

THE HIGH COURT

[2020] IEHC 610
[2019 No. 74 CAF]

IN THE MATTER OF THE FAMILY LAW DIVORCE ACT 1996

BETWEEN

A

**APPELLANT
(FORMERLY RESPONDENT)**

- AND -

B

**RESPONDENT
(FORMERLY APPLICANT)**

JUDGMENT of Mr Justice Max Barrett delivered on 25th November 2020.

I

Background

1. This is an appeal by Ms A against the financial provision made by the Circuit Court in respect of the parties following on their divorce. It follows on 1½ days of hearing in the High Court at which both parties represented themselves. It was a notably challenging hearing, thanks entirely to Mr B's demeanour and behaviour. He was repeatedly verbally abusive of Ms A in court, he had to be asked many times to stop cutting across her when she spoke, he often scoffed at Ms A's submissions when he was supposed to be quiet, he threatened Ms A with prosecution for perjury and, at one point, suggested that she was defaming him when in truth she was but making submissions in a notably restrained and competent manner (submissions that are, of course, cloaked with privilege from liability in defamation). More than once Mr B used foul language and more than once he was so intemperate that the court had to indicate that a Garda would have to be called in if he persisted in his behaviour. In fairness, Mr B apologised to the court for some of his interruptions. Notably, however, he never apologised to his former wife. Instead to the very end he was making vitriolic comments about or to her and almost constantly cutting across her whenever she spoke. Ms A indicated that this was what it was like when she was living with Mr B.
2. Two of Mr B's children, a son and daughter, gave evidence about how challenging their father's behaviour was when he was living at home. Mr B's son seemed quite stoic in Mr B's rather intimidating presence; his daughter, a gentle soul, physically recoiled when Mr B spoke. (On Day 2, Ms A eventually turned sideways in her seat in court in a clear attempt to avoid the aggression that was continuously being directed towards her). After I entered the Four Courts on the morning of Day 2 of the hearing, I could not but notice, as I walked down the corridor towards the courtroom, just how far apart the parties were sitting – Ms A and her children at one end of the corridor and Mr B at the other – and how close and loving the mother, son and daughter were in their interactions, all of them notably sitting in such a way that they did not have to look down the corridor towards Mr B.
3. The daughter recalled hours of arguments at home, always hearing her father's voice being the first to be raised, how she was forever afraid for her mother, how her father

used to come close to her mother's face and point his finger into her face, how the daughter used to get stomach upsets from the stress, and how she often told schoolteachers that she was upset. When her father asked her about 'good times' the daughter could not recall a time when life at home had ever been less than uneasy. She did not recall her father ever striking her mother, but her brother did. The daughter painted one particularly striking vignette of when she was a little girl sitting at the top of the stairs one night, her head cupped in one hand, the other wiping away her tears, listening to her father going on and on in some argument, and all the time being worried for her mother's well-being.

4. Remarkably, Mr B at one point in the proceedings sought to justify striking his wife during their marriage. The court set him straight on this point and, disturbingly, must reiterate, yet again, a point that it made as recently as X v. Y [2020] IEHC 525, at para. 47, and which it has already had to reiterate since:

"There is no context in an intimate relationship in which domestic violence is permissible....A party to an intimate relationship should never have to live in the fear and/or with the actuality of domestic violence being perpetrated upon that party. There are no 'ifs' or 'buts' in this regard, no exceptions, no mitigating circumstances. Domestic violence and/or the threat of domestic violence (even where no actual violence ensues) is always unacceptable."

5. If Mr B found something that his wife said was of a nature to set off his temper, then the appropriate course of action for him to take was to head out on a walk, take a cold shower, or take himself to his parents' house for the night, basically whatever it took to 'cool down'. There is no excuse for domestic violence.
6. Throughout the proceedings, Mr B talked incredibly quickly, almost frenetically, all the time aiming complaints and insults galore at Ms A. He has run through five solicitors in the course of these proceedings, a statistic that is telling, regardless of whether they came off record or he dismissed them. He had an *Isaac Wunder* order issue against him at one point. He complains that he was once the victim of a particular tort, and he has good complaint in this regard, though he did sue over the tort and was successful, receiving substantial damages and an apology; however difficult it may be, Mr B needs, if the court might respectfully observe, to draw a line under this episode which he referred to again and again in his submissions.
7. Mr B has, regrettably, taken in the past to posting the details of his marital woes and his intentions concerning these proceedings on social media. Some of the posts seem threatening, some seem infused with a conspiracy theory that would be offensive to the court if it was not so silly, and some use language that is choice. His posting of these details has been mortifying for his ex-wife and – were they to discover that these posts issued (assuming they have not already discovered) – would be most embarrassing for his children. Before he takes to social media again, the court would respectfully urge Mr B to think of the impact of his actions for his children.

8. There was a period when texts were being sent by Mr B to his children, which they found disturbing. For example, a supposed 'Happy New Year' message sent by Mr B to a daughter promised that he would be making all sorts of trouble in the year ahead. Fortunately, it appears from the evidence that the sending of such messages has now stopped. However, relations between Mr B and his children are fraught, Ms A averring, *inter alia*, as follows:

"I say that our children suffer stress and anxiety...[owing] to the respondent's behaviour. They have come home from access on numerous occasions in a distressed state where the respondent has told them [that] they are only 'pawns in a game', he is going to sell their home and he doesn't care where they live..."

9. The evidence in the pleadings is oftentimes harrowing to read. One daughter vividly captures an almost non-stop rant by Mr B that occurred on a post-separation outing to a park by her, Mr B, and one of her brothers. The rant began on the drive to the park, continued throughout the time in the park, and lasted for much of the drive home. The daughter describes how, in the park, her brother, clearly a considerate fellow, would kick their football ahead, it seems so that she could run after it and escape, if only for a few moments. In the end, the daughter hid behind a tree to cry. When she eventually returned to the others, her father was still ranting. She screamed at him to stop, started crying hysterically, began to shake, and felt like she could not breathe. Her father's response when she said that she could not breathe was the strikingly selfish observation, "Welcome to my world". In the end, it seems Mr B only stopped ranting (and thereafter sat in stony silence for the rest of the journey) because the daughter on the way home gave every indication that she was about to jump from the moving car. Her account is but one among many pieces of evidence in the pleadings that give an arresting sense of how utterly intolerable Mr B's behaviour has been, how deleterious a presence he is for his children, and how his behaviour and demeanour in court were no aberration, but consistent with a longstanding and continuing pattern of impossible behaviour that is patently damaging to Ms A and her children, as it would be to any wife and child/ren.
10. Mr B insists that Ms A, one of her in-laws (a retired Garda), some State officials and even one of his own onetime solicitors are all in some sort of great conspiracy against him. In deciding this appeal, the court does not have to rule on whether or not this great conspiracy of individuals wishing to 'do Mr B down' in fact exists – albeit that the court may have an instinctive sense as to where the truth of matters may lie.
11. Mr B asserts that he is a reasonable man and that the court was not getting the true measure of his ex-wife – a lady who, notably, did not once respond in kind to the vitriol that he heaped on her and hers in court, who broke down crying several times under the pressure of Mr B's onslaught in court (which was almost overwhelming in its vigour and pace), and who impressed the court as a woman who is, frankly (and understandably) worn out by Mr B. A man who behaves in as unpleasant and unyielding a manner as Mr B did in court will inevitably face an uphill struggle in establishing that actually he is a reasonable man – and Mr B did not triumph in that struggle. In passing, the court cannot

but note that it was deeply unimpressed that when Ms A broke down in tears, Mr B's response more than once was to call out "*Crocodile tears!*". They were not 'crocodile tears'. They were the inevitable consequence of his appalling behaviour.

