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THE SUPREME COURT
FAMILY LAW

171/00

Keane C.J.
Murphy J.
Fennelly J.

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

BETWEEN

P K (Otherwise C)
APPLICANT/APPELLANT
and
T K
RESPONDENT

JUDGMENT delivered the 5th day of March, 2002 by FENNELLY J.

The appellant is the applicant in High Court proceedings, issued in 1999, in which she seeks a divorce from the respondent pursuant to section 5(1) of the Family Law (Divorce) Act, 1996. The appellant and the respondent were married in New York on 20th April 1963. A decree of divorce was granted by a New York Court on 7th January 1980 on the petition of the respondent. The appellant contests the validity of that decree in Irish law, stating that neither party was at that time domiciled in New York. The judgment of the High Court (Murphy J), determined, as a preliminary issue, that the domicile of the appellant was that of New York State. Accordingly, the court ordered that the decree of the New York court was entitled to recognition in the State and that the marriage of the parties in 1963 did not subsist in the State.

The High Court hearing was partly oral and partly on affidavit. The learned trial judge, in particular, had the benefit of the oral evidence of the appellant including a detailed cross-examination.

This is an appeal against that judgment. Recognition of the New York decree depends on the domicile of the appellant being in New York. The domicile of the respondent was at all times Irish.

THE FACTS

The appellant was born in New York State in 1938, which gave her her domicile of origin. She has, however, an Irish family background and Irish relatives, which she cherishes and values highly. She came to Ireland to pursue a University degree in 1959. She obtained her an MA in 1963.

She met the respondent in Dublin in 1961. He moved to work at a university in the United States in 1962. The marriage took place in New York in April 1963. Both parties are teachers and writers.

The parties came to Ireland in September 1963. The three children of the marriage were born in 1964, 1965 and 1969. The respondent worked as a teacher in a secondary school and later at university. The appellant worked in the home looking after the family. In 1971 the appellant began to work at the same university. In 1972, the appellant was offered a full-time post at a university in the United States. For this reason and also to enable the respondent to concentrate on his writing, the family moved to the United States. In 1974, the family moved back to Ireland and purchased a house jointly with another couple.

Throughout the period from 1963 to 1977, the parties lived and worked primarily in Ireland, though occasional short-term teaching opportunities led one or other of them to go abroad for short periods.

During the years 1973 to 1977 the marriage began to be in difficulty. The

parties were effectively living apart. The respondent obtained a teaching post in Paris for the first half of 1977. The parties entered into a separation agreement on 21st November 1977. About the same time the family home was sold. The separation agreement provided for the payment of certain maintenance by the respondent for a period of four years only. He was to have custody of the three children, subject to an unusual arrangement under which the appellant was to have custody of one child for a period of three years and then of another child for a further period of three years. During these periods the appellant was to be responsible for the maintenance of the child save that the respondent would pay for education but in the first period only. It is agreed that the marriage had irretrievably broken down by 1977. The parties have, subject to some financial disagreements, abided by the separation agreement.

In late 1977, the appellant moved to New York. She had no job here and little prospect of employment. So she went to seek employment in New York. She says that the circumstances of the breakdown of the marriage and her separation from her children were extremely painful. She has not, however, been particularly successful in her pursuit of employment. At one stage she had to undertake house work and then office work in New York. Later she has obtained teaching posts for various periods of time but has never had permanent employment. She obtained two Fulbright Fellowships from the United States Government, one to a university in Ireland and one to the Netherlands. She had a four-year university appointment up to 1999 but has no pension or life assurance.

The appellant returned to Ireland in the years 1977 to 1980 to see the children. The respondent asked her to find the name of a lawyer in New York to get a divorce there. This she did. The divorce was uncontested. The appellant did not ask for any provision, though the separation agreement was annexed to the decree.

The appellant has lived and worked in the United States since 1977 apart form the brief periods mentioned and she has a very small rent-controlled flat in New York City.

In the course of her evidence and, in particular, of her cross-examination, the appellant maintained that she had always intended to return to Ireland. She accepted that she had ceded responsibility for the children to the respondent. The ensuing exchange perhaps best sums up the tenor of the evidence which was before the High Court:

"Q And I have to put it to you that the reason behind that separation agreement and that lead in provision of three years was to allow you to re-establish yourself on the academic circuit by making a return to New York?

A I am sorry, this is not so. I am not -- that is not so. My effort to gain work to remain constant in Ireland had been going on for since '74 to '77. I could not establish myself. I had not benefits. I had not assistance. I had not employment. I had nothing to offer my children. I left my children. They were the dearest and are the dearest thing in my life. This was not something I did for my career.
Q The only suggestion I am putting to you, Ms Colby, was that at that time you signed the separation agreement you intended to revert and go back to New York and start a new career. That is all I am putting to you, nothing more than that?
A I cannot accept that wording. I think it prejudices my being at that time, I signed that agreement because I was going back to New York to seek an income and sustainability and to begin a life. I think there is a great difference in the language and the description of myself as a person."

