[2024] IEHC 181

Record No. 2022/137M

THE HIGH COURT

FAMILY LAW

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996 AS AMENDED BY THE FAMILY LAW ACT, 2019

BETWEEN:

L.J.

APPLICANT

AND

P.E

RESPONDENT

Judgment of Ms. Justice Nuala Jackson delivered on the 23rd February 2024.

INTRODUCTION

1. The Applicant and the Respondent were married in December 2015. The Applicant is English by origin and the Respondent is Irish. The parties met in Country A, married in Ireland but lived and worked in Country B, commencing a number of months prior to their marriage. At all material times during which their relationship was ongoing, the parties lived in Country B. They have two children, aged 6 and 4 years respectively. Both parties are highly qualified and have enjoyed considerable career success. Unhappy differences arose between them and terms relating to their separation were agreed and ruled upon by the courts of Country B.

2. There were two such agreements:

A. The relocation agreement which permitted the relocation of the children to Ireland to live with the Respondent and also provided for access between the children and the Applicant in that context. This agreement was entered into in early 2021 and the Respondent so relocated later that year. There have been considerable difficulties in relation to access which culminated in a report being compiled by Professor Jim Sheehan. Prior to such court ordered report coming to hand, the Applicant had instituted proceedings before this Court pursuant to, *inter alia*, the Guardianship of Infants Act, 1964 as amended. Orders (2nd May 2023 Barrett J.) have been made in the context of those proceedings, informed by the recommendations of Prof. Sheehan. In the context of the within proceedings, I was not asked to review these arrangements for the children, indeed, the Consent Order envisages that there will not be a review until April/May 2025. I will address this further below.

B. The Separation Agreement entered into between the parties was ruled by the Court in Country B on the 20th May 2021. This agreement deals with issues of maintenance and the division of real property (the parties owned a family home in Country B). It provided for the payment of maintenance in respect of the children in the sum of [currency of Country B] which is approximately €5,880 together with a percentage of the Applicant's annual bonus. This was a reduction from the periodic maintenance figure of [currency of Country B] (approximately €8,350) per month prior to relocation. I was informed that the reduction was to take account of the increased costs of access for the Applicant in the context of relocation.

3. I was informed during the course of the within hearing that there were two matters extant before the courts of Country B namely (i) pensions and (ii) a claim in respect of maintenance arrears by the Respondent. I will deal with these later in this judgment.

4. The parties are seeking a Decree of Divorce and pursuant to section 5 of the 1996 Act, and I can only make such a Decree if I am satisfied that proper provision exists or can be made for the parties and the dependent children of the marriage. In determining such proper provision, the principles set out in section 20 of the 1996 Act must be considered and applied to the extent that they are relevant. Additionally, I accept the submission of Senior Counsel for the Applicant that the previous Agreements should be considered

in the light of the principles set out by the Supreme Court in the judgment of Denham CJ (as she then was) in **Y.G. v N.G. [2011] 3 IR 717**, although it must be remembered that there was no full and final settlement clause in the case under consideration and, in any event, the issue of periodic maintenance is always open to review where there is a fundamental change of circumstances. The division of the real property of the parties has been dealt with by the courts of Country B and the family home was sold and distributed in accordance with the terms agreed between the parties.

5. In circumstances in which arrangements for the custody, care and control are the subject of existing orders of this Court and I have not been asked by the parties to alter these and I have further been informed that considerable progress has been made in refining these arrangements through negotiation (which would be most desirable having regard to the previous acrimony in this regard), I am content to say that proper provision in this regard dictates that the current orders continue with liberty to apply and re-enter in relation to this matter whether to rule negotiated terms or to further address issues pertaining to the children, absent agreement. Of course, issues relating to children can never be final and may be re-opened before at any time. That is not to say that it is to be recommended that litigation continue *ad infinitum*. While I am mindful that Professor Sheehan's report recommends a review not before 2025, I must have regard to the determination of the Court of Appeal (Kelly J.) in **M v M** [2015] IECA 29, paragraphs 41 – 48.