12. On Day 2 of the hearing, the court was treated to some recordings that Mr B had made of Ms A in her home and by which he hoped to show how unreasonable she can be. In fact, the recordings, to the extent that they were audible and comprehensible, revealed a woman who was, at worst, cross at the moment when the recordings were made. But who among us has never been cross? Maybe Ms A has in the past said things in temper or in jest that ought not to have been said; the court does not know; what it does know is that there can be few persons alive who have never said something that should not have been said – and if there are such persons Mr B repeatedly demonstrated throughout the hearing that he is not among them.
13. Mr B seemed to take particular umbrage that certain things allegedly said to him by Ms A during the course of their marriage were untrue, but if they were said and they were untrue then Mr B ought to have (and can still) turn the other cheek, take comfort in the truth, and move on. As to why Mr B thought it a good idea to go around recording his family, this remains unclear to the court; the son who spoke in court indicated that it was very uncomfortable when Mr B was doing this and it undoubtedly was. The court is unconvinced as to the evidential merit of a recording made by a husband at a moment when he perceives himself to be acting reasonably and when his spouse is perceived by him not to be behaving at her/his finest. And if Mr B's conduct and demeanour in the family home resembled his conduct and demeanour in court, and it is clear from the pleadings that they did, the court perfectly understands why Ms A would have been cross in her dealings with him.
14. Mr B seemed to set great store in the fact that when Ms A was a young woman she was in a non-marital relationship with a man and had a child by him, which relationship eventually ended on other than the best of terms. If there was any hope on Mr B's part that the court would somehow view Ms A differently by virtue of being apprised of the fact that one of her children is from another/a non-marital relationship, that was a futile hope. Ms A is patently a good mother to all of her children and that is all that counts. As to the fact that a previous personal relationship into which Ms A had entered ended on other than the best of terms, what of it? Some relationships end well, some relationships do not end so well, *c'est la vie*.
15. Impressively, all four of Ms A's children love each other as brother and sister, even though technically one of the children is a half-sibling. All of the children have a double-barrelled surname, being the surnames of Ms A and Mr B combined. So to each other and to the world they are (and love each other as) full siblings within one family. Unimpressively, Mr B has, following on the breakdown of his marriage, upset the children by seeking to have his three children by the marriage take just his surname, and by distinguishing their half-brother as a 'mere' half-brother. Ms A avers, *inter alia*, in this regard as follows:

"[Mr B]...tried to isolate [Ms A's] son from a previous relationship by looking to change the children's surname to just [X]...instead of...[X]-[Y]'...[T]his caused a lot of upset in our home. [Mr B] also tried to isolate [Ms A's] son from his siblings by calling him their half-brother, a term that was never used in our home although the children knew the situation. This term was used by [Mr B] to cause hurt and [he] achieved this."

16. It is a wonderful thing for a child to be blessed with an extra brother or sister who is loved and gives love. To use children to get back at his ex-wife and to try to set children who love each other against one another is an awful thing for Mr B to have done.
17. Perhaps the lowest point at the hearing was Mr B's contention that Ms A had been sexually abused as a child (abuse which Ms A says never occurred). The court does not know why Mr B thought this was a fit matter to raise. It was irrelevant to the proceedings (there can be few proceedings to which it would be relevant). Until the court realised what was afoot and put an end to matters. Mr B even saw fit to play – before an alleged victim of child sexual abuse – a recorded phone call in which Mr B was discussing this alleged abuse with another man in indelicate terms. If Ms A had been a victim of child sexual abuse, has Mr B any idea of how upsetting it would be for Ms A to hear such a recording? And has Mr B any idea of how upsetting it is for any woman to hear her alleged sexual experiences being discussed in indelicate terms by two men? The calls were not probative of anything, save in one sense: they proved to the court that Ms A is the hapless victim of an ex-husband who will stoop to any level to harass and humiliate her.
18. As if the foregoing was not bad enough, within a few minutes of the mention of sexual abuse came a further sexually-related allegation ungrounded in evidence, this time that Mr B's wife was at some point involved in an extra-marital affair, which allegation was followed swiftly on by the allegation that consequent upon that alleged affair Ms A became infected with a sexually transmitted disease. This was just lewd talk, ungrounded in evidence. Regrettably, the court must conclude that, for whatever reason, in his dealings with his ex-wife, Mr B appears to have lost all sense of decency and propriety. Ms A, by virtue of her humanity alone, never mind the fact that she is also the mother of Mr B's children whom she is rearing and rearing well, is a being of dignity and worth, entitled at all times to respect.
19. Mr B maintained at the hearing that his children have been turned against him by Ms A. They did not give the court this impression: their evidence chimed but it seemed unforced and uncoached. Both Ms A and Mr B can be proud that they have such pleasant children following all that has happened; and so much has happened that one of Mr B's children, it appears, succumbed for a time to dissociative identity disorder as a consequence. Ms A gulped back her tears and almost groaned with pain when she described in court how 'we nearly lost [Child's Name] last year'. This was no act. It was a mother's natural response to her child's suffering. For his part, Mr B repeatedly asserted that the children must be suffering from PTSD as a result of everything that has occurred but maintains that

everything that has occurred is Ms A's fault. It is not. Mr B is ever prepared to see the mote in his ex-wife's eye but seems blissfully unconscious of the beam in his own.

20. Throughout the proceedings when the court asked a question (often while it was asking the question) and even more particularly when Ms A spoke (often while she was speaking), Mr B would launch again and again into an almost unceasing 'stuck record' diatribe which typically comprised allegations that:
- Ms A is a liar and mentally unwell (she is neither, though the court does not see in any event that mental ill-health is a matter for criticism; in fairness to Ms A she also made this point – that mental ill-health is not a badge of shame – though also noting that in point of fact she is not, and has not been, mentally unwell); at one point Mr B, as though he was not already being offensive enough, even threw in a reference that Ms A is a "*bunny boiler*", thereby reducing himself still further in the estimation of the court; and/or
 - one or more members of her family is or are bad and/or thuggish; and/or
 - officers of the court and State have been acting in a great conspiracy against Mr B; and/or
 - he was the victim of a notable tort in the past (he was but he has now received significant damages and an apology for the wrong done to him); and/or
 - his wife was the victim of sexual abuse (Ms A indicated that this was not true, though the court, again, does not see the relevance of this allegation in any event), and/or that some other irrelevant sexually-related issue, ungrounded in evidence, presented (infidelity, *etc.*); and/or
 - he was always a good father (an assertion which, regretfully, is not borne out by the evidence); and/or
 - in a singularly unconvincing proposition, that he should have obtained a barring order against Ms A (for reasons that, to put matters at their most charitable, are less than clear) and that he should have required Ms A to leave the family home (which rather elides over the fact that for a time Mr B in fact reduced his wife to such a state that she sought shelter with her children in a women's refuge).
21. As he made these and other allegations, Mr B would sometimes turn to fume at his ex-wife and/or sometimes be so lost in his complaints that he did not notice that the court was seeking to say something.
22. In passing, the court should perhaps note that following on the breakdown of the marriage Ms A was forced by economic circumstance to quit her agreed role as homemaker in the family home and to take up a job in the workplace. Ms A did this not least, though not only, so that she could meet the mortgage repayments on the family

home, which repayments have been paid almost exclusively by her since the marriage between her and Mr B effectively ended back in 2013.

23. It was a considerable challenge for the court to manage Mr B over a 1½ day period and the court, as a court, at least could ask a Garda to come into the courtroom if needed (with the risk that when a Garda is about an arrest may follow) and to make a finding of contempt if necessary, with all that follows from that. Ms A, as a private citizen, does not have these resources to hand and it would, without a doubt, be a complete impossibility for her to have to continue deal with Mr B on a regular basis in the future, a point which brings one neatly to the purpose and substance of this application.

II

The Purpose and Substance of this Application

24. In terms of financial provision, the Circuit Court ordered as follows:

- "3. *On consent, an Order that the Applicant pay the phone credit for the dependant children the gymnastics fees for [STATED CHILD] and the football gear and fees for [STATED CHILD]. The parties are each to pay 50% of any educational expenses for [STATED CHILD] going forward and 50% of the school uniforms for [STATED CHILD] and [STATED CHILD].*
4. *An Order that the Applicant pay to the Respondent €120 per week in respect of maintenance for the dependent children [THREE NAMES STATED], to be divided equally between them, so long as they remain equally dependent, such payments to commence the 1st November 2019 and to be made by way of standing order directly into the Applicant's bank account, details already furnished...*
6. *An Order that the Family Home be sold once the youngest child ceases dependency, the proceeds of sale to be divided 40% to [Mr B]...and 60% to [Ms A] following the discharge of the mortgage. Any of the maintenance payments which may be outstanding at the date of sale are to be paid to the Respondent from the Applicant's share of the proceeds of sale. Any party who incurs an expense in upgrading the Family Home in advance of the sale is to be reimbursed from the proceeds of sale."*

25. Ms A has never received any payment from Mr B under point 3. It beggars belief that Mr B's response when he was asked by the court whether he had made any payment under this limb of the order was glibly to assert that he has never been asked. His children's rearing continues to cost money and if he is the good father he purports to be, he should be stepping up to the mark at notoriously expensive times of the year (such as the new academic year) and asking what needs to be paid, not waiting to be asked and ultimately paying nothing. Ms A's response, unsurprising in all the circumstances presenting, is that she has not asked Mr B for any payment because she does not want to go near him.
26. Although most of the maintenance due to Ms A under the Circuit Court order (the court returns to the outstanding amount in a moment) has been paid to this time, Ms A believes

that this is to make Mr B look good to the court and that once the proceedings have ended he will stop paying her and seek to use payment as a means of making her life miserable. Mr B called out the word "*Speculative!*" when Ms A made this submission. But in fact Ms A's submission was not so speculative: when the Coronavirus pandemic broke out, Mr B decided of his own volition that he would break the Circuit Court order and pay Ms A reduced maintenance; he never sought the consent of the court to this reduction; he never bothered to apologise to this Court for the affront that he has shown in breaching a court order; nor was any undertaking given to the court that he would make good the shortfall. So Ms A is right to be dubious as whether payment of maintenance will continue once these proceedings have ended; Mr B has past and continuing form when it comes to breaching court orders (and continuing in breach) at whim and without remorse. The court entertains little doubt that if Mr B thought it would harass or humiliate Ms A to reduce or stop paying maintenance, once these proceedings have ended, he would do so, such is his contempt for Ms A and his disregard for court orders.

