

THE HIGH COURT

[2020] IEHC 609
[2020 No. 28 CAF]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND
FAMILY LAW REFORM ACT 1989
AND IN THE MATTER OF THE FAMILY LAW ACT 1995**

BETWEEN

M

**RESPONDENT
(FORMERLY APPLICANT)**

- AND -

M

**APPELLANT
(FORMERLY RESPONDENT)**

JUDGMENT of Mr Justice Max Barrett delivered on 25th November 2020.

I

Background

1. This is an application for a variation of maintenance pending the hearing of the substantive appeal in these proceedings, which appeal is due to come on in the summer of 2021.
2. To preserve the privacy of the parties, save as regards certain publicly known figures, no monetary sums are stated in the main text of this judgment. Instead such sums are referred to as 'Sum A', Sum B', etc. The actual cash sums associated with each such reference appear in the Appendix to this judgment which is not being made public.
3. The appellant father and the respondent mother are the estranged parents of three children, one a young child, one a near adolescent and one an adolescent. The three children live primarily with the respondent; however they spend three weekends out of five with the appellant.
4. The respondent is a self-employed tradesperson. The appellant works in the industrial sector. He has set out in his affidavit evidence the position regarding his income. He is a PAYE worker employed by a reputable firm. One error crept into his affidavit evidence (simply by virtue of when that evidence was sworn and this application was heard), viz. he did not receive a pay increase in the spring, anticipated that he would not get a pay increase at all given the Coronavirus pandemic, but in fact was the fortunate recipient of a backdated pay increase in the autumn and looks set to receive another in 2021. There will also be some additional income forthcoming in December and, it seems, sometime in the spring, by virtue of a company share scheme, which it is accepted will be used to meet a debt owing to the appellant's sister which the appellant incurred so as not to breach the Circuit Court order as to maintenance. There will also be a payment of Sum A coming his way in the near future by virtue of having opted out of a particular company scheme.

II

The Appellant's Financial Position

5. The appellant's net monthly income is Sum B per month. It is claimed that the Circuit Court, in making the maintenance order, had regard only to how much maintenance should be paid to the children and that it should also have looked at the actual income available. Whatever about the claim as to what was done in this case, the court of course accepts as a general proposition that in determining the maintenance payable in any one case a court cannot just look at what children need but must also have regard to what the party against whom the maintenance order is to be made can in fact pay.
6. Counsel for the appellant maintains that: the appellant has pared back his expenditure; to meet his maintenance obligations, as ordered, the appellant has borrowed money from a sister; he also has necessary motor car expenses which he financed with a loan from his brother which was being repaid at Sum C p.m. but is now being paid back on a Sum D p.m. basis; his rent is Sum E p.m. which he maintains is a competitive rate for the area in which he lives; that leaves him with Sum F p.m. from which he meets e.g., grocery expenses of Sum G p.m.; yet under the current maintenance arrangements, he pays Sum H maintenance per month plus a family home mortgage of Sum I per month plus other family-related expenses.
7. The problem that presents, the appellant maintains, is that if one takes, e.g., just the rent and grocery expenses alone (ignoring the car expenses and all other expenses and they cannot, of course, be ignored in real life) his monthly income is less than his monthly maintenance + mortgage liability. So the situation that presents, it is contended, is fundamentally untenable.
8. A further issue that arises is that because of a change in the way the appellant is paying his taxes (from joint assessment to separate assessment), the appellant has an unexpected one-off liability to the Revenue Commissioners that requires to be paid. In fact, given that the appellant's monthly income has dropped while this liability is being paid, the respondent accepts that there should be some downwards modification to the maintenance payable.

III

The Respondent's Financial Position

9. As regards the respondent, there is some dispute between the parties as to whether she has been candid as to the entirety of her income. There is, it is true, limited vouching and the headings for expenses are a bit unclear. However, she does not appear, on anyone's account, to be in receipt of a vast income. Her own counsel described her trade income as "*pathetic*" and "*a little bit better than pin-money*" amounting to about Sum J p.m. (net) in her last full year of trading (the current year, as for so many people, has been a trading disaster, thanks to the pandemic). She also took up additional low-paid employment as her marriage encountered difficulties but ultimately found that it was impossible to combine this employment with her care obligations to the couple's children.
10. In the current year, the respondent has actually done better on the PUP payments than she was doing from her trade. Thus, during the lockdown she has been in receipt of PUP payments amounting initially to €350 p.w., now amounting to €250 p.w. (because she

does not meet the income threshold for €350 p.w.), with the possibility of a slight increase in income if the current lockdown ends pre-Christmas, and with the possibility of a return to greater normality in the year to come, if we remain out of lockdown and life returns to some semblance of normality.