6. The maintenance payable pursuant to the [Country B] Separation Agreement is in the sum of approximately €5,800 per month together with 50% of the net annual bonus of the Applicant. This maintenance is payable for the support of the children equally divided between them (although there was some dispute as to whether the bonus payment was for the children or the Respondent but I do not have to determine this as it is not material to my decision herein). It is arrears in respect of this bonus payment which is one of the actions remaining before the [County B] Courts. However, there have clearly been many changes of circumstances since the current maintenance was agreed:
    i. The Applicant is about to relocate to live in Ireland. While he now has the children more of the time, he will not have the very high travel and

accommodation costs associated with access when he was living in a different country;

ii. The Applicant has changed his employment and his salary has reduced in consequence;

iii. The Respondent has changed her employment and her salary has increased in consequence;

iv. The Applicant has purchased accommodation and has loan repayments in that context;

v. The Respondent continues to rent accommodation although she did give evidence indicating a desire to purchase secure accommodation and the financial consequences of so doing;

vi. The Applicant is in a new relationship and resides with his partner with whom he shares many living expenses. The Applicant and his partner are expecting a child in the near future.

SUBMISSIONS

7. The parties made the following submissions:

8. The Applicant submitted that child maintenance was the only live issue and that this was a matter to be dealt with by me on the basis that the children are habitually resident in Ireland. It was submitted that a variation by way of dramatic reduction was appropriate in the circumstances of this case. I was asked to reduce the periodic payment and to eliminate the bonus payment. The Applicant made an open offer which I have fully considered. The Applicant submitted that there had been a huge change in the financial circumstances, that the [Country B] agreed (and ordered) maintenance was very high and that the position for the Applicant was now stark. The Applicant submitted that the financial positions of the parties were now equal, referencing the reduced income of the Applicant and the increased income of the Respondent. It was further submitted that the Applicant was to be commended for his career sacrifice in moving to live in Ireland. The Applicant also referenced that it was a short marriage and the trauma involved in relocation. The Applicant objected to the accountancy analysis of the Applicant's expenditure levels indicating (a) that no similar analysis had

been done by the witness in respect of the expenses of the Respondent and (b) the levels of expenditure permissible in insolvency situations were not an appropriate standard. The Applicant referred to the starkness of the figures of his forensic accountant. The Applicant challenged the sum allegedly paid back by the Respondent to her family in respect of family loans over the course of the separation. The Applicant referenced the impending birth of his third child (with his now partner) and the expenses he has in relation to the children when they are with him. The open offer of the Applicant suggested a payment of approximately €1,295 per month (€1,000 plus 50% of certain vouched expenses, many of which were subject to prior agreement between the parents).

10. The Respondent acknowledged that the only real issue before me is periodic maintenance for the children. The change of circumstances was acknowledged as was the appropriateness of a maintenance reduction. However, the level of reduction, according to the Respondent, should be much less than advocated for by the Applicant. The difference in the accommodation status of the parties (the Applicant has purchased a premises and the Respondent is renting, with a hope of purchase) was highlighted. The level of mortgage which the Respondent would require and the fact that she would have to fund this alone whereas the Applicant was sharing this expense with his now partner was referenced. The Respondent submitted that the percentage decrease sought was entirely out of line with the alteration in circumstances and, importantly, the Respondent sought a total figure to be paid on the basis that vouching would lead to acrimony and descension. The Respondent challenged some of the Applicant's figures and particularly the vagueness of certain house maintenance expenses and she referenced the sacrifice in standard of lifestyle which was sought to be imposed upon the children and the Respondent due to the unilateral decision of the Applicant to move to Ireland.

11. I asked the parties to address me in relation to the pension issue and the suggestions being made (by both parties although I think more strongly by the Applicant) that pension division should be left to the [Country B] Courts. The Applicant submitted that the [Country B] Court was seised of this matter and that I should have full confidence, in accepting the jurisdiction of the [Country B] Court, that this matter would be properly dealt with. It was likewise submitted that the Respondent had invoked the [Country B]

jurisdiction in relation to alleged arrears (arising from non-payment of the bonus percentage to the Respondent by the Applicant) and that I should allow these proceedings to complete there. The Respondent did not demur in relation to the bonus arrears but asked that I would consider pension inequities between the parties in the context of the maintenance issue before me.

