

**THE HIGH COURT
CIRCUIT APPEAL**

[2024] IEHC 185

Record No. H.CAF.2023.0000083

**IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996 AND IN THE
MATTER OF THE FAMILY LAW ACT, 2019**

BETWEEN:

R. J

APPLICANT

AND

E. K

RESPONDENT

EX TEMPORE JUDGMENT delivered by Ms Justice Nuala Jackson on the 28th of

March 2024:

1. An Order for periodic maintenance in favour of the Applicant and the dependent children of the marriage was made by the Circuit Family Court in 2005 in the context of divorce ancillary relief orders. The children have been legally non-dependent for a number of years now. The only periodic maintenance currently being paid is spousal maintenance in respect of the Applicant. This is in the sum of € 88.87 per week and, based upon an Order made subsequently, is now paid by way of attachment of earnings secured upon the pension of the Respondent. The sum in question is €385 per month.
2. The Respondent seeks to vary this periodic maintenance to zero and a motion to do so was brought before the Circuit Family Court and determined on the 6th December 2023 at which time there was a minor variation downwards to €80 per week. This Order has been appealed by the Respondent. This reduced Order would not appear to have become operative and the sums being deducted pursuant to the attachment of earnings order remain at the original rate.

3. It is clear that there have been a number of applications in relation to the manner of payment of such maintenance and the variation thereof over the years. In this regard, the amount remained unchanged until the minor reduction made by the Circuit Court in December 2023 as mentioned above.

4. The entitlement to vary periodic maintenance is provided for in section 22(1)(b) of the Family Law (Divorce) Act, 1996 ('the 1996 Act'). The factors to which I must have regard in determining any such application are set out in section 22(2) of the 1996 Act:

'(2) Subject to the provisions of this section and section 20 and to any restriction or exclusion pursuant to section 14 (2) or 17 (26) and without prejudice to section 16 (2) (d), the court may, on application to it in that behalf—

(a) by either of the spouses concerned,

(b) in the case of the death of either of the spouses, by any other person who has, in the opinion of the court, a sufficient interest in the matter or by a person on behalf of a dependent member of the family concerned, or

(c) in the case of the remarriage of either of the spouses, by his or her spouse, if it considers it proper to do so having regard to any change in the circumstances of the case and to any new evidence, by order vary or discharge an order to which this section applies, suspend any provision of such an order or any provision of such an order temporarily, revive the operation of such an order or provision so suspended, further vary an order previously varied under this section or further suspend or revive the operation of an order or provision previously suspended or revived under this section; and, without prejudice to the generality of the foregoing, an order under this section may require the divesting of any property vested in a person under or by virtue of an order to which this section applies.'

5. There is a two-stage process involved in applications such as that under consideration:

- A. I must consider that variation/discharge is proper having regard to any change in the circumstances of the parties and to any new evidence. In this regard, section 22(2) is reflective of previous legislation¹.
- B. The second stage in the process is to conduct an examination of the circumstances arising and, having regard in particular to the matters listed in section 20(2) and (3) of the 1996 Act, to determine whether a variation or discharge should take place and, if a variation, the extent of same.

IS THE VARIATION/DISCHARGE PROPER HAVING REGARD TO ANY CHANGE IN CIRCUMSTANCES?

- 6. The legislation states that in order to alter maintenance, a change of circumstances must be shown. The term “fundamental change” is sometimes used as a pre-requisite to variation but there is no reference in the legislation to the nature of the change required. However, it is undoubtedly the case that the change of circumstances must be real and not trivial in nature. The variation of ancillary relief orders was considered in *F v F [2008] IEHC 471*, Abbott J identified three governing principles which should apply in such circumstances, namely:
 - i. That the court does have jurisdiction to vary the terms of the orders where the circumstances have fundamentally changed, but such variation must strike a “balance and symmetry” with the original order;
 - ii. The court must consider alternatives so as to continue to ensure proper provision is secured as required by the Family Law (Divorce) Act 1996;
 - iii. The court will only exercise this discretion provided that the alternative measures are in accordance with the Constitution and the Family Law (Divorce) Act 1996.

