

**THE HIGH COURT
FAMILY LAW**

[2021] IEHC 674

[2021 No. 2 CAF]

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

BETWEEN

D O'C

APPLICANT

AND

C O'C

RESPONDENT

JUDGMENT of Mr. Justice Jordan delivered on the 15th day of September 2021

Introduction

1. This matter comes before the Court on foot of a Notice of Appeal filed on the 1st of February 2021 by the husband in relation to Orders made by Judge McDonnell in the Dublin Circuit Family Court on the 21st December 2020 and the 28th January 2021. The matter was heard before the Court on the 2nd and 3rd. June 2021 and on 15th. and 27th. July 2021. Judgment in the matter was reserved.

Factual Background.

2. The parties married in the summer of 2006 after a relationship of some years duration. There are four children of the marriage; K. who was born in 2007, E. born in 2010, A. born in 2013 and D., born in 2016.

3. The family home of the parties is in proximity to Dublin and was purchased by the husband in 2003 for €175,000. It was financed by a mortgage and €15,000.00

savings of the husband as the deposit. From 2006 onwards, the property has been held in their joint names. The family home is encumbered with a mortgage in favour of the E.B.S. It was further the subject of a 'top up' or renovation loan of €100,000. The mortgage outstanding is c. €165,000.00 and the value is c. €300,000.00. The mortgage repayments are made on a 50/50 basis. While the wife has the use of the house at present and pursuant to the circuit court order until the youngest child completes the Leaving Certificate [when the property is to be sold] it must also be observed that the husband's mortgage repayments under this regime do represent a savings plan or investment for him as he will have his interest in the dwelling house realised when the house is eventually sold.

4. The husband is a public servant. He says he suffers from some health difficulties, but no medical evidence was called and indeed he presented throughout the hearing as a person in good health. Exhibit DOC8 which is a 6 line Report from a G.P dated January 2020 exhibited in an affidavit sworn by the husband on 10th. March 2020 refers to investigations concerning complaints but provides little if anything to support any suggestion that the husband's health is now compromised to any significant extent. Indeed, the husband is on the evidence getting on with his life. He is working hard and hoping to re-marry soon.

5. The wife is engaged in what might be best described as a hybrid of self-employment and employee work in secretarial services.

6. In or around 2015, if not before, difficulties arose in the marriage. The parties attended marriage counselling. Unfortunately, this was unsuccessful. On the 2nd November 2018 the husband moved out of the family home.

Chronology; Pleadings and Orders.

7. The Circuit Family Court proceedings commenced by way of Family Law Civil Bill issued on the 1st May 2019 on behalf of the wife. The reliefs sought, included, *inter alia*, a Decree of Judicial Separation.
8. Solicitors entered an appearance in the proceedings on behalf of the husband on the 31st May 2019.
9. On the 11th September 2021, the wife issued a motion returnable to the 20th November 2019 seeking interim maintenance for herself and the children.
10. The husband filed a Defence and Counterclaim in the 20th November 2019.
11. Judge Ní Chulachain made an Order for interim maintenance on the 9th December 2019 on foot of the Motion issued in September. The Order provided for the payment of €35.00 per child per week and 50% of the mortgage repayments and 50% of the educational, extra-curricular, health and dental costs from the 12th December 2019. Additionally, Judge Ní Chulachain ordered that the husband continue to pay the critical illness insurance, health insurance and life insurance pending the hearing of the action.
12. The husband issued a motion in March 2020 seeking an order directing the wife to, *inter alia*, engage in discussions with their mortgage bank, the E.B.S.
13. On the 23rd April 2020, the husband's then solicitors issued a motion to come off record in the matter. The motion was made returnable to the 29th July 2020. The order was granted by Judge Horgan in the Circuit Family Court on that date.
14. In September, 2020 the husband issued a supplemental motion to the earlier one of March 2020.
15. On the 2nd November 2020, Judge McDonnell in the Circuit Family Court ordered, *inter alia*, that accountants for both sides engage with each other. On the same

date, the husband issued a Family Law Civil Bill seeking a Decree of Divorce. Solicitors for the wife then entered an appearance in those proceedings.