She also spoke about getting "into the mainstream of academia" in the United States. It is clear that the appellant wishes to obtain an Irish divorce in order to seek maintenance from the respondent. She maintains, however, that she has continued at all times to maintain her Irish domicile. She became an Irish citizen and has maintained her citizenship and her Irish passport to this day.

THE HIGH COURT JUDGMENT

The learned trial judge said that the evidence given by both parties was sincere, heartfelt and genuine.
He cited the judgment of Budd J *In re Sillar. Hurley v Wimbush* [1956] I.R. 344 ("*In re Sillar*"), stating that the proper inference to be drawn where a person is resident in the jurisdiction is that he or she forms an intention to remain there indefinitely and that mere statements to the contrary will not alter domicile. The trial judge said that there were no statements or independent evidence of domicile in this case. He did not rule directly on whether the appellant had lost her domicile of origin on moving to Ireland upon her marriage to the respondent. He appears to have assumed so. The respondent, upon the matter being raised at the hearing of the appeal, did not attempt to argue that the appellant had not acquired an Irish domicile of choice. The learned trial judge proceeded:

".... though not all of her children were born in this jurisdiction, maintaining a family home from 1964 to 1977 does provide evidence of animus manendi. One assumes that this may have been the basis for a domicile of dependency in the past.

However, that is no longer the position since C.M. v T.M. as cited above. A wife needs to prove that she has abandoned her domicile of origin to a domicile of choice. It may very well be that this proof is satisfied so long as a wife remains married and resides primarily in the domicile of her choice. In the present case the overwhelming evidence is that, after the separation agreement of 1977 that the Applicant either reverted to her domicile of origin or choose New York as a domicile of choice by maintaining her residence there for the past 22 years. While it is clear that the issue of domicile is as of January 1980 when the divorce decree was obtained, it is significant that the Applicant in going back to New York in 1977 to seek employment and agreeing to the terms of the separation agreement whereby custody would be given substantially to her husband, was reverting to the security of her domicile of origin.
In relation to the divorce it seems clear to me that, whatever pressure there might have been to agree, that the Applicant used the New York divorce in 1987 in relation to maintenance for her youngest child. It is inconsistent to maintain that as there was no system and no structure in Ireland at the time she had no alternative.
I find that in relation to her lawyer's letter of the 3rd September, 1987 and the 6th of October, 1987 that her lawyer recognised the jurisdiction of New York and the validity of the divorce decree.
It seems clear that the Applicant's contention that, while she was divorced in New York, that such divorce did not apply in Ireland to be at variance with her moving letter of August 22nd, 1978. She hoped that her husband would initiate divorce as quickly as possible. It was her wish too to be free ("free of the nightmare of insecurity which has been my present existence"). Indeed, in relation to the allegation of duress or pressure, this letter would seem to me to disprove passivity, let alone pressure or duress.
The Court has been asked to deal with the preliminary issue in these divorce proceedings. It seems clear to me that the domicile of the Applicant at the time of the divorce of January, 1980 was that of New York State."

In that passage, the learned judge was referring to evidence in the form of correspondence from the appellant to the respondent, which the respondent relied upon as showing acceptance of the separation, but also some correspondence concerning disputes about maintenance under the New York divorce decree, which was used to show reliance on the divorce decree.

THE APPEAL

The appellant accepts that the correct rule to be applied is whether either of

the parties to the marriage was domiciled, at the date of the decree of divorce, in the country whose court granted the decree. (*W v W* [1993] 2 I.R. 476).
The appellant's domicile of origin was in the State of New York, which, according to the finding of the learned trial judge, changed to an Irish domicile of choice upon her being married and moving to Ireland to raise her family and that this domicile had not changed at the time of the divorce decree. She had lived in Ireland for some thirteen years after her marriage. After 1977, she had lived in New York but this, she says, was on an involuntary basis. She was compelled to do so by economic necessity and the circumstances of the breakdown of the marriage.
The test, as laid down in *In re Sillar,* for determining whether she had reverted to her domicile of origin *is:*

"*From a consideration of the case law it is clear that it is a question of fact to determine from a consideration of all the known circumstances in each case whether the proper inference is that the person in question has shown unmistakably by his conduct, viewed against the background of the surrounding circumstances, that he had formed at some time the settled purpose of residing indefinitely in the alleged domicil of choice. Put in more homely language, that he had determined to make his permanent home in such place. That involves, needless to say, an intention to abandon his former domicil. Where he has made a declaration touching on the matter it must be weighed with the rest of the evidence. Such a declaration may be a determining factor, but will not be permitted to prevail against established facts indicating more properly a contrary conclusion."*
Furthermore, Black J, in *In re Joyce: Corbett v Fagan* [1946] I.R. 277, at page 301, stated that: *"one principle at least is beyond doubt, namely, that the domicile of origin persists until it is proven to have been intentionally and voluntarily abandoned and supplanted by another."* Counsel for the appellant also cited *T v T* [1983] I.R. 29; *Lambert v An tArd Chláraitheoir* [1995] I.R. 372.
Counsel for the appellant takes issue with the treatment by the learned trial judge of the evidence of the appellant herself regarding her actions and her explanations of them in the period following the separation from the respondent in 1977 and her subsequent return to New York. While it is accepted that it is easier to abandon a domicile of choice than a domicile of origin, the rationale is that one must always have a domicile. The learned trial judge did not attach enough weight to the appellant's own declarations regarding her intentions to return to Ireland when she could and to the fact that her going to New York was explicable by reference to need. (see *McC v McC* Supreme Court Unreported 28th July 1995.) These arguments were supported by extensive reference to the transcripts of evidence.

