors advise Mr Z and his children what was agreed on the day – and those solicitors are not in agreement with Mr Z and his children as to what was agreed. Where all the truth of this lies, does not fall to be resolved at this time. The court would but note that for Mr Z and his children to be correct would require that the estate's solicitor, the estate's counsel, the notes of the estate's legal team, the solicitor to Mr Z and his children, and their counsel must all be wrong. But, in the context of the within application, which is concerned solely with the sale of the house, where does it get matters in any event as to who is wrong and

who is right in this regard? The house still falls to be sold in accordance with the order for sale made in the judicial separation proceedings, *i.e.* the house sale has nothing to do with the will; it proceeds on foot of the court order, not the will.

**ii. Other Alleged Wrongs.**

20. In addition to the foregoing, Mr Z and his children consider that the solicitor tasked with the administration of the estate is guilty of looting the estate, that a previous distribution made ought not to have been made, that the said solicitor should be liable in damages and/or fined (the court is unclear as to who is to fine him), with Mr Z seeking in effect to be allowed to act as the *de facto* administrator of the estate – not that it is open to the executrix simply to ‘hand over’ her functions in this way. Again, if Mr Z and/or any or all of the children consider that they have some form of legal complaint, they need, with respect, to proceed by way of the correct form of legal proceedings, having first obtained independent professional advice as to their prospects of success. For the avoidance of doubt, given the seriousness of the allegations levelled at the solicitor, a gentleman bound by legal and professional duties, the court ought expressly to note that it makes no finding/s against him. Nor does it see, on the evidence before it, why that solicitor ought not to have exclusive carriage of the sale of the family home.

**III**

**Conclusion**

21. The court will order that the order of 29 October 2008 be considered to be valid and subsisting and, for the reasons aforesaid, the court will grant the reliefs sought.

**TO THE APPLICANT/RESPONDENT:**

**WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

*Dear Applicant/Respondent*

*I have dealt in the preceding pages with various issues presenting in this application. Much of what I have written might seem like jargon. In this section, I identify briefly some key elements of my judgment and what it means for each of you. This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.*

*FOR THE APPLICANT. My sense from reading the papers and listening to your counsel is the same as yours, namely that to enable you to discharge your role as executrix, and to ensure that the inheritance your late sister’s children will receive is not unduly depleted by the ever-rising costs of administration, it is necessary that the house be sold as efficiently as possible. I am therefore going to make a number of orders that will assist you in this regard. These include entrusting exclusive carriage of the sale to your solicitor and empowering him to appoint an auctioneer. I will ‘re-list’ this matter, *i.e.* have it come before me again, next June. My reason for ‘re-listing’ is to try and inject some impetus into the sale process. I am not ordering that the house must be sold by next June. I would respectfully encourage you to keep an eye on how matters proceed in a bid to ensure that the sales process is as efficient/effective as possible.*

FOR THE RESPONDENT. It was clear to me that you genuinely want to maximise your children's inheritance and have concerns about the administration of your wife's estate to date. However:

- (i) *for so long as the administration continues, its cost will rise, reducing the size of your children's inheritance, so it is in their interests that the house be sold as efficiently as possible, the assets distributed and the administration finalised;*
- (ii) *I have concluded, with respect, that while you have made some effort to sell the house, the efficiency of the sales process will improve if the proposed solicitor is given exclusive carriage of the sale and empowered to appoint an auctioneer;*
- (iii) *I will 're-list' this matter, i.e. have it come before me again, next June. My reason for 're-listing' is to inject some impetus into the sale process. I am not ordering that the house must be sold by next June.*
- (iv) *if you or your children consider yourself to have suffered one or more legal wrongs, you must seek appropriate legal redress. It is a waste of your children's inheritance for you and/or them to prolong matters as this application has been prolonged by raising concerns that do not fall to be decided in the context of this application – for where else is the money to pay for such an unnecessarily prolonged court hearing to come from, other than from the estate that your children stand ultimately to inherit?*

*Please note that I make no observation/finding as to whether any or all of the grievances you aired at the hearing and/or in the material placed before me are well-founded, or whether any (if any) future legal proceedings, concerning those grievances would succeed. I note that to bring such proceedings would carry costs/risks, and your children may decide that their inheritance is better spent otherwise. I make no findings against the solicitor for the estate.*

*Yours faithfully,*

*Max Barrett (Judge)*