16. Judge McDonnell made orders on the 21st December 2020 and 28th January 2021. These orders are the subject of this appeal.

17. The Order of the 21st December 2020 granted a Decree of Divorce. In respect of ancillary Orders,

- the Court ordered that the family home referred to earlier in the judgment be placed on the market once the youngest child D. completes his leaving certificate. The net proceeds of this sale after the deduction of all associated costs of sale were to be divided in the following way: 55% to the wife and 45% to the husband. The parties could sell the property sooner than this if they reached agreement to do so.
- The wife was to have exclusive right of residence in the property until same was sold.
- Both parties were to nominate a solicitor to have carriage of the sale of the property and both were to agree an auctioneer and both were to be bound by reasonable advices of the auctioneer in respect of the sale of the property.
- In relation to the mortgage repayments, the parties were to discharge them on a fifty percent each basis.
- The maintenance element was finalised in the Order of the 28th January 2021.
- The husband was ordered to continue to discharge the costs of the health insurance of the wife on an interim basis until the wife takes her own policy out and the Court noted there was to be no lapse in the policy for her. The

wife was to be removed in January 2021 as the Court expected to have an up to date position then in respect of the new health insurance policy.

- The Court recommended, in its Order, that both the husband and the wife would engage with Ms. Rene Canavan to seek her views / recommendations in respect of the suitability of Rainbows for their daughter, A.
- Prior to the date on which the matter was returned before the Court (28th January 2021), the parties were to endeavour to reach agreement on a ‘workable access schedule for all parties going forward’.

The matter returned before Judge McDonnell on the 28th January 2021 when the second substantive Order was made. It dealt with custody, access, pensions, debts and maintenance. It is the financial aspects that have been the focus of most attention on the hearing of this appeal.

The Law

18. The recent Court of Appeal decision in *N.O. v P.Q.* 2021 IECA 177 sets out the law concerning “proper provision” in cases such as this in a clear and comprehensive way. In considering the legal position, it is necessary to commence with section 20 of the Family Law (Divorce) Act 1996 which provides :-

‘(1) In deciding whether to make an order under section 12, 13, 14, 15 (1) (a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.

(2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:

(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. *In this regard it is clear that the husband is an experienced employee and he has undertaken third level education relevant to his work in the recent past. The court is satisfied that his employment is secure and that it is probable that he hopes for promotion. He does contend that overtime is no longer as plentiful as it used to be. In terms of his income and earning potential the court considers it probable that these proceedings are and have been a brake on the applicant's career and overtime aspirations which brake will hopefully be released when these proceedings conclude. Indeed, it may be that the wife's financial position will also improve in time. The court must however deal with the financial reality of the parties as it is at present in light of the evidence. Any improvement in the position of either party can be accommodated by an application to vary maintenance in the future as permitted by the legislation.*

(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 a civil partnership of the spouse or otherwise). *The husband is in a new relationship and hopes to marry his current partner whom he lives with. However, little evidence was given in respect of this. There was brief evidence of the family situation of the current partner and evidence that the current partner is a professional person in employment. The wife has another person in her life but he does not reside with her and again little*

evidence was offered about him. Thus, a case is not made concerning this consideration by either party.

(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. *The spouses were both hard working parents before the proceedings commenced and did not enjoy a lavish lifestyle. Their separation has imposed additional financial pressures on them both and has made the task of juggling the family finances even more of a challenge for them both.*

(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. *This chronology is detailed above. The couple were married in 2006 and separated at the end of 2018. They had 4 children together – born between 2007 and 2016.*

(e) any physical or mental disability of either of the spouses. *Again this is referred to above. There is no credible evidence before the court that the husband's health is compromised to such an extent as to warrant special provision or allowance to be made. The court is satisfied that the husband did appreciate the importance of producing cogent medical evidence to prove his assertion that his health is compromised and he did not do so. Furthermore, as already stated his presentation in court and the evidence in the case did not suggest any degree of infirmity but rather the contrary.*