11. The appellant maintains that the respondent has Sum K in a bank account and that it is unfair that he is in a position where he owes money, *e.g.*, to his sister that has gone unpaid, yet the respondent has the said savings which can be 'dipped into'. The respondent maintains that she has a business account with a float of Sum L from which she meets all business supplies, accounting, *etc.* expenses. That float cannot be used for household expenses; otherwise she cannot run her business.
12. The couple had a joint credit union account of about Sum M when their relationship ended, which they split 50/50 between them. The respondent's Sum N can be seen from her accounts to be diminishing over time, not least, one assumes, because of monies owing on a credit union loan for Sum O, and on a Sum P loan (obtained to meet legal expenses arising from a former personal injuries claim). She also points to the fact that, *e.g.*, the boiler in the house is going to need replacing and she has been keeping a little aside for such necessary expenses on one's own home that a landlord would have to meet on rented property, such as that which the appellant lives in. Her point is that she needs a little buffer in this regard that the appellant does not. As her counsel put it, in very human terms, "*The day that it [the boiler] breaks down, we're the ones that are going to be freezing*", the 'we' being the respondent and the three children of the estranged couple.

IV

Some Shared Financial History

13. Historically, it appears that the respondent took what her counsel described as a "*financial backseat*" to her estranged husband. The respondent wished to 'up-skill' to become eligible for a certain type of employment; her estranged husband was unsupportive and this proposal fell through. Her husband returned to education, upskilled and enjoys his current employment. In terms of his pay, there was always a slightly unusual arrangement whereby he was paid into his own sole account, the statements for which were sent to his mother's house. From this sole account (the details of which were never made known to the respondent) the appellant would transfer funds to an account for their joint use.
14. In a nine-month period in 2019, Sum Q was transferred from the sole account to the joint account; as to what happened to the balance of the money in that account the respondent has never had any visibility on it. It is accepted that some of the money in the sole account was likely spent elsewhere but the sense is that not all of it can have been spent, and so far all that has been produced is one statement showing that the appellant now has no money in the sole account. But, of course, one statement does not tell a complete financial tale and the respondent does not accept the *bona fides* of the appellant when he paints himself as someone in near penury; it is contended that he has more

savings than he has indicated and, fundamentally, it is contended that he should pay maintenance for his children.

V

The Education Fund/'Rainy Day' Accounts With the Credit Union

15. During the course of their married life together, credit union accounts were opened by the parties for each of the three children and currently contain in the region of Sum R which was originally intended as an education fund and are now proposed should be used as a 'rainy day' fund, the 'rainy day' having unfortunately come. These accounts were funded in effect by the appellant and he has not funded them since 2019, the respondent pointing to this non-funding as, in effect, additional spare income that accrued to the appellant. Because the accounts are in the name of minors, withdrawals from the accounts require the signature of the appellant and of the relevant child. The Circuit Court order indicates that the money in the children's credit union accounts is to be frozen. Such a 'freezing', the court is advised, was not sought, but that is what the order nonetheless provides.

VI

Proposed Interim Solutions

(i) What the Appellant Proposes

16. It is proposed by the appellant that as an interim solution, and to avoid a situation in which the mortgage on the family home goes into arrears, the parties would dip into what was the education fund to meet the ongoing mortgage requirements. There is also a need for monies for orthodontic treatment for one of the children and it is likewise proposed by the appellant that this money should come from the credit union accounts.

17. As to maintenance more generally, the appellant claims that the evidence points to his being in a position to pay maintenance of Sum S p.m. However, if the entirety of the mortgage was paid out of the credit union accounts, rather than part-paid from the respondent's own income, she would receive the Sum T p.m. plus the benefit of not having to pay her share of the mortgage.

(ii) The Respondent's Position

18. The respondent does not accept that the proposed maintenance payment of Sum U p.m. is reasonable, noting that it has the result that a gentleman in receipt of a gross income of Sum V p.a. would pay about Sum W p.w. maintenance per child.

