

SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY AT
AIRDRIE

[2021] SC DUM 46

AIR-F125-19

JUDGMENT OF SHERIFF M BOVEY

in the cause

ANDREW KELLY

Pursuer

against

LINDA KELLY

Defender

Pursuer: Monaghan, Brown (Counsel)

Defender: Smart

18 May 2021

The Sheriff, having resumed consideration of the cause: refuses *in hoc statu* to dismiss the pursuer's financial crave; appoints a proof before answer on the parties' respective averments and reserves the issue of the expenses of the debate.

NOTE

[1] This is a divorce action in which the husband pursuer seeks a capital sum of £100,000. The parties debated that claim on the defender's general relevancy plea on 10 May 2021.

[2] In article 4 of condescence, the pursuer avers that the parties cohabited for a number of years before they married. He continues:

“The Defender sold her flat at 49 F... Croft, Kirkintilloch. The Defender sold this property when she became involved in her relationship with the Pursuer. The Defender utilised the equity from the sale of her flat together with a sum of £18,000.00 inheritance and a sum of £18,000.00 which was gifted to her by her brother to allow her to purchase the property at 13 G... Crescent. The Defender purchased the property at 13 G... Crescent initially in her sole name. The parties then married on 28 June 2005. During 2007 the property at 13 G... Crescent was re-mortgaged and the property title was taken in joint names of the parties. The Pursuer made payment towards upgrading the property at 13 G... Crescent including paying for installation of a new conservatory and a new kitchen to the property ... the Pursuer and the Defender granted a Disposition of 13 G... Crescent in favour of the Defender’s children, reserving to themselves a liferent interest in the property. The parties separated in October 2010 when the Defender demanded that the Pursuer vacate the property at 13 G... Crescent.”

[3] In article 6 of condescence, the pursuer avers:

“The market value of the said property as at 29 July 2020 (“the valuation date”), without the liferent was reasonably estimated at £190,000. With the liferent it was reasonably estimated to have a value of £115,000. The value of the liferent as at the valuation date is therefore reasonably estimated at £75,000.”

[4] The pursuer avers joint debts at the date of separation of about £15,000.

[5] For the defender, Mr Smart adopted his written argument:

“There is a liferent interest in the property at 13 G... Crescent. That liferent interest has not failed. Mr Kelly continues to have and would continue to have post divorce that liferent interest. He cannot reside at 13 G... Crescent because he has been requested to leave and were he to attempt to return he would likely be excluded by reason of domestic violence involving a conviction. Nonetheless if Mrs Kelly chose to leave 13 G... Crescent voluntarily, or indeed died, Mr Kelly would be free to continue to live there in terms of the liferent. To that extent therefore he has lost nothing at the time of the granting of decree of divorce. Having lost nothing he is not entitled to compensation for having lost nothing.”

[6] On this basis, he asked me to dismiss the capital claim.

[7] Counsel for the pursuer argued that the liferent is matrimonial property and its value should be taken into account in calculating the pool, the valuation and the division being decided after proof. The pursuer will not lose approach of the defender was unsound and did not accord with the Act or recognise the value of the liferent. Mr Brown described the position of a proper liferenter as being one of *interim dominus* or proprietor for life,

subject only to the limitation inherent in the fact that the full fee goes to the fiar on termination¹. Where two or more have conferred upon them a liferent right, and a question arises as to the way in which the right is to be enjoyed, the exercise of the right is to be regulated on the principles which rule the administration of common property². When differences arise between co-owners in the management of their common property our law has recognised two methods of cutting the Gordian knot – the appointment of a judicial factor and recourse to an action of division and sale³.

[8] The defender has no financial crave or crave relating to the liferent. In reply, Mr Smart made it clear that this was a deliberate decision; if she sought transfer of the liferent, the pursuer would undoubtedly have lost something.

[9] Section 8 of the Family Law (Scotland) Act 1985 provides:

“(1) In an action for divorce, either party to the marriage ... may apply to the court for one or more of the following orders—

(a) an order for the payment of a capital sum to him by the other party to the action;

(aa) an order for the transfer of property to him by the other party to the action;...