(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. *Of note is the wife's energy and industry in looking after 4 young children as they came along, in looking after the home and working outside the home - and now working in a hybrid employment [albeit with some childminding help]. Of note also is the fact that she has not sought spousal maintenance as such although still the primary carer of 4 young children. The applicant appears to have little appreciation of these facts. In evidence the wife explained that " It's stretched – it's just tough going". This court has no doubt that this is the truth of the situation she finds herself in. The husband has certainly provided for the family by working hard. The wife has done likewise and is continuing to shoulder the additional burden of primary carer with stretched resources. While it is understandable that the husband wishes to move on in his new relationship the situation is that he has four dependent children whom he has an obligation to provide for while they are dependent. The burden or larger part of the financial responsibility cannot be visited on the mother following the marriage breakdown and her daily contribution in looking after the home and four young children cannot be ignored. Nor can her contribution to date in this regard be ignored.*

(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. *It is probable that the wife would have improved her skill set and her career options were it not for the fact that she has had four children between 2007 and 2016 and has looked after them and the home throughout. In addition, she has worked outside the home and latterly both outside the home and within as a self-employed typist. The wife's opportunity to up-skill or to find more remunerative employment is significantly eroded because she is the primary carer for four young children. The fact that she has help is a factor but does no more than alleviate a little what is a quite significant workload. The father did contribute in the house during the marriage, but the weight of the domestic and childcare work has always been and remains on the wife.*

(h) any income or benefits to which either of the spouses is entitled by or under statute. *Of note is the fact that the wife is in receipt of €560.00 per month children's allowance which is a valuable part of her monthly income.*

(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. *Although this is a high conflict case, the court*

does not consider the threshold met to justify conduct on either side influencing the outcome. While the husband has been critical of the wife's paperwork in the case the deficiencies evident are not significant when one looks at the bigger picture. In this respect, the court is also satisfied that the husband's paperwork is in substance deficient.

(j) the accommodation needs of either of the spouses. *The mother and children need a home and allowing them reside in the family home until the youngest child is "grown up" is sensible. The father needs accommodation and the court must have regard to the cost. However, the court must also have regard to the reality that accommodation in Ireland, whether rented or purchased, varies greatly in terms of cost from one area to another. This fact means that people do not always get to live where they wish – because they cannot afford to do so.*

(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. *The wife has a very small pension which she ceased contributing to some years ago and probably because it was a luxury she could not afford. The husband has a pension which is valuable and which must be a feature in the consideration of the provision to be made for the wife and the dependent children.*

(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried. *This does not arise on the evidence.*

The means of the husband and wife.

19. As already mentioned the husband has been and remains a hardworking individual.

20. Likewise, the wife is a hardworking individual. During the marriage she has generated a second income for the family in addition to looking after the home and each of the four children. The wife has had the assistance of a childminder during the marriage and presently has the assistance of an Au Pair. Nonetheless, it is very evident to the court that the wife is struggling with heavy work commitments which are made up of her self-employed secretarial work, her one or two days a week PAYE secretarial work and her home duties which are a constant demand on her.

21. The evidence is that the income of the wife for 2020 was as follows: -

Maintenance €140 per month x 12 = €7,280.00

PAYE Work €18,692.00

Self - employed income €16,000.00 aprx.

Children's Allowance €6,720.00

Total: €48,692.00.

22. In terms of liabilities the affidavit of means of the wife sworn on the 25th of May, 2021 shows a Credit Union loan of €24,623.79 (incorporating legal fees, accountant's fees, credit card bill and personal loans from her family). In addition, there is a mortgage due on the family home which the wife is jointly liable for.

23. At present the weekly outgoings which the wife pays are less than normal mainly because some of the children's activities have been suspended due to Covid. The wife puts her weekly outgoings in the region of €1,000 which includes the mortgage repayment. The mortgage repayment is approximately €157.00 per week. Notwithstanding his challenges in respect of the wife's figures the court is satisfied that

the figures presented in evidence by the wife are credible and her weekly expenditure is reasonable for a family of five (the four children and herself). The deficiencies identified by the husband in the wife's affidavits of means do not detract from the credible evidence that the wife is spending whatever comes in on the family expenses. She has nothing to spare and she wastes nothing on luxuries.

24. In addition to the family home, the wife has listed her Zurich pension in her recent affidavit of means. It appears that this pension pot has a value in the region of €20,000. It is an asset but a small one.

