

Neutral Citation No: [2017] NICA 65

Ref: McC10446

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 25/10/2017

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND
ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN
IRELAND, CHANCERY DIVISION [2016 No 111538]

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NORA SHERRIE (A PATIENT)
BY HER CONTROLLER AD INTERIM AND NEXT FRIEND,
THE OFFICIAL SOLICITOR

Plaintiff/Respondent

-v-

MICHAEL DANIEL PATRICK SHERRIE

Defendant/Appellant:

—————
Before: Gillen LJ, Deeny LJ and McCloskey J
—————

McCloskey J (giving the judgment of the court)

Introduction

[1] The court has decided to exercise its power under section 38 of the Judicature (Northern Ireland) Act 1978 to remit this appeal to the learned trial judge on the grounds and for the purposes set forth below.

The Underlying Proceedings

[2] By an originating summons dated 16 November 2016 the Official Solicitor, acting on behalf of the above named Patient, applied to the Chancery Division of the High Court under RSC Order 85, Rule 2 for the following forms of relief:

- (a) A determination that on its proper construction, the right of residence conferred upon the Patient by the Will of her deceased spouse has terminated on the basis either that the Patient has ceased to reside in a specified dwelling house – hereinafter “the house”) or that the Patient is mentally or physically incapable of exercising the said right or for any other reason.

- (b) A determination that on the proper construction of the said Will all duties, responsibilities, obligations and other burdens of the Patient in respect of the house cease at the same time as all benefits to enjoy same.
- (c) A determination that in the events which have occurred the Patient has terminated her right of residence in the house and that all duties, responsibilities, obligations and other burdens of the Patient in respect of same have ceased.

[3] The sole named Defendant, Michael Daniel Patrick Sherrie, is the son of the Patient. When the case was listed for hearing on 28 April 2017 he was neither in attendance nor represented. McBride J, having considered the submissions of counsel for the Patient and the available documentary evidence, made the following twofold declaration:

- (i) That the Patient is no longer exercising the right of residence conferred by the Will of the deceased.
- (ii) That on the proper construction of clause 2 of the said Will, all duties, responsibilities, obligations and other burdens placed on the patient in respect of the house apply only when the Patient is exercising the right of residence conferred by the said Will.

The formal Order of the court did not issue at once since, as recorded in [7] of the judgment delivered approximately one month later, the Defendant was given an opportunity to make representations and the Order was stayed until 15 May 2017. On the latter date, as recorded in [10] of the judgment, the Defendant was in attendance, provided the court with some documents and advanced certain submissions.

[4] In a carefully constructed reserved judgment delivered the following week, on 23 May 2017, the Judge in effect affirmed her tentative Order on the grounds and for the reasons given.

[5] On 6 June 2017 the Defendant filed notice of appeal, the grounds consisting of the following:

"I disagree with the declaration made on 23 May 2017."

Given the concerns which the terms of the Defendant's appeal and his unrepresented status generated, this court invited Her Majesty's Attorney General for Northern Ireland to act as *amicus curiae*. This was the stimulus for the helpful written and oral submissions of Mr Colmer of Counsel.

[6] It is appropriate to draw attention to two earlier Orders of the High Court in respect of the Patient:

- (a) On 21 September 2016 the Master of the Office of Care and Protection ordered the appointment of the Official Solicitor to the Court of Judicature as Controller ad Interim for the Patient. This Order recited the court's assessment that the Patient was incapable of managing her property and affairs by reason of mental disorder and, further, expressed the necessity of making immediate provision in relation to the Patient's interest in the house.
- (b) On 10 February 2017, in proceedings brought by the Belfast Health and Social Care Trust (the "*Trust*") against the Patient, the Official Solicitor and the Defendant, the Family Division of the High Court made an Order that (*inter alia*) the Trust was authorised to designate a suitable place of residence for the Patient, to assess and provide for her needs and to keep her in a locked unit or under appropriate supervision in unlocked conditions having regard to her medical condition. This Order further provided that the court would review the case annually, receiving reports from both the Trust and the Official Solicitor.

Disposal and Remittal

[7] The fundamental reason for the court's decision to remit this appeal is to enable the first and third of the determinations sought in the originating summons (*supra*) to be fully addressed. Neither is addressed nor determined in the Order or judgment of the court below.

[8] While the Judge might conceivably consider that there is no material distinction between the first and third of the determinations pursued in the originating summons, this will be a matter for her.

[9] As appears from the above, the fundamental issue to be addressed, and determined, is whether the Patient's right of residence in the house has terminated. The determination of this issue will require the Judge to proceed measurably further than the terms of the extant declaration. In doing so, it will be incumbent upon the Judge to make appropriate findings of fact in respect of certain material issues. These include in particular the Patient's historical connections with and use of the dwelling house. It is apparent from the materials and submissions which this court has considered that this may entail the resolution of certain contentious factual issues and a more profound consideration of the matters recorded in [19] and [20] of the judgment.

[10] The Defendant is likely to remain actively involved in these proceedings following the remittal. It is clear to this court that he may well be the source of certain material evidence aspects whereof may be contentious. The Judge will,

therefore, wish to give consideration to requiring the Defendant to present the evidential aspects of his case via the conventional mechanism of sworn testimony and cross examination. The Judge may also wish to consider directing a transcript of the Defendant's presentation to the court on 15 May 2017. We are mindful also of the possibility that the Judge will receive updated evidence of the Patient's capacity and the prognosis for her diagnosed condition of dementia.

[11] Having made the necessary factual findings, the Judge's task will then be to decide whether, as a matter of law, termination of the Patient's interest in the dwelling house has occurred. It is apparent to this court that this is not an altogether straightforward question of law and we consider that the Judge will be assisted by the written submission compiled by Mr Colmer.

[12] One of the chief virtues of remittal will be that in requiring the Judge to address and determine the first and third of the forms of relief sought in the Originating Summons, the maximum clarity and finality in respect of the Patient's affairs bearing on her interest in the dwelling house will be achieved. To this end we add the observation that if the Judge were minded to conclude that the Patient's interest in the house has terminated specific findings in relation to any period during which the Patient did exercise her right of residence and the date of termination would be appropriate.

[13] Finally, we observe that the evidence likely to be available to the Judge will include the reports generated by the first annual review required by the Order of Keegan J.

[14] We consider the exercise which will follow from remittal to the court below to be manifestly preferable to the alternative course canvassed by Mr Lockhart QC on behalf of the Patient, namely (in substance) the making of findings by this court in the exercise of the admittedly broad powers enshrined in RSC Order 59, Rule 10(1), (2) and (3). We are unable to agree with his central submission, which was that the findings not contained in the judgment at first instance are clear and obvious. Rather it appears to us that there are certain factual issues which are unclear and/or contentious. Furthermore, remittal will ensure maximum fairness to the Defendant.

[15] The effect of our Order is that the Defendant's appeal to this court has not been determined on its merits. It remains alive in this forum and will be determined on a suitable future date following the promulgation of the further Order and judgment at first instance which remittal will generate. The eventual determination of the appeal on its merits will not require the re-composition of the same panel of Judges.