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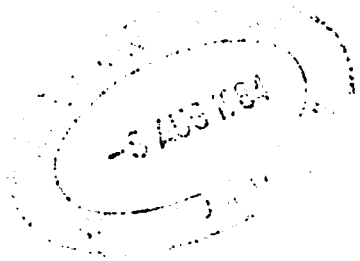
1981 No. 967 SP

1982 No. 49 SP

H. P.



Plaintiff

-and-

W. P.

Defendant

Judgment of Finlay P., delivered the 10th day of April 1984.

This is an Application to review the Taxation of the Plaintiff's costs arising in a Family Law Action.

The proceedings were commenced by Special Summons claiming the following relief;

1. Pursuant to the Guardianship of Infants Act, 1964 an Order granting the Plaintiff sole custody of the infants named in the title;
2. An Order pursuant to Section 5 of the Family Law (Maintenance of Spouses and Children) Act, 1976 requiring the Defendant to pay the Plaintiff maintenance;
3. An Order pursuant to the Family Home Protection Act, 1976 requiring the Defendant to discharge all mortgage repayments and insurance payments due on the family home;
4. Orders pursuant to the Family Law (Protection of Spouses and Children) Act, 1981 requiring the Defendant to vacate the family home and prohibiting him from entering the premises and from molesting or using violence against the Plaintiff or the children:

Further relief was sought by way of injunction prohibiting the Defendant in the alternative from entering the family home or from entering any other places in which the Plaintiff or the children might reside.

The matter came before the Court for the first time on the 27th of

November, 1981 pursuant to a Notice of Motion issued by the Plaintiff seeking interim Orders with regard to custody, maintenance and an interim Order under Section 21 of the Family Law (Protection of Spouses and Children) Act, 1981 and certain other ancillary relief. The Court by Order dated the 27th of November, 1981, the parties having reached an interim settlement of that Motion, made Orders by Consent thereon and reserved the Costs of the Motion.

The Defendant issued a Special Summons on the 22nd of January, 1982 claiming, pursuant to the Act of 1964, access to the children, pursuant to the Family Home Protection Act, 1976, an Order restraining the Defendant from pledging or interfering with or disposing of the chattels in the family home and an Order pursuant to the Partition Acts, for a sale of the family home.

The proceedings instituted by H. P. as Plaintiff and numbered 1981 No. 967 SP, were before the Court on a number of occasions, adjourned for the purpose of completing the filing of Affidavits by the Defendant and a date for them was then fixed which was subsequently adjourned. On the 29th of July, 1982, both these Summonses came before the Court for hearing and were heard together. Oral evidence was given and no Order was made on that date, but the further hearing was adjourned. The matter came before the Court again on the 26th of August, 1982 and an Order was then made by me, I having heard all the proceedings in these cases, firstly providing:-

> "That if and when the property in the house at 102 Mount Anville Estate, Goatstown, Dublin is vested in Helen Mary Purcell, she shall not, without the liberty of the Court, alienate, dispose of or charge her interest in the said property."

This was an Order made by me pursuant to agreements which had been reached between the parties and on which I heard evidence whereby

the claim of the wife pursuant to the Family Home Protection Act of 1976 for an Order requiring the Defendant to discharge all mortgage repayments and insurance payments due from time to time in respect of the family home and the claim of the Defendant W. P. in the proceedings instituted by him for the sale of the family home under the Partition Acts were compromised by an arrangement whereby the entire interest in the family home which was held jointly by the parties should be vested in H. P., the wife and she would undertake the responsibility for the discharge of the mortgage and for the insurance and other outgoings out of the house from funds being provided by members of her family.

The other three Orders made by me on the 26th of August, 1982 dealt with the obtaining of passports in the names of the children and with the access of W. P., the father to the children. In the Order made by me on the 26th of August, 1982 it is stated:-

"And the Court Doth Reserve the Costs of this Motion and Order."

It is quite clear from the Court file that there was, in fact, no Motion before the Court on that occasion, but what was before the Court was the hearing of the two Summonses. I am satisfied, therefore, that the reference to Motion in the reservation of Costs in the Order of the 26th of August, 1982 is a clerical error and, if necessary, should be amended under the slip rule so as to provide for a reservation of the costs of the proceedings and Order.