25. Both the husband and the wife own older cars which they understandably would like to replace if they had the means to do so.

26. The wife also has a very small amount of money in savings as of the date of swearing of her recent affidavit of means.

27. Amongst the weekly outgoings of the wife is the Credit Union loan repayment of €118.03. While the court does not have the precise period which this loan will run for it has a number of years to run in circumstances where the principal sum outstanding is almost €25,000.

28. In terms of his assets the husband also lists his interest in the family home as his main asset in his most recent affidavit of means sworn on the 7th May of 2021. He has Credit Union shares valued at €4,350.00 but Credit Union loans (combined) amounting to €15,129.00 approximately. This figure includes €5,500 in respect of legal costs which he incurred in this litigation.

29. In the second schedule the husband swears that his net pay per week is €807.00 or €41,964 per annum. This figure is based on the total for the first seventeen weeks of his pay cheques in 2021 – divided by seventeen and multiplied by 52 – with the same process for tax and USC deductions and including the mandatory pension deductions.

30. In his recent affidavit of means the husband makes the point that overtime which increased net income has reduced starting in 2020. He says that his annual overtime totals in 2018 and 2019 were approximately 700 to 800 hours per annum.

31. Insofar as the overtime situation is concerned, the court has already expressed a view in that regard. While proceeding on the basis of the current figures the court does consider it probable that the husband's financial situation will improve in the future through overtime and possibly as a result of promotion.

32. The weekly expenditure deposed to by the husband in the fourth schedule of his recent affidavit of means does lack credibility in several respects. Having considered the evidence, the court is satisfied, as a matter of probability, that the weekly expenditure in the recent affidavit of means of the husband is overstated.

33. At the moment, and for some time now, the husband has resided along with his new partner in a rented house. On his evidence he pays rent in respect of this house of €231.00 per week. The two children of his new partner also reside in the house. It appears that the monthly rent is €2,200.00. The vouching documentation of the husband indicates the following rent payments: -

January 2020	€1,000
February 2020	€1,000
March 2020	€800
April 2020	€800
May 2020	€650
June 2020	€750
July, 2020	€700
August, 2020	€700
September, 2020	No statement.

October, 2020	No statement.
November, 2020	No statement.
December, 2020	€600.
January, 2021	€600.
February, 2021	€1,000.
March, 2021	€1,000.
April, 2021	€1,000.

34. In his affidavit of means sworn on the 7th of May of 2021 the rent paid by the husband in respect of his current accommodation is stated to be €231.00 per week. That is not borne out by the evidence – and it is not borne out by the available documentation detailing the payments actually made.

35. In evidence the husband stated that he intended to remarry. His intention is to marry his new partner. Given that the husband is living along with his new partner and her two children in rented accommodation and in circumstances where his payments to her in respect of rent is fluctuating the husband has left the court in the position that it is not at all clear what his actual weekly expenditure or liability is in respect of accommodation or rent. What is however clear is that his weekly expenditure in that regard has not been what he has indicated it to be in his affidavit sworn on the 7th of May of 2021 – and is considerably less.

36. In evidence the husband spent some time explaining how difficult it was for him to make ends meet. Amongst other things he explained that he had not bought any clothes for some time and that his partner buys clothes for him. He explained that he was wearing a suit which his new partner had bought for him. He explained that the shoes he was wearing were shoes which belonged to his deceased father and which his mother had given to him. Yet, in his recent affidavit of means he deposes to an

expenditure of €30 per week on clothes and shoes (including clothes for work as the allowance is within his net pay). One would have thought that an annual budget in the region of €1560.00 would from year to year provide a reasonable wardrobe and footwear for a middle-aged man.

37. But it may well be the truth of the situation is that the husband has not spent money on clothes and shoes for some time now – in which event it is difficult to see how this item is listed in his sworn affidavit of means as involving weekly expenditure of €30.00.

