Neutral Citation No: [2023] NIFam 6 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **OHA12116** *ICOS No:* **14/18172/10 14/18172/11** *Delivered:* **28/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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Between:

CLAIR ELIZABETH STELFOX

Petitioner

and

JOHN BRIAN STELFOX

Respondent

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Ms A O'Grady KC (instructed by Caldwell & Robinson Solicitors) for the Petitioner
Mr M Bready (instructed by Reid Black Solicitors) for the Respondent

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O'HARA J

Introduction

[1] On 21 July 2021, I gave judgment on previous applications by the same two parties – that judgment is available as [2021] NIFam 26. The parties were married for more than twenty years and have four children. When they divorced in 2016 a financial settlement was reached and was made a rule of court. The case made by Mrs Stelfox in the earlier proceedings was that without cause the respondent had failed to comply with the court order in that he had not paid the maintenance to which he had agreed and committed himself. She sought his committal for breach of the court order for maintenance, for false averments made in his affidavits about his income and employment and for withholding documents on discovery.

[2] For his part, the respondent sought a downwards variation of the maintenance to zero on the basis that since 2017 he has not been in a position to pay that maintenance. He also sought remission of all outstanding arrears.

[3] I concluded that the respondent earned more money than his then employer admitted to the court. I was also satisfied that at certain points in time, and certainly

during 2016/17, the respondent had access to funds which he attempted to hide or wash by putting them through the account of Ms Faulkner, his partner of some years. At para [44] I said:

> "No maintenance has been paid to the petitioner by the respondent since spring 2017. As indicated at earlier parts of this judgment I am sure beyond any doubt that the respondent withheld documents on discovery, that he made false averments about his employment and income and that he has not disclosed the true relationship between him and Mr Gareth Magee."

[4] I went on to accept that the respondent's bankruptcy had an adverse effect on his earning opportunities with the ultimate result that I should reduce the arrears by half and the amount of maintenance to be paid monthly in future by half. I then continued as follows:

> "[52] … I accept that it is at least possible that the respondent could not pay the maintenance in full at various times during the last four years, but I do not accept that he could not pay any maintenance at all at any time during that period. I believe it was his choice not to pay anything at all. Therefore, his actions were a deliberate and continuous refusal to honour any part of the order.
>
> [53] So far as the breaches of court orders for discovery and affidavits are concerned, they too were deliberate and, in my judgment, were undoubtedly designed to mislead the petitioner and the court and therefore to skew the outcome of the case. For example, if the respondent's false averment about being unemployed in December 2016 had been accepted by the petitioner, rather than probed, there may well have been a different attitude on her part to pursuing any litigation. It is as a result of her tenacity and the admirable commitment of her legal representatives that the respondent's lies were exposed despite his best efforts."

[5] My ultimate conclusion was that I should impose on the respondent a prison sentence of three months for breaches of court orders. No appeal was made against any part of my decision and the sentence of imprisonment was served.

The current applications

[6] By application dated 17 February 2022 the respondent applied for the maintenance order to be varied downwards (again) and for all arrears to be remitted in their entirety. His basic contention is that the sentence of imprisonment effectively ended any chance he had of pursuing or rebuilding his career as a solicitor so that he has effectively no income to pay any arrears or ongoing maintenance.

[7] In response the petitioner has applied for his committal to prison (again) by reason of his failure to comply with the orders which I made in July 2021 at which time I ordered him to pay arrears (reduced by half) and ongoing maintenance (reduced by half). Her case is that there is no more reason to believe anything he now says about his income and access to funds than there was previously when he was established to be a liar. She also highlighted a letter sent by his solicitors on 5 August 2021, after he had been sentenced to three months in jail but before he had started to serve that sentence. That letter included the following:

> "There is some prospect of family members helping our client. Quite frankly, the degree of assistance that might be achievable is entirely dependent on the willingness of the court to reconsider its judgment as to the penalty to be imposed upon our client before the judgment is made a final order."