DECISION

12. It seems to me that there have been so many circumstantial changes that the previous, indeed, current maintenance sum payable does not remain a useful touchstone in the context of review. It is my view that proper provision in terms of maintenance is best approached by looking at the current financial resources of the parties and their current outgoings. Of course, the latter must be examined in the light of previous expenditure when income resources were somewhat more ample. It was agreed between the parties that maintenance for the children is the only matter to be determined by me subject only to my determination concerning the pension and inheritance blocking orders. I have also considered the issue of maintenance securitisation.

13. So far as the section 20 criteria are concerned, I consider that sub-section (2)(a), (b), (d), (f), (g), (h), (j) and (l) are of importance here and I fully considered these specific issues as well as all of the circumstances of the parties.

RESOURCES AND EXPENDITURE

14. The Applicant's income when he moves to Ireland will be €135,000 gross per annum. He will additionally receive a €15,000 sign on bonus in September 2024 when his probationary period is ended. It would appear that he will be eligible to participate in the Executive Bonus Scheme on a pro-rata basis for the next financial year, starting 1st July. It is therefore to be expected that the Applicant will receive a bonus each year. His evidence was that this would be, at its maximum, in the order of a percentage of 10%. His past experience would appear promising in this regard but I accept that a bonus is not guaranteed. On the basis of his most recent Affidavit of Means, I therefore conclude that he is likely to have a net monthly salary of approximately €6,700 per

month, inclusive of bonus. He has an entitlement to health insurance but this is taxed as a benefit in kind. Health insurance for the children is paid by the Respondent under a similar scheme available from her employer. The Applicant is entitled to participate in the staff pension scheme, life assurance and disability benefit. The evidence of the Applicant was that pension provision was prudent and to be advised and that he wished to contribute to the work scheme to the maximum permissible level being 7%. The Respondent contended that this percentage is excessive having regard to the current financial needs of the children. She indicated that she was currently limiting her pension provision to a 2% pension contribution as more was not currently affordable. The Applicant will receive a €9,000 relocation allowance which is paid on a vouched basis.

15. It is clear that there has been a considerable amount of lump sum or exceptional expenditure items by the Applicant in the past year or so. It was somewhat inexplicable that the Applicant had not paid to the Respondent her entitlement to a share of his bonus in circumstances in which these many exceptional items demonstrated clear ability to pay:
    a. The purchase of a motor vehicle was made with a loan from his parents. This loan was repaid in full. The Applicant indicated that it was now his intention to trade in this vehicle against a much larger and more luxurious vehicle on the basis of a PCP scheme purchase which would have monthly repayments of €688 per month.
    b. There was reference to another loyalty award/bonus-type payment which he received during 2023. The Respondent claims an entitlement to 50% of the net of same whereas the Applicant disputes that it is a bonus. This is a matter for the [Country B] Courts to decide. However, I do not see that there can be any argument to contradict that the payment to be made to the Respondent from 'regular' bonus is something which should be paid and should have been paid. The payment of maintenance orders is not a matter for the discretion of the maintenance debtor but a mandatory obligation. The Applicant argued that there was some adjustment calculation to be made based upon the earlier respective contributions of the parties, however, this is not evident from the Agreement of the 20th May 2021 which appears to me to be very clear in its terms.

c. The Applicant would appear to have made the maximum permitted annual payments to a pension fund which is not amenable to pension order under Country B law (the [C] pension). This fund has significantly increased since the date of separation. Additional sums were paid into a [C] (PRSI-type) pension fund up to the maximum permitted annual amount of circa. €7,000. While the desire of the Applicant to maximise pension provision is entirely understandable, this should not occur to the detriment of the support needs of the children and definitely not while maintenance sums due and owing remain unpaid.

