THE HIGH COURT

[2023] IEHC 254

[2023 No. 1 CAT]

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

– AND –

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

A

APPLICANT/RESPONDENT

– AND –

B

RESPONDENT/APPELLANT

JUDGMENT of Mr Justice Max Barrett delivered on 11th May 2023.

SUMMARY

This is an application in which I decide, for the purposes of the Domicile and Recognition of Foreign Divorces Act 1986, that, at the date of the institution in Country Q of her proceedings for dissolution of a marriage previously entered into in Ireland, the petitioner for that divorce had abandoned her Irish domicile of origin and acquired a domicile of choice in/of Country Q.

A. Background

1. In 1983, Ms A married Mr X, a man whom, she states, repeatedly beat her, sometimes in front of their infant child.

2. In or around 1986, Ms A and Mr B formed a friendship. By 1987 this had developed into a serious romantic relationship. Mr B indicated that this would have been known to others. Certainly it was known to Mr X who, on occasion, attacked Mr B (then a very young man).

3. Economically, the 1980s were not an easy time in Ireland. Mr B got some employment but his prospects were not great and he decided to leave. In 1988 he went to Country Q. He indicated in his evidence that his prime motivation in leaving was to get a job and to make some money (with a view to returning to Ireland to start a business, which – after some years – he eventually did). However, the antagonism being directed at him by Mr X was also a factor.

4. In 1988, Ms A followed Mr B to Country Q. She left without her child and came back again, it seems to see if her marriage could be saved. But by July 1989 she had had enough. I took a note at the hearings of what Ms A said at this point in her evidence. She said, amongst other matters that "*I couldn't, couldn't stay*" and that "*I was never, never coming back*".

5. Life in Country Q went well. Both Ms A and Mr B are hard-working individuals. They both got jobs quickly. Ms A recalled in her evidence that she worked six days a week. Mr B indicated in his evidence that he sometimes worked seven days a week, sometimes doing double shifts. So it was hard going, but at least they were working, there was money coming in, they had friends and Ms A indicated a number of times in her evidence that it was a lovely time, save in one respect: she repeatedly pointed to her heart in her evidence and indicated that there was always a niggling there over the thought of the child that she had left back in Ireland.

6. The child was looked after by his paternal grandmother (Mrs P) who came across in the descriptions of her by Ms A as a thoroughly good lady. The paternal grandfather (Mr P) also came across in the descriptions of him by Ms A as a gentleman. Ms A spoke to the child once a week by telephone (her face lit up in the witness-box as she described this). Ms A recalled that these calls were on a Monday evening. Mr B indicated in his evidence that he thought it was maybe another evening. Nothing turns on this.

7. Ms A also took every opportunity that she could to visit Junior in Ireland. Mr X seems to have done what he could to frustrate these visits. Mrs P did what she could to facilitate them. But it was not easy. There were several such visits a year. More often than not Ms A came to Ireland by herself. Sometimes she came in the company of Mr B.

8. Throughout this time, Mr X was an awkward and abrasive presence. Amongst other matters, he refused to allow the child to visit Ms A in Country Q. According to Ms A he did, however, indicate that when the child reached the age of 12 or 13 it would be for the child to decide with whom he wished to reside. It was not clear to me from the evidence whether Mr X would have been satisfied for the child to move to Country Q if the decision of the child was that he wished to live with Ms A.

9. Over in Country Q, the material circumstances of Ms A and Mr B were continuously improving. They went from renting a room to renting a flat, and in time – I will come back to this – they went on to buy a house together. But if I stick with matters chronologically for now, in 1992 Mr P (unfortunately) passed away. He had always been nice to Ms A and she attended his funeral, flying back to Country Q on the evening of the funeral. I do attach some significance to the fact that Ms A returned to Country Q at this time. She was obviously satisfied to attend a funeral at which Mr X was also present, so her fear of him seems, to some extent, to have diminished, presumably because she was living in Country Q which was home at this time.

10. In any event, back to Country Q, Ms A went. That was in October 1992. There, on 28th July 1995, so almost three years later (and all the while living in Country Q) she presented a petition for divorce. On 5th July 1996 she was granted a final and absolute divorce decree. Sometime around 1995 or 1996 Mrs P visited Ms A in Country Q. She came for a weekend and stayed for a week. She did not bring Junior as Mr X was still refusing to let the child leave

Ireland. There is no significance to this visit, save that I have in my notes that Ms A indicated at this point in her evidence that "*That was my life. I was there to stay.*"

11. Sometime around 1995/1996 – neither Ms A nor Mr B were precise as to the date – they bought a house in Country Q. Mr B indicated that he was told by a co-worker that he was better to buy a house than to be paying rent especially as, such was the buoyant state of the housing market in Country Q at the time, he could expect that any house he bought would likely rise in value. He acted on this sensible advice (which proved, as matters turned out, to be very good advice).