In that case, the court was considering variation of a lump sum payment order, a variation not contained within section 22 of the 1996 Act, unlike in the present case. It is well established that periodic maintenance orders are always open to review and alteration where circumstances have changed. Indeed, section 13 of the 1996 Act provides that all types of maintenance order(s) may be sought at the time of divorce “or

¹¹ Section 6(1)(b) of the Family Law (Maintenance of Spouses and Children) Act, 1976 refers to “any circumstances not existing when the order was made” and “any evidence not available... when the maintenance order was made” (or last varied).

at any time thereafter” during the lifetimes of the spouses, subject only to re-marriage of the maintenance creditor/applicant terminating maintenance entitlements.

7. Whatever the standard of changed circumstance applied, it is clear that there have been many real and substantive changes of circumstance since this order was made in 2005. The Applicant was not gainfully occupied outside the family home at that time. She was gainfully occupied caring for the children of the parties. The children are now non-dependent. The older child is married and residing with her husband outside the jurisdiction. The younger child is engaged in post-graduate studies and also working part time. He resides with the Applicant mother and I accept her evidence that his contributions towards her household expenses are minimal. The Applicant has undoubtedly assumed significant financial burdens over the years including bringing up the children on relatively modest financial means and also buying out the Respondent’s interest in the family home. She has clearly been assiduous and careful in the application of resources. She informed me that she had, previously, been assisted by her family in this regard. She has succeeded in rearing two successful children, both educated to post-graduate level, and in creating a very comfortable home. The Respondent has suffered injury and financial distress. The former resulted in him taking early retirement (in 2010) and the latter resulted in him entering into a personal insolvency arrangement (in 2019). In this context, he lost an investment property which he had acquired. The Applicant purchased the Respondent’s interest in the family home and also has had top up mortgages in order to carry out improvements and other works to the family home. I am satisfied that the requisite change of circumstances has arisen in the present case to justify a review of maintenance.

EXAMINATION OF CIRCUMSTANCE UNDER SECTION 20(2) AND (3) OF THE 1996 ACT

8. Not all of the section 20 particularised matters are engaged herein but it is my view that (a), (b), (e), (g), (h), (j) are of particular relevance. All of the matters referenced in section 20(2) of the 1996 Act have been considered by me.
9. Documentation was submitted to me by both parties. I have considered their respective Affidavits of Means and I have heard their oral testimony. It was concerning and sad

that, after such a long period of separation, there remained such acrimony between them. This is unfortunate and I would encourage them to attempt a more respectful relationship. They have reared two successful children with whom they both appear to have a good relationship. It is to be hoped that they will continue these relationships going forward without involving the adult children in their personal antagonism. The merging of such acrimony in the parental relationships must be most difficult for the children.

10. I was not provided with full details of the previous applications made but I was informed that these had been ongoing over many years. However, it would appear that there has been a significant change of circumstances in this case as the Applicant is now in gainful employment outside the home and, as she told me, has been in such employment since September 2023. The Applicant has been most enterprising both in relation to her employment and in relation to the earnings which she has made from the family home. It is also my understanding that this application is the first since the Respondent entered into his personal insolvency arrangement. This will be considered further below.

11. The current financial situation of the parties, excluding maintenance, is as follows:

The Applicant (per her Affidavit of Means of the 22nd February 2024 and some vouching):

- i. The Applicant has a monthly income from her employment of **€3,299.18** per month. It should be noted that this represents a considerable increase in income from that disclosed in her Affidavit of Means (sworn on the 3rd October 2023) when this matter was before the Circuit Family Court. At that time, excluding maintenance, the income of the Applicant was € 1,859.52.
- ii. The Applicant's mortgage repayment is €1,230.89 per month.
- iii. Therefore, after housing costs, her monthly income is **€2,068.29**.

