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(G)

THE HIGH COURT
(CIRCUIT APPEAL)

1984 No. 37 CA

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
AND IN THE MATTER OF EDWARD KEELEY AN INFANT
AND IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES
AND CHILDREN) ACT 1976
IN THE MATTER OF THE FAMILY HOME PROTECTION ACT 1976
AND IN THE MATTER OF THE MARRIED WOMENS STATUS ACT 1957
SECTION 12



G K

Applicant

and

E K

Respondent

Judgment delivered by O'Hanlon J., the 6th day of November 1985

In this case the husband and wife married on the 25th July, 1975 and Edward, the only child of the marriage, was born on the 9th September, 1977.

Both husband and wife have been in employment, with occasional breaks, throughout their married life. Each works in the Dublin City area, but their family home is in Maynooth, and this has caused difficulties in the past, since they have only one car available and their child has to be left in on their way to work, to stay with the wife's mother.

They are still living under the one roof, in Maynooth, but the wife, as Applicant, now claims an order giving her sole custody of their son, and an order declaring her interest in the family home and in the motor car.

The marriage has not been a very happy one. It was beset with difficulties from the early stages. The wife has had difficulties, physical or psychological, or both, in accepting the physical intimacy which normally prevails between husband and wife, and has suffered from feelings of inadequacy as a result, which have been very painful for her. The husband has suffered the inevitable feelings of disappointment and frustration which are to be expected when the marriage does not bring with it the sense of physical as well as spiritual union between the partners. Doctors and marriage counsellors have not been able to resolve these difficulties, and the couple have drifted apart from each other and have lost even the sense of comradeship which held them together at some stages of their marriage.

Now they are living a cat-and-dog existence which must be very difficult for each of them to bear. Their problems have been compounded by the severe physical incapacity which has always affected the husband, and which makes it difficult for him to earn his living in his chosen avocation as sign-writer. I am prepared to accept that he has to endure a considerable amount of pain, and this may well have had the effect of making him depressed and difficult to live with at times.

I do not think I can apportion blame between the parties for the present absence of a loving and caring relationship between them. The failure to achieve compatibility in the sexual relationship must throw a very great strain on any marriage, but neither partner can be blamed for physical or psychological incapacity over which they have no control. The wife claims that the husband was insensitive and lacking in affection and understanding when she was going through difficult periods, for example, when she was pregnant.

For my part, I am not prepared to condemn either partner as bearing the greater share of the blame for the unfortunate deterioration which has occurred in the relationship of this married couple. I think that each of them cares a lot for their son, Edward, and wants to do the best they can to bring him up properly and in a happy environment. I feel that to award sole custody of the child to one or other spouse would amount to a finding that the other had in some way proved himself or herself unworthy or unfit to have custody. A different situation could arise if the parents ceased to live together and it became necessary to choose one of two homes as the appropriate place for the child to live.

As matters now stand I propose to reverse the order made by the learned President of the Circuit Court and refuse the application made by the wife for sole custody of the infant. There can be no doubt about it, that bringing up a child in an atmosphere of continual tension, animosity and hostility between its parents must be gravely harmful to the wellbeing of the child. It would also be harmful for the child were the parents to break up and live apart, even with rights of access allowed in favour of the parent who was deprived for the time being of the custody of the child. No matter which course is taken, the child will suffer and will suffer seriously, unless the father and mother can succeed in living together and give the child what every child needs - the support and care of both parents throughout his childhood.

I am well aware of the seeming impossibility of achieving again a relationship of tolerance and mutual respect and affection between two people who feel bitterness and antagonism towards one another. The only hope is that the love each parent

has for their child might enable them to sink their differences in order to make life at least tolerable for him while he is growing up. These are human problems which cannot be solved by any magic wand waved in a court of law.

With regard to the question of ownership of the family home, there is no doubt that a much greater contribution was made by the wife towards the purchase moneys, both down payment and mortgage repayments, than was made by the husband. But the property was purchased in the joint names and the wife very fairly said in the course of her evidence that the parties intended the house to be in joint ownership with equal rights to both of them and with neither of them having the right to put the other out. I take the view that the intention of the parties was that the house should be in their joint names and joint ownership, without a resulting trust in favour of the wife derived from her greater contribution to the purchase moneys, and that her attitude has changed only because of the deterioration in their relations which has taken place since the property was acquired. For these reasons I propose to declare that each of them, the husband and the wife is entitled to a 50% interest in the family home, and to vary the order of the learned President of the Circuit Court in this respect also. I make the further declaration, which was not opposed, that the husband and wife are entitled to the family motor car in equal shares.

R. J. O'Hanlon

R.J. O'Hanlon.
6th November, 1985.