12. Mr B maintained that, so far as he was concerned, he bought this house as an investment property and that it remained his intention to return to Ireland and start a business here. This may have been his intention. However, I respectfully do not accept that the house he and Ms A bought and in which they lived as their family home was anything other than a family home. All of us when we buy a family home – if we are lucky enough to do so (and it is, sadly, a diminishing hope for many at this time) – expect that, all else being equal, chances are that over the 20-30 year lifespan of a mortgage the property we are buying will rise in value. However, that expectation does not suffice to turn a family home purchase into an investment property purchase. If that were the case there would be few if any family home purchases; they would all be investment property purchases. And though I have no evidence before me in this regard, I would be a little surprised if the lending institution which assisted in the purchase of the family home in Country Q was advised (or believed itself to be) assisting in anything other than a family home purchase, though again I have no evidence before me in this regard.

13. In 1996 there was some notion of Mr B buying a house in Ireland. However, this fell through and never happened. However, in 1998 he did buy a house in Ireland and later renovated it. Ms A indicated that *this* was to be an investment property. However, I respectfully do not accept that this was so, for the very good reason offered by Mr B in his evidence. He indicated that he converted the box room of what was a three-bedroomed house into an *en suite* bathroom and he posed the question in his testimony why he would do that if he was going to rent it out, that he could ask for more rent if he was renting out a three-bedroomed house rather than a two-bedroomed house (with *en suite*).

14. I find Mr B's evidence in this last regard to be convincing evidence that the house in Ireland was always intended to be the couple's family home and I am buttressed in this sense by what happened subsequently. The couple sold their home in Country Q, Ms A moved to the family home in Ireland in late-1998, Mr B had some work to finish in Country Q but by sometime in early-1999 he was back in Ireland and the two were ensconced in their family home. Since that time their lives have been in Ireland. Mr B set up a business here which is still going. Ms A worked separately for a time and then took a job as a secretary in her husband's business.

15. Mr B also indicated in his evidence that there was often talk between himself and Ms A over the years about the prospect of moving back to Ireland. But while he may have been determined to return, the evidence before me does not suggest that Ms A shared that determination. She had decided back in July 1989, when she left Ireland, that "*I couldn't, couldn't stay*" and that "*I was never, never coming back*". Just because, years later, she discussed the possibility of returning does not mean that she had resolved to do so, or was even teetering on abandoning (or even minded to abandon) her original resolution of July 1989. Spouses discuss all manner of future possibilities all the time without ever acting on them.

16. The move back to Ireland must have come very late in 1998 because Ms A and Mr B got married in Country Q on 20th November 1998. Unfortunately, this second marriage proved relatively short-lived. Unhappy differences arose between the couple and in February 2002, Mr B quit the family home and the couple have never lived together since. So, at the time of writing, the relationship between them has been ended for over two decades.

17. Mr B sought a divorce in Ireland sometime around the end of 2004. Matters then took the turn that has led to the present application coming before me. In April 2006, Ms A received legal advice that the circumstances that I have described above pointed to her, as a matter of Irish law, (i) having retained her domicile of origin in Ireland at all times, and (ii) never having acquired a domicile of choice in Country Q, with the result that (iii) the divorce in Country Q would not be recognised as a matter of Irish law and hence (iv) Ms A, as a matter of Irish law, has continued to be married at all times to Mr X.

18. Ms A proceeded in accordance with this advice for a time, subsequently switched solicitor (and counsel) and now no longer accepts this advice. There was some suggestion at the hearing that there was some significance to her having accepted the initial advice and having proceeded

on same and that (for whatever reason) Ms A is no longer satisfied to proceed on this advice. In this regard, however, I respectfully accept the submission of counsel for Ms A. The advice received in 2006 was but advice and Ms A acted on that advice. She later switched solicitor (and counsel) and now is proceeding differently (I presume on different advice, though my notes do not indicate that this was expressly stated). When doctors honestly differ, their patients sometimes die; when lawyers honestly differ, their clients sometimes alter their course of action. That is all that seems to have happened here.