[8] The hearing of these applications was scheduled for June 2022 but was delayed at the last minute to allow the respondent to secure legal aid. It was then heard on 7 October 2022 when I heard oral evidence from both parties. At the end of that hearing, I asked to see papers from the respondent's engagement with his professional body, the Law Society of Northern Ireland. That request was agreed to by the respondent, despite which the court did not receive the relevant papers until 29 November 2022. I invited the parties to make any additional submissions in writing in light of the content of those papers. The petitioner did so on 25 January 2023, but the respondent did not add to his previous submissions.

The Evidence

[9] The respondent's evidence was that when he was sent to prison in 2021 the Law Society was alerted to my judgment. Its Professional Conduct Committee (PCC) wrote to him on 6 August 2021 and invited his comments/explanations on the judgment. He responded on 12 August. In that response he entirely rejected the findings which I had made. At one point he said "… it would be inappropriate for me to comment at length on the content of the judgment of Mr O'Hara (sic) or how he could possibly come to the conclusions which he has reached." He continued by claiming that he had been given advice about the prospects for lodging an appeal to the Court of Appeal "based on the inaccuracies of the judgment" but had decided

that having been involved in this "debacle" for so long he did not have the energy or the money or the drive to spend another six months going back over old ground. The reference to the lack of money is curious given that he was legally assisted during the earlier proceedings.

[10] At a further meeting of the PCC, it decided to refer the respondent's case to the Independent Solicitors' Disciplinary Tribunal. The charge against him was that he was guilty of professional misconduct in that he had contravened Regulation 12 of the Solicitors' Practice Regulations 1987, in that he acted in a manner that compromised or impaired or was likely to compromise or impair:

- His integrity;
- The good repute of solicitors in general;
- His proper standard of work;
- In that in the context of matrimonial proceedings the respondent was found to have failed to comply with court orders, gave dishonest evidence and/or statements to the court and allowed himself to be held in contempt of court.

[11] The Tribunal met on 9 September 2022. The respondent had been required by notice dated 2 February 2022 to reply to the case against him by way of affidavit within 21 days and to furnish any documents he intended to rely on. He provided no affidavit or documents but forwarded an unsworn statement on 25 February 2022. In that statement he adopted an approach very similar to the one which he had set out in August 2021 to the PCC. He made the following main points:

- He did not intend to attend the hearing nor to be represented.
- He expressed disappointment that the Law Society had relied, in referring his case to the Tribunal, on the judgment of July 2021.
- As far as he was concerned this was a private civil matter which does not bear on the general public or members of the legal profession.
- The court's findings were based on "speculation, conjecture and hyperbole."

[12] At no point in his statement or in his August 2021 response to the PCC, was there any acknowledgement by the respondent that he was at fault. Nor was there any expression of remorse for what he had done.

[13] The Tribunal issued its decision on 9 September 2022. It decided that "in order to protect the good reputation of the solicitors' profession, it had no alternative but to order that the respondent be struck off the Roll of Solicitors."

[14] In terms of his current employment and income, the respondent's case is that when he was released from prison in November 2021, he accepted that his career as a solicitor was up. (By that time, of course, the Law Society's disciplinary proceedings were well underway.) He asserts that he has no income other than a carer's allowance of approximately £69 per week, payable because he lives with and looks after his elderly mother. Since he lives with her, he has no overheads such as rent, rates or electricity. He enjoys power of attorney over his mother's affairs, although that can only be used for her benefit and in accordance with her wishes.

[15] The respondent said in oral evidence that when he was released from jail he was not fit mentally to work. No medical evidence of any sort has been provided to support that contention. In any event, he says that he cannot apply for state benefits because in order to do so he would have to declare that he was actively seeking work. Since he is caring for his mother, he cannot do that.

[16] In addition, he says that his finances have been scrutinised both by the insolvency service in relation to his bankruptcy and by the Legal Aid authorities in relation to his application in connection with these proceedings. His contention is that the court can, therefore, be assured that he is telling the truth and that he really does have no assets or access to funds.