CONCLUSION

There was no real dispute at the hearing of the appeal as to the applicable

legal principles. Both parties accepted that the recognition of the New York decree depended entirely on whether the appellant had a New York domicile at that time. Since the decision in *W v W*, domicile of one party is enough for recognition. No broader basis for recognition of foreign divorces was advanced. In this connection, it has to be observed that parts of the judgment of the learned trial judge quoted above appear to imply that it may be significant that the appellant approbated the decree. The present case, must, however, in the existing state of the law, be decided exclusively by reference to the domicile of the appellant at the time of the decree.
Walsh J, in *Gaffney v Gaffney* [1975] I.R. 153 at page 152 stated that, since recognition of divorce decrees of another jurisdiction, depends on status which confers jurisdiction, there can be no place for rules based on estoppel which might prevent a party giving evidence on that issue. That dictum has not been challenged in this case. The evidence to which objection was taken in that case was evidence which the plaintiff had given to show that she had been coerced by threats into presenting a divorce petition in England, a petition which on its face asserted that the plaintiff was domiciled in England. It would have been egregious to exclude it. The dictum of Walsh J was recently approved in the judgment of Keane C.J. In *A.S. -v- R.B.* (Unreported 19th December 2001 at page 52). The matter was not, it appears, fully argued in that case. Nonetheless, the principle appears to have been broadly accepted in many jurisdictions, though with occasional dissent. (see Dicey and Morris, The Conflict of Laws, 13th Edition 2000 p. 762, Shatter's Family Law, 4th Ed. 1997, p. 413). For my own part, I would not wish categorically to exclude the possibility that a person had so acted in relation to a decree of divorce granted by a foreign jurisdiction might be precluded from questioning its validity. However, the issue has not been argued on this appeal and the facts would not appear to support even a generous application of the doctrine of estoppel.
The issue of whether the appellant had abandoned her Irish domicile of choice by leaving Ireland in 1977 and going to New York was, in the final analysis, one of fact for the High Court to determine. That court has determined this question in the affirmative. It is not contested that the learned trial judge directed himself correctly on the law. He had to decide whether the appellant had unmistakably, to paraphrase the test enunciated by Budd J, shown by her conduct, viewed against the background of the surrounding circumstances, that she had formed the settled purpose of residing indefinitely in New York.
An important element in that assessment is that New York was the domicile of origin. This does not mean, as a matter of principle, that a different test is to be applied where a person having earlier abandoned his domicile of origin in favour a domicile of choice, is now alleged to have reverted to the domicile of

origin. In each case, the question is as posed by Budd J in the passage cited. It is a question of fact. However, it is a matter of common sense that a person may be more likely to revert to a domicile of origin than to seek out a new domicile of choice. Put otherwise, it may be easier to persuade a court of the former. The learned trial judge was entitled to have regard to that fact, combined with the fact that the appellant's parents were still resident in New York. He referred to the "security of her domicile of origin".

He was also, I think entitled to have regard to the fact that, at the date of the hearing in the High Court, the appellant had been residing in the United States, if not always in New York, for more than twenty years, but in a qualified way. The date of the divorce decree is, in principle, the relevant date. However, retrospective light may be cast on the appellant's intentions on the earlier date by her later actions. (see *McC v McC* per Egan J 28th July 1995.)

It is true that the courts will not automatically assume a change of domicile where the move is explained by some external and intrinsically temporary factor. As in the case of *T v T* [1983] I.R. 29, a person may take up even permanent employment in another country without changing domicile. The common expectation is that he will return to his place of origin.

It was for the learned trial judge to make an appraisal of all the facts of the case. He had the benefit of hearing the appellant and of assessing her explanation of the motives for her move to New York in 1977 and her subsequent resumption of residence there. In particular, he was entitled to have regard to her statement (answer 115 quoted above): *"... I signed that [separation] agreement because I was going back to New York to seek an income and sustainability and to begin a new life."* In my opinion, there was sufficient evidence before the learned trial judge to sustain his conclusion that the appellant had a New York domicile at the time of the divorce decree. Accordingly, that decree is entitled to recognition in Irish law.

I would dismiss the appeal.