19. On 11th May 2022, Judge Berkeley adjudged in the Circuit Court that Ms A was domiciled in Country Q on 5th July 1996 and that her divorce in Country Q can be recognised in Ireland. That matter has come on appeal to me. I respectfully agree with the conclusion reached by Judge Berkeley.

B. Some Points of Particular Relevance

20. Before I proceed to consider the applicable law, it may assist for me to point out a few facts that seem to me to be of particular relevance in the facts as I have described them above.

21. First, in July 1989 when Ms Q fled Ireland, it was her evidence that "*I couldn't, couldn't stay*" and, notably, that "*I was never, never coming back*".

22. Second, in 1992 after Mr P (unfortunately) passed away, Ms A was obviously satisfied to attend a funeral at which Mr X was also present, so her fear of him seems, to some extent, to have diminished, yet she still returned to Country Q which was at this time clearly her permanent home. This is thoroughly consistent with the resolution that she had settled upon in July 1989 that she was "*never, never coming back*".

23. Third, from 1992 through to the time of her divorce (and for some time afterwards), Ms A continued to make her permanent home in Country Q, *i.e.* for her this was not some arrangement of an indefinite but less than permanent nature. There is nothing in the evidence or in her actions to the time of the divorce that she had in any way resiled from the resolution that she had settled upon in July 1989 that she was "*never, never coming back*".

24. Fourth, while there *may* have been talk of a possible return to Ireland over the years (and I suspect there are many emigrants who, from time to time, talk of the hope of return but never realise or perhaps even seek to realise that hope) as of 28th July 1995 (when she issued her petition for divorce) Ms A continued to live in Country Q and when she received her divorce in Country Q, there was no intention on her part to return to Ireland at that time. She had resolved in July 1989 that "*I was never, never coming back*" and she acted consistently with that resolution.

25. Fifth, Ms A and Mr B purchased a family home in Country Q in 1995/1996 and this acquisition followed on six/seven years of them living together in Country Q so it was but a further manifestation, at least on Ms A's part, now in bricks and mortar, of "*never, never coming back*".

26. Sixth, the arrangement whereby Junior was reared by his paternal grandmother seems to have been an effectively permanent one: there was no indication in the evidence by either party that there was ever any intention that this arrangement would be sundered or that Mrs P expected that she would be relieved at any point of the task of rearing her grandson or that Ms A intended eventually to resile from the resolution she had settled upon in July 1989 of "*never, never coming back*".

C. Some Statute Law

27. Section 5(1) of the Domicile and Recognition of Foreign Divorces Act 1986 states as follows:

> "*For the rule of law that a divorce is recognised if granted in a country where both spouses are domiciled, there is hereby substituted a rule that a divorce shall be recognised if granted in the country where either spouse is domiciled.*"

28. Section 5(7) of the Act of 1996 defines the term "*domiciled*" as meaning "*domiciled at the date of the institution of the proceedings for divorce*". Here that date is 28th July 1995.

D. Some Case-Law

29. I note in passing that the onus of proving that Ms A abandoned her domicile of origin (Ireland) for a domicile of choice (Country Q) rests on Ms A and, as Keane C.J. observes, at p.15 of his judgment in *D.T.* v. *F.L. and Anor* [2003] IESC 59, considered further below, is a "*significant onus*". As counsel for Mr B observed, even the verb 'to abandon' is a powerful verb and suggestive of the level of onus that a person situated as Ms A now finds herself must discharge. That said, however, one ought not to – if I might use a colloquialism – 'over-egg the custard': it is an onus that *can* be discharged and I do not understand Keane C.J. to be suggesting other than what he expressly states, namely that it is a "*significant onus*" (but not an insurmountable one).

30. In terms of applicable law, it is common case between the parties that the judgment of Keane C.J. for the Supreme Court in *D.T.* v. *F.L. and Anor* that is determinative of this appeal. Keane C.J. sets out the applicable law at pp.14-17 of his judgment, treating successively with *In Re Sillar, Hurley* v. *Winbush* [1956] I.R. 344, *T* v. *T* [1983] I.R. 29, and *C.M.* v. *T.M.* It seems to me that Keane C.J.'s customarily helpful analysis of the law can be reduced to the following questions:

(1) As a question of fact, following from a consideration of all the known circumstances of a case, is the inference that falls properly to be drawn, that the person on whom the above onus falls, has shown unmistakably by her conduct, viewed against the background of the surrounding circumstances, that she formed at some time the settled purpose of residing indefinitely in the alleged domicile of choice?

