

THE HIGH COURT

FAMILY LAW

[2024] IEHC 68

[2022 No. 69 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW

REFORM ACT 1989,

AND IN THE MATTER OF THE FAMILY LAW ACT 1995,

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

AMENDED)

BETWEEN:

P

APPELLANT

AND

C

RESPONDENT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 8th day of February, 2024.

INTRODUCTION

1. This matter comes before the court by way of an appeal from an order made in the Circuit Family Court on 24 October 2022. The appellant was the applicant in the Circuit Court and was the husband of the respondent. When the matter was heard and

determined in the Circuit Family Court, the parties had been married for just over twelve years and there are two dependent children.

2. The Circuit Family Court granted a decree of divorce in respect of the marriage. The Circuit Court made a series of ancillary orders, addressing financial provision and matters relating to the children. The appeal before this court was framed as a full appeal from all orders of the Circuit Court. At the commencement of this appeal this court was informed that the orders in respect of the children concerning custody and access were not being contested by the appellant. Essentially, the hearing before this court was concerned with the question of financial provision. The appellant sought to argue that his obligations were too onerous, particularly in light of the effect on his financial position by interest rate increases on a number of property loans.

3. This is a case in which the financial resources available to the parties are relatively limited, and neither party could expect that their divorce will not impact on their lifestyles or generate some level of hardship. While the legal representatives of the parties approached the hearing before this court in a thorough, courteous and professional manner, it is clear that the relationship between the parties is acrimonious and punctuated by mistrust and allegations of poor behaviour. Importantly, the family situation requires to be considered in light of the fact that one of the children is a person with a diagnosis *inter alia* of Autistic Spectrum Disorder and is a young person with a very high level of needs. The nature and extent of that child's needs as he approaches his majority were not fully explored, and it is not possible for the court at this point to anticipate the full extent of his needs or any consequent dependency as he approaches

and reaches his chronological majority. Hence, certain matters inevitably will have to be addressed by the Circuit Family Court at a later stage.

BACKGROUND

4. Prior to the commencement of these proceedings, there had been applications in the District Court, with some appeals to the Circuit Court, in respect of mutual allegations of domestic violence and issues around access and maintenance.
5. The proceedings were commenced by a Family Law Civil Bill dated 24 December 2018, and a Defence and Counterclaim issued on the 30 April 2019. Thereafter, a number of affidavits of welfare and means were exchanged, and the case was managed to a hearing on the 24 October 2022. Shortly prior to the hearing of the matter in the Circuit Court, it appears that the parties agreed that the proceedings could be reconstituted so that instead of relief being sought pursuant to the Judicial Separation and Family Law Reform Act, 1989, the relief would be sought by reference to the Family Law Divorce Act, 1996 (“the 1996 Act”).
6. The Circuit Family Court was satisfied that at the date of the institution of the proceedings the parties had lived separate and apart from each other for at least two of the previous three years, and that there was no reasonable prospect of reconciliation between the parties. Those findings were not contested in this appeal. Orders were made in respect of the custody, care and control of the two dependent children. Those orders were not contested in this appeal. Likewise, access had been the subject of a prior determination and, although there was a dispute about how the appellant was addressing

access, the structure imposed by the Circuit Family Court was not contested by the appellant. The ancillary orders made in the Circuit Family Court which were challenged in this appeal can be summarised as follows:

- First, the Circuit Family Court made a maintenance order providing that the appellant was to pay to the respondent €100 per week indefinitely. The appellant was to pay €120 per week maintenance in respect of each of the children. In respect of the older child this payment was to continue for the period while he was a dependent within the meaning of the 1996 Act. In respect of the younger child, who suffers from a disability, the payment was to be made until that child became eligible for disability allowance or its equivalent. Hence a total payment of €340 was to be made by the appellant to the respondent, and that payment was to commence on 28 October 2022. In addition, in the event that the older child attended third level education and did not qualify for a SUSI grant, the appellant was directed to pay 50% of the college fees.
- Second, the Court made an order pursuant to section 15(1)(a)(ii) directing the sale of the family home in June 2031 and the payment of 100% of the proceeds of the sale to the respondent after the deduction of the balance of mortgage and costs of sale. Pending that sale, the appellant was ordered to pay the mortgage, Local Property Tax (“LPT”), mortgage protection policy costs, and house insurance.
- Third, the court made an order pursuant to section 15(1)(a)(i) providing a right of residence in the family home to the respondent until it was sold.
- Fourth, the court made the usual order directing the County Registrar to execute all documents necessary to give effect to the order, in the event the appellant failed to do so within 21 days of being called upon to do so.

- Fifth, the court made an order pursuant to section 17 of the 1996 Act directing that 50% of the retirement benefit to which the appellant was entitled and 100% of the contingency be transferred to the respondent.
 - Sixth, the court made what are described as “mutual blocking orders” pursuant to section 18(10) of the 1996 Act.
 - Seventh, the court made an order pursuant to section 18(10) of the Family Law (Divorce) Act, 1996, that neither party shall on the death of the other party be entitled to apply for an order under that section for provision out of the other party’s estate.
 - The parties were provided with liberty to apply and no order was made as to costs.
7. On the same date, the Circuit Family Court made orders pursuant to section 6 of the Domestic Violence Act 2018, (a) prohibiting the appellant from using or threatening to use violence against, molesting or putting in fear, the respondent, and (b) prohibiting the appellant from watching or besetting the place where the respondent resides or from following or communicating (including by electronic means) with the respondent until further order of the court. That order has not been appealed.
8. As required by the Courts of Justice Act, 1936, this appeal proceeded by way of a *de novo* hearing, and the appellant, as he did in the proceedings before the Circuit Family Court, bore the burden of proof. Nevertheless, the Circuit Court order was used as a template or focus for the arguments being made before this court. The court heard evidence from the appellant and the respondent, together with a witness who gave evidence in respect of respite care provided for the younger child.