12. The Respondent (per his Affidavit of Means of the 21st February 2024 and some vouching):

- i. The Respondent has a pension of €1,287.21 per month (this is the amount received by him into his bank account and therefore is the amount after reduction of the attachment of earnings which is in the sum of €385 per month) – therefore the monthly pension income is €1,672.21 (there would likely be some reduction on this as the €385 per month would be subject to income tax although the current taxation position in this regard was unclear to me). I believe that a figure of €1,595.21 per month is probably more or less correct (I have calculated income tax at the standard rate).
- ii. The Respondent also receives social welfare in the sum of €259.84 per week. This amounts to €1,125.97 per month.
- iii. Total: €2,721.18 per month
- iv. His mortgage payment is €181.79 per week being €787.75 per month.
- v. Therefore, after housing costs, his monthly income is **€1,933.43**.

13. If the current maintenance payment is included, having regard to the Revenue implications, an increase/decrease in the order of €230/€300 per month would be likely depending on applicable tax rates.

14. On the basis of the foregoing, I am of the view that it is appropriate that appeal herein be allowed and that the maintenance order herein in favour of the Applicant be discharged as and from the date of this Order. The income of the Applicant is greater than that of the Respondent, as is her post- accommodation income. Both parties have liabilities and lifestyle expenses over and above accommodation costs but it is my view, as detailed below, that both have potential additional income resources from rental or similar income. Periodic maintenance orders are never final in nature and are always subject to review and revisiting but based on current circumstances, I do not believe that it is appropriate that maintenance would be paid *inter partes*. There was reference made by the Respondent at hearing to recovery of sums previously paid by him. I do not believe that this is appropriate. I make no further order herein.

15. There are three further issues to which I must refer having regard to the submissions and evidence which I heard in this case:

(a) Other sources of income of the parties:

16. The Applicant asserted that the Respondent had other sources of income being rental income from his residential property, that he was in fact living with his now partner in a different property and she also indicated that he had an undisclosed account with a bookmaker. The Respondent acknowledged that a person stayed with him on an occasional basis and that this person made occasional modest household contributions. He denied that his residential property was generating a regular rental income. He denied the account with the bookmaker.

17. The Respondent asserted that the Applicant was earning rental from short term rentals/student homestays. The Applicant accepted that she had previously derived an income from student homestays but that she no longer did so due to her employment commitments. The Respondent asserted that these additional sources of income were continuing and produced a listing on a website which the Applicant accepted did relate to her house. This showed a most comfortable and well-appointed property. She denied having posted the online offering.

18. I formed the view that it is likely that each of the parties has some additional income derived from offering accommodation to third parties in their respective residences. There is no evidence before me in relation to gambling income of the Respondent such as would enable me to make a determination in this regard. I was provided with little transparency in relation to any of these alleged additional income sources. More importantly, perhaps, it would appear that some additional income is available or potentially available to both of the parties from such activities.

(b) The terms of the divorce ancillary relief orders and, in particular, the waiver by the Applicant of any claim on the pension of the Respondent:

19. Section 22 of the 1996 Act makes it clear that decisions in relation to variation/discharge of previous Orders must have regard to the factors set out in section 20 of the 1996 Act. This section has been considered above. While section 20 states that I must have regard to all of the circumstances, one of the factors expressly referenced is prior separation agreements:

'(3) In deciding whether to make an order under a provision referred to in subsection (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.'

20. The consent terms agreed in 2005 and ruled by the Circuit Family Court as terms ancillary to the divorce are not a formal separation agreement. They are terms agreed between the parties in the context of separation/divorce and, in this context, it is my view that they are clearly relevant in the context of any review application. Of course, additionally, it is these consent terms which were ruled upon by the court granting the decree of divorce and deemed to constitute proper provision in that context. In the present case, the ancillary relief orders in the divorce application provided for periodic maintenance for spouse and children. At that time, the Respondent was gainfully employed outside the family home and the Applicant was engaging in work within the home. The construction of the consent terms was that the Applicant would buy out the Respondent's interest in the family home and that:

"The Applicant agrees to waive any interest she may have in the Respondent's pension including his retirement benefits, contingent benefits and his gratuity from [redacted] and agrees to a Nominal Pension Adjustment Order pursuant to Section 17(2) and 17(3) and a Pension Blocking Order pursuant to Section 17(26)." (underlining added)

21. The Respondent argues that he is now retired and in receipt of income from his retirement benefits and, in consequence of this clause, the Applicant's maintenance should cease. This view is understandable in the context of the consent term referenced. It is clear that there is a periodic maintenance order in place here which will remain in place pending alteration by court order. The question is: is the Respondent entitled to vacation of the periodic maintenance order in favour of his wife due to her waiver of her rights in respect of retirement benefit payable under his pension? It is undoubtedly the case that the Respondent is entitled to seek a variation of maintenance based upon his retirement. It is undoubtedly the case that the waiver is a "circumstance" of relevance under section 20 and section 22(2) of the 1996 Act. In the present case, the pension income is not the sole source of income of the Respondent and therefore

continued periodic maintenance might be justified based upon the totality of his income. However, it is my view that the position would be different and the focus to be given to a waiver such as in the present case would be much more compelling in the event that the Respondent's only source of income derived from retirement benefits under the pension to which the waiver relates. However, all financial circumstances must be taken into consideration in any assessment of appropriate periodic maintenance.

(c) The relevance of the personal insolvency arrangement entered into by the Respondent:

22. I was provided with limited evidence in relation to the personal insolvency arrangement ('PIA') of the Respondent. It would appear that this was entered into in 2019 and is to conclude in relatively early course. It was accepted by the Respondent that his periodic maintenance obligation was a debt which formed part of the application for the arrangement. What is the significance of this in the context of this application? Subsequent to a PIA being entered into, the debtor's financial position becomes such as accords with the said arrangement. It is on the basis of this financial position that I must assess the present application. If the inclusion of periodic maintenance at a particular level in a PIA precluded an application for variation, it would result in a situation in which improvements or deteriorations in the financial circumstances of the parties thereafter could not be addressed by this court. Of course, if maintenance is reduced/terminated, the financial position of the debtor changes and this may be of significance in the context of the personal insolvency arrangement. Section 119 of the Personal Insolvency Act, 2012 as amended by section 89 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 states:

119. (1) Subject to this section, a Personal Insolvency Arrangement may be varied in accordance with its terms.

(2) A personal insolvency practitioner, whether on his or her own initiative or on a request made in accordance with subsection (3), shall propose a variation of a Personal Insolvency Arrangement (in this section referred to as a 'variation') where—

(a) it appears to the personal insolvency practitioner that there has been a material change in the debtor's circumstances, and

(b) the personal insolvency practitioner is satisfied that there is a reasonable prospect that a variation that addresses such circumstances would be approved in accordance with this section.

23. Burke and Comyn, *Personal Insolvency Law* (Bloomsbury Professional, 2014) states at p. 143, fn 176:

“Material change in debtor’s circumstances means a change to the debtor’s circumstances that would materially affect his or her ability to make payments, or otherwise perform his or her obligations under the PIA and includes an increase or decrease in the debtor’s assets, liabilities or income.”

24. I am therefore of the view that in determining maintenance, I must have regard to the circumstances listed in sections 20 and 22 of the 1996 Act and whether there has, in consequence of such determination, been a material change in the context of insolvency arrangements is a matter to be considered pursuant to the statutory obligations applicable to such arrangements.

CONCLUSION AND SYNOPSIS

25. I am of the view that it is appropriate that the maintenance order in favour of the Applicant be discharged as and from the date of this Order.

26. The Respondent also seeks recovery of sums previously paid by him. I do not believe that this is appropriate in this case and make no Order in this regard.

27. I make no further orders.

28. Periodic maintenance orders are never final in nature and are always subject to review and revisiting but based on current circumstances, I do not believe that it is appropriate that maintenance would be paid as the income of the Applicant is greater than that of the Respondent, as is her post-accommodation income.