27. All this brings one to the substance of what Ms A seeks. But to understand what she seeks it is necessary to explain a little more background. When Ms A's mother died, she (Ms A) inherited the family home (House 1). Mr B moved in and all was well for a time. Then Ms A's siblings (whom Ms A loves) indicated that they thought it unfair that Mum had left House 1 to Ms A without making provision for them. So it was agreed that Ms A would pay a certain amount to each sibling. The stated sum for each sibling was largely put together by Mr B (who works in a sector where cash-in-hand payments are known, with all the difficulty that brings in assessing his personal situation but which proved useful in raising the necessary cash sum). The couple then continued to live in the family home.
28. Sometime afterwards, Ms A and Mr B (still married) decided to move to a better house (House 2). So they sold House 1 and used the proceeds of the sale of that inherited property, and a home mortgage loan, to move to House 2. Ms A still lives in House 2 with the children. As touched upon above, following the breakdown of the marriage it was necessary for Ms A to quit her agreed role as homemaker and find a job (which she still holds), not least, though not only, so that she could pay the home mortgage, which she has been paying entirely by herself since August 2013 (when the marriage effectively ended) apart from a two-year period in which Mr B paid half of the mortgage payments, it seems at the urging of a solicitor (who has since been discovered by Mr B to be in on the great plot against him). In lieu of (i) getting no payments under point 3 of the Circuit Court order, and (ii) given her concerns that there will be no payments under point 4 of the Circuit Court order after these proceedings have ended, Ms A has asked that (iii) if she forfeits any payment under points 1 and 3 to which she presently stands entitled, she would be given the house when the mortgage payments are complete (by which time she will have paid easily the greater number of monthly instalments). This would relieve her of having to engage with Mr B over money, with all the difficulty that will undoubtedly entail. It would also leave her and the children feeling safe in the house after years of extreme tension and suffering occasioned to Ms A and her children by Mr B's impossible behaviour/s.

29. Mr B's response to this, though it embraced all his general complaints was, in essence, that:
- (a) he kept House 1/2 in good repair,
 - (b) he put together most of the money for the siblings,
 - (c) at a time when the marriage was working and Ms A was working (by mutual agreement) as a mother and homemaker, he paid the mortgage repayments on House 2,
 - (d) if he is ever asked for money under point 1 of the Circuit Court order, he should be able to put it together, and
 - (e) the dependency of his youngest child will end, to his mind, when she is in her mid-twenties; she is currently an adolescent.
30. The court turns to consider the applicable law in the next part of this judgment. However, it may be useful to make a number of points concerning Mr B's response as detailed in the preceding paragraph. As to:
- (a) Mr B appears to have done maintenance work around the houses at a time when he was living there, but that is no more than doing his share of chores, just as Ms A did hers; there is no especial kudos for that; it is expected behaviour that does not yield some legal entitlement;
 - (b) having regard to the evidence the court will allow that Mr B put together €150,000; however, if he maintains that some sort of debt obligation arose between himself and his wife as a consequence, then he should have proceeded to recover his share of the debt if that is what he wanted; the court does not see that financing the gifting of money by a wife to her siblings somehow gives one an equitable claim to her inherited property, nor does it appear that this was ever agreed between Ms A and Mr B;
 - (c) the court does not see that paying the mortgage on a family home when one is a married father and the sole 'breadwinner' is doing anything more than is required of one in that capacity; the mortgage cost in or about what it would have cost Mr B to rent a decent apartment for himself had he been living alone or alone with his children at the time and the *quid pro quo* of the arrangement was that Ms A would sacrifice going out into the workforce herself and would work instead for free as a homemaker, a most generous arrangement on her part;
 - (d) this is an odd proposition given Mr B's general (though, frankly, incredible) claim to impecuniosity, and one which rather suggests, as Ms A confidently expects, that ever getting Mr B to pay under point 1 of the Circuit Court order would, in truth, prove an ordeal; the court suspects that it would be but a pretext for further harassment and humiliation of her by Mr B;

(e) noted.

III

Damages and Savings

(i) Damages

31. As a result of a particularly bad tort that was done to him in the past, in the early years of the last decade Mr B was awarded a substantial six-figure sum in damages. Unfortunately no faith can be put in the letter of 17 June 2015 in which the claimed distribution of the said damages is described. Why so? Among other reasons because it is stated in that letter that Mr B gave €60,000 to his parents "for money which client owed them". Yet on Day 2 of the hearing of the appeal when the court was running through the figures, Mr B indicated that he owed only €30,000. When the court queried why he paid €60,000 to his parents when he owed them but €30,000, Mr B referred the court to the Fourth Commandment. There was such a divergence between the letter of 17 June 2015 and the evidence given by Mr B in court in this regard, that the court cannot be confident as to where the truth lies or even whether, in reality, all the money has now been spent as claimed or at all. Ms A indicated, and the court accepts her evidence, that all of the claimed thousands of euro of expense on items for the children never happened (though there was some expenditure).

(ii) Savings

32. In his Family Law Civil Bill before the Circuit Court, Mr B claims, *inter alia*, that when it came to gifting the money to his ex-wife's siblings, he "put up the vast bulk of these funds at least €150,000 from his own savings" (emphasis added), so he had "at least" €150,000 in savings. When Ms A first mentioned the €150,000 in savings, Mr B sniffed at the notion that he would have such savings. When Ms A indicated that this was what Mr B had himself claimed in his pleadings, Mr B asked to be directed to where so preposterous a claim had been made. When he was pointed by Ms A to the Family Law Civil Bill, Mr B indicated that the pleadings must have been prepared by one of the solicitors who is part of the great plot against him, and that the notion he had savings of the scale claimed was fanciful. When the court noted that the Family Law Civil Bill had in fact been prepared by the one firm of solicitors whom Mr B had mentioned as a trustworthy firm of solicitors, Mr B seemed taken aback. Yet in the later stages of the proceedings, Mr B appeared repeatedly to accept that he had advanced €150,000 from his savings. The abiding impression that arises is that if the reference to the savings had not appeared in his own Family Law Civil Bill, Mr B would simply have lied and said that there were no such savings. He was prevented by his own documentation from proceeding with this lie. A man prepared to lie under oath in one respect clearly loses credibility as to his truthfulness in all respects.

33. How did Mr B amass savings of "at least" €150,000? Ms A indicated that Mr B works in a business where a lot of business is done 'cash in hand'. The court accepts that Ms A is correct in her assessment as to where the money came from; she seemed at all times a truthful woman and who better than an ex-wife to know where her ex-husband's resources came from? However, her evidence in this regard raises an interesting point that the court turns now to consider.

34. If one is to believe Mr B's evidence, since parting from Ms A (and despite the fact that he now lives with his parents) he has been living 'hand to mouth', stringing out his credit card despite being in work at all times. The problem, of course, for a court, when it comes to someone who has access to 'cash in hand', is that provided the cash is kept 'off the books' (and in a perhaps not unrelated aside, Mr B revealed that he had kept a drop-safe of cash in his family home) that cash is essentially invisible, except perhaps to a forensic accountant who can match lifestyle to cost and gauge in her/his opinion whether what is claimed is true or not. When the court put this problem of invisibility to Ms A, she acknowledged that the invisibility of concealed cash earnings is a problem for a court *if* the court is seeking to gauge exactly how much a man earns. However, she added that she was seeking to make a different point, *viz.* pointing to the incredibility of the evidence that a man who was once good for €150,000 in savings should, despite remaining in employment, suddenly be living from 'hand to mouth' once he departed from his wife and could expect that proceedings would eventuate in which he would have to pay maintenance.
35. This last point *is* a different point and one that is respectfully accepted by the court as correct. Mr B's claimed impecuniosity is not credible; he has a history of being an industrious worker, a keen saver and a man who works in a trade where, the court accepts, some level of 'cash in hand' is not unknown. Consistent with past habit, Mr B must have some savings set aside, the court does not know how much, but, on the balance of probabilities, it does not doubt that they are there. On a related note, it was striking in the proceedings that in his very brief references to the future (in his evidence and submissions he was focused almost entirely on every bitter detail of the past) Mr B made no mention of a need for ready cash or of a need for the maintenance payments to be reduced and even hinted at an ability to meet additional incidental expenses as they fell due even though he is supposed to be impecunious. He also indicated a charge-out rate for work which Ms A, who, again, is undoubtedly familiar with the truth of Mr B's earning capacity from the time when they were a couple, considered to be fancifully low, confidently asserting that Mr B "*would not get out of bed in the morning*" for the half-day rate mentioned. Her evidence in this regard is accepted by the court as by far the more credible.