9. This is a case in which the respondent clearly has extremely limited resources, and where, on the appellant's case, he is hard pressed financially. There is very little agreement between the parties and no expert evidence was called in respect of valuations or financial circumstances. The respondent had issued *subpoenas* directed at the appellant's parents, in circumstances in which payments made between the appellant and his parents and their proper characterisation were in issue. Unfortunately, neither witness was able to attend court as a result of medical difficulties. Those medical difficulties were explained, and were of a nature that they were unlikely to be resolved in time for any adjourned hearing if an adjournment was sought and granted. While the relative scarcity of some evidence presents problems, the court will endeavour to make decisions on the evidence and documents furnished to the court.

THE EVIDENCE

10. The parties appear to be in general agreement about some elements of the case. The appellant and respondent were lawfully married to one another on a date in July 2010 within the State and a certified copy of the marriage certificate was produced. Likewise, the appellant and respondent are Irish citizens and have been ordinarily resident in the State throughout periods of over one year preceding the institution of the proceedings in 2018. The general circumstances of the family are set out below.

11. Currently, the appellant is in his late 40s and works at a third-level institution in the State. He has a background in professional sports and his work appears to be focused on that area. For a period of time, he worked as a sports professional outside of the State. He has a modest pension associated with his current employment.

12. Prior to the commencement of the relationship between the parties, the appellant purchased four properties in 2002/2003. These will be described as “No. 7”, “No. 40”, “No. 43”, all of which are in the same estate in Kildare, and “No. 15” which is located in Dublin. The house described as No. 40 was the most recent family home and the respondent resides at that address with the two children. The appellant resides in “No. 43”, which is very proximate to the family home. The other two properties are suitable as rental properties, although there are disputes around their use and availability for rental.

13. The parties have two dependent children, the eldest of whom is approaching his 16th birthday and the younger of which is 12 years old. The younger child has diagnoses *inter alia* of Autism Spectrum Disorder (“ASD”) and global developmental delay (“GDD”). At the commencement of the proceedings, the younger child was attending a special class in a primary school, but since then he has commenced a transition to secondary school, which was not straightforward. Because of his considerable difficulties, which are set out in a number of expert reports, and which were described in evidence by the respondent and a respite worker, the behaviours of the younger child can be extremely challenging and occasionally his distress can be expressed in violent outbursts, often directed at his mother. It is important to note at the outset that the court is fully satisfied from all of the evidence that the respondent is an entirely devoted and committed mother to her children. As a result of the difficulties presented by the younger child, she has endeavoured to, and in many aspects succeeded in, accessing appropriate services and educational supports for her son. Nevertheless, the younger child, on the evidence, has found it extremely difficult to complete more than a couple of hours per day of school and he does not tolerate change. Therefore, while some very

modest respite of approximately five hours per week is available, it is rarely possible for all of that respite to be utilised.

14. The respondent, who was in her late 30s at the time of the hearing, had worked as a beautician and in childcare. Very late in the day, and despite an express plea to the contrary in the Family Law Civil Bill, the appellant through counsel accepted that because of the obligations of the respondent towards the younger child there was no prospect of her being able to take up any work outside the home. This concession does no credit to the appellant: it ought to have been clear for a considerable period of time. While this will be addressed below, the court is fully satisfied that since the birth of the child in 2011, shortly a year after the marriage, it was highly unlikely that the respondent would have been able to take up any employment outside the home.

15. I should note also that the respondent had a child from a previous relationship who reached her majority in September 2018. That child lived with the couple until she moved out of home after her majority, and until her majority the respondent received a relatively modest maintenance payment from the child's father.

16. The parties have sworn affidavits of means over the period from when the proceedings commenced to shortly before this appeal. In order to understand the issues that were dealt with in the hearing it may be helpful briefly to summarise the main points in those affidavits.

The appellant's affidavits for the Circuit Family Court proceedings

17. The appellant swore a number of affidavits of means prior to the hearing in the Circuit Court. He provided valuations of the properties at No. 40, No. 43, No.7 and No.15, initially in 2018 in the amounts of €450,000, €235,000, €315,000 and €225,00 respectively. In his affidavit of means from October 2022, the valuations are given at €525,000, €310,000, €395,000, and €250,000. This suggests an increase in property value ranging from circa 11% (No.15) to circa 32% (No. 43) over approximately 4 years.

18. In 2018, the appellant swore that his income from his employer was circa €2,888 per month (net) and he had a combined monthly rental income of approximately €3,623. His expenditure was approximately €4,890 per month. In 2022, the appellant's total income from his employer was approx. €3,076 per month (net), and he had a combined rental income of approx. €2,384 per month, giving him a combined income of approx. €5,460 per month. His expenditure was stated to be approximately €5,926 per month.