38. The evidence of the husband in relation to the Credit Union loans totalling €15,129.00 is less than satisfactory. The total liabilities have to be viewed in the context of the collateral provided in the Credit Union in the form of Credit Union shares valued at €4,350.00. Given the husband's current financial circumstances it is difficult to understand why he has not restructured these relatively small Credit Union loans as part of prudent management of his finances. It is true that no evidence was given concerning such an option but the evidence is that the husband is in good secure employment, does have equity in the family home, has a secure pension and credit union savings of €4,350.00. His wife has borrowings from the credit union of €24,623.79 and savings in the credit union of €1200.04. Having regard to the evidence the court is satisfied as a matter of probability that the husband could manage his credit union borrowings better to reduce his monthly repayments by spreading repayments over a longer period.

39. Aside from that, it would be unfair to quibble greatly with other items of expenditure as the husband is working hard and his financial needs are a constant pressure. But 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. And here there are four.

40. The court order: - Taking the court order dated 21st day of December, 2020, that will be varied and this court's decision is: -

- (1) **The court affirms the decree of divorce – and in respect of which there is no issue between the parties save as to the issue of proper provision.**
- (2) **The court affirms the order pursuant to s.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 this section for provision out of the other party's estate.**
- (3) The court varies the order in respect of the family home to read :
An order that the family home situated at _____, _____ in the County of _____ be placed on the market on the 1st day of February, 2036. The net proceeds of sale following a deduction of all of the costs associated with the sale (including auctioneer's fees) are to be divided 50% to the husband and 50% to the wife. The parties may sell the property before this date if they reach an agreement in writing (signed by them both and witnessed) to bring the date forward to a specified date. The wife is to have an exclusive right of residence in the property until such time as the property is sold – and for the avoidance of doubt the wife is entitled to decide who else resides in the property for the duration of her occupation of it.

(The court has specified the period of exclusive occupation in favour of the wife and the date on which the property is to be placed on the market for sale to be 1/2/2036 in the interests of the welfare of the children. It is undesirable to have the sale date tied to the date of the youngest son's completion of his Leaving Certificate exams as so fixing the date may create some uncertainty and is more likely to put additional stress and anxiety on the family. This can hopefully be avoided by fixing a date just after he turns 20. In the ordinary course of events the youngest will have completed his secondary education a year or two before then – and he ought to have done so. The court is also adjusting the division to 50/50 as it considers it fairer to do so given that the husband paid the initial deposit and the wife will have exclusive use until 1/2/2036. The wife will also have the cost of routine maintenance such as painting and decorating which will fall to her as occupier and are at her sole discretion - plus the cost of house insurance. In the event of any major expenditure on the house being necessary which is not covered by insurance, such as a major roof repair or replacement of the central heating being essential, then such is to be regarded as capital expenditure and both parties will be equally responsible for the cost - not least to safeguard their respective investment in the house. This provision is to be construed reasonably by the parties as owners).

- (4) The court affirms the Circuit Court Order that both parties are to nominate a solicitor to have carriage of the sale and that both parties are to agree an auctioneer and that both parties are to be bound by the reasonable advices of the auctioneer in respect of a sale of the property.**
- (5) The court affirms the Circuit Court Order that both parties are to discharge the mortgage payments on a 50/50 basis going forward.**

(The court is alert to the fact that the request for a restructuring of the mortgage has been unsuccessful).

- (7) **The court is making no further order in respect of the balance of the Circuit Court Order of 21st December, 2020 in view of the Order dated 28th of January of 2021 of the Circuit Court.**

41. While this Court agrees with the recommendation contained in the penultimate paragraph of the Circuit Court Order dated 21st December, 2020 it does not intend to repeat it as the parties are aware of the wisdom of the recommendation.

42. In so far as the court order dated 28th day of January, 2021 is concerned, that will be varied and the court's decision is as follows: -

- (1) **This court affirms the Circuit Court Order that the husband and the wife remain joint guardians and custodians of the dependent children with primary day to day care and control to the wife.**
- (2) **The court directs that the communications between both parents concerning the welfare of the children be civil and non-argumentative and that neither party seek to dominate the other.**
- (3) **The mother has liberty to arrange for the dependent child A to access such therapeutic supports, whether through play therapy or otherwise, as she considers appropriate and the court dispenses with the need for the father's consent in respect of same. The court further directs that the mother is to keep the father informed in respect of such therapy by a text or email at least once per month whilst such therapy is ongoing. Any therapy or like costs involved are to be treated as health costs and shared equally by both parents if not covered by Insurance. The court further directs that both**

parties are to cooperate with any therapists retained in this regard, if and when requested. The court lifts the in camera rule to permit the parties to inform any therapist retained of the content of this paragraph of the court order.

