

**THE HIGH COURT****FAMILY LAW****2006 33 M****IN THE MATTER OF THE FAMILY LAW DIVORCE ACT 1996****BETWEEN****P. H.****APPLICANT****AND****F. D.****RESPONDENT****JUDGMENT of Ms. Justice Irvine delivered on the 7th day of June 2011**

1. This is an application brought by the applicant, P.H., to reduce his maintenance obligations as provided for in an order of the High Court made on 8th December, 2006.

2. The applicant and the respondent, F.D., were married on 12th June, 1998. They have twin daughters who are now ten years of age. Unfortunately, their marriage broke down when their children were mere infants, and after somewhat protracted litigation, McKechnie J. granted a Decree of Divorce on 8th December, 2006.

3. Under the terms of the aforementioned order, the applicant was directed to pay maintenance to the respondent in the sum of €3,000 per month. €1,000 was apportioned to each child and the remaining €1,000 to the respondent until November 2010, at which stage, three-quarters of the maintenance then payable was to be apportioned to the children equally and the balance apportioned to the respondent. It was provided that maintenance would be varied in each year in accordance with the Consumer Price Index, with the first adjustment to be made in August 2006.

4. At the heart of the present application is the applicant's assertion that at the time the court made its original maintenance order, he was in receipt of an annual net income of in excess of €90,000 per annum. As a result of the economic downturn, he states that his remuneration has been reduced by his employer and he has had to pay significantly increased Government levies. The overall effect of these changes left him with a net income of €86,000 for 2009 and €73,000, for 2010 allowing for a tax avoidance payment of €17,000. His last net monthly take-home payslip shows an income of €5,221.45. If that sum is representative of his current monthly income, the applicant will have a net income of €62,650 this year. In evidence, he stated that he hoped to receive an additional bonus of €5,000-€10,000 at the end of the year, payable next January.

5. I think it highly probable, having heard the applicant's evidence as to the performance of S. D. this year, that he will receive a substantial bonus at the end of 2011 and I think I should proceed on the assumption, that that bonus will be in the region of €7,500 net of tax. Accordingly, I think it is reasonable to assume that the applicant's total net yearly income will be not less than €70,157 (€5,221.45 x 12 + €7,500). This figure could well be an underestimation of the applicant's anticipated income if the recent wage slip produced is not representative of the applicant's monthly income for the current year. In this regard, I note that the net sum of €5,221.45 is less than the net figure he received in any of the last seven months of 2009. Further, whilst no bonus was apparently paid to the applicant in 2010, the bonus he was paid in 2009 was €22,980, and in 2008 was €18,494, sums greatly in excess of the bonus which I have factored into my calculations.

6. I propose accordingly to proceed on the basis that the applicant's income for this year will be in the region of €70,157. Somewhat artificially distributing the applicant's prospective bonus over the twelve months, the applicant should be considered to have available to him €5,846.41. I appreciate that the bonus will not be paid until next January, but then the applicant has savings of €58,000 in the bank, which he can dip into until such time as that bonus payment is received by him. The question then is, having regard to the outgoings of both parties, what is a reasonable sum for the applicant to pay by way of maintenance to the respondent and their two children.

7. The issue of maintenance is not a mathematical exercise. Even if it be the case that the court accepts that the applicant's income may have reduced by 21% since the original order was made, that does not entitle him to an automatic proportionate reduction in his maintenance payments unless he can demonstrate that the maintenance so reduced would be sufficient to meet the reasonable ongoing needs of the respondent and their two children.

8. The respondent has no savings and has no additional funds available to her other than the sum she receives from the applicant. I am also satisfied that she has done all that can to reduce her outgoings. She spent the monies recovered from her SSIA investment on legal fees pertaining to her divorce and accordingly these monies are no longer available to her. She has dropped her private health insurance. In fact, the respondent, notwithstanding her best endeavours ran into difficulties in meeting her mortgage commitments in recent times. When this occurred the applicant was of great assistance. He managed to renegotiate the terms of her mortgage and loaned the respondent the sum of €3,259 to allow her pay off her arrears, a payment that was a precondition to the grant of the new facility. The respondent confirmed that she has still not been able to repay this sum in full to the applicant and that she still owes the applicant €2,500. All of these facts suggest that the respondent is struggling on her present maintenance. I also think it's not unreasonable to assume that the cost of feeding and clothing the children and catering to their needs is growing all the time as they get older.

9. Of significance to the application is the fact that the respondent, as a result of injunction proceedings instituted by the applicant

is obliged to reside with the children in Dublin. The court order made was destined to ensure that the applicant would be in a position to take an active role in the parenting of his children and it appears to me that this order has achieved its objective. The applicant has significant access to his two daughters and the respondent makes no complaint about his performance or commitment as parent. Further, until very recently, the applicant and respondent enjoyed a period of relative stability and friendship, in the course of which they spent significant amounts of time together with their children as a family, notwithstanding their previous acrimonious litigation. However, this Court Order which the applicant is not disposed to relinquish, has left the respondent in the position of having to rear her twin daughters as a single parent in a city where she has no family support whatsoever. Her parents and siblings all reside in Cork, where she states she would much prefer to live. The respondent had hoped to reside in Cork, where, with the help of her parents, she would have been able to work fulltime and become financially independent of the applicant. She has tried in the past to work as a single parent in Dublin but she found that it was impossible. She referred to the problems of meeting work commitments when, as was frequently the case, one or other child was sick, her inability to call upon relatives at short notice to deal with such emergencies and to the difficulty of finding and paying for childcare during the school holidays. Unfortunately, the applicant's parents are not in a position to assist the respondent, having regard to the fact that they do not drive and live too far away to be relied upon for support.