19. In 2018, the appellant stated that his liabilities regarding his properties amounted to a combined total of €2,080,500. He also had car loans of approx. €13,602. In 2022, his liabilities regarding his properties combined amounted to approx. €1,990,248. He also had car loans of approx. €12,000 and a furniture loan €250.

The respondent's affidavits for the Circuit Family Court proceedings

20. From 2019 to 2022, the respondent also provided a series of affidavits of means. In 2019, the respondent's income was €3,296 per month. Her expenditure was approximately €3,343 per month.

21. By 2022, the respondent's income was approximately €2,653 per month (she noted that she was only receiving €220 per week in maintenance, which was in arrears). Her expenditure was approximately €3,755 per month.

The appellant's affidavits for the Appeal

22. The appellant provided an updated affidavit of means, sworn on 20 October 2023. In the First Schedule, the appellant sets out his assets as being the four named properties: No. 40– the family home (€550,00), No. 43 (€325,000), No. 7 (€400,000), and No. 15 (€250,000). The appellant disclosed two bank accounts, between which he stated he held circa €540, bringing his total asset value to approximately €1,525,540.

23. In the Second Schedule, the appellant sets out his monthly income/salary which is made up of his salary from his employer (circa €3,569) and the rental income from No. 15 (€1,500). The appellant stated that there was no receipt of rental income from No. 7. This brings his monthly income to a total of approximately €5,069.

24. In the Third Schedule, the appellant sets out his liabilities and debts which are made up of personal loans and loans on the properties outlined above. There are secured loans totalling €988,145, made up of a consolidated loan on the 3 rental properties of €772,500, and a loan of €215,645 on the family home; a car loan of €7,372; a personal loan of €1,411 for maintenance arrears; a loan from his parents of €20,500; and he estimated his outstanding legal fees at approx. €25,000. This brings his combined total asserted liabilities to approximately €2,030,575.

25. In the Fourth Schedule, the appellant breaks down his monthly outgoings into two categories – 'Outgoings Nett' (amounting to circa €4,853) and 'Monthly outgoings re:

rental properties' (amounting to circa €3,797). This brings his total outgoings when combined to €8,650.95 per month. The appellant avers that he is in a monthly deficit of €2,297 regarding the rental properties. This is an increase of approximately 47% from his expenditure in 2022.

The respondent's affidavits for the Appeal

26. The respondent provided an updated affidavit of means, sworn on 8 November 2023.

In it, she avers that her outgoings amount to the sum of circa €4,259 per month and breaks down the cost of such outgoings in the Fourth Schedule of her affidavit of means. This is an increase of approx. 13% compared to her 2022 expenditure.

27. In the First Schedule, the respondent sets out her assets as being her beneficial interest in the four properties. She does not provide a valuation for those properties. Other assets include her car valued at €13,000, and money in bank accounts of circa €385.

28. In the Second Schedule, the respondent sets out her income/salary, which is made up of carer's allowance (€326) which will reduce by €50 per week when her older son reaches his majority, domiciliary allowance (€82) which will be in place until the younger son turns 16, maintenance paid by the appellant (€340) and children's allowance (€60). This brings her total income to circa €3,232 per month.

29. In the Third Schedule, the respondent sets out her liabilities and debts which are made up of the following: legal fees of an unknown amount, a credit union loan (€12,803.42), a car loan (€18,732.40), and a bank loan (€1,300). This brings her total debts and liabilities in excess of €32,835.

30. In the Fourth Schedule, the respondent breaks down her weekly outgoings which include groceries (€300, with €100 going towards food for her younger son's particular diet), car expenses (approx. €113.80), her loans (€202) and children's expenses.
31. Both parties also furnished the court with extensive vouching documentation.
32. In his vouching provided for the appeal in November 2023, the appellant provided copies of statements from his two disclosed bank accounts, with Bank of Ireland and PTSB.
33. Regarding maintenance payments, it appears from the Bank of Ireland account ("BOI account") that the appellant paid the respondent approximately €220 per week prior to the Circuit Court Orders on an ad hoc basis. Comparing payments per month from his BOI account starting in June 2023, he paid the respondent €1,340 in June (approx. €335 per week), €1,360 in July (approx. €340 per week), €1,360 in August (approx. €340 per week), €1,360 in September (approx. €340 per week) and €1,700 in October (approx. €425 per week). While that suggests that the appellant overall is paying the maintenance ordered, the payments are not made evenly throughout each month, which clearly presents difficulties for the respondent in arranging her affairs.
34. The appellant received ad hoc payments from accounts labelled '365 50euro' of €1,000 on 21 June 2023 and 1 August 2023, '365 2000euro' of €2000 on 29 June 2023. In his evidence he said it was a loan from his parents.
35. The appellant had taken on further studies which initially he self-funded. Once those studies were completed, he received a refund of circa. €16,255. The appellant told the

court that he used those funds to pay €10,000 back to his parents. These payments match those in his first account dated 20 September 2023 and 28 September 2023. The payment of €10,000 is labelled as '365 Online [*redacted*]' which does not match the labels of '365 50euro' which is a different designation to the account from which payments were said to be received from his parents.

36. In the BOI account, there were payments reflecting his mortgage payments of €1,464.01 on 30 June 2023 and of €1,492.96 on 31 July 2023. The appellant obtained a moratorium from his lender for those payments for September, October and November 2023.