[17] Other than looking after his mother, he says that he leads a fairly simple restricted life, save that he spends up to three/four nights per week with Ms Faulkner who is still his partner. He was asked in cross-examination whether she had yet repaid any of the mysterious £50,000 advanced to her by Mr Brian Guy (see paras [37]-[41] of the July 2021 judgment). His answer was that he did not know and that they do not talk about it because she is a very private person.

[18] In oral evidence he appeared to express some very limited remorse for how he had behaved though it was not clear what he was sorry for. It was only after the court hearing in October 2022 that I was given access to his two statements referred to above to the Law Society in which he expressed no regret whatever. On the contrary, they reject any suggestion of wrongdoing and are quite defiant in tone.

[19] In his April 2022 affidavit sworn for the purposes of these proceedings, the respondent contrasted his position with that of the petitioner, saying at para [7] that:

> "To the best of my knowledge and belief the petitioner still works as a qualified solicitor in Scotland. I am unaware of her precise earnings but with this qualification she has good opportunities to earn a respectable income."

[20] For the avoidance of doubt, the maintenance money which he has not been paying was not to be paid to her for her personal benefit. He was to pay it in order to support their children, not her. Her earnings are therefore irrelevant.

[21] In this context, I note that it is agreed evidence that on his release from prison he had a bank account with approximately £1,750. He then received a tax rebate of £605 approximately and when the carer's allowance started to be paid to him, it was backdated with a lump sum of approximately £1,115.20. In the scale of things these are relatively small amounts, but not one penny was sent by him to the petitioner to recognise the ongoing obligations in respect of maintenance.

[22] When he was challenged in cross-examination about the letter from his solicitor dated 5 August 2021, see para 7 above, he said that it was a last effort by his family to help him avoid prison and salvage his career. He denied that it indicated in any way that he himself, as opposed to his family, had money available.

[23] For her part, the petitioner resists the applications by her ex-husband to free him from any outstanding or future liability in respect of maintenance. She points to the findings in the July 2021 judgment as proof that nobody should believe anything he says when it comes to money. And she repeats that when they reached the matrimonial agreement which became the court order on their divorce, they both knew that he was facing bankruptcy because of his indebtedness over property in the Republic of Ireland. It is not the bankruptcy, she says, which has prevented him from paying the maintenance as agreed and ordered – it is completely his own decisions and actions which have brought the parties to this point.

Discussion

[24] The parties provided helpful written submissions for which I am grateful. I have considered them along with the authorities referred to. There is no significant disagreement between the parties on the applicable legal principles, but there is inevitably a difference of emphasis on how those principles apply to this case. A starting point, following *Hammerton v Hammerton* [2007] 3 FCR 107, is that committal proceedings amount to a criminal charge within the meaning of Article 6 ECHR, that the burden of proof lies on the petitioner and that the standard of proof is proof beyond a reasonable doubt.

[25] I also accept and take into account the following principles:

(i) On the facts of any given case, the time may come when it is obvious that the coercive element provided by a term of imprisonment will have evaporated and there is little to be gained other than pure punishment from any continued incarceration – see *Re W (A Child)* [2011] EWCA Civ 1196.

(ii) The power to order committal for civil contempt is a power to be exercised with very great care.

(iii) The court will not order committal where the contempt is of a minor or technical nature.

(iv) The length of any sentence of imprisonment should be commensurate with the seriousness of the contempt.

[26] For the respondent, Mr Bready submitted that what the court faces now is not wilful non-payment on the part of the respondent, but an inability to pay. He also submits that it cannot be proved beyond a reasonable doubt that the respondent has the means to discharge the maintenance and arrears and has wilfully chosen not to do so. It follows therefore, he submits, that the committal of the respondent to prison:

(a) Would serve no public interest.

(b) Would be manifestly excessive in all the circumstances.

(c) Would not be a proportionate response to the conduct complained of.

(d) Would be wrong in principle because the coercive element provided by a term of imprisonment has evaporated and there is little to be gained other than pure punishment from any incarceration.

[27] Mr Bready continued by submitting that if a period of custody is appropriate, then there are mitigating factors which should be taken into account so that any sentence of imprisonment should be suspended. Finally, he submitted that in any event the application to vary the maintenance payments downwards should be granted, since the petitioner would not be prejudiced by that order, given that she could in the future apply to vary it upwards should the financial position of the respondent improve.