10. Having heard and considered the evidence of the respondent, I reject the suggestion made on behalf of the applicant that the respondent could be working either part-time or fulltime and that this would be a viable method of relieving the financial burden which rests on the applicant. At the moment, the children are at primary school. If the respondent was to work part-time, for that to be economical, she would have to find work which matched the school hours of the children which are incredibly short. For the same reason, the work would have to be relatively local, given that she must deliver and collect the children to and from school each day. I cannot assume in the present climate that such employment, which must be in hugely high demand, is readily available. Also, the respondent has nobody to call upon in the event of either child being sick. It is all very well to say she should get help in such circumstances, but where do you get it when your child has a temperature at 7.00am and you have to be at work by 9.00am if you have no partner or family to call upon. Also, school holidays would generate very significant childcare costs for the respondent and I simply cannot imagine, taking into account these costs and the cost of travelling to and from work, that even it was feasible for the respondent to get the type of work which I have described, the same would generate additional income of any relative significance.

11. For similar reasons, the respondent is not in a position to work fulltime. It is undoubtedly the case that the respondent is now very well qualified. However, she has had practically no work experience over the past ten years, and again, having regard to the economic climate, I cannot assume that she could walk into a job tomorrow even if she decided it was feasible as a single parent. Further, any such employment would generate significant childcare costs on a daily basis with even greater costs whilst the children are on holiday from school. There is also the problem that in the event of either child being sick, she has no backup. All of these hurdles blocking the respondent's return to work would be surmountable if she was living close to her parents in Cork. They would be in a position to provide her with the appropriate emergency backup and assistance with childcare that most working women who have the benefit of a partner enjoy or who, in a marriage breakdown situation, have parents or siblings able to assist them with their childcare needs.

12. I also reject the respondent's suggestion that it might be reasonable to expect the applicant to take a lodger into his home to provide him with additional finance to meet his maintenance obligations and I further believe that it would be unreasonable to expect him to forego contributing to his pension.

13. Having considered all of the evidence I am satisfied that there should be some amelioration in the maintenance which is currently payable by the applicant by virtue of the court order made in December 2005, notwithstanding the fact that I am satisfied that this will impose a degree of hardship upon the respondent. I also accept the evidence of the applicant that the downturn in his income will make this payment difficult, but if it does so, he has the cushion of €58,000 in the bank which he can call upon to supplement his own living expenses. Even if the respondent has to take an additional €5,000 or €7,000 out of that account for the next couple of years, I believe that this is what is required to achieve justice between the parties, at least until the stage when the twins attend secondary school, by which stage, hopefully, the applicant may be in a position to contribute to her own maintenance and that of the children.

14. I do not intend, in the course of this judgment, to analyse the circumstances which may have led to the respondent, who I view as a most reasonable and responsible parent, to embark upon the issue of her own motion. Suffice to state that I believe she acted appropriately in initially accepting a 10% reduction in her maintenance, having been appraised by the applicant of a change in his terms and conditions of employment which he advised her was likely to reduce his monthly take-home pay by €785. She was then not surprisingly upset, when she noted, in the letter provided by S. D. dated 23rd March, 2010, that his gross remuneration for 2009 had actually increased, albeit that his net pay was down by 4% for the year. The evidence before me has established that the applicant's net take-home pay for the months of July to December inclusive for the year 2009 was only 10% less than for the same period in 2008, and that does not take into account the fact that the applicant's bonus in 2009 was €22,980 as opposed to €18,494 in 2008. I will accordingly not criticise the respondent for her approach.

15. Having considered all of the evidence before the court, I am satisfied that the appropriate current maintenance payment to be made by the applicant is a sum of €3,000 per month. I will apportion €750 to the respondent and €1,125 to each of the children and these sums will be subject to adjustment in accordance with CPI with effect from 1st June, 2012.

16. As I am satisfied that the reduction in the maintenance payment now directed will place the respondent in a position of relative financial hardship accordingly I believe it is important that she is placed in a position where she can monitor with accuracy the applicants income over the next few years so that she may seek to renegotiate an increased maintenance payment if his salary increases above that which forms the basis of the present order. To this end I will make an order that on or before 14th January 2012 and the same date in each subsequent year the applicant will furnish to the respondent:

- (a) copies of all wage slips received by him in respect of his previous year's earnings;
- (b) a copy of his P60 for the previous year;
- (c) details of any bonus payment received or to be received by him in respect of the previous financial year;
- (d) details and proof of any payment made by him as a tax avoidance measure in the previous financial year;
- (e) a statement from his employer confirming the information furnished pursuant to (a) –(c) above.