The matter came again before the Court on the 5th of October, 1982 and was adjourned to the 1st of November, 1982, when the Order pursuant to which this Taxation has been carried out, was made. The Order is again entitled, in the matter of both separate Summonses, and they were heard together. The Orders then made were as follows;-

An Order providing for the access of the Defendant in these proceedings to the children who were in the custody of the Plaintiff.

An Order for the payment of maintenance by the Defendant in these

proceedings to the Plaintiff and a noting of an undertaking by the Plaintiff not to sell or charge the family home, without the Consent of the Court, until the infants attain the age of twenty-one years.

In that Order the Plaintiff was awarded by me 50% of her Costs of the proceedings, record number, 1981 No. 967SP, when taxed and ascertained and I made no Order as to the Costs of the proceedings, record number, 1982 No. 49 SP, in which the Defendant in these proceedings was the Plaintiff and the Plaintiff the Defendant.

Having regard to these Orders what fell to be taxed by the Taxing Master were the Plaintiff H. P.'s proceedings, 1981 No. 967 SP , which were heard after the usual preliminary hearing before the Master and after a number of applications for adjournments and the fixing of dates on the 29th of July, 1982, the 26th of August, 1982 and the 1st of November, 1982. No Order with regard to the Costs of the Motion heard on the 27th of November, 1981 in respect of which Costs were reserved, was made and accordingly, they do not form part of the Costs to be taxed pursuant to the Order of the 1st of November, 1982 or pursuant to any other Order.

The sole item, the subject matter of this Application to review the Taxation, is the Instructions Fee of the Solicitor for the Plaintiff, which was claimed in the sum of £2,500.00. This was, on Taxation, taxed in the sum of £1,050.00 and on the carrying in of Objections, the Taxing Master increased this figure to £1,250.00.

Having considered the Report of the Taxing Master; having heard oral evidence by the Costs Accountant, who represented the Plaintiff on the Taxation, and having heard the submissions of Counsel,I have come to the conclusion that certain errors of principle have crept into the Taxation of this Bill of Costs with regard to the Instructions Fee and that it is necessary that it should be sent back to the Taxing Master for Re-Taxation.

At page 3 of the Report it is stated:-

"That the Costs in this matter relate to professional work done

and services rendered in relation to access to the infants herein and to the payment of maintenance by the Defendant, the Defendant being liable only, for 50% of the Costs when taxed. These Costs do not relate to the case at large or proceedings thereunder."

As I have mentioned, all the proceedings herein were heard before me and I am quite satisfied that this does not represent the correct appreciation of what was involved in the proceedings brought by the Plaintiff, the Costs of which I Ordered to be paid by the Defendant as to 50% thereof. As already indicated amongst the claims of the Plaintiff in those proceedings was a claim seeking to force the Defendant to discharge the mortgage on the family home and to pay insurance and other outgoings concerning it. A substantial part of the work done by the Solicitor for the Plaintiff in respect to that claim consisted of the arrangement which eventually was made between the parties and which is reflected in my Order of the 1st of November, 1982, whereby in lieu of that Order there would be an assignment of the Defendant's half share in the family home to the Plaintiff and consequential provisions including, inter alia, the discharge of certain debts due by the Defendant so as to permit maintenance to be paid to the Plaintiff, a secure home to be obtained for the Plaintiff and the children who are in her custody, and the Defendant to have a reasonable capacity to earn and continue to support himself and his family. Amongst other things in the protection of the children I heard extensive evidence from members of the Plaintiff's family as to the scheme and possibility of her being in a position to maintain the necessary outgoings on this home and I heard evidence with regard to the strong desirability of the children continuing to reside in it. An approach to the Taxation of the Instructions Fee on the basis that the only issues to which it relates are maintenance and access, is therefore, incorrect.