19. The respondent is amenable to the appellant, on an interim basis pending the hearing of the appeal, 'dipping into' the credit union accounts for his share of the mortgage repayments. She is also amenable to the one-off orthodontic costs for one of the children being met from the credit union accounts. However, she is anxious that as much money as possible should remain in the credit union account pending the hearing of the appeal.

20. Having assessed matters in light of all the circumstances now presenting and having sought to pare back matters as much as possible, the respondent considers that maintenance of Sum X p.w. per child is necessary and required (yielding a monthly maintenance payment of Sum Y). Given that the appellant, following on the rent payment

from his net monthly income has Sum Z p.m. and will see his half of the monthly mortgage repayment met from the credit union accounts, she sees that Sum AA p.m. leaves the appellant with Sum BB p.m. for the remainder of his expenses. She also contends that the appellant could find a place at a lower rent, if he was to live further out from where he now lives.

VII

Conclusion

21. The appellant complained that the final affidavit from the respondent had been filed only the day before the hearing of this application. The court does not accept that this is a valid complaint for two reasons.
22. First, when this matter was initially brought before the court it was rightly presented by counsel for the appellant as one of urgency, so rather than allow the respondent the three weeks sought for filing her affidavit, the court put the matter in for hearing within a week so as to facilitate the appellant. That was always going to be a very tight timeframe in which to turn around an affidavit from the respondent, especially an affidavit as detailed as the one that was eventually forthcoming, and the detail has been helpful. (In truth, the court half-expected in advance of the hearing that one week might well prove to be just too tight and more time would be needed, so it was impressive that the affidavit was turned around so fast).
23. Second, although a likely lengthy replying affidavit will have to be filed for the appellant in the context of the fuller proceedings, for the purposes of the within interim hearing there is actually a fairly net point arising for the court and one that was clearly fully grasped and well treated with by counsel for the appellant.
24. The net point presenting is this:
 - the appellant says in effect, 'Until matters are fully resolved, let's pay all the mortgage from the credit union accounts and I'll pay you Sum CC p.m. maintenance'
 - the respondent says in effect, 'Until matters are fully resolved, let's pay your half of the mortgage from the credit union accounts, you'll pay me maintenance of Sum DD p.m. and I'll pay my Sum EE of the mortgage from whatever funds are available to me.'
 - the appellant then says, in effect, 'Why would I pay you money simply for you to pay it back. Why not just pay the entirety of the mortgage payment from the credit union and then isn't the dispute between us down to should you get Sum FF p.m. or Sum GG p.m?'
25. Ostensibly, the respondent's position may seem odd. Why transfer money from my account to your account only to see it transferred back into our mortgage account? But it is not so odd when one looks at it further. In truth, the court sees sense to the respondent's position: it is simply impossible in this day and age and in this State to feed

and provide for three growing children (one a child, one a near adolescent, and one an adolescent) on the monthly maintenance figure proposed by the appellant. Courts are not in the business of making orders premised on the impossible. So the court accepts that the maintenance sought by the respondent is sensible and appropriate and will order monthly maintenance of Sum HH. *However*, pending the hearing of the substantive appeal, the court will allow the maintenance obligation to be satisfied by (a) the entirety of each monthly mortgage obligation being paid from the credit union accounts, with (b) the result that only Sum II will have to be paid directly by the appellant to the respondent. The court will vary the Circuit Court order to allow for the foregoing and, if it is considered that the court's approval is necessary, will also authorise payment of the orthodontic costs from the credit union accounts.

26. What the court proposes is not the same as ordering Sum JJ p.m. by way of maintenance. The court is quite deliberately and, for the reasons stated, ordering Sum KK p.m. maintenance, but allowing it to be met in the short-term in the manner just described.
27. The appellant should note that the court is proceeding as it is on the express understanding that there are no other income/monies/savings available to the appellant apart from what has been described in his affidavit evidence and, in particular, that he has no savings on the side from the sole account into which his salary has traditionally been paid, from which the estranged couple's joint expenditures were financed during their time together, and of which the respondent has never yet had due visibility.
28. The court would respectfully request that counsel for the appellant prepare a draft court order that reflects the above and circulate it to the parties and the court by email. Once the form of the order is agreed the court will see that it is issued. The court is conscious that the parties are operating on slim resources and, provided the order can be quickly agreed by email, sees no reason for counsel or the parties to appear again.
29. The court does not recall that argument was made regarding costs but would propose to make no order as to costs, subject to any argument that the parties might wish to make in this regard.