- (4) **The court notes the access agreed between the parties and fixes that access regime as agreed . The agreed access schedule is contained in appendix 1. The agreed access schedule does not deal with Christmas Access and the court affirms the order made in the Circuit Court on 28th. January 2021 in respect of the access arrangements for the Christmas holiday period 2021 onwards [Paragraph 15 of that Order is hereby affirmed].**The parties have failed to agree on pick up and drop off points. The father does not wish to have the mother calling to his current residence. This is a position taken by the father in circumstances where he is in a new relationship and understandably wants to move on with his life afresh in so far as possible. However, this court is concerned primarily with the welfare of the children and considers it most undesirable that drop-offs be at playgrounds or landmarks away from their parents' residences. Such logistics should not be necessary and both parents need to accept the adjustments that care of and contact with their children now require. **The children are to be dropped off at the residence of the father by the mother and dropped home by him to the mothers' residence following access. The father may choose to pick the children up at the mothers' residence so that the mother need not call to his residence. If the latter is his preference, then the father must so elect**

now and confirm by e-mail to the mother within 7 days. Should he so elect and later wish to change to the mother dropping the children off at his residence then he may do so by so advising by e-mail to the mother at least 21 days in advance - but any such change will then be permanent unless the parties agree otherwise in writing or there is a variation by court order.

- (5) **The court directs that, in the event of difficulties arising in respect of any matters relating to access and/or in respect of any issues concerning the welfare of the children, the parties are to seek the assistance of a mediator in the first instance in an effort to resolve any issues prior to making any application to court in respect of same.**

Pension

43. The assets of the parties are relatively modest and essentially consist of the equity in the family home which is in joint names and the pension of the husband and the small pension of the wife.

44. The wife was born in 1977 and is 43 years of age. She holds a personal pension plan which was set up in 2007. There have been no contributions into this pension since July 2019 and the total contributions made were small. The fund in the pension has a value as of the 9th December 2020 of approximately €20,200. At retirement this pension fund may be used to provide a 25% tax free retirement lump sum and the 75% balance may be invested to provide income in the form of fund withdrawals or may be used to purchase an annuity from a life assurance company. There are no other benefits or guarantees associated with this pension fund.

45. The court is satisfied that the contributions into this pension ceased because the wife could not afford to make contributions. The reality is that the pension is of modest value. It can best be described as a small pot of personal savings which the wife has managed to put away and which she will be able to access at a future date in accordance with the scheme rules.

46. The husband was born in 1978 and is 42 years of age. He is a member of a pension scheme with an associated spouses and children's scheme. These are public sector defined benefit schemes. This public sector pension is a valuable asset. The pensionable service commenced in 2000 and the husband had just over 20 years of actual pensionable service in the scheme as of December of 2020.

47. The family law legislation does not confer any pension scheme entitlements as such. The legislation confers power on the courts to make orders which will confer such entitlements.

48. In this case the wife's argument as to why pension adjustment orders ought to be made in her favour in respect of the husband's public sector pension is essentially that such orders are required in order to achieve a degree of equity insofar as the respective pension rights on both sides are concerned. Although she has worked during the marriage and continues to work she has very little by way of pension provision and her earnings have been spent on the family. In addition, she has been and remains the primary carer of the children. Against that the husband has accumulated pension entitlements. It is not disputed that he has earned these pension entitlements.

49. The court does accept the wife's argument that appropriate pension adjustment orders ought to be made in respect of the husband's public sector pension in order to create a degree of equity between the respective pension rights. These orders should have regard for the duration of the marriage and the court proposes to make pension

adjustment orders by reference to the period between the date of the marriage on the 3rd of June of 2006 and the date when the decree of divorce was granted in the Circuit Court which is the 21st of December of 2020.

