

Neutral Citation No: [2023] NIFam 26

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Ref: FOW12501

ICOS No: 20/87453/A01

Delivered: 28/11/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

CANDICE WINTER

Petitioner

and

COLIN WINTER

Respondent

**Ms Lisa Moran BL (instructed by Donaldson McConnell & Co. Solicitors) for the
respondent**

The appellant appeared as a litigant in person

FOWLER J

Introduction

[1] The petitioner and respondent were married in 2001 and have two children. They separated in 2020 and divorced in May 2023. The petitioner issued ancillary relief proceedings in 2021. On 9 November 2023 I gave judgment on a previous application by the respondent for leave to appeal out of time against an ancillary relief consent order made by Master Bell on 31 May 2023. In those proceedings I refused to accede to the respondent's application to extend time for appeal and accordingly refused his application to appeal out of time.

[2] In the present proceedings it is the petitioner's case that the respondent has without cause failed to comply with the terms of the court order made in May 2023. She now seeks his committal to prison for breach of the terms of this order. The respondent states he cannot afford to pay the maintenance and other sums payable under the consent order and orally represented to the court that there should be a downward variation of the total payable by him and other adjustments to the order.

Background

[3] The parties were married on 6 January 2001 in South Africa and separated in October 2020. The respondent is a consultant anaesthetist and the petitioner a health therapist. They have two children, a girl born on 11 January 2005 and boy born on 27 November 2007. Mutual Decrees Nisi were issued on 4 May 2023 and Decrees Absolute on 21 July 2023. During the marriage, the petitioner and children were financially dependent upon the respondent. Ancillary relief proceedings were brought before the Master in respect of assets acquired during the course of the marriage. The assets include the former matrimonial home which is subject to a mortgage and in negative equity. The respondent has a substantial NHS pension, and a modest pension is held by the petitioner. Until relatively recently the respondent also carried out significant private work and other part-time employment with the RAF. More recently the respondent has ceased his private medical work, obtained a job offer in Kuwait and has given notice to his NHS employer. He has expressed his intention to leave Northern Ireland in the next few weeks and take up his offer of employment in Kuwait.

[4] During the course of ancillary relief proceedings, the petitioner wife was required to make an application before the Master for maintenance pending suit. This was necessitated by the respondents alleged failure to make regular payments into the parties' bank account to meet recurring financial obligations including the mortgage.

[5] Originally, the respondent was legally represented and on 8 February 2022 the case appeared before the Master for a maintenance pending suit hearing. Having the benefit of legal advice a consent order was made in respect of maintenance pending suit where the respondent agreed inter alia to remove a number of identified direct debits and standing orders from the account held in the parties' joint names on or before 20 February 2022. It was also agreed that the respondent would set up a direct debit payment in the sum of £3,772 per month until further court order or agreement between the parties. This was to discharge recurring financial obligations including household expenses and the mortgage. Further, the respondent would set up a standing order payment in the sum of £500 per month to be paid to the petitioner for her benefit and that of the children. This payment was to commence on 20 February 2022 and to continue until further order or agreement.

[6] The respondent failed to abide by this maintenance pending suit order and a judgement summons was issued by the petitioner and heard before Mr Justice O'Hara on 11 May 2023. He ordered that the respondent was to pay a lump sum of £7,000 to the petitioner and gave a period of 12 months to pay this amount. No payments have been made in this regard albeit the period for payment has not yet expired. Significantly, no notice of appeal has been served on the petitioner in respect of this order.

[7] Just prior to ordering this lump sum payment the ancillary relief proceedings were listed for hearing on 9 May 2023 before Master Bell. At this juncture a jointly instructed actuary prepared a report in relation to pension distribution for the hearing on 9 May 2023. By this stage the respondent was representing himself and on the day of hearing negotiations took place which resulted in a matrimonial agreement being drafted and signed by the parties. At this point the hearing was adjourned to secure pension trustee approval of the pension sharing order, this was obtained. The matrimonial agreement was made a rule of court in a consent order issuing on 31 May 2023.

[8] In summary the consent order provided as follows:

- (i) A transfer of the beneficial interest in the matrimonial home to the petitioner and there would be a legal transfer when the petitioner was able to secure mortgage transfer approval.
- (ii) A 45% pension sharing order in relation to the respondent's NHS pension.
- (iii) A periodic maintenance order in favour of the petitioner of £1,000 for a period of four years, payments commencing on 22 May 2023 into the petitioner's account ending in ...47.
- (iv) Under paragraph 7 a periodic maintenance order in favour of the petitioner of £3,275 for a period of four years, payments commencing on 22 May 2023 into the joint account ending in ...04.
- (v) Under paragraph 9 that the respondent would remove all direct debits and standing orders from the account ...04 held in joint names other than specified direct debits identified in paragraph 9 of the order.
- (vi) That this agreement at paragraph 31 was without prejudice to the extant judgment summons which was dealt with by Mr Justice O'Hara two days later as indicated at para [6] above.