IV

Some Questions Arising

36. How is the court to proceed in respect of an husband: whose influence has been inimical to (a) the viability of his marriage and (b) the welfare of his children, to the point that (I) one of the children succumbed to dissociative identity disorder as a result of all that happened and (II) all of them, according to both parties, have been entirely 'stressed out' (which is doubtless too weak a term to employ)?
37. How is the court to make proper provision in a just manner between two ex-spouses:
- (1) one of whom, Ms A, does everything that is proper (looks after the children, is forced by economic circumstance to abandon her agreed role of homemaker and

get a job in the workplace, and who conducts herself properly in court proceedings); and

- (2) the other of whom, Mr B, (a) has largely left his children to their mother's care, (b) has conducted himself so badly that one of his children succumbed to a dissociative identity and all of his children have been 'stressed out' (again, the phrase seems too mild) by his actions, (c) months after a divorce decree has been granted, has made no incidental maintenance payments for his children (on the risible basis that none has been sought, as if children had suddenly become free to rear and he was pre-empted from volunteering payment at times of the year which are known to be expensive, e.g., the new school year), (d) has seen fit for no good reason to reduce his monthly maintenance payments in breach of a court order, (e) manifests such obvious contempt for his wife and disregard for court orders as to create the very real possibility, if not likelihood (Ms A considers it a certainty), that once these proceedings are complete, Mr B will feel free, whenever it suits him, and if he thinks it will harass or humiliate Ms A, again to reduce, if not altogether stop, paying the maintenance payable, and (f) comes before the court asserting that he is a near-pauper even though the proposition flies in the face of logic and common-sense?

V

Law

A. *Some Academic Commentary.*

i. Overview.

38. In approaching the law in this area, I have had regard, *inter alia*, to applicable case-law and the following valuable academic commentary: Cahillane, L., "Revisiting Article 41.2" (2017) 40 *D.U.L.J.*, pp. 107-26; and Crowley, L., "Sheltering the Homemaker in Irish Family Law: Ireland's Failure to Evolve with the Shifting Social and Family Norms" (2018) *International Survey of Family Law*, pp. 271-96.

ii. Preferential Treatment of Marital Family.

39. Crowley (Sheltering, at p. 272) observes, *inter alia*, as follows:

"Family law in Ireland is premised upon absolute respect for the marital family. The family is accorded an elevated status in the Irish Constitution, where it is expressly regarded as a unit that is superior to all positive law with inalienable and imprescriptible rights. This marital union is founded upon the express constitutional preference for the wife and mother to remain in the family home to fulfil her duties to the family as a whole. Article 41.2.1 of the Irish Constitution critically outlined below, obliges the state to take the steps necessary to ensure that no woman is forced through economic necessity to work outside the home."

40. In this case it was agreed between the parties that their respective responsibilities would be split between them in such a way that Ms A would work as a homemaker in the family home and Mr B would work outside the family home. Ms A consequently did not get a job outside the family home, something she has since shown herself eminently capable of

doing. When the marriage breakdown occurred, as mentioned above, Ms A was forced by economic circumstance to quit her agreed role as homemaker in the family home and to take up a job in the workplace. Ms A did this not least, though not only, so that she could meet the mortgage repayments on the family home, which repayments have been paid almost exclusively by her since the marriage between her and Mr B effectively ended back in 2013.

41. Crowley writes (Sheltering, at p. 273) that "*Irish lawmakers have elected to permanently protect the homemaker rather than mandate any expectation of, or right to post-divorce independence*" and of a situation in that has seen Irish lawmakers "*refusing to permit any scenario where spouses can be deemed to have definitively severed their financial ties, thereby insulating the position of the homemaker*". How is the court to proceed so as to accord with the intention of lawmakers in this regard "*to permanently protect the homemaker*" and to set about "*insulating the position of the homemaker*" in (a) a situation in which the homemaker (Ms A) was forced out of her chosen (and agreed) role of homemaker and into paid employment so that she could, post-separation, pay the joint mortgage (which except for a 24-month period she has paid alone) and provide for her children and (b) the impossible situation that arises because of Mr B's post-separation contemptuous treatment of Ms A (which has the result that any normal interaction between Ms A and Mr B is entirely unfeasible)?

- iii. Article 41.2.1° of the Constitution
42. Under the heading "*Constitutional Preference for Women in the Home*", Crowley (Sheltering, at pp. 277 - 279) observes, *inter alia*, as follows:

"The constitutional preferential treatment of the marital family is twinned with a patriarchal view of the domestic role of the mother within that family unit, with express constitutional recognition in Article 41.2.1° 'that by her life within the home, woman gives to the State a support without which the common good could not be achieved'.

...

The meaning and impact of Article 41.2.2° has always been unclear; Denham J. (as she then was) gave weight to its value in her dissenting judgment in Sinnott v. Ireland [[2001] 2 I.R. 545]. Although the judgment is of very limited precedential value given the opposing views of the other six judges of the Supreme Court, her views are interesting nonetheless:

Article 41.2 does not assign women to a domestic role. Article 41.2 recognises the significant role played by wives and mothers in the home. This recognition and acknowledgement does not exclude women and mothers from other roles and activities. It is a recognition of the work of women in the home. The work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles fall to be analysed.

...

[A] short-lived attempt by Barr J. in *L v. L* [[1989] ILRM 528], prior to the introduction of the remedies of judicial separation and divorce, to equate the domestic contributions of a married woman in the home to a right to a share in the family home held in her husband's sole name was ultimately overturned by the Supreme Court. What has been referred to as a 'laudable attempt to improve the economic situation of the home maker' was regarded as 'an usurpation of the legislative role' and the Supreme Court refused to accept that 'the transfer of any particular property right could be a general jurisdiction capable of being exercised in pursuance of...[Article 41.2.2°]...of the Constitution' Such legislative intervention does now exist on separation and divorce under the provisions of the Family Law Act 1995 and the Family Law (Divorce) Act 1996, in particular in sections 16 and 20 respectively which require the court to have regard to domestic spousal contributions as well as career sacrifices that may have been made by one of the spouses in order to provide support for the family in the home." [Emphasis added]

43. The lesson thus seems to be that in addressing the issue that presents between Ms A and Mr B there is no need for the court to steer towards Article 41.2. of the Constitution; there is ample statutory basis on which to act in the Family Law (Divorce) Act 1996.
44. Although the judgment of Barr J. in *L v. L* was later reversed by the Supreme Court, an insightful assessment of his judgment in *L v. L*, and how it fared before the Supreme Court, is offered by Cahillane at pp. 119-20:

"In a well-reasoned judgment, Barr J noted that previous case law had established that a woman's work in the home could not give rise to a beneficial interest in that home unless there had been some sort of financial contribution. However, those cases had not considered Article 41.2. He pointed out that in this provision, the Constitution envisages that ideally a woman should devote her time and attention to her duties in the home and that in practical terms this means a woman who adopts that concept 'has a special place in society which should be buttressed and preserved by the State in its laws.' He also points out that many women who make this choice are obliged to make a sacrifice in doing so and thus in return for that sacrifice 'which the Constitution recognises as being in the interest of the common good, she should receive some reasonable economic security'. Shortly afterwards, Barr J's judgment was quoted with approval, albeit obiter, by Barrington J in an unreported judgment in a similar case where he criticised the existing legal approaches as starting from the wrong point in the law and equity and stated that the proper starting point was that taken by Barr J. Barrington J also pointed out the inconsistency in the existing laws with the values in Article 41 which meant that a woman with an independent income was in a better position than the woman who fulfils the constitutionally preferred role of wife and mother. However, his colleagues in the Supreme Court were shocked by the revolutionary nature of Barr J's High Court judgment. McGuinness has noted that the legal team was very

doubtful of success in the Supreme Court, especially given that the members of the court were all middle-aged or older men likely to be the sole owners of their property. While certain members of the Court were sympathetic to the arguments of the plaintiff, Barr J's judgment was simply a step too far for them. While Barr J's judgment concentrated on the principles involved and took a purposive approach, anxious to give some meaning to this otherwise useless provision, the Supreme Court concentrated on the traditional development of property law and took a strict separation of powers perspective, noting that Barr J was going beyond developing an existing law and had ventured into the realm of law-making. The result was that Article 41.2 was now effectively meaningless and no further litigation was taken directly on the provision."

45. Crowley (Sheltering, at pp. 284-85) continues:

"The need to appease those who feared significant societal impact resulted in a divorce regime that now incorporates a capacity (if not expectation) that financial ties remain post-divorce in order to protect the 'vulnerable' Irish homemaker. Thus, the regulatory approach that was enacted is premised upon broadly drafted statutory provisions affording the judiciary very extensive discretion to determine what financial relief orders to make. This was done in order to guarantee, as much as possible, the ongoing rights of dependent wives and children.

...