37. There were a some lodgements to his PTSB account that were not properly clarified. The appellant received money in under different labels of 'Lodgement', 'Rent', 'LDG 750 Cash', 'rent', 'RENT', 'CT [*redacted*]' of amounts ranging from €750 to €2,000. These payments are approximately at the end of each month. In cross-examination it was put to him that these payments are cash top-ups from his tenants, and this topic will be discussed later. The appellant also receives payments from a local authority of approximately €2,350 per month into his PTSB account (apart from in August 2023) which are HAP rent payments. He also received a payment from this payee on 25 October 2023 of €2,379.82. In his evidence he said the HAP payment is now €1,500 and that the payment in October was, he believed, the deposit and the first month's rent.

38. There were also lodgements to the appellant's PTSB account of amounts ranging from €500 to €2,000, which were stated to have come from his mother.

39. From a consideration of his bank account records it appears reasonably clear that there has been an increase of circa 53% in the costs of the mortgage payments over a 7-month

period. This reflects the fact that the loans and security are held by a fund rather than a pillar bank, and have been subject to the recent significant increases in interest rates.

40. In her most recent vouching booklet, the respondent provides her PTSB account statement from September 2022 to June 2023, her Credit Union statement of 6 June 2023, and Revolut statements from January 2023 to June 2023. Given her sources of income and general circumstances, the account statements reflected the position set out in the respondent's affidavits of means and also show small loans and certain repayments to family members of the respondent. Overall her account statements highlight her precarious financial position, and on occasions they have come close to a zero or negative balance position.

THE HEARING

41. The court heard evidence from a person employed through the HSE to provide respite to the younger child. That evidence made clear the extensive needs of that child, that he often will not participate in the respite care, and despite being clearly loved he presents with very serious behavioural challenges that can manifest in physical aggression.

The appellant's evidence

42. The court heard evidence from the appellant. Very briefly, the appellant had proposed an open offer which contemplated the sale of the current family home, and the respondent and children moving to one of the other properties, with a reduction of the overall maintenance payment from €340 to €300. This was explained on the basis that

the appellant could no longer afford to keep up the existing arrangements as his income was insufficient to meet his outgoings. In relation to his proposal, the appellant stated that he was proposing to borrow a sum of over €200,000 from his parents, with no interest payments required. If that sum was combined with the proceeds of the sale of the family home, it would allow the appellant to regularise his finances by discharging the debt on the rental properties. The respondent did not accept that proposal for reasons set out later in this judgment.

43. The appellant began his evidence by outlining that he had purchased the four properties before he first started living with the respondent in 2006. All properties are held in his name. He estimated their combined current values at €1.6 million. He stated that the loans in respect of three of the houses were consolidated in 2006. He illustrated his difficulties by stating that the family home required a mortgage payment of circa €1,100 in October 2022 (the time of the Circuit Court hearing) but was now at circa €1,555.

44. The appellant stated that when he left the family home he moved into the former rental property at No.43, which therefore meant that he could no longer derive any rental income from that property. He explained that he derived a rental income from the house called No.15 of €1,500 per month. Originally that was a three-bedroom house, but he had converted it to a two-bedroom house. The house called No.7 had been occupied by tenants for approximately 10 years, but he had permitted the tenants to leave in mid-September 2023, before the tenancy expired. He stated that it had remained vacant for two reasons. First, he was not sure what would happen in these proceedings (there were earlier proposals made by the appellant to re-organise the living arrangements and sell some of the properties, which did not bear fruit). Second, he stated that the property

needed an investment of €25,000 to €30,000 to bring it back to a rentable condition. The appellant stated that the property called No.15 was rented, with new tenants having gone into occupation in September 2023, and that he received HAP payments of €1,500 for the rent.

45. The appellant sought to explain that in relation to the property at No. 7 he had accepted cash of around €500 per month, on top of the HAP payment.
46. The appellant explained that he had borrowed money from his parents and when he received the refund of €16,500 in respect of his college fees, he had paid back €10,000 to his parents and used €6,000 to pay sums due on the mortgages. The appellant stated that when the existing moratorium on the mortgage on the rental properties ceased it would result in him having a deficit of over €2,000 per month.
47. The appellant's evidence was quite short on detail and his explanations of the loan arrangements with his parents and the situations involving the rental properties were unclear and far from convincing. The appellant seemed overly preoccupied with his personal circumstances and gave the impression of being insufficiently concerned about the circumstances of the respondent and their children. That impression was fortified by his response to questions put to him under cross examination. However, it is clear that there has been a substantial increase in the loan repayment amounts in the last year and that will have to be considered as part of the consideration of the ability of the appellant to keep up the current payments.
48. Under cross examination, a number of matters emerged. First, the appellant was evasive and claimed to have a poor recollection of matters that were put to him. I did not find

many of his responses credible and consider that the appellant very much wished to avoid dealing with the specifics of his finances.

49. Second, it is clear that the appellant treated the respondent very poorly. In that regard, the appellant took a hostile and difficult approach to dealing with access and appeared to have no insight into the consequences for the respondent of caring for their children, particularly the younger child. The respondent did not describe this as a burden, and is dedicated to her children, but the evidence was clear that her work caring for her children leaves her with very little time to spend on herself. The appellant's hostile approach (as set out in the very many text messages seen by the court) extended to failing to facilitate the respondent when she required urgent medical treatment.