[9] In breach of the above order, it is alleged by the petitioner that the respondent:

- (a) Failed to make maintenance payments under paragraph 7 of the order, to the petitioner's account ... 47 as follows:

£1,000 on 23 May 23
£1,000 on 23 June 23
£1,000 on 23 July 23
£1,000 on 23 August 23

- (b) The respondent failed to remove all direct debits other than those specified under paragraph 9 of the order from the account ... 04. This permitted the payment of direct debits to the benefit of the respondent to the value of £11,672.08.
- (c) The respondent drew various sums on the joint account ...04 for his own personal use totalling £17,588.01. This was contrary to paragraph 10 of the consent order.

Procedural requirements for committal

[10] The procedural rules governing committal are set out in Order 52, of the Rules of the Court of Judicature (Northern Ireland) 1980. The relevant principles are set out in the judgment of McBride J in the case of *Hurl v Lupari* [2017] NIQB 23 at paragraph [25].

[11] In summary, in order to establish a contempt of court arising from breach of a court order it is necessary for the petitioner in the present case to prove the following elements, namely, that :

- (i) The defendant had notice of the terms of the order;
- (ii) The defendant has acted, or failed to act, in a manner which involved a breach of the order; and
- (iii) The defendant knew of the facts which made that conduct a breach.

[12] I remind myself in line with the decision in *Hammerton v Hammerton* [2007] 3 FCR 107, that the standard of proof on each element is the criminal standard, ie beyond reasonable doubt. I also remind myself as cautioned by Cross J in *Re B (IA) (an infant)* [1965] Ch. 112 at 117 that:

“Committal is a very serious matter. The court must proceed very carefully before they make an order to commit to prison; the rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations.”

Notice

[13] The order in the present case was served on the respondent with a penal notice attached by personal service on 3 August 2023. I am further satisfied that the notice of motion in this case details and sets out every breach by reference to each missed periodical maintenance payment, all direct debit/withdrawal taken by the respondent and sums drawn from the account ...04.

Breach of the Order

The petitioner's case

[14] The matrimonial agreement dated 9 May 2023 and corresponding court order dated 31 May 2023 were personally served on the appellant on 3 August 2023. The petitioner in her affidavit of 27 September and in oral evidence in court set out what she described as the respondent's long history of lack of co-operation and non-compliance with court orders and directions. Specifically, since May 2023 she has been faced with the respondent's wilful refusal to comply with the terms of the court order which he agreed. It is the petitioner's case that the respondent has not complied with the essential terms of the consent order and as a last resort she has been forced to take committal proceedings.

[15] She gave evidence that no maintenance payments have been made to her from May 2023 to date of issue of the Notice, some £4,000 being outstanding at the time of the application Notice. Out of desperation she had since June removed £2,000 from the joint account for living expenses for herself and the two children. This was in circumstance where the respondent would lodge his pay into the joint account and then proceed to either spend excessively or latterly, once his direct debits for his car had been honoured, he would then transfer significant sums from the joint account to an account she was unaware of, held in the name of the respondent's brother.

[16] The petitioner gave evidence that the direct debits agreed to be removed from the joint bank account have not been removed. That the respondent is using the joint bank account for his direct debits, personal expenses and is withdrawing excessive sums and spending extravagantly on foreign travel and other unnecessary personal expenditure. At the same time failing to pay her maintenance and defaulting on the mortgage.

[17] As a result unauthorised direct debit payments of £11,672 have been taken from the joint bank account. £17,588 of unauthorised personal withdrawals to the benefit of the respondent have been removed from the joint bank account. Expensive international travel has been undertaken by the respondent for leisure and seeking employment outside the UK between 9 May 2023 and 24 October 2023. This is to the extent that the joint account is significantly overdrawn, and the mortgage is in arrears. All of this to the detriment of the petitioner and in breach of the court order.

The respondents case

[18] The respondent both orally and in writing made the case that with his current earnings he is unable to the afford £1,000 maintenance to the petitioner and £3,275 household expenses. He claims this to be 83% of his current income. Unfortunately, the respondent has decided to give up his private hospital work and locum work

which was, and no doubt still is available to him if he chose to take that opportunity. He also has the ability to earn additional remuneration working for the RAF. Most recently, he has now resigned from his post in the NHS to seek employment outside Northern Ireland. I do not accept that he cannot afford to pay the maintenance required of him under the order. He has chosen to deliberately reduce his earning capacity pending leaving Northern Ireland. This is essentially to avoid paying maintenance to the petitioner for the defined period of four years. This was the agreement which both parties compromised on, but the respondent is determined, in my view, to pay as little as possible or nothing to the petitioner until he leaves. This he denies and maintains he will see his children are provided for. Again, I do not accept that this is the case, his relationship with both his children appears from the evidence to be strained and the precarious situation he has placed his family in concerning their home and potential repossession is in my view directly related to his actions.

[19] He failed to pay the sums due under a maintenance pending suit order from February 2022 which required enforcement proceedings before O'Hara J. I accept that his attitude is simply one of indifference towards the petitioner and by extension his children and the order of the court.