d. Purchase of house by the Applicant. This purchase was a sensible one. However, the means of funding of it and the repayment of same seemed to me to (a) be calculated to reduce the disposable income of the Applicant and (b) an attempt to pay off accommodation finance over an unrealistically short period. The seven year loan obviously attracts large repayments (when compared with a 25 year mortgage) and the loan from the Applicant's parents is likewise repayable over a short, 12 year period. Despite the fact that the written terms of this loan provide for interest only payments to be made, the Applicant would appear to have unilaterally determined to commence discharge of interest plus capital on this loan at the cusp of this hearing. I fully understand the desire to repay family loans but, having entered into a written agreement in relation to same, I fail to understand why the Applicant is not using the terms thereof to best benefit. It seems to me that he could repay the commercial loan and interest only on the family loan (he pays 50% and his partner the balance) and, in due course, take out a normal, mortgage-type loan over 25 years for the purchase. This will reduce his repayments significantly in the short and medium term although, obviously, making the duration of the repayments over a longer period. However, by so doing he will increase the funds available for the support of the children. The Applicant is only 37 years of age and in lucrative permanent and pensionable employment. Long term finance options appear to me to be entirely reasonable. Short term payment reduction can be achieved through optimising the terms of the written family loan agreement.

e. Monies spent on the Applicant's newly acquired house. The figure for house maintenance seemed to me to be entirely excessive (a sum of €660 per month was stated for maintenance and repair in the most recent Affidavit of Means of

the Applicant). Evidence was given of two leaks in the premises. It was indicated that insurance had not been claimed due to excess payments under the policy. The evidence in this regard was opaque to say the least. There was also an insurance claim in Country B, again due to water damage, which yielded a sum of €7,000. The Applicant indicated that this related mainly to damage caused to items owned by his partner but clearly it was part of their joint resources in establishing their new home.

f. A sum of circa. €25,000 seems to have been expended on furniture and fittings for the new house.

g. The Applicant is also to receive a relocation allowance.

Cumulatively, these items amounted to a considerable resources which were no longer available in the context of considering proper provision and the financial circumstances of the parties.

16. The Respondent changed her employment in October 2022. She continues to work from home but I fully accept her evidence that this does not facilitate an alteration/reduction in required childcare. She clearly cannot carry out the obligations of her employment and mind two young children at the same time. There was some suggestion by the Applicant that childcare costs might be reduced with each parent caring for the children if and when they are available to do so. I do not see any realism in this. Childcare facilities do not so operate and it is clear from the Applicant's terms of employment that he must be in the office/available for work, from 9 am to 5.15 pm, five days per week. It is my finding that the Respondent has availed of all possible State grants and allowances in relation to childcare expenses.

17. Pursuant to her contract, the Respondent has a gross annual income of €105,000. She would appear to have a car allowance annually of €11,000 gross. This is not referenced in her contract of employment but is clear in her payslips. The evidence given was that this was a payment which would last for a total period of 18 months and end thereafter, such that it would only continue for a short number of months. The evidence in relation to this was unsatisfactory as there was no clarity in respect of the contractual basis of this payment. The Respondent has an annual bonus, which she has received on a *pro*

rata basis since joining the company[1], and it is in the sum of approximately 12% of base salary. On this basis, I concluded that she has currently a net employment income of €6,527 (inclusive of bonus and car allowance). She also receives children's allowance. If the car allowance ceases, I estimate that her net income would reduce by approximately €458 per month. She has health insurance benefits which avails her and the children and for which she pays. She has life assurance under her contract of employment.

18. The Respondent is currently residing in rented accommodation and has been so residing since she returned to live in Ireland in 2021. The rent which she is paying is onerous (€3,500 per month) but the realities of the Irish rental market must be acknowledged. It was argued that the house in which she resides is excessive, beyond the needs of herself and the children and, while it appears a very comfortable, large property, I accept that options in this regard are limited and the proximity to family members was an additional attraction in circumstances in which she was moving to live in a new place. The Respondent expressed keenness to purchase a property and said she would need a mortgage of approximately €450,000 to do so, referencing the cost of the property acquired by the Applicant. I accept that the purchase price of accommodation for the Respondent and the children would likely be similar to that of the Applicant. The Respondent's evidence was that she has only €100,000 remaining for a deposit on such property as €77,000 had been paid back to her family by way of repayment of family loans. Again, it was most unsatisfactory that this very large sum had been paid out on the cusp of proceedings and the vouching provided was less than satisfactory. The Affidavit of Means of the Respondent of February 2023 referenced such debt at a maximum of €62,000. There was an indication of a further advance of €9,547 for legal fees in the summer of 2023 in the vouching booklet. However, the final receipt of €19,000 (which would appear to have been received just prior to hearing) was unclear and did not accord with the legal fees sum due in the up to date Affidavit of Means of the Respondent. Overall, I believe that the Respondent did receive financial assistance from her family. I believe this related primarily to moving costs when moving to Ireland and assistance with legal fees. In relation to more