The divorce laws create a protective safety net for spouses who are encouraged to make choices and sacrifices for the family and public good, within a context which provides guaranteed capacity to seek restitution and compensation or maintain the dependency arrangement, in the event of a 'pre-death' termination of the union.

...

Financially, the constitutional post-divorce threshold to be achieved prior to the grant of a decree requires the court to be satisfied that proper provision in the circumstances has been made for both spouses and any dependent children. Evidently, in the context of Irish family law, the protection of the homemaker is a key social priority."

46. Here Ms A for long worked in the family home as a homemaker until, post-separation, was forced by economic circumstance to quit her agreed role as homemaker in the family home and to take up a job in the workplace, Ms A doing this not least, though not only, so that she could meet the mortgage repayments on the family home, which repayments have been paid almost exclusively by her since the marriage between her and Mr B effectively ended back in 2013.

47. 'Proper provision' is not defined in the Family Law (Divorce) Act 1996 and it is for a court to decide in every case what constitutes proper provision in all the circumstances

presenting. The court proceeds in the next section of this judgment to consider the issue of proper provision.

B. Proper Provision

48. When it comes to proper provision, the court reiterates below certain of the points made in Part IX of its judgment in *M v. S* [2020] IEHC 562 and makes some accompanying comment:

"The meaning of 'proper provision' was considered by the High Court in W.A. v. M.A. [2005] 1 I.R. 1. There, the applicant and the respondent executed a separation agreement which divided their property and assets approximately equally between them. Subsequently, the applicant's financial situation strengthened and that of the respondent weakened. Over a decade after the separation agreement the applicant sought a divorce and the respondent claimed for various counter-orders. The issue of 'proper provision' in the context of the granting of a decree of divorce arose, Hardiman J., sitting in the High Court, brought the dictionary definition of "proper" to bear (a perfectly legitimate approach to statutory interpretation) observing, inter alia, as follows, at 15-16:

"'Proper'

This term is not defined in the statute and counsel did not refer me to any particular preferred meaning of it. I therefore interpret the word in its natural and ordinary meaning. This in itself is not an entirely straightforward exercise since the term has many meanings; the Oxford English Dictionary identifies some fourteen meanings with a number of subgroups. It is in fact a word of peculiar difficulty since, as the editors of the dictionary say:-

'The sense had already undergone great development in Latin, Romantic, and French, before the word was taken into English, where the chronological appearance of the census does not correspond with the logical development.' With that caution in mind, the relevant meanings of the term appear to me to be as follows:-

- '(a) in conformity with rule; strict, accurate, exact ...,*
- (b) such as a thing of the kind should be ...,*
- (c) adapted to some purpose or requirement expressed or implied; fit, apt, suitable; fitting, befitting; what it should be or what is required ...,*
- (d) in conformity with social ethics or with the demands or usages of polite society ..."*

It will be seen that the dictionary definition leaves a good deal of scope for discretion in the interpretation of the word.

That discretion is trenched upon by [e.g.,] the need to consider the various matters set out in s 20(2)"...

....

[Court Note: Perhaps of particular relevance in the context of the within proceedings is Hardiman J.'s approval of the notion that 'proper provision' extends, inter alia, to what is "in conformity with social ethics or with the

demands or usages of polite society". "Polite society", the court confidently asserts, frowns with singular severity on a husband such as Mr B who (a) has largely left his children to their mother's care, (b) has conducted himself so badly that one of his children succumbed to a dissociative identity and all of his children have been 'stressed out' (again, the phrase seems too mild) by his actions, (c) months after a divorce decree has been granted, has made no incidental maintenance payments for his children (on the risible basis that none has been sought, as if children had suddenly become free to rear and he was pre-empted from volunteering payment at times of the year which are known to be expensive, e.g., the new school year), (d) has seen fit for no good reason to reduce his monthly maintenance payments in breach of a court order, (e) manifests such obvious contempt for his wife and disregard for court orders as to create the very real possibility, if not likelihood (Ms A considers it a certainty) that once these proceedings are complete, Mr B will feel free, whenever it suits him, and if he thinks it will harass or humiliate Ms A, again to reduce if not altogether stop paying the maintenance payable, and (f) comes before the court asserting that he is a near-pauper even though the proposition flies in the face of logic and common-sense. "Polite society", the court confidently asserts, expects that this Court will move as far as is legally possible in remediating these wrongs if it is to make 'proper provision'].

b. Some Case-Law of Relevance

...The court has been referred to the decisions of the Supreme Court in *D.T. v. C.T. [2002] 3 I.R. 334* and *Y.G. v. N.G. [2011] 3 I.R. 717* and of the High Court in *M.K. v. J.K. (No 2) [2003] 1 I.R. 326*. Those cases are authority for, inter alia, the following propositions; references are to the page numbers indicated on the Lexis database.

The Constitutional/Statutory Scheme

- (1) *In terms of applicable law, the starting point in a divorce case is Art. 41.3.2° of the Bunreacht, as amended by the 15th Amendment (and now the 38th Amendment also), the statutory machinery for the implementation of which is the Family Law (Divorce) Act 1996 (D.T. v. C.T., Keane C.J., at p. 381).*
- (2) *The duty of the courts to ensure that proper provision is made for a spouse before a decree of divorce is granted flows directly from the provisions of Article 41 of the Constitution and it is in the context of that Article as a whole that the nature and extent of the duty set out in the Act of 1996, must be interpreted (D.T. v. C.T., Murray J., at p. 424).*
- (3) *The Constitution and the Act of 1996 circumscribe the power conferred on the designated court, by obliging it, before it may grant a decree of divorce, to be satisfied of certain matters. The court must, if it is to act constitutionally, satisfy itself that the evidence proves these matters. The consent of the marriage partners*

cannot confer upon the court the power to dissolve their marriage so as to absolve it from this duty (D.T. v. C.T., Fennelly J., at p. 433).

- (4) *Section 20(2) sets out a long list of criteria to which a court must have regard in the making of financial orders. Furthermore, the list is not exhaustive and does not confine the discretion of the court. Section 20(5) perhaps complicates the matter further by requiring that, in the final analysis, the court should not proceed to make an order unless it would be in the interest of justice to do so (M.K. v. J.K. (No 2), O'Neill J., at p. 346).*

Clean Break?

- (5) *When, following the 15th Amendment, the Oireachtas came to introduce divorce legislation, it was modelled to some extent on modern English divorce law. There is, however, an important difference. English legislation embodies the 'clean break' principle laid down by the House of Lords in *Minton v. Minton* [1979] AC 593 (D.T. v. C.T., Keane C.J., at p. 384).*
- (6) *Irish law does not establish a right to a 'clean break'. However, it is a legitimate aspiration (Y.G. v. N.G., Denham C.J., at p. 729).*

[Court Note: In the context of the within proceedings what Denham J., as she then was, would appear to contemplate/countenance is that the court would place Ms A, so far as practicable (and without departing from the need for proper provision), in a position in which she has as little as possible to do with Mr B given his truly impossible behaviour/s towards her and the children.]

- (7) *The absence of specific statutory machinery for the making of 'clean break' provision should not preclude the court from seeking to do so in appropriate cases. In the present case, where the amplitude of resources makes it possible, the desire of the parties for financial finality should not be frustrated (D.T. v. C.T., Fennelly J., at p. 440; see also Y.G. v. N.G., Denham C.J., at p. 729)....*

[Court Note: Again, in the context of the within proceedings what Denham J. would appear to contemplate/countenance is that the court would place Ms A, so far as practicable (and without departing from the need for proper provision), in a position in which she has as little as possible to do with Mr B given his truly impossible behaviour/s towards her and the children. Though there is not quite an "amplitude of resources" the two ex-spouses do appear able to manage financially by themselves; hence Ms A's desire for "financial finality" so that she and her children can be free of Mr B and his impossible behaviour/s for once and for all. In the circumstances presenting, the court is minded to grant Ms A largely what she wants *plus a little more*: she is prepared to sacrifice maintenance completely so long as she has the house, not least because she does not believe that, once these proceedings are over, the maintenance will be paid; however, the court considers that an order as to ownership of the house plus orders for maintenance, suspended unless certain eventualities occur, represent the better way forwards.]

Certainty and Finality

- (8) *Keane C.J. did not believe that the Oireachtas, in declining to adopt the 'clean break' approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties (D.T. v. C.T., Keane C.J., at p. 385).*

[Court Note: The court refers to its last two comments above. "[C]ertainty and finality" are precisely what Ms A is seeking.]