50. Equally troubling, the appellant sent a series of demeaning, vulgar and sexualised text messages to the respondent around the time of their separation. From the text messages, it was also apparent that for a considerable period of time the appellant (who lives very close to the family home) was observing the family home closely and texted the respondent if he believed (wrongly it seems) that the respondent had left the children unattended at times. The appellant stated in evidence that he regretted many of those interactions and was sorry to have made the respondent feel bad. My strong sense was that this was more in the nature of a prepared response and was not accompanied by any real sense of genuine regret.

51. In terms of the financial issues, the appellant agreed that at various times since the parties separated, he had allowed significant arrears to build up in respect of maintenance. In particular, he stopped paying spousal maintenance when he started his college course. The appellant stated that he was paying as much as he could afford. However, clearly his inability to pay was influenced in large part by the fact that he

chose to attend a college course for his benefit at a cost of over €16,000. The appellant also acknowledged that until the hearing of this appeal he had maintained the position that the respondent should have found a job.

52. In relation to the appellant's wish to reduce the overall maintenance payments, he accepted that in fact he had been better off after the Circuit Court order in a certain respect. Prior to the orders in 2022, the appellant had been obliged by reason of earlier interlocutory orders to pay 50% of education, back to school and medical expenses. That was not part of the Circuit Court order.

53. In relation to the income generated by the rental properties, the appellant was evasive and unconvincing. He professed not to recall many specific details, but I do not accept that his recollection was so poor. The appellant accepted that he had under-declared the rental income in tax returns. It also became clear that the appellant, certainly until recently, had taken cash payments from his tenants on top of the ostensible rental payments. The respondent contended that the appellant accumulated a substantial amount of cash that he kept in a safe in the attic. The appellant stated that there was no safe, but that he did keep some cash in a "little red box".

54. It is not possible to come to a conclusion as to how much money the appellant took and accumulated in cash. However, the court is satisfied that cash payments were received. Those payments were not disclosed by the appellant. Moreover, it was notable that almost in the immediate aftermath of the Circuit Court hearing, the appellant increased the rent for one of the properties, although that proposal was not drawn to the attention of the respondent or the court. Even insofar as payments relating to rent appear in his bank statements, the appellant gave the impression of being quite unsure as to the nature of some of the lodgements. Overall, the effect is that the court cannot take the view that

the appellant's affidavits of means or his vouching documentation are complete or provide a full picture of his financial situation.

55. A further, perhaps more significant, difficulty arose in relation to the financial relationship between the appellant and his parents. As noted above the respondent had sought to issue *subpoenas* to compel their attendance at the hearing of the appeal. Medical evidence was offered to explain their inability to attend, and this was accepted by the court. Nevertheless, where the appellant was obliged to discharge the burden of proof in this case, and was subject to disclosure obligations, his evidence in relation to the financial relationship with his parents was very unsatisfactory.

56. Among the vouching documents provided by the appellant are statements from Lloyds Bank in respect of a UK bank account. The account is held in the name of the appellant and prior to the parties separating in November 2017, the correspondence address is the house at No. 40. The statement of account for June 2018 is directed to the appellant at his work address. The account shows that there was a lodgement of £50,221.34 at some point between March and April of 2016. There was a balance of £38,629.86 as of November 2016, which had reduced to £34,725.96 by 1 November 2017. Statements are not available for the period between November 2017 and May 2018, but the statement for 1 May 2018 shows that the account balance was reduced to £175. The appellant's Bank of Ireland account shows a payment in of just over €38,000 on 13 November 2017 and the appellant's name is given as the source. Subsequently, the appellant transferred a sum of €30,000 to his mother's account on the 15 December 2017.

57. In seeking to explain those transactions the appellant stated that he had bought a property in the UK in 1999. His parents bought half of the property for €50,000 in or

about 2001, and he used those funds as a deposit for the property called No.7. After he separated from the respondent his parents requested the money back and he transferred what was left to his mother. None of this was supported by any documentation or other form of corroborating evidence.

58. Also in the vouching documentation was an account statement from EBS. That account is held in the joint names of the appellant and his mother. That account shows a lodgement of €35,410 in March 2017 which is described as a “cash lodgement”. There is a further lodgement of €30,000 on the 18 December 2017 from his mother’s account. It is hard to avoid the conclusion that the December 2017 lodgement relates to the same funds that the appellant had lodged to his mother’s account two days previously. The account statements go on to show a cash withdrawal from that account in the amount of €57,420 on the 4 November 2019, and from the available statements the account remained with a balance of just over €8 until the 31 December 2022, which was the most recent statement provided. It was clear that this joint account was not disclosed until the hearing in the Circuit Court.

59. The appellant asserted that he was not aware of the joint account until late 2017. He stated that he only found out about the account when he transferred the money to the account. This does not seem to be quite correct as the money went from the appellant’s account to his mother’s account and she seems to have transferred the money onto the joint account. On that chain of transactions, which is clear from the bank statements, the appellant did not transfer any funds directly to the joint account.