(2) Put in more homely language, is the said inference that she determined to make her permanent home in the place? (*Sillar*).

(3) Was there (and there needs to have been) on the part of the party on whom the onus of proof falls an intention to abandon her former domicile? (*Sillar*).

(4) Where the person on whom such onus falls makes a declaration which is supportive of the discharge of that onus (which declaration falls to be weighed with the rest of the evidence and may be a determining factor) is it the case that there are no established facts indicating more properly a contrary conclusion? (*Sillar*).

(5) Does the period lived abroad involve the volitional and factual transition which is the *sine qua non* for shedding a domicile of origin and acquiring a domicile of choice? (*T.* v. *T*).

(6) Does the period lived abroad involve more than the external manifestation of the temporary compulsion of circumstances? (*T.* v. *T*).

(7) Has there been a setting up of a permanent home in a foreign place whereby the situation which it is intended to create is intended to continue for the foreseeable future and may be altered only in the event of a change of circumstances which is not then (a) in contemplation or (b) anticipated as being likely to happen at a future date, but (c) excluding consequences such as the inevitability of old age and natural changes in family circumstances which are not anticipated in the short or medium term? (*M* v. *M*).

(8) Is it the case that what presents is *not* merely a setting up of home there for an indefinite period, involving the continuance of circumstances which are themselves indefinite as to likely duration? (*M* v. *M*).

31. If the answer to each of these questions is 'yes' then that points to a party having abandoned her domicile of origin and acquired a domicile of choice.

E. Consideration of Questions Identified in Part D

32. I turn now to address the questions identified in Part D.

33. (1) As a question of fact, following from a consideration of all the known circumstances of a case, is the inference that falls properly to be drawn, that the person on whom the above onus falls, has shown unmistakably by her conduct, viewed against the background of the surrounding circumstances, that she formed at some time the settled purpose of residing indefinitely in the alleged domicile of choice?

34. Yes. Upon quitting Ireland for Country Q in July 1989 Ms A had resolved that she "*couldn't, couldn't stay*" and "*was never, never coming back*". There is nothing to indicate that she had resiled from these resolutions by the time her divorce proceedings were instituted in Country Q on 28th July 1995.

35. (2) Put in more homely language, is the said inference that she determined to make her permanent home in the place?

36. Yes, for the reasons stated in response to Question (1).

37. (3) Was there (and there needs to have been) on the part of the party on whom the onus of proof falls an intention to abandon her former domicile?

38. Yes, for the reasons stated in response to Question (1).

39. (4) Where the person on whom such onus falls makes a declaration which is supportive of the discharge of that onus (which declaration falls to be weighed with the rest of the evidence and may be a determining factor) is it the case that there are no established facts indicating more properly a contrary conclusion?

40. Upon quitting Ireland for Country Q in July 1989 Ms A had resolved that she "*couldn't, couldn't stay*" and "*was never, never coming back*". There is nothing to indicate that she had resiled from these resolutions by the time her divorce proceedings were instituted in Country Q on 28th July 1995.

41. Mr B's intention may always have been to return to Ireland and start a business here when he could. That does not mean that Ms A, who was not even married to him until 20th November 1998, would resile from her previously stated resolutions that she "*couldn't, couldn't stay*" in

Ireland and was "*never, never coming back*" if and when Mr B came here (and even the fact of marriage did not necessarily mean that she would so resile).

42. (5) Does the period lived abroad involve the volitional and factual transition which is the *sine qua non* for shedding a domicile of origin and acquiring a domicile of choice?

43. Yes, for the reasons stated in response to Question (1).

44. (6) Does the period lived abroad involve more than the external manifestation of the temporary compulsion of circumstances?

45. Yes, for the reasons stated in response to Question (1).

46. (7) Has there been a setting up of a permanent home in a foreign place whereby the situation which it is intended to create is intended to continue for the foreseeable future and may be altered only in the event of a change of circumstances which is not then (a) in contemplation or (b) anticipated as being likely to happen at a future date, but (c) excluding consequences such as the inevitability of old age and natural changes in family circumstances which are not anticipated in the short or medium term?

47. Yes for the reasons stated in response to Question (4).

48. (8) Is it the case that what presents is *not* merely a setting up of home there for an indefinite period, involving the continuance of circumstances which are themselves indefinite as to likely duration?

49. Yes, for the reasons stated in response to Question (4).

F. Conclusion

50. For the reasons stated above, I will respectfully affirm the judgment and order of the Circuit Court of 11th May 2022.