- (9) *The principles of certainty apply to family law as to other areas of the law. Certainty is important in all litigation. Certainty and consistency are at the core of the legal system. However, the concepts of certainty and consistency are subject to the necessity of fairness. Consequently, each case must be considered on its own facts, in light of the principles set out in the law, so as to achieve a just result. Thus, while the underlying constitutional principle is one of making proper provision for the spouses and children, this is to be administered with justice to achieve fairness (D.T. v. C.T., Denham J., at p. 403).*

[Court Note: Notably, the court is not just tasked with making proper provision; it is tasked with administering the concept of proper provision "with justice to achieve fairness", i.e. the end objective is fairness. Here the court has to arrive at fairness in a situation where Mr B (a) has largely left his children to their mother's care, (b) has conducted himself so badly that one of his children succumbed to a dissociative identity and all of his children have been 'stressed out' (again, the phrase seems too mild) by his actions, (c) months after a divorce decree has been granted, has made no incidental maintenance payments for his children (on the risible basis that none has been sought, as if children had suddenly become free to rear and he was pre-empted from volunteering payment at times of the year which are known to be expensive, e.g., the new academic year), (d) has seen fit for no good reason to reduce his monthly maintenance payments in breach of a court order, (e) manifests such obvious contempt for his wife and disregard for court orders as to create the very real possibility, if not likelihood (Ms A considers it a certainty) that once these proceedings are complete, Mr B will feel free, whenever it suits him, and if he thinks it will harass or humiliate Ms A, again to reduce if not altogether stop paying the maintenance payable, and (f) comes before the court asserting that he is a near-pauper even though the proposition flies in the face of logic and common-sense.]

- (10) *A court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s 22 of the Act of 1996, where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit (D.T. v. C.T., Murray J., at p. 432).*

[Court Note: The court would make the same point as at point (8) above.]

Broad Discretion

- (11) *While s.20(2) of the Act of 1996, lists in detail the factors to which the court is required to have regard in making the various financial orders provided for in Part III of the said Act, it is obvious that the circumstances of individual cases will vary so widely that, ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances (D.T. v. C.T., Keane C.J., at p. 386; see also Murray J., at p. 422).*

[Court Note: The court notes the reference to "a just resolution" and would make the same point, mutatis mutandis, as was made in respect of "fairness", at point (9) above.]

- (12) *Normally, even in cases where the parties might be considered to enjoy a substantial degree of financial comfort, the finite resources of the parties will be an underlying prescriptive factor in the exercise of a discretion as to how those resources can be applied in making proper or fair provision for both spouses (D.T. v. C.T., Murray J., at p. 423).*
- (13) *The Oireachtas, in choosing the approach it enshrined in s.20, made a considered decision to confer upon the court a duty of a particularly broad discretionary character. This requires the court to pass judgment on the presence and, where they are present, the weight it attributes to an extremely wide range of specified considerations (D.T. v. C.T., Fennelly J., at p. 435).*
- (14) *The matters listed in s.20(2) of the Act of 1996, are designed to ensure that the court will have regard to all the wide variety of circumstances which should, in the interests of justice, be weighed in the balance when considering what is proper provision. The starting point in that regard must be, on the one hand, to the resources and on the other to the needs, obligations and responsibilities of the parties. There is no stated limitation on the financial resources or on the "financial needs, obligations and responsibilities..." to be considered by the court and which may be available for the purpose of making provision. They may extend to resources or to needs, obligations or responsibilities which either spouse "is likely to have in the future" (D.T. v. C.T., Fennelly J., at p. 437).*

Financial Needs

- (15) *The standard of living of a dependent spouse should be commensurate with that enjoyed when the marriage ended. The Act of 1996 specifically refers to matters to which the court shall have regard and these include the standard of living enjoyed by the family before the proceedings were instituted or before the spouses commenced to live apart, as the case may be (Y.G. v. N.G., Denham C.J., at p. 731).*

[Court Note: Here the standard of living enjoyed by Ms A was one in which, thanks to the sale of the inherited property, she was living in a larger property with a husband who worked outside the house while she agreed to be a homemaker. She now lives in the property purchased in part with the proceeds of the inherited property but works outside the family home out of economic necessity occasioned by the breakdown of the marriage and paying by herself (save for a brief 24-month period) the entirety of the mortgage on the home. Just as she had the expectation that when the mortgage would be paid off by her husband (while they lived together and she was a homemaker) she would live in the home, it seems to the court that there is an even more pressing entitlement that such a scenario should come about in a situation where she has been forced by economic necessity to take a job outside the family home, has continued to rear her children at the family home and has been paying by herself (save for a brief 24-month period) the entirety of the mortgage on the home.]

(16) *If a party has new needs, for example a debilitating illness, that will be a factor to be considered by a court in all the circumstances of the case (Y.G. v. N.G., Denham C.J., at p. 731).*

(17) *Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances (Y.G. v. N.G., Denham C.J., at p. 732)...*

[Court Note: Crowley, L. in "Sheltering the Homemaker in Irish Family Law: Ireland's Failure to Evolve with the Shifting Social and Family Norms" (2018) International Survey of Family Law 271-96, 287-88, comments usefully as follows in this regard, in observations that the court respectfully adopts:

"[I]n YG v. NG [Footnote: [2011] 3 I.R. 717], the issue of inherited property and the extent to which it could be divided on divorce was raised for consideration. [Footnote: At the start of the marriage the parties had taken up residence in a house inherited by the appellant husband from his aunt and uncle. Additionally, he had come to the marriage with savings of IR£3,000]. Denham CJ. identified inherited property as deserving of special attention and confirmed the view that it should not necessarily be treated in the same manner as assets earned by one or both spouses in the course of the marriage. 'Assets which are inherited will not be treated as assets obtained by both parties in a marriage ... but the circumstances of each case should be considered specifically. [Footnote: At 732]. Similarly in the earlier case of C v. C [Footnote: [2005] IEHC 276] O'Higgins J. demonstrated some reluctance to grant the extensive ancillary relief orders sought by the respondent wife, making repeated reference to the inherited nature of much of the property at issue. He identified the applicant as having 'a strong claim on the house, having inherited it on the death of his father, when the parties took up residence there. Additionally, O'Higgins J. noted that he 'had family

connections with it for a very long time...[and that]...the respondent did not contribute either directly or indirectly to its acquisition...'. In determining the respondent's claim in respect of the family home, O'Higgins J. relied upon the views of Denham J. in the earlier case of *T v. T*, [Footnote: *T v. T* [2002] 3 IR 334] on the issue of benchmarks for asset distribution, noting her view that the concept of one-third as a check on fairness may have no application in some cases, including where the assets or future income of one of the parties is 'related to property brought solely by one party to the marriage...') [Footnote: At 384-85]. Rather than dividing the inherited assets, he determined that in the circumstances, proper provision required the payment of maintenance and the purchase of a suitable house for the respondent, regarding such an approach as...the best way to ensure the future of the business - which is the parties' main source of income - while at the same time being fair to both the applicant and the respondent. It also takes into account the fact that the properties were inherited by the applicant and brought into the marriage by him.

Thus, although the legislation has not placed parameters upon the concept of matrimonial property, the Irish judiciary has shown itself willing to identify, based on source, property that might not properly be suited to a spousal claim. Certainly, it appears that property inherited by one of the parties may in appropriate circumstances fall outside the asset pool available for asset distribution. [Footnote: However, this is only possible where there are other assets available to satisfy the proper provision requirements of the Irish divorce law regime. It is reasonable to suggest that a property such as a family farm, where both parties have worked the farm for the duration of a lengthy marriage, may be perceived by the courts as transforming over time, from a property inherited solely by one spouse into a marital asset to which both parties can lay a legitimate claim, as evidenced by the successful claim of the dependent wife in *N. v. N.* (Unreported, High Court, Abbott J., 18 December 2003)...In *MK v. JK (or SK)* [2001] 3 IR 371 at 382/83, McGuinness J. referred to the equal division made by the court in the English decision of *White v. White* [2001] 1 AC 596: 'It should be noted that the husband and wife in *White v. White* were not a couple with traditional roles but were business partners in a large farming enterprise. Throughout his speech Lord Nicholls stressed that the overall objective of the court should be fairness"].

[Court Note: Here, House 1 was an inherited property. House 1 was transmuted into House 2 by the parties with the great assistance of that inherited property.

It was striking in the proceedings that in his very brief references to the future, Mr B made no mention of a need for ready cash or of a need for the maintenance payments to be reduced and even hinted at an ability to meet

additional incidental expenses as they fell due even though he is supposed to be impecunious. He also indicated a charge-out rate for work which Ms A, who, again, is undoubtedly familiar with the truth of Mr B's earning capacity from the time when they were a couple, considered to be fancifully low, confidently asserting that Mr B "would not get out of bed in the morning" for the half-day rate mentioned; her evidence in this regard is accepted by the court as by far the more credible.]