The respondent’s evidence

60. The respondent was examined and cross examined. The respondent explained her role in providing for the dependent children as best she could in light of her scarce resources. The older child attends secondary school and appears to be doing well. The respondent takes responsibility for their medical, dental and optical needs. In addition she takes care of his day to day educational expenses such as school trips and sports. The appellant, other than by paying maintenance, does not make a contribution to those matters. In respect of the younger child, the situation is far more difficult as a result of his very extensive needs. A feature of his ASD is that he will only eat specific foods, which means that the respondent must provide separate food and meals for him, at a cost of approximately €100 per week. In addition, the respondent has purchased learning apps, sensory toys, clothes and so forth. She facilitates the younger child participating in ASD friendly outings.

61. The respondent has not worked outside the home since the birth of her younger child, and I accept her evidence that there is no reasonable likelihood of her being able to take on such work. The respondent attends CAMHS multi-disciplinary team appointments every two weeks, and attends with the National Disability Service once per month. That is in addition to facilitating home visits once a month, and participating in phone calls on a weekly basis. The respondent stated that the appellant had attended three such meetings in the year prior to the hearing. The younger child is attending school but frequently he is unable to attend or has to be collected early by the respondent. One of the consequences of attending to the care needs of her children is that the respondent has missed major events such as her brother's wedding and a scheduled surgery, among a number of other events. The respondent has not had any holidays and in effect has had no time to herself to relax or take proper breaks.

62. There was some dispute around holiday arrangements. As matters stand the appellant is to take the children for periods over the holidays. This has not worked out, mainly as a result of the younger child's difficulty with changes. However, I am satisfied on the evidence that the appellant could make a stronger effort to deal with those situations rather than seeking to return the younger child to the respondent once an issue arises.
63. The respondent made clear that she was very unwilling to move from the current family home (No.40). The house is adapted to meet the needs of the younger child and has been the family home since the younger child was born. The younger child finds it extremely difficult to adjust to change, and the respondent is anxious to remain in that home with the younger child for as long as possible.
64. The respondent gave evidence that for the period from 2014 to 2017 the appellant had received rental payments in respect of No.43 in the amount of circa €1,500 per month in cash. The cash was stored in the attic in a red petty cash box. Similarly she recounted receiving cash from the tenants of No.7 from time to time, and that cash also went to the red box.
65. Ultimately, the respondent was clear that she was struggling to survive on the current maintenance payments. She also received carer's allowance of €326 per week, children's allowance of €60 per week and domiciliary allowance of €82 per week. The overall amount will reduce by €50 when the oldest child reaches his majority, and by €132 when the younger child reaches the age of 16. The respondent also has loans of approximately €21,000, together with obligations in relation to legal fees.

66. Other than wanting to remain in her current accommodation until the younger child reached his majority; the respondent was satisfied that the appellant could rent and retain the rents from the other properties. The respondent also addressed the many text messages that had been furnished to the court and described her reaction to them.

67. Overall, I was satisfied that the respondent was a credible and honest witness, and I accept her evidence. I accept that she has undoubtedly borne almost the entire burden of caring for the parties' children. I also accept that, at various stages, she observed substantial sums of cash being received from the tenants of the rental properties. On the other hand, for the reasons set out above, I was not satisfied that the appellant provided a credible account of his finances, or that the monies transferred from the UK account and the monies in the joint account were or are held for his mother's benefit. I have taken into account that the appellant's mother for medical reasons was unable to attend to give evidence, but nonetheless the appellant made no real effort to address the issues around receipt of cash or the other monies. These all are matters within his own knowledge. At times he was evasive in his answers and demonstrated in my view a marked reluctance to provide a clear explanation for matters that ought to have been straightforward.

68. Similarly, I am not satisfied with the reasons given why one of the tenancies was permitted to terminate early and why that property has not been rented subsequent to the termination. I accept that clearly there has been a significant increase in the cost of servicing his property loans, and that this has led to financial hardship. However, my finding is that the appellant has access to or is capable of generating more funds that he

currently has disclosed or received. Other than showing a letter sent by his mortgage provider in relation to a proposal, the appellant did not provide any compelling account of any efforts that were made or that could have been made to explore whether there are any other options available to him to refinance or restructure his borrowings. The appellant clearly is a resourceful and intelligent person with a stable job. However, at the hearing of this appeal he adopted a passive approach to his finances and he seemed more focused on establishing that the answer to his difficulties lay in reducing his already somewhat minimal obligations to the respondent and his children.

69. Finally, I am also satisfied that the appellant engaged in controlling and abusive behaviour towards the respondent. He demonstrated no real understanding of the toll that caring for the younger child has taken on the respondent, up to the point where until shortly before the appeal hearing he maintained that she ought to return to work. That stance, in the context of the evidence of the extensive needs of the child, was entirely divorced from reality. Insofar as the appellant expressed some remorse for his treatment of the respondent, this seemed somewhat rote and did not impress me as genuine.

LEGAL PRINCIPLES

70. The essential task of the court is set out in section 5 of the 1996 Act, as amended, which provides:

“5. – (1) Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that –

(a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least two years during the previous three years,

(b) there is no reasonable prospect of a reconciliation between the spouses, and

(c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family,

the court may, in the exercise of the jurisdiction conferred by Article 41.3.2° of the Constitution, grant a decree of divorce in respect of the marriage concerned.”

71. As noted above there is no doubt that the spouses have lived apart from one another for a period of well in excess of two years from the date of the institution of the proceedings, and that there is no prospect of reconciliation. The court is concerned therefore with the question of how proper provision can be made for the spouses and their dependent children.