[1] This bonus was not reflected in the payslips furnished to me in vouching but it was accepted that a bonus for a three month period, reflective of the Respondent's time in the new employment for three months of 2022, had been paid and that such bonus would likely be paid into the future.

occasional, day to day expenses, it is difficult to imagine why these would have been required from family members by way of loan when maintenance was being received at a very high level. I believe that it is more likely that the Respondent has a deposit of in or about €120,000 (making some readjustment to sums alleged repaid in the context of family loans). This would mean that a mortgage of circa. €430,000 will ultimately be required to purchase an appropriate dwelling. While it is likely that accommodation costs will reduce in this context, in the short term the financially onerous rental obligations will continue. Indeed, it may well be necessary for the Respondent to resort to using some of her capital resources to sustain accommodation costs in the short term.

19. There was much argument in relation to expenditure levels set out in the Affidavits of Means of the parties and particularly so in relation to those of the Applicant. I heard evidence from forensic accountants/financial advisers in relation to the financial circumstances of the parties. This was useful albeit that the financial circumstances arising in this matter were not complex. I wish to comment in particular in relation to the evidence of the financial witness for the Respondent in relation to the expenditure of the Applicant. It seems to me that a witness such as a financial adviser/accountant/insolvency practitioner has expertise which can be of use to a court in examining the financial issues arising but, of course, it is for me to determine what maintenance is appropriate and the extent to which lifestyle standards being advocated by either or both of the parties are excessive or otherwise. I did form the view that certain of the expenditures being envisaged by the Applicant were excessive when viewed in the light of the financial needs of the children. It is not for me to attempt to dictate how the parties should live or to critique their expenditure on individual items. In a case such as the present in which I am assessing child maintenance only, I must examine their income, examine the financial requirements of the children having regard to reasonable lifestyle standards and requirements for families in the financial circumstances of the parties and I must assess the appropriate level of maintenance, always having regard to the amount which the parties have left for their own necessaries. It is for them to determine the manner in which they wish to expend remaining funds.

20. In this process, I have examined the day to day, out of pocket expenditure for the children as set out in the Affidavit of Means of the Respondent. Subject to certain

comments, I found these expenses as deposed to be appropriate to and necessary for their needs. The school costs for children required only slight adjustment as the evidence was that the afterschool costs were going to increase in the near future. I therefore allowed a figure of €600 per child per month. As previously indicated, I am satisfied that all grants and allowances have been claimed. I did form the view that there was some overlap between afterschool expenses and holiday childcare expenses referenced elsewhere in the Affidavit of Means of the Respondent and therefore I have calculated the afterschool expenses over a 10 month period therefore amounting to €500 per month per child. The total sum for school costs is therefore €1,714 for both children. In relation to the children's other costs, I also found them appropriate and reasonable with minor adjustment – I halved the sum for "Toys and Games" and for "books/children's magazines" as the Applicant will undoubtedly purchase some such also. I also disallowed the weekend activities as the Applicant will likewise have these expenses going forward. Therefore, the total under "children's other costs" is €859 per month for both children. The total of such direct, out of pocket, expenses is therefore €2,573 per month. I believe that the parties should equally bear these expenses meaning that the Applicant, in respect of these out of pocket expenses only, should pay the sum of €1,286.50.

21. The Applicant is going to have another child shortly and I have calculated herein based on an equivalent out of pocket expense for this child being €1,286.50, for which the Applicant will have a 50% responsibility.

22. In addition, the children of the marriage have their primary residence with their mother and some contribution must be made towards this. I accept that the Applicant must also maintain a residence for the benefit of himself and his children when they are with him. The Applicant must likewise bear his share of such expenses for his third child, soon expected. I have formed the view that the minimum which could be attributed to the Applicant's share of such subsistence expenses is €300 per month per child, a total of €600 for the two children of the marriage (obviously the Applicant will have his share of responsibility in this regard for the expected third child also).