- (18) *Where one or both parties are in receipt of income, but their joint assets are not of such significant value, the first task of the court will almost certainly be to consider what the financial needs of the spouses and the dependent children are. At one end of the spectrum, there will be cases in which, at best, no more than basic subsistence requirements at the most can be met. At the other, there will be both substantial assets and income available and the court will be concerned with the proper distribution, in terms of the section, of the available assets so as to ensure that proper provision is made for the spouses and any dependent children (D.T. v. C.T., Keane C.J., at p. 386).*
- (19) *The Act of 1996 does not require the assets of the spouses to be divided between them and the dependent children in every case. There will be cases in which it would be solely concerned with the appropriate level of the maintenance to be paid by one spouse to the other and as to what is to happen to the family home. But in cases where there are substantial assets brought into being in circumstances where it would be unjust not to effect some form of division, the court will inevitably find itself having to determine, where the parties are unable to agree, how the assets should be divided and whether that division should take the form of a lump sum order or a property adjustment order (D.T. v. C.T., Keane C.J., at pp. 386-87).*

Non-Discrimination

- (20) *The work of a spouse in the home cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or the breadwinner during the course of the marriage (D.T. v. C.T., Murray J., at p. 427).*

[Court Note: It would be to discriminate against Ms A if the court were to count Mr B's mortgage payments during the years that he was the sole breadwinner as conferring a benefit on him when the only reason for non-payment by her was that she, by agreement and to his advantage, was acting as a homemaker.]

- (21) *Lord Nicholls, in White v. White [2001] 1 AC 596 emphasised that the whole tenor of English divorce legislation was the avoidance of a discriminatory approach: the fact that, as often happened, the wife had devoted the greater part of her time to looking after the children and caring for the home generally, was no ground for confining her share of the family assets, in the*

event of a breakdown of the marriage, to so much of the assets as met her 'reasonable requirements'. That is also the law in Ireland (D.T. v. C.T., Keane C.J., at p. 389).

- (22) *In Cowan v. Cowan [2002] Fam. 97, a so-called 'ample resources' case, Thorpe LJ, at 118-19, summarised his understanding of White v. White [2001] 1 AC 596 as follows, "Disapproved is any discriminatory appraisal of the traditional role of the woman as home maker and of the man as breadwinner and arbiter of the destination of family assets amongst the next generation. A calculation of what would be the result of equal division is a necessary cross check against such discrimination....Disapproved is any evaluation of outcome solely or even largely by reference to reasonable requirements." Provided that it is always borne in mind that in 'ample resources' cases an equal division of the assets is emphatically not mandated by the legislation, Keane C.J. considered that there should be no difficulty in adopting a broadly similar approach in this jurisdiction. (D.T. v. C.T., Keane C.J., at pp. 389-90).*
- (23) *When a court is exercising its discretion in making provision for spouses on an application for divorce, the following should be considered: (i) in making such provision a spouse who has worked principally in the home during the course of the marriage should not be disadvantaged in the making of such provision by reason of that fact; (ii) both spouses are entitled, in principle, to seek that the provision made for them provides them with a measure of independence and security in their lives and there is no reason why, in principle, a non-earning spouse should be confined to periodic payments. The extent to which this can be achieved in practice will depend on the circumstances of the case, the resources available and the exercise of judicial discretion in taking into account all the factors referred to in s 20; (iii) a court has power to direct the payment of lump sum payments where this is considered an appropriate means of making proper provision for one or other of the spouses; (iv) all the resources, assets and income of the applicant and the respondent) should be taken into account (D.T. v. C.T., Murray J., at pp. 431-32).*

[Court Note: The court notes the breadth of its discretion in this regard.]

'Breadwinners' versus 'Homemakers'

- (24) *The role of the dependent homemaker and child carer, usually the wife, is not to be disadvantaged in the distribution of assets by reason of having a non-economic role (M.K. v. J.K. (No 2), O'Neill J., at p. 349).*
- (25) *In Irish society today, it can no longer be assumed that the husband and wife will occupy their traditional roles in which the husband has been the breadwinner and the wife the home builder and carer. The roles may on occasions even be reversed and, in many instances, both husband and wife will be in receipt of income from work. In those cases where one spouse*

alone is working and, in the result, a significantly greater responsibility for looking after the home has devolved on the other, it is clear that under s.20(2)(f) of the Act of 1996, the court must have regard to that as a relevant factor (D.T. v. C.T., Keane C.J., at p. 387).

- (26) *A court is obliged by virtue of s.20(2)(g) to have regard to the financial consequences for either spouse of his or her having relinquished the opportunity of remunerative activity in order to look after the home or care for the family (D.T. v. C.T., Keane C.J., at p. 387).*
- (27) *In assessing the "proper provision" under Article 41.3.2°, the court must look at both aspects of a spouse's role in the family, i.e. the two sides of the coin. Thus, the court must have regard to the role of the spouses in relation to the welfare of the family, to their contribution in looking after the home or caring for the family: s.20(2)(f). On the other side of the coin, the court must have regard to the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each, and the degree to which the future earning capacity of a spouse was impaired by reason of the spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family: s 20(2)(g). By this total approach to the family role of a spouse and its effect, formal recognition is given to the role of caring for the family (D.T. v. C.T., Denham J., at p. 402).*
- (28) *Article 41.3.2° of the Constitution and the Act of 1996, clearly require that value be placed on the work of a spouse caring for dependents, the family and the home. A long-lasting marriage, especially in the primary childbearing and rearing years of a woman's life, carries significant weight, especially if the wife has been the major home and family carer (D.T. v. C.T., Denham J., at pp. 402-03).*

[Court Note: As noted previously above, here that value falls to be placed in a context where Mr B (a) has largely left his children to their mother's care, (b) has conducted himself so badly that one of his children succumbed to a dissociative identity and all of his children have been 'stressed out' (again, the phrase seems too mild) by his actions, (c) months after a divorce decree has been granted, has made no incidental maintenance payments for his children (on the risible basis that none has been sought, as if children had suddenly become free to rear and he was pre-empted from volunteering payment at times of the year which are known to be expensive, e.g., the new school year), (d) has seen fit for no good reason to reduce his monthly maintenance payments in breach of a court order, (e) manifests such obvious contempt for his wife and disregard for court orders as to create the very real possibility, if not likelihood (Ms A considers it a certainty) that once these proceedings are complete, Mr B will feel free, whenever it suits him, and if he thinks it will harass or humiliate Ms A, again to reduce if not altogether stop

paying the maintenance payable, and (f) comes before the court asserting that he is a near-pauper even though the proposition flies in the face of logic and common-sense.]

- (29) *In ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the courts should, in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner. The value to be attached to their respective contributions in those circumstances is, perhaps, underscored by Article 42.1 of the Constitution which refers, inter alia, to the "duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children" (D.T. v. C.T., Murray J., at p. 428).*

[Court Note: It is, *inter alia*, for this reason that the court considers that it ought not to count Mr B's mortgage payments during the years that he was the sole breadwinner as conferring a benefit on him when the only reason for non-payment by Ms A was that she, by agreement and to his advantage, was acting as a homemaker.]

- (30) *Where substantial assets and income have accrued to one spouse in the course of the marriage, the court should take them into account in determining the proper provision to be made for the other spouse. They are available in order to make a proper provision for the other spouse. In the case of a wife who has worked primarily in the home, she is just as entitled as her husband to have the 'fruits of the marriage', taken into account by the court in determining what provision should be made for each of them (D.T. v. C.T., Murray J., at p. 430).*

[Court Note: Here Mr B received a substantial six-figure windfall in the context of the money that he received by way of damages. Not a cent of this made its way to his wife and she contends, and the court accepts, that far less than he contends ever made its way to his children. This windfall, properly managed and coupled perhaps with savings, would have enabled a substantial down-payment to be made on a residence or even facilitated the outright purchase of a residence. The court has already indicated above that it does not accept Mr B's explanation as to how the damages were dissipated, nor even that they have all been dissipated.]

- (31) *Section 20(2)(f) obliges the court to give due weight and consideration to the respective roles of the breadwinner and the homemaker, i.e. such weight as is appropriate in all the circumstances. It does not erect any automatic or mechanical rule of equality. Nor does it institute any notion of family resources or property to be subjected to division. Several considerations militate against the adoption of such rules of thumb. The children of the marriage have to be considered and their provision by one spouse may mean that property should not be equally divided. One or both of the parties may*

have entered into new relationships, possibly involving children. The supposed 'breadwinner' or 'homemaker', as the case may be, may not, depending on the circumstances deserve to be placed on an equal footing. It is only with the greatest care, therefore, that one should formulate any general propositions (D.T. v. C.T., Fennelly J., at pp. 438-39).

- (32) *In White v. White [2001] 1 AC 596, Lord Nicholls observes, at p. 605, that "If, in their different spheres, each [spouse] contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer". Fennelly J. adopted this language to the extent that he argues for equal recognition of the value of the contributions that may have been made during the marriage, in their respective roles, by the money-earning spouse and the home-making spouse (D.T. v. C.T., Fennelly J., at p. 439).*

Other Relevant Factors

- (33) *Other factors to which the court is obliged to have regard is the standard of living enjoyed by both parties before the breakdown of the marriage, their respective ages and the duration of the marriage (D.T. v. C.T., Keane C.J., at p. 387).*
- (34) *A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party (Y.G. v. N.G., Denham C.J., at p. 732).*

[Court Note: It seems to the court that this is a proposition which falls to be applied as regards the windfall damages (as considered in the last Court Note above).]