(c) an incidental order within the meaning of section 14(2) of this Act.

(2) Subject to sections 12 to 15 of this Act, where an application has been made under subsection (1) above, the court shall make such order, if any, as is —

(a) justified by the principles set out in section 9 of this Act; and (b) reasonable having regard to the resources of the parties.”

[10] Section 9 provides:

¹ paragraph 1634 of volume 13 of the Stair Encyclopaedia; *Miller v Inland Revenue* 1928 SC 809 at page 829

² Bell's Principles paragraph 1067

³ *Price v Watson* 1951 SLT 266 at column 2 of page 269

“(1) The principles which the court shall apply in deciding what order for financial provision, if any, to make are that — (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage.”

[11] Section 14 of the 1985 Act provides:

“(1) ... an incidental order may be made under section 8(2) of this Act before, on or after the granting ... of decree of divorce...

(2) In this Act, “an incidental order” means one or more of the following orders—

- (a) an order for the sale of property; ...
- (d) an order regulating the occupation of the matrimonial home ...
- (k) any ancillary order which is expedient to give effect to the principles set out in section 9 of this Act or to any order made under section 8(2) of this Act.”

[12] In *Murdoch v Murdoch*⁴ the Sheriff made an order for a counterbalancing payment in the absence of a crave at the instance of the defender who appealed to the Sheriff Principal. The Sheriff had noted the absence of a crave for the defender, but made an order for payment of a sum as a counterbalancing payment nevertheless, in order to achieve a fair division of the net matrimonial property. The Sheriff Principal⁵, decided that such an order in terms of section 14(2)(b) of the 1985 Act could not be made in the absence of a crave by the defender. Having noted that the Sheriff was entitled to take one view as to the value of the flat as matrimonial property and another as a resource, he ultimately concluded that the appropriate course was to recall the Sheriff's interlocutor, but only to the extent of the counterbalancing payment thus leaving the order for transfer of the matrimonial home in place. While that might not on the face of it appear to be a fair division of the matrimonial property, it was, in the opinion of the Sheriff Principal, appropriate as one justified by a

⁴ [2012] ScotCS CSIH_2 (10 January 2012) 2012 SC 271, paragraph 13

⁵ following *Muir v Muir* 1994 SCLR178, *Trotter v Trotter* 2001 SLT (Sh Ct) 42 and *MacPhail on Sheriff Court Practice 3rd Ed*, at paragraph 9.05,

special circumstance in terms of section 10(6) of the 1985 Act, that circumstance being the defender's conduct in refusing to seek leave to amend to incorporate a crave for payment.

He concluded his Note explaining the decision as follows:

"Questions of fairness to the defender of such an unequal division might, in other circumstances, have led to another disposal but here, in my view, the appellant is the author of his own misfortune. The consequences for the appellant are significant in that he not only loses the benefit of the award but retains liability for the bank loan. The 'unfairness' of the unequal division of matrimonial property is one precipitated by his own actions. Put bluntly, in my view, he has only himself to blame. The consequences are entirely of his own making and he has had numerous opportunities to avoid them."

[13] In the Inner House, the defender held to his position but the pursuer made amendments seeking orders against herself:

"4(a) In the event of an order being granted in terms of foregoing crave 4; to grant an incidental order in terms of which the pursuer makes a compensating payment to the defender, in exchange for the transfer of title in the property at 38 D ... Tower, East Kilbride in the sum of TWENTY THOUSAND POUNDS (£20,000) STERLING, within 14 days of said transfer being completed, with interest thereon from the due date until payment.

4(b) To grant an incidental order ordaining the pursuer to secure a variation of the existing standard security held by South Lanarkshire Council in respect of the property at 38 D ... Tower, East Kilbride, whereby the defender is freed of all liability thereunder, and within one month of the date specified by the court."

[14] The Inner House did not agree with the Sheriff Principal that the Sheriff did not have the power to make an unsought order but were *inclined to the view* that such an order would be competent⁶.