72. In that regard, the approach to the statutory tests in this area has been addressed by the Court of Appeal in the case of *N.O. v. P.Q.* [2021] IECA 177. In keeping with the approach of the Court of Appeal in that case I will now address the factors that must be considered as part of the analysis for the purposes of section 20 of the 1996 Act. I will set out the relevant provisions in bold with my observations following in normal type.

(a) The income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future.

73. Under this heading, the court must address the current financial position of the parties at the present time. The court notes that, the appellant has a permanent and pensionable job with a third level institution. He has a modest pension. There was no evidence that he expected any substantial promotion or was likely to be earning substantially more in the future, other than potentially by way of periodic pay increases connected to his current role. At various stages until relatively recently, the appellant supplemented his income with additional work. His evidence was that this was not sustainable while he was pursuing his additional studies. However, his studies are now completed and he retains the option to resume some of that work.

74. The appellant also is the owner of four properties, including the family home. Assuming that the appellant will continue to live in No.43, the court is satisfied that two of the properties ought to be capable of being rented. The court is not satisfied that the evidence established in any convincing way that the property described as No.7 could not be rented. As there was no evidence of market rental rates for the properties the court will approach matters on the basis that the properties are capable of yielding the rents that were applicable at the date of or shortly before the hearing.

75. Finally, the court is not satisfied that the appellant has provided a full account of the resources available to him. Clearly, the appellant had access to cash payments in respect of the rental properties over an extended period of time. The appellant did not provide a convincing explanation of the extent of that income or what has become of it. Likewise, the court is not satisfied that the monies transferred to his other account or indeed the overall funds in the joint account are not available to the appellant.

76. The respondent is not employed outside the home, and I am satisfied that this will remain to be the case until she ceases to care for the younger child. Essentially, she is dependent on maintenance and statutory payments.

(b) The financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage or registration in the civil partnership of the spouse or otherwise)

77. Here, there was no evidence to suggest that either party currently is proposing to remarry. Their primary financial needs and obligations are towards themselves and their dependent children. Their needs – as expressed in the oral and affidavit evidence – relate to the payment of the mortgages and providing for themselves and their children. In that regard, it is clear that the needs of the younger child are very extensive, and each of the parties will continue to have obligations in that regard. There is no doubt that the appellant is facing a difficult situation in light of the effect of increased interest rates applicable to his property loans. Even if these matters were capable of accurate prediction, there was no evidence of the likely trajectory of interest rates in the short to medium term. Therefore, the court will approach matters on the basis that the appellant will face interest rate payments at the level applicable at the date of hearing.

(c) The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be.

78. There is no doubt that when the parties commenced living apart, they experienced a fall in their standard of living, particularly as interest rates increased the costs of repaying their property loans. The fact of their separation inevitably will have an impact on them financially, and they will have to find a way to deal with the pressure of living with fewer available resources, particularly while the houses remain encumbered by the mortgages.

(d) The age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another.

79. The appellant is in his late 40s, and the respondent is in her late 30s. The marriage dates from 2010, and the parties had lived together as a couple since 2006. The parties separated in November 2017.

(e) Any physical or mental disability of either of the spouses.

80. This does not arise in this case.

(f) The contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.

81. Under this heading, it is clear that the appellant came to the marriage with the four properties and that he has discharged the vast bulk of the parties' expenses. The appellant is in stable and gainful employment and will receive income from his properties. The respondent has no real earning capacity as a result of caring for the dependent children, and in particular the younger child. The respondent is unlikely to be in a position to take up employment in the foreseeable future. The respondent has contributed to the welfare of the family by undertaking the overwhelming bulk of providing for the children. This includes taking care of the needs of the younger child, which in effect amounts to a full time occupation.

(g) The effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.

82. Here, the appellant appears to the court to have been able to pursue and achieve his career objectives despite any family obligations. On the other hand, while the respondent's career history is relatively limited, she has postponed any remunerative work in order to be the primary carer for the children. Undoubtedly this dedication has impaired her ability to seek remunerative work and that will continue to be the case for some time. If a situation arises in the future in which the obligations towards the younger child are taken over by others, for instance if he is placed in a residential care facility when he is an adult, the respondent will be able to seek work but will do so at some level of disadvantage.

(h) Any income or benefits to which either of the spouses is entitled by or under statute.

83. The respondent is in receipt of carer's allowance in the amount of €326 per week. That will reduce by €50 per week when her older son reaches his majority in approximately two years. She receives domiciliary allowance of €82 per week, which likely will cease when her younger child reaches the age of 16 years in approximately three years, assuming he is deemed eligible for statutory payments. The respondent also receives children's allowance in the amount of €60 per week.

(i) The conduct of each of the spouses if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.

84. As addressed above the appellant has engaged in extremely poor conduct towards the respondent. The Circuit Family Court made serious orders against the appellant pursuant to the provisions of the Domestic Violence Act 1998, and those orders have not been challenged by way of an appeal to this court. Because those orders in effect have been accepted by the appellant and will regulate his conduct in the future, and because the financial issues are straitened, I do not consider that they require to be taken into account in addressing ancillary relief. This is not in any sense to diminish or disregard the deeply unpleasant nature of the appellant's behaviour towards the respondent.

(j) The accommodation needs of either of the spouses.