At page 5 of the Report, the Taxing Master states not only that he considered the Fee claimed to be excessive, something which frequently occurs in such Reports, but refers to it as an enormous fee and a gross

overcharge. Having decided, as I have done, that the matter must be re-taxed I do not intend to express any view with regard to the precise Instructions Fee which is appropriate to the case because I feel that the Taxing Master should have an originating opportunity, in accordance with the principles set out in this Judgment, of taxing it a new, but evidence given to me by the Costs Accountant called in evidence before me, of other cases where Instructions Fees in similar cases have been taxed, would indicate that this Fee could not be described as either a gross overcharge or as enormous in relation to the work done.

The next item on which I consider that there has been an error in principle in the approach of the Taxing Master to this Taxation is that as stated by him at page 7 of his Report his view is as follows:-

> "The fact that the Solicitor for the Costs did not choose to instruct Counsel, is of course a matter for him, but he cannot in my respectful view, claim any particular extra remuneration for himself if he chooses this course, nor seek to visit the result of his action to the detriment of the Defendant, the paying party herein."

Counsel on behalf of the Plaintiff has accepted before me that a Solicitor exercising his right of audience in The High Court and acting on behalf of his client without Counsel is not entitled to charge a separate or specific amount, over and above the appropriate Instruction Fee, which would be equivalent to the Fees payable to Counsel. He submits, however, that there should be an increase in the Instruction Fee compared to that which would be properly chargeable by a Solicitor carrying out the same work, but in a case where the advocacy in pleading was conducted by Counsel.

It seems to me that this submission is correct. A Solicitor who decides to plead a case himself must give to it at each and every hearing his personal attendance or the personal attendance of a senior and suitably experienced and qualified member of his firm. He must in addition, not only carryout

the ordinary preparatory work which would be appropriate for the purpose of briefing Counsel, preparing and having ready the documents he needs and securing the attendance of witnesses and submitting proofs of their evidence but must, it seems to me, make specific preparation by way of research into any legal points that may arise and by way of consideration of the approach and pleading of the case on the facts as would be appropriate for a Counsel preparing a brief. For this additional work an additional factor should, it seems to me, become material in the general assessment of his Instructions Fee.

By reason of these errors which have apparently arisen in this Taxation and in particular by reason of the fact that on the papers and information before him, the Taxing Master was apparently of the opinion that the case really only dealt with maintenance and access. I have decided that it is not an appropriate case for me to substitute a figure for that allowed by the Taxing Master, but rather that it is a case in which I should exercise my jurisdiction to request the Taxing Master to re-tax this Item on the Bill of Costs. I therefore direct the Re-Taxation of Item 33, the Instructions Fee on this Bill.

I have only one other comment to make. It was submitted to me by Counsel on behalf of the Plaintiff and not disputed by Counsel on behalf of the Defendant that a significant part of the Taxation and some of the adjournments for the obtaining of further information dealt with a question as to the payment by the Plaintiff to her Solicitor of a sum or sums of money in advance of the conclusion of the proceedings and by way of payment on account and according to the submissions made to me, if they are accurate, the Taxing Master appeared to hold the view that it was necessary for him to enquire into the amounts of such payments and the sources from which they came before proceeding to Tax the Plaintiff's costs.

This seems to me to be fundamentally incorrect. It is the Plaintiff in any proceedings or the Defendant, as the case may be, whose Costs are being Taxed and not the Solicitor for the Plaintiff or the Solicitor for the

Defendant as the case may be, in a party and party Taxation. The Plaintiff is entitled, in this case, to an Order taxing the Costs 50% of which she is entitled to recover from the Defendant. The Defendant cannot be concerned nor can the level or measure of those Costs be determined by any arrangement which may have been made by the Plaintiff with her own Solicitor by way of payment of Costs in advance. If the Plaintiff has, in total, paid to a Solicitor more than the Costs eventually taxed against another party, and more than the Costs which would, in addition, be taxed on a Solicitor and Client Bill, such a person has a perfect right to recover excess moneys back from the Solicitor concerned. If, on the other hand, a party has made to his or her own Solicitor a payment on account of Costs, which is less than the aggregate of the party and party Costs taxed against an opponent and the additional items of Solicitor and Client Costs properly payable, such party receives the Costs awarded, and out of them pays the balance due to the Solicitor.

approved.

J. A. Finlay