[28] For the petitioner, Ms O'Grady referred to my earlier judgment and used it as the foundation for her submission that this is not a case of "can't pay" but is instead a case of "won't pay." She contended that it was and remains apparent that the respondent is simply determined not to pay the maintenance. By way of example, she cites his failure to seek employment of any sort since his release from prison. She referred to the respondent's lack of remorse for his actions, particularly as evidenced in his engagement with the Law Society. In essence, she submitted that he will not pay and just does not care that it is his obligation to pay.

[29] I should record that on one issue I reject Ms O'Grady's submission. She contended that the three months prison sentence imposed in July 2021 was only for breach of court orders in relation to discovery and affidavits. In fact, it was also for the failure to pay maintenance – see paras [51]-[53] of the judgment.

Conclusion

[20] In my judgment, the current circumstances have come about exclusively as a result of the respondent's conduct and decisions. He already understood that he would in all probability be made bankrupt when he entered into the matrimonial agreement which is for the benefit of his children.

[21] Since then, he has done almost everything he can to thwart the agreement. On only one occasion, in 2017, after arrears had built up, did he pay off those arrears, but that was under threat of committal proceedings. Since then, he has paid nothing and has gone to extraordinary lengths to flout the court order for maintenance. He has lied to the court orally and on affidavit. He hid his ongoing work as a solicitor and was only exposed by dint of investigation on behalf of the petitioner. This gives the lie to the contention that I should take any comfort at all from the fact that statutory authorities have not uncovered any hidden funds. Even since July 2021, when I halved both the arrears and the ongoing maintenance payments, he has made no effort to get any form of paid work.

[22] The petitioner relied on the letter of 5 August 2021 as proof that the respondent has access to money. While I sympathise with that view, and her suspicions generally, I cannot be satisfied to the requisite standard in relation to that letter. It is possible that the offer was, in fact, as the letter expressly says, coming from his family rather than from the respondent personally. They may have been used as a front by him but I cannot be certain that was the case.

[23] But I am sure that he could have paid something to the petitioner from the small bank account, the tax rebate and/or the arrears of carer's allowance. And I am also sure that he could have sought employment. I repeat that there is no medical evidence that this educated man is unfit for work. Happily we live in a time when unemployment rates are low. In my judgment the respondent is shamefully using his care of his mother as his excuse not to try to find paid employment and thereby pay some maintenance. I do not doubt that his mother needs care, but she does not have to receive it from him. He could seek paid employment and use some of that income to pay maintenance. He has obligations beyond his mother which he is deflecting and choosing to ignore. That is simply not acceptable. It is cynical in the extreme.

[24] In reaching this judgment I am inevitably influenced by his lack of remorse for his previous actions. If he did regret what he had done and just could not secure employment, the position would be different. But he does not regret it and he just has not tried. It is as if he sees himself above the law, free to disregard the inconvenience of court orders.

[25] The respondent has shown nothing but contempt for the maintenance order made in reduced terms in July 2021. I find him guilty beyond a reasonable doubt of contempt of that order.

[26] In fixing a sentence for this contempt, I have considered the fact that he has already served a prison sentence for his earlier contempt. I have considered whether this sentence should be suspended but I have decided not to take that option. In my judgment, the respondent has, in effect, done nothing but double down on his previous disregard of his obligation to pay maintenance. There is no hint whatever that he will behave differently in future. And, as before, as a former solicitor who practised for many years with some success, he must know that court orders are to be obeyed rather than ignored.

[27] If anything his position is even worse than before because of his failure to accept, learn or do anything positive despite the previous judgment and sentence. At paragraph [55] of that judgment I indicated that I felt constrained in passing sentence because the longer he went to jail for, the less chance there was of the petitioner receiving anything. I now feel no such constraint. In the circumstances, taking all matters into account, I impose on him a further prison sentence, this time for six months. It follows from the foregoing that I dismiss the respondent's applications in relation to arrears and future payments.