THE HIGH COURT

[2023] IEHC 414

[2021 No. 86 M]

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

IN THE MATTER OF THE FAMILY LAW ACT 1995, AS AMENDED

BETWEEN

D

Applicant

– and –

D(2)

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 14th July 2023.

1. I originally gave judgment in the substantive proceedings in this case on 12th January last. The facts of this case are outlined in detail in that judgment and I do not repeat them here. I also use the same anonymised details that I used in my earlier judgment.

2. Following on that judgment, certain orders were made. Mr D has not complied fully with those orders. So this application, the first application made by Ms D since my orders issued, has been to seek the attachment and committal of Mr D. No previous application was made by

Ms D seeking, *e.g.*, execution by the sheriff, appointment of a receiver by way of equitable execution, or to charge Mr D's company shareholding.

3. Mr D turned up in court on the day the application for attachment and committal was heard. As the parties know, an order of attachment directs that the person against whom an order is served be brought before the court to answer the alleged contempt in respect of which the order is issued. An order of committal directs that, upon arrest, the person against whom the order of committal is directed must be lodged in prison until the established contempt is purged. Mr D's attendance in court for the hearing of the attachment and committal application made the application for attachment moot. I refused the application for committal and said I would give fuller reasons at a later stage. This judgment contains those fuller reasons.

4. Ms D makes the following complaints:

(i) *that she has not received her full maintenance payments and payments have not been made on time*

Mr D has been declared bankrupt in Country A (from where Mr D hails) and says that he is unable to pay the maintenance payments that were ordered. Ms D maintains that the full truth was not told to the insolvency service of Country A and has been (or will be) making submissions to that service in this regard. Like counsel for Ms D, it is not clear to me how Mr D has made some of the representations that Mr D appears to have made to the insolvency service of Country A. However, for now I have before me a valid bankruptcy order from Country A.

(ii) *that Mr D has failed to pay certain dental and OT expenses incurred by his children*

I do not see that Mr D expressly addresses this in his affidavit evidence; however, I assume his argument would be that this is due to his claimed impecuniosity.

(iii) that Mr D has attended certain significant religious ceremonies in which one of his children was involved without prior notice.

This is denied and an explanation has been given.

(iii) *that Mr D has failed to pay a lump sum that he was ordered to pay*

Mr D maintains that Ms D will be able to participate in the bankruptcy proceedings in the United Kingdom and that she will be paid the lump sum when that process is complete. There is no evidence before me as to what assets are available in the personal bankruptcy or whether these will suffice to meet the lump sum ordered.

(iv) *that Mr D has failed to transfer a car and motorhome to Ms D as ordered by the court, with the requisite tax paid on the car.*

Mr D maintains that he is financially unable to pay the VRT due before the vehicles can be transferred.

(v) *that Mr D, though he claims to be impecunious, has rented a property close by Ms D that costs in or about* [redacted] *per month.*

Mr D maintains that this rent is being paid by his parents.

(vi) *that Mr D, who has a history of occasionally leaving his children on their own, an issue that I expressly addressed in my previous judgment, has continued to do so.*

This is denied. The application to vary access has been postponed to a future time and I will deal with matters then. The welfare of the children is a matter of paramount importance to the court. I note with concern that both Mr D and Ms D are now swearing to the children having been left on their own at night-time by the other parent. I would be grateful if when it comes to the application as to variation of access that the parties would swear comprehensively as to what has been happening in this regard. In the meantime, it goes without saying, regardless of where the truth as to the parties' respective allegations lies (and I do not know where it lies), that the parties should ensure that they never place the children at risk by leaving them alone at night. All of the issues now being raised before me are, by comparison, unimportant compared to the safety of the children.

(vii) *that Mr D has made comments critical of the Irish courts system.*

This is denied. There is, of course, no law against criticising the courts. I assume the point that is sought to be made in this regard is that Mr D in breaching the court orders has been engaging in flagrant and deliberate breach of court orders. The comments that have been alleged of Mr D seem more silly than anything else (if they were made and, again, it is denied that they were made).

5. Mr D has sought to make a virtue of the fact that he has been paying as much maintenance as he claims he can afford. As his counsel knows (even if Mr D does not), the correct course of action in that circumstance is to make an application for a variation of maintenance ordered, not for Mr D to take the law into his own hands and unilaterally vary downwards the amount of maintenance that he pays.