⁶ Paragraph 25

Discussion

[15] By disposition registered on 4 May 2009 the parties disposed the property to the defender's adult children reserving to themselves equally and the survivor a liferent in the property. It is, accordingly, a proper liferent by reservation.

[16] It seems that the defender seeks to retain enjoyment of the liferent by virtue of the likely exclusion of the pursuer on the grounds of domestic violence. By virtue of not claiming a transfer of the liferent, the pursuer seeks to avoid having to account for the pursuer's share on divorce.

[17] This will not work:

[18] The financial claim by the pursuer proceeds on the basis that the liferent is matrimonial property which will remain with the defender after divorce. I accept the submission for the pursuer that such a liferent is property for the purposes of the 1985 Act. In principle it falls to be dealt with in like manner as a matrimonial home. Given that the parties will not cohabit, this means that it will be occupied by one or other party or dealt with by sale, transfer or renunciation.

[19] The defender currently occupies the property but makes no claim to it on divorce. Her solicitor said that the pursuer had chosen voluntarily to leave the property. I cannot imagine attaching any significance to such an assertion. In the great generality of divorces, the parties do not continue to live in the same house after decree. Someone has to leave and for the party who remains to seek to have any advantage from that fact more than exclusive occupation seems wholly unrealistic.

[20] The principles the Court is to apply in deciding what order for financial provision, if any, to make include that the net value of the matrimonial property should be shared fairly between the parties to the marriage. As the matrimonial property means all the property

belonging to the parties or either of them⁷ at the date of separation⁸, it follows that the Court must take into account the liferent in adjudicating the pursuer's financial claim. The defender cannot change this by not claiming.

[21] This is enough for the rejection of the defender's motion to dismiss the pursuer's financial crave.

[22] If the Court did not regulate the ownership of the liferent on divorce, it would remain the joint property of the parties. The result of the defender's ill-advised scheme would be to leave the parties as joint owners of the liferent after divorce. Not being a matrimonial home, the defender would have no answer to an action of division and sale.

[23] How should the court respond to the defender's scheme which would leave the parties with joint property which has already been the subject of dispute which can be readily anticipated to recur?

[24] The defender seeks to make a mockery of the clean-break philosophy of the 1985 Act. A major function of contemporary family law is to provide and enforce a system of rules whereby a couple's capital and income can be redistributed in a just way when their marriage ends in divorce.

[25] In *Little v Little*⁹ Lord President Hope emphasised that the court had a wide discretion to do justice as between the parties so as to achieve a fair and practical result in accordance with common sense.

[26] It is clear from the decision in *Murdoch* that a party can seek an order against himself. It would not be difficult for the pursuer to seek to have him renounce his interest in the

⁷ Section 10(4)

⁸ Section 10(3)

⁹ 1990 SLT 785 at 786L-787D

liferent within a specified period of the defender having paid a capital sum awarded by the Court.

[27] Failing that, the issue of the Court making an unsought order arises. This might raise the issue of whether the Inner House in *Murdoch* overruled the decision of the Sheriff Principal of this Sheriffdom who had said this was incompetent. My inclination is that it did. In this regard I refer particularly to paragraphs 22 and 23 of the Opinion of the Court.

[28] Moreover, the pursuer's fourth crave is

"To make such order as is expedient to give effect to the principles set out in Section 9 or to any order made under Section 8(2), both sections of the Family Law (Scotland) Act 1985 in terms of Section 14(2)(k) of the said act."

It appears that, subject to any issue of fair notice, the Court could act without amendment.

[29] It is in any event worth noting that if the Sheriff who heard the proof in this case took the view that the decision of the Sheriff Principal in *Murdoch* remains binding, it is rather more unfavourable to defender than the Inner House view.

[30] Meantime, I shall refuse to dismiss the pursuer's financial crave. Given the complexities of the case, I shall leave the pleas in law standing and appoint a proof before answer on the parties' respective averments. I shall reserve the issue of the expenses of the debate.