# THE FAMILY HOME & THE WIFE: DEBT AND JUDGMENT MORTGAGES

## TRINITY COLLEGE V. KENNY

## Supreme Court Judgement of Baker J. delivered the 21st day of December 2020

This is an interesting recent case that looks at how the Courts might deal with an application to sell a family home by a Bank or other creditor.

### Background

This case, which has been going on for upwards of 10 years, involved an 87 and 88-year-old couple - Mr and Mrs Kenny.

Originally Mr Kenny owed money to Trinity, who got a judgement against him in the High Court. As a result of this judgment, they could put a mortgage on the Kennys’ family home. This type of mortgage is called a judgement mortgage.

When Trinity got the judgment, they applied to the Court to sell the family home to recover the judgement debt from the sale’s proceeds.

It is worth noting that the couple also had a holiday home in County Donegal. However, Trinity could not seek to sell this home for technical reasons. 9It was, in fact , sold as part of the order of the Supreme Court.)

It is also essential to bear in mind that only Mr Kenny’s interest in the family home is burdened with the debt. This means that Mrs Kenny is not a debtor to Trinity.

These proceedings are known as partition proceedings, where a co-owner (Trinity) makes an application to the Court to divide the asset (partition) or, if this is not possible, order the sale of the premises.

Because Trinity became the owner, by registration of a judgement mortgage, of Mr Kenny’s interest in the family home, it is entitled to be treated as the co-owner. Trinity can, therefore, seek to sell the family home.

### Equitable Jurisdiction of the Court

This jurisdiction is an equitable jurisdiction of the Court:-

*“While the remedy is equitable and thus must be seen as flexible in nature, the rights of mortgagee cannot always give way to the wishes of the co-owner ...it is difficult to refuse outright an order for either sale or partition, if the co-owner does not offer to purchase the share of the claimant (Trinity)…… The jurisdiction to order sale is the exercise of equitable discretion and gives the Court the flexibility of the extra remedy, made in light of the facts and in the interests of achieving a just result and one which recognises the rights of the parties.”*

She sets out the factors which are relevant to the exercise of this equitable jurisdiction:

1. Whether the “innocent,” i.e. non-debtor co-owner, might be rendered homeless due to the sale.
2. As a corollary, whether the proceeds of sale, available to the non-debtor co-owner, might be enough to accommodate that person or both owners following a sale.
3. The fact that the sale would not provide sufficient funds to discharge the judgement creditor’s debt, while it must be a factor, is not in itself a factor that would be determinative.
4. Whether the non-debtor co-owner got value for the loan or other debt.
5. The Court will look at the living arrangements of the non-debtor co-owner, be that as a spouse, a civil partner, a parent, sibling or child, and whether the order for sale might lead to hardship.
6. The parties’ age and means could be material, and it would seem relevant to take into account the ages of both the debtor and non-debtor co-owner as the justice of the case requires.
7. Any offer to make payment in reduction of liability would be a factor.
8. The likely financial consequences of making an order for sale are relevant and perhaps sometimes even central to the discretionary exercise. – E.g. if the proceeds of sale after paying the non-debtor co-owner would be sufficient to enable the non-debtor co-owner to secure alternative accommodation.

The Court agreed that an order for sale could be made but applied restrictions.

### Judgement on Appeal

The judge considered several relevant factors, being:

1. There net proceeds on sale that would be availble to Mrs Kenny was not significant;
2. Mr and Mrs Kenny are now at such an advanced age that to require them to move would generate more than the disruption envisaged by the trial judge.

As a result, the judge considered that making an order for immediate sale would be oppressive because of their age and the length of time they lived in the family home, with family and friends and support services nearby.

The judge affirmed the order for sale but with the grant of a stay until the death of the last to survive of Mr and Mrs Kerry, whichever is later.

The children of the couple shall have the liberty to purchase the premises in Donegal should they choose, at a price agreed between the parties.

### Afterthought

This case highlights that a Court will take all parties interests into account – the debtor , creditor and non-debtor owner.

In looking at the facts, it will appy the legal principles of this case –such as how much is available to get alternative accomodaton or will the non-debtor owner be homeless.

The Court will not automatically grant an immediate order for sale and will commonly apply a stay.

It will look at the facts of each case to apply justice between the parties.

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