85. Each of the parties requires a place to live. In the case of the respondent, this need must take into account the need for each of the dependent children to have a stable place of residence. The older child is approaching his final years in secondary school and should not be troubled by the difficulties associated with moving house. The younger child is very resistant to change, and I accept the evidence that moving house would be traumatic for him, and would be contrary to his best welfare interests. In addition, the current residence of the respondent is well suited to meeting the needs of the younger child.

(k) The value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring.

86. In this case, the appellant has the benefit of a pension fund which currently is relatively modest. If the divorce proceeds, absent orders to the contrary, the respondent will forfeit the opportunity to benefit from that. In reaching a decision, the court will take account of that factor.

(l) The rights of any person other than the spouses but including a person to whom either spouse is remarried.

87. With the exception of the needs of the dependent children, this is not an issue that arises in this case.

CONCLUSIONS

88. As noted above, the situation here is that there are relatively substantial assets but that the effect of interest rate increases mean that it will be a struggle to maintain a surplus for some time. Each party will have to be pragmatic and conservative if those assets are to provide for their needs, at least until the mortgage situation is regularised. As noted by Jordan J. in *D O'C v. C O'C* [2021] IEHC 674, at para. 39:

“ ... that does not take from the fact that people must live within their means and that will inevitably involve an adverse impact on lifestyle choices and quality of living when money is tight. Marital separation creates an immediate and unavoidable financial difficulty for many if not most people – and particularly where there are young dependent children to be looked after. ”

89. Having considered all the evidence, the court has come to the conclusion that the appellant has not discharged the burden of proof in establishing his contention that he is unable financially to meet the orders made by the Circuit Family Court. The court is satisfied that reducing the amount of maintenance overall in this case would place an intolerable and untenable burden on the respondent, who already is living in very straitened circumstances and has no current ability to take steps to access remunerative employment. The court notes that the position of the appellant will improve over time and with prudent management he is likely to be able to retain the benefit of three valuable properties, two of which can generate reasonable rents. Those property interests combined with his salary should be adequate to provide for his needs in the future.

ORDERS

90. Taking account of the orders of the Circuit Family Court, this court will make the following orders:

- i. An order affirming the order of the Circuit Family Court granting a decree of divorce in respect of the marriage contracted between the parties herein on [**date redacted**] at [**location redacted**].
- ii. An order affirming the orders of the Circuit Family Court in respect of custody, care and control of and access to the children.

91. The following ancillary orders will be made to ensure that in the circumstances provision will be made for each of the spouses and their dependent children:

- i. Pursuant to section 18(10) of the Family Law (Divorce) Act 1996, as amended, neither party shall on the death of the other be entitled to apply for an order under this section for provision out of the other party's estate.
- ii. An order pursuant to section 13(1)(a)(i) of the 1996 Act that appellant pay maintenance to the respondent in the amount of €100 per week indefinitely.
- iii. An order pursuant to section 13(1)(a)(ii) of the 1996 Act that the appellant pay maintenance in the amount of €120 per week in respect of each of the children. In respect of the older child this payment will continue until he reaches his majority. If the older child attends third level education and does not qualify for grants / financial aid, the appellant will pay 50% of the college fees. In relation to the younger child, the payment will be made until he becomes eligible for disability allowance, or its equivalent statutory payment.
- iv. An order pursuant to section 15(1)(a)(ii) of the 1996 Act that the family home (No. 40) will be placed on the market on the 1 June 2031. The net proceeds of the sale of the house, following the deduction of all costs associated with the sale and after

the discharge of any amounts outstanding associated with any mortgage or charge, are to be paid to the respondent. With a view to minimising costs, expenditure and the potential for dispute, the parties are ordered to nominate a solicitor to have carriage of the sale and to nominate an auctioneer to handle the sale's process, and both parties are to take the reasonable advice of those solicitors and auctioneers.

- v. The parties may sell the family home prior to 1 June 2031 if they reach an agreement in writing to bring the date forward to an earlier date, which agreement must be signed by each of them and witnessed.
- vi. Pending the sale of the family home, the appellant is to pay the mortgage, mortgage protection policy costs, house insurance, and Local Property Tax in respect of the family home.
- vii. An order pursuant to section 14(5) of the 1996 Act, if either party is in default, directing the County Registrar for Dublin or their nominated official to do all such acts, sign all documents and execute any transfer to implement any Order herein.
- viii. An order pursuant to section 15(1)(a)(i) of the 1996 Act, as amended, conferring on the respondent the exclusive right to reside in the family home to the exclusion of the appellant for the duration of her occupation of that property.
- ix. An order pursuant to section 17 of the 1996 Act directing that 50% of the retirement benefit to which the appellant is entitled and 100% of the contingency be transferred to the respondent.

92. For the avoidance of doubt, the appellant remains free to deal with his properties other than the family home as he chooses.

93. With the exception of matters relating to the finalisation of orders in this appeal, all further applications in relation to this case are to be made to the Circuit Family Court.

94. As this judgment is being delivered electronically and there is a need to draw up the necessary orders carefully, this matter will be listed before me on the 8 March 2024 to address any issue in relation to the form of the order. If the parties are in a position to agree a draft order in accordance with this judgment, the agreed draft may be submitted to the court at that hearing. The court is provisionally of the view that there should be no order in respect of costs, but the parties will be entitled to make any oral submissions in relation to costs on the adjourned date.