50. Given the protracted nature of these proceedings and the high conflict existing the court did consider it necessary to hear evidence from both sides in relation to pension provision and in relation to the pension adjustment orders being contended for by the wife.

51. On the 27th. July 2021 the court heard evidence from a pension expert on behalf of the wife, Ms. D , and from a pension expert on behalf of the husband, Mr. P. Both experts had prepared written reports which were exchanged and submitted to the court. Each of the experts approached the issues in a professional manner and their evidence was informative and helpful.

52. There was a considerable measure of agreement between both experts. They did diverge in relation to matters such as approaches to valuations on, for example, future un-accrued benefits, future state retirement age (66 versus 68) and whether or not the “supplementary pension” ought to be considered by the court.

53. However, the differences between the respective experts and a decision on such conflicts as did exist between them both are not necessary in circumstances where the court proposes to make orders based on an award of a percentage entitlement of a specified “pension benefit” for the period specified.

54. Mr. P on behalf of the husband did make the point in his report and in his evidence that in his opinion (and supported by guidance from the Pensions Authority), given the complexity and longevity of pensions and pensions legislation, if other assets are available to provide adequate provision, then this should be the preferred route to resolution as opposed to seeking to put in place protracted and complex pension orders

where benefits can only be realised many years (or even decades) after a couple has divorced.

55. The evidence of Mr. P in this regard reflects a sensible view in terms of approaching pension adjustment orders. However, the nature and value of pension pots vary greatly as indeed do the situations and context in which they exist. At one extreme a business person may have accumulated significant wealth in a pension through hard work, good fortune in business and competent tax advice. The wealth of that individual may be such that the pension is simply another column in the portfolio of wealth spreadsheet. In that same scenario the spouse of that individual may have no pension provision whatsoever. At the other end of the spectrum one will find a case such as this where one spouse commenced a pension but did not have the resources to fund it and as a result has an almost non-existent pension pot whereas her spouse has a worthwhile and valuable public sector pension – and which public sector pension is the main asset in existence after the separation of the spouses in circumstances where their combined earnings during the marriage were spent on living and rearing their young family.

56. This is a case where it is necessary to achieve a degree of equity between the respective pension rights and having regard to the period of the marriage. The making of proper provision for the wife requires that this be done as failure to do so would leave her significantly disadvantaged financially by reason of her dedication and commitment to the marriage and to the rearing of the children.

57. It is desirable in this case that this Court make the actual pension adjustment orders. Failure to do so could lead to this litigation being protracted further and this is the core reason why the court decided to hear the evidence and submissions regarding the pension adjustment orders.

58. This Court will make pension adjustment orders in the terms of the draft submitted to the court and which was dealt with in evidence – but with the following variations. At paragraph 1B the percentage will be varied from 50% to read 46.3%.

59. At paragraph 2B the percentage shall be varied from 50% to 46.3%.

60. At paragraph 3B the percentage shall be varied from 76% to 70%.

61. In the second paragraph at 4B the typographical error “clarify” shall be amended to read “clarity” and there will be a similar amendment in the second section of para. 5B.

62. The terms of the pension adjustment orders are as set out in the pension adjustment orders at Appendix 2.

Maintenance.

63. It needs to be said that father’s approach to the maintenance issue, though possibly a sincerely held belief, is incorrect. It does seem quite clear that his view is that ; -

- *the Court should look at and accept what he says he requires in terms of money to deal with his financial obligations [other than maintenance] and to defray the cost of the standard and quality of life which he has chosen post separation.*
- *Having then accepted his position in that regard the court should see what is left over to defray maintenance to his children and order maintenance accordingly.*
- *While he disputes that this is so the court has arrived at this conclusion on evaluating the evidence in the case and the detailed submissions. The flawed approach of the father concerning his obligations towards his children lies at the root of his unhappiness at the quantum of the court ordered maintenance.*