[20] He has claimed to have additional costs not accounted for in the consent order in relation to his father having been taken into frail care in South Africa. I accept that it appears his father has been taken into a residential unit in South Africa. Unfortunately, no evidence has been produced to verify what if anything he personally is paying for in this regard. The letters provided to the court are in my view inadequate for this purpose.

[21] The respondent makes the point he was never taken off the mortgage for the matrimonial home. That this has breached the terms of the consent order. I do not accept this argument. It has not been possible to remove him from the mortgage given the arrears that have been built up and making it virtually impossible for the petitioner to obtain another mortgage. Again, he has contributed to this in large measure.

[22] He indicated in correspondence to the petitioner's solicitors in no uncertain terms that it was his desire and aspiration to move to Kuwait. The content and tone of that correspondence is revealing. He stated that:

"I wish to point out that arguably I don't have to continue to pay further spousal maintenance once I have left Northern Ireland. UK court rulings no longer apply to me then. Fact. And I would suggest you won't have a clue where I will be settling. So good luck in trying to figure that out as you desperately ponder a REMO application for spousal support. That is why UAE, Kuwait or Saudi are perfect for me... Indeed I won't be screwed over by

the NI courts' obsession with their unfettered sympathy for all divorcing wives. "

...

I'm emigrating to a happy peaceful existence away from my ex-wife, Northern Ireland - and you. I cannot wait to be away from this pathetic place."

[23] I have no doubt the respondent intends to leave Northern Ireland and if possible, avoid paying maintenance under the consent order. He has been determined in his efforts thus far to avoid paying maintenance to the extent of using an account in the name of his brother, in my view, to conceal from the petitioner and her solicitors his expenditure. His evidence concerning this aspect of the case and the suggestion he never looked at his bank account to see what was paid in or out was incredulous.

[24] He has also claimed that as a result of the divorce he has suffered serious mental health problems and did not even notice the maintenance due under the order had not been paid. I do not accept this proposition for the following reasons; He was travelling extensively over this period both for leisure and seeking employment; He was working in a demanding job without any significant period off work and he did not report his serious mental health problems to his employer. No report from a GP or psychiatrist has been provided to support this proposition.

[25] He was cross-examined on the failure to pay the required maintenance to the petitioner, and he accepted this had not been paid claiming that he could not afford it.

[26] He claimed he did not cancel the direct debits as agreed as he would lose benefits associated with the account if he did so and he was not prepared to do that. To do so would have, in his opinion, served no purpose other than to inconvenience him. He agreed that he continued to draw on the account and in effect increase the overdraft but gave the reason that he was entitled to do this as he was the only one contributing to the account and it would be bizarre in the extreme not to allow him this facility. This ignores the fundamental purpose of the order to provide that the petitioner had a separate account for personal expenditure, the respondent had a separate account for personal expenditure and a joint account with a defined monthly payment for household expenditure to pay essential bills.

[27] Having had the opportunity to observe Dr Winters, listened to his evidence and submissions, I conclude he was disingenuous, inconsistent and incredulous. I am satisfied beyond reasonable doubt that he has been delaying the payment of maintenance pending his departure from Northern Ireland. He has not paid maintenance to his wife on foot of the consent order as pleaded nor indeed the maintenance pending suit liability. It is not the case he has made an attempt but has been unable to pay in full the sums owing. He has simply reduced his earning capacity, left his NHS employment, and secured a job offer abroad in a county with

no reciprocal enforcement procedure and has boasted about it in an email to the petitioner's solicitor.

[28] Accordingly, I am satisfied to the requisite standard that Dr Winter has committed the breaches specified in the application Notice dated 3 August 2023.

Knowledge

[29] In conclusion I must consider the mental element required for a finding of liability for contempt. It is not necessary for the petitioner to prove that the respondent knew or believed that he was committing breaches of the orders and in support of this proposition is the decision of the Court of Appeal in *Varma v Atkinson* [2020] Ch 180 where Rose LJ stated at [54]:

"In my judgment ... once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach."

[30] I am satisfied beyond reasonable doubt that the respondent had knowledge of the consent order and the terms contained in it. He had been representing himself at the time of agreeing to the order and I am satisfied he retained a copy of the matrimonial agreement and was served a copy of the order making the agreement a rule of court. Having carefully considered his evidence, submissions and written correspondence set out above, I am equally satisfied to the requisite standard that he knew full well that he was both deliberately siphoning money from the joint bank account for his own needs to the exclusion of his wife and children and omitting to pay maintenance which he was obliged to pay under the consent order. Had proof of intention been necessary I would have been sure his actions were intentional in any event. He is an intelligent man and acted with deliberation in his determination to avoid the terms of the order which he himself agreed to.

[31] I am satisfied, therefore, that Dr Winter is in contempt for breach of each of the grounds set out in the Notice of application for committal dated 27 September 2023. I am also satisfied that the petitioner has met the criminal standard of proof required in this case. I must therefore consider the question of sanction and I adjourn this matter to give time for submissions to be prepared on sentence.