23. This amounts to €1,886.50 per month, to be attributed equally to the two children.

24. I appreciate that this exceeds the open offer made herein. It likewise is much less than the Respondent sought (she indicated €3,000 per month was required). However, the parties have choices to make in relation to the funding of accommodation, club memberships, car purchases, house expenditure, pensions and such like. These are matters for them to determine once appropriate and reasonable provision is made for the children having regard to the overall earnings of the parents.

25. This is intended to be a composite figure from which the Respondent will discharge all of the children's outgoings save for their expenses when they are with the Applicant and his discretionary spending upon them – no vouching will be required but obviously new extra curriculars that run over into the Applicant's access time should only be commenced by agreement or order of the court. While I do not accept that there have been any significant delays in the payment of periodic maintenance when due, I am of the view that it is more predictable for all concerned if payment is made by direct debit/standing order and I so order. The current level of maintenance per the Country B court Order and Agreement should continue until the Applicant relocates to Ireland. There will be no further orders relating to the future bonuses of the parties.

PENSION

26. I have concluded that I cannot simply abdicate the pension decision to the Country B Court, primarily because I do not have any definitive information as to what the Country B Court will do in relation to pensions and, clearly, this is an issue integral to making proper provision for the parties. I was informed what a Country B Court would likely do but it remained unclear as to (a) whether the Country A pension of the Respondent would be taken into account or not and (b) as to whether the parties could, by agreement, alter the generally applicable principles. In addition, I must have regard to the four year age gap of the parties, with the person with lesser pension provision being the older person.

27. There are a number of pensions in this case:

    1. The Applicant has a UK contributory pension (in respect of which he continues to make the necessary contributions). This will be a valuable asset in due course.

2. There is a private pension in County B (Pension type D), attaching to the Applicant's former employment there. I am told that this will be divided equally between the parties based on value as of date of institution of these divorce proceedings (value: €190,000).
3. There is a [Pension type C] pension of the Applicant which would appear to be a Country B pension facility attracting tax relief into which contributions may be made. It would appear that the current balance of this pension is €53,000 (including the maximum contribution each year since separation). It would appear that the Respondent received €19,000 from her own [Pension type C] pension at separation.
4. The Respondent has a pension from her time in Country A valued at approximately €92,000.
5. The parties both have commenced, or will commence, pension provision in their now employments. The values are negligible.
6. It is to be expected that both will have Irish contributory State pensions in due course.

28. It is my view that proper provision would be:

(a) That private Country B pension (Pension type D) of the Applicant (to date of divorce) is equally divided (approximately €95,000 each)
(b) That the Respondent keeps the €19,000 received and her Country A pension (total: €111,000)
(c) That the Applicant keeps the UK contributory and the [Pension type C] pension in its entirety. He will, of course, also have the pension at (a) from November 2022 to date, an increase of approximately €47,000 I have been told). This amounts to a total of €100,000 (excluding the UK pension).

29. I believe this to be proper provision. I would hope that the parties can have orders made in respect of the Country B pension at (a) above to reflect this but I will give liberty to apply and re-enter if this is not achievable.

30. I will grant mutual orders pursuant to section 18(10) of the 1996 Act. The benefit of the life policies (or death in service lump sum payments pursuant to pensions) should be available to secure the maintenance for the children of the parties. I did not hear

details of such policies and I would ask for details in this regard on the allocated for mention date. I propose that two thirds of each such policy/death in service benefit be allocated for such security (one third per child of the marriage) given that there is a third child in respect of whom legal provision must be made also. This securitisation of child maintenance should continue over to any equivalent benefit in the case of a change of employment of each or both of the parties. The sums to be paid out to be provided to the surviving parent on trust for the children to be used for their maintenance and support during dependency. Precise orders in this regard will follow submission of the details of such policies/benefits.

31. I will give liberty to re-enter and to apply in relation to the arrangements for the children under section 15(1)(f) of the 1996 Act.

32. Subject to any submissions the parties may wish to make, based upon the financial provision that I have made herein, I would not intend to make any order for costs.