- *That fact is that the father and mother have costly financial obligations in respect of their four children. Those obligations will impose lifestyle limitations on them both while their children remain dependent.*
- *The maintenance ordered for the children is not generous. It would have to be somewhat greater were it not for the income generated by the work of the mother and which work is clearly placing her under significant pressure because of her role in the home and as primary carer.*
- *The husband submitted an open offer in writing to the court which it has studied. It is the second open offer which the court was referred to and came on the 15th July when the court heard submissions in relation to the Pension adjustment orders [the court adjourned the case further to hear evidence in respect of those orders]. As was the case with the earlier open offer [which the wife rightly rejected] the most recent open offer is unacceptable in terms of proper provision and would in fact exacerbate the wife's financial situation and vulnerability if accepted. It would if accepted be to the detriment of the children's security and welfare. As a proposal it places the wishes and financial objectives of the husband centre stage - when the children and a secure home for them should be a greater priority. There is nothing to stop the parties negotiating in relation to the family home if they are both willing and able to do so. That is a matter of choice for both sides and the court will not force additional financial obligations or pressures on the wife. The recent proposal was rejected by the wife and she was correct to reject it.*

In respect of maintenance, this court orders that –

- (1) The Court will increase the maintenance figure slightly but on the basis that the mother pays for the extra-curricular activities currently listed as swimming and stage school and brownies. These activities may vary as the children grow older and the mother is to continue to discharge such costs unless and until such activities become so costly as to require a variation application to be made. The father is to be responsible for the children's GAA subscriptions and costs.**
- (2) The husband is to pay to the wife maintenance in the sum of €45.00 per week per child commencing on 4th. October 2021 and payable as heretofore.**
- (3) The arrears of maintenance as of 2nd August 2021 are to be discharged in full by the husband prior to 3rd. December, 2021. The amount is agreed to be €528.72.**
- (4) The husband is to pay 50% of the monthly mortgage payments in respect of the family home [and the wife is to pay the other 50%].**
- (5) The father is to pay 50% of the educational costs of the children. Likewise health and dental costs of the four children if not covered by health insurance. Any expense in excess of €200 is to be notified and agreed between the parties in advance. Any such expense is to be discharged within 14 days of request being made to the other parent by the parent who is dealing with or has dealt with the bill.**

- (6) **The husband is to continue to pay the health insurance which covers the husband and the dependent children. He is to continue to pay the critical illness cover which provides cover for himself and the dependent children. He is to continue to pay the life insurance which is to cover himself and the dependent children.**
- (7) **The parties are each responsible for their own debts – including their Credit Union loans. For the avoidance of doubt, they are equally responsible in respect of the mortgage on the family home.**
- (8) *The court is minded to order that the earnings of the husband be attached in respect of the weekly maintenance payments - because the husband has already defaulted and has not treated maintenance payments as a priority even though court ordered. But the Husband has said that he undertakes to pay the maintenance and has promised to do so – in open court. The court is not treating his undertaking as it would a sworn undertaking from somebody with legal representation. But it is accepting at face value the assurances of the husband and will therefore not make an attachment of earnings order. The court accepts that such an order would not look good for the husband in his employment and it is in nobody's interest that his career be in any way impacted if he is abiding by the court order. If there is a default then the husband can expect an application to be made to the Circuit Court for such an attachment of*

earnings order and for an order that any costs incurred by the wife in respect of such an application be paid by him.

(9) Any further applications in respect of this matter are to be made to the Circuit Court.

(10) The court is not making any order for costs in this case in circumstances where the wife did receive legal aid in respect of this appeal. *The court did consider making a costs order against the husband as it did find his approach and strategy at stages of this litigation and hearing unacceptable. His approach in this case has been incorrect and unreasonable from an early stage. However, both he and his wife find themselves as parents who have separated with protracted and high-conflict litigation as one consequence. The court must be measured in dealing with the unravelling of their differences and disputes and will therefore ignore what may best be described as a less than sensible approach by the husband when dealing with the issues which had to be resolved as a result of the marital breakdown.*

64. This matter will be listed on 14th October 2021 [Physical hearing] to deal with any issue in relation to the form of the order. If the parties have agreed a draft order in accordance with this Judgment then the agreed draft Order may be submitted to the Registrar with a request for a perfected order to issue. In that event there will be no attendance required on 14th. October,2021. If either party behaves unreasonably in this regard then an order for any costs thereby incurred including the costs of 14th October 2021 may be made against that party.