6. I respectfully do not accept the submission by counsel for Mr D, at para.13 of counsel's written submissions, that breach of a maintenance order is cured by (here belatedly) commencing an application for variation of maintenance. For the avoidance of doubt the order as to maintenance has been and presumably continues to be breached. I have had cases where people have borrowed money from family or financial institutions to continue to comply with a court order as to maintenance until a variation hearing can be brought on. The application for a downward variation of maintenance has been postponed to a future date to enable counsel for Ms D to put in a replying affidavit.

7. I note the submission by counsel for Mr D that the maintenance orders were made without the benefit of complete information. I await to see what further credible evidence is provided in this regard when the application for variation of maintenance proceeds.

8. This is the third time in as many terms that I have been presented with an application for attachment and committal that has gone to hearing. So it is worth briefly re-visiting some key precepts applicable to such an application (and examining how they impact upon the present application):

(i) Civil contempt is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court. (*Shell*

v. *McGrath* [2006] IEHC 108; *Wardglade* v. *Deery* [2021] IEHC 255; *Laois County Council* v. *Hanrahan* [2014] IESC 36).

Given that Mr D has obtained a bankruptcy order in Country A, I do not see that imprisoning him at this time would coerce him into meeting his maintenance payments or paying the VRT that I understand is due to be paid before the vehicles can be transferred.

(ii) Committal by way of punishment should be the last resort. It should only be engaged where there has been serious misconduct. (*Shell* v. *McGrath* [2006] IEHC 108; *Wardglade* v. *Deery* [2021] IEHC 255; *Laois County Council* v. *Hanrahan* [2014] IESC 36).

Mr D has unilaterally varied the maintenance payments in breach of a court order, he has not transferred the car or motorhome as ordered, and he has not paid the lump sum ordered. However, he maintains that this is due to an inability to meet the maintenance payments or pay the applicable VRT, and that the lump sum will be forthcoming in the bankruptcy process (albeit no evidence has been forthcoming as to how much of the sum will ultimately be paid). So there has been serious misconduct. Given that Mr D has been made a bankrupt in Country A, I must, at this time, give credence to his claims as to impecuniosity. I do not see how I could properly conclude that this is a last resort scenario when there is no evidence that Ms D has attempted anything other than committal by way of enforcement.

(iii) The contempt must amount to serious misconduct involving flagrant and deliberate breach of a court order. Mere inability to comply will not amount to serious misconduct. The circumstances justifying the imposition of punishment will almost always include an element relating to the public interest, including the vindication of the authority of the court. (*Laois County Council* v. *Hanrahan* [2014] IESC 36).

Please see my answers to (i) and (ii).

(iv) The default must amount to a conscious decision, a distinction falling to be made between an alleged contemnor who is unable to pay and one who, through a deliberate act or in a culpably negligent manner refuses to pay (*McCann* v. *Judge of Monaghan District Court* [2009] IEHC 276).

Given that Mr D has obtained a bankruptcy order in Country A, I do not see that it has been established at this time that he is refusing to pay in the manner just described, rather than being, to a greater or lesser extent, unable to pay.

9. Counsel for Mr D complains that the endorsed order supplied to Mr D in this case does not comply with O.41, r.8 RSC because it does not replicate the form of endorsement in O.41, r.8. However, O.41, r.8 is quite clear that the endorsement must include the stated words, or words to that effect. The wording that appears in O.41, r.8 is the following:

"*If you the within named A.B. neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order*."

10. The wording applied by way of endorsement in this case is the following:

"*If you the within named Respondent neglect to obey this order forthwith you will be liable to process of execution including imprisonment and/or fine for the purpose of compelling you to obey the said order.*"

11. The words quoted in the preceding paragraph are to the effect of those that appear in O.41, r.8 RSC.

12. Counsel for Mr D also referred me to *Ulster Bank Ireland* v. *Whitaker* [2009] IEHC 16 as authority for the proposition that an order that is to be endorsed must contain the relevant endorsement. It must, and here it does.

13. I note Mr D's averment in his affidavit evidence that Ms D has been upsetting the children by discussing Mr D's potential committal with them. I do not know if this is so. I would but

note that these are *in camera* proceedings and that it is inappropriate for anyone to discuss any aspect of these proceedings with any of the children.