Conduct of Parties

- (35) *The conduct of the parties will be relevant where, in the opinion of the court, it would be unjust to disregard it (D.T. v. C.T., Keane C.J., at p. 387).*

[Court Note: The court considers that it would be unjust to disregard Mr B's impossible behaviour/s.]

- (36) *Ultimately, when all these factors have been assessed by the trial judge, he or she must be satisfied that any financial orders made constitute proper provision for each of the spouses, and the dependent children, within the meaning of the Constitution and the Act of 1996 (D.T. v. C.T., Keane C.J., at p. 387).*
- (37) *As to when it would be "unjust" within the meaning of s 20(2)(i) to disregard the conduct of each of the spouses, in Wachtel v. Wachtel [1973] Fam. 72, Denning MR said, at p 90, that:-*

'There will no doubt be a residue of cases where the conduct of one of the parties is...both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life ... in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place.'

Keane C.J., in D.T., agreed with the view expressed by Lord Denning in Wachtel that the court should not reduce the financial provision which it would otherwise make to one of the parties save in cases where misconduct has been "obvious and gross". The same approach should logically be adopted to a proposed increase in the level of financial support because of the suggested misconduct (D.T. v. C.T., Keane C.J., at p. 391; see also Denham J., at pp. 408-09)...

[Court Note: Mr B behaved appallingly throughout the marriage, in the manner outlined at the outset of this judgment and is most definitely in *Wachtel* territory.]

Date of Valuation of Assets

- (38) *As to the time at which the assets should be valued, the language of s.20(2)(a), and, in particular, the reference to "property ... which each of the spouses concerned has or is likely to have in the foreseeable future" is more consistent with an assessment by the court of the value of those assets as of the date of the hearing. Any other construction would seem to give rise to the possibility of injustice to either party. That was also the view taken by the Court of Appeal in Cowan v. Cowan [2002] Fam 97, 122 (D.T. v. C.T., Keane C.J., at pp. 390-91).*
- (39) *The assessment of assets must be as of the date of trial or appeal. This is consistent with the wording of the statute which refers to "circumstances exist", "the income...which each of the spouses concerned has or is likely to have", "the financial needs which each of the spouses has or is likely to have". However, while the assessment of assets is at the date of the trial or the appeal, there may be important factors relevant to that sum to be taken into consideration in determining the proper provision for the spouses. E.g., the fact that a considerable sum of money was acquired by a spouse after their separation, the basis for such a new acquired sum, or the existence of a deed of separation, may be very relevant (D.T. v. C.T., Denham J., at p. 404).*

- (40) *Assets should be assessed as at the date of trial. However, there may well be circumstances as to their relevance as an asset base in providing proper provision. Thus, if the parties had no joint enterprise (such as a farm or business or professional practice) and one party after separation commenced and achieved success in a wholly new area, that may be a circumstance applicable to the determination of the asset base relevant to proper provision. While the factors set out in s 20(2)(a)-(1) must be applied, it may affect the benchmarking of fairness (D.T. v. C.T., Denham J., at p. 405).*

Ad Seriatim Consideration

- (41) *In determining proper provision, it is mandatory for the court to have regard, in particular, to the factors set out in s.20(2) of the Act of 1996. The relevance and weight of each factor will depend on the circumstances of each case. Best practice is to consider all the circumstances and each particular factor ad seriatim and give reasons for their relative weight in the case (D.T. v. C.T., Denham J., at p. 402).*
- (42) *What the court of first instance must do is go through the various factors set out in s.20(2) seriatim and deal with the circumstances of the case in the light of these factors insofar as they are relevant to the circumstances of the case, assessing in the light of the evidence, the weight to be attached to each factor. Having completed that exercise, the court must then, in the light of s.20(5) of the Act of 1996, consider in a residual way and on the basis that the court's discretion is not confined solely to the factors set out in s.20(2) but must have regard to whether or not an order which the court might be disposed to make, having weighed up the various factors in s.20(2), should not be made unless it would be in the interests of justice to do so (M.K. v. J.K. (No 2), O'Neill J., at p. 350).*

Lump Sum

- (43) *There is nothing in the Constitution or legislation which prohibits a lump sum as part of a financial ancillary order. In considering whether such an order is applicable, the provisions of the Act of 1996 must be applied (D.T. v. C.T., Denham J., at p. 403).*
- (44) *The Constitution would require that the making of lump sum payments be ordered if, in the particular circumstances of the case, the court considered in its discretion that that was the appropriate manner by which proper provision should be made for the spouse in question (D.T. v. C.T., Murray J., at pp. 429-30).*

Proper Provision (not Division)

- (45) *Under s.20(1) of the Act of 1996, "the court shall ensure that such provision as the court considers proper having regard to the circumstances exists" will be made for the spouses and any dependent children. Thus, this duty requires the court to make proper provision, having regard to all the circumstances (Y.G. v. N.G., Denham C.J., at p. 730).*
- (46) *The Act of 1996 enables the court to make a variety of financial and property orders; the purpose of the making of these orders upon the granting of a divorce*

decree is to ensure that proper provision is being made for a dependent spouse and children (M.K. v. J.K. (No 2), O'Neill J., at p. 332).

- (47) *In English matrimonial law, the court in divorce proceedings is primarily concerned with dividing assets as fairly as possible between the parties rather than making proper provision for the spouses and their dependent children. Such an approach could not be adopted in this jurisdiction, where the appropriate criterion is the making of proper provision for the parties concerned (M.K. v. J.K. (No 2), O'Neill J., at p. 348).*
- (48) *The scheme established under the Act of 1996 is not a division of property. The scheme provides for proper provision, not division. It is not a question of dividing the assets at the trial on a percentage or equal basis. All the circumstances of the family, including the particular factors referred to in s.20(2) are relevant in assessing the matter of provision from the assets (D.T. v. C.T., Denham J., at p. 404).*
- (49) *It is not the case that in making financial provision for spouses their assets should be divided between them. Neither the Constitution nor the Act of 1996, requires that, expressly or implicitly. It is rather that a spouse should not be disadvantaged by reason of the fact that all, or nearly all, of the assets and income in the marriage are those of the other spouse. It also means that in cases where there are very substantial assets belonging to one spouse which greatly exceed any conceivable day-to-day needs of either spouse, whatever their standard of living, those assets should not as a matter of course remain with the spouse who owns them, with the other spouse being confined to depending on periodic payments (D.T. v. C.T., Murray J., at p. 428).*
- (50) *Proper provision should seek to reflect the equal partnership of the spouses. Proper provision for a spouse who falls into the category of a financially dependent spouse should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligations, continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependant on receiving periodic payments for the rest of her life from her former husband. 'In principle' because in many cases the resources or circumstances of the parties will dictate that the only means of making future provision for the spouse in question will be by periodic payments from the other spouse (D.T. v. C.T., Murray J., at p. 429).*

[Court Note: It seems to the court that the references in the above to "personal dignity" and to "without necessarily being dependant on receiving periodic payments for the rest of her life from her former husband" are of especial significance in this case where Mr B, *inter alia*, (a) has conducted himself so badly

that one of his children succumbed to a dissociative identity and all of his children have been 'stressed out' (again, the phrase seems too mild) by his actions, (b) months after a divorce decree has been granted, has made no incidental maintenance payments for his children (on the risible basis that none has been sought), (c) has seen fit for no good reason to reduce his monthly maintenance payments in breach of a court order, (d) shows such obvious contempt for his wife and disregard for court orders as to create the very real possibility, if not likelihood (Ms A considers it a certainty) that once these proceedings are complete, Mr B will feel free, whenever it suits him, and if he thinks it will harass or humiliate Ms A, again to reduce if not altogether stop paying the maintenance payable, and (e) comes before the court asserting that he is a near-pauper even though the proposition flies in the face of logic and common-sense]

- (51) *The court must do what is "proper" in the sense of 'appropriate'. This is synonymous with what is "fair" or "just". In the moral sense, this is a clearly stated objective. In practice, it requires the court to weigh in the balance the infinite variety and complexity of the elements of human affairs and relationships and to arrive at a just result (D.T. v. C.T., Fennelly J., at p. 434).*

[Court Note: Again this objective falls to be applied in a situation where Mr B (a) has largely left his children to their mother's care, (b) has conducted himself so badly that one of his children succumbed to a dissociative identity and all of his children have been 'stressed out' (again, the phrase seems too mild) by his actions, (c) months after a divorce decree has been granted, has made no incidental maintenance payments for his children (on the risible basis that none has been sought, as if children had suddenly become free to rear and he was pre-empted from volunteering payment at times of the year which are known to be expensive, e.g., the new school year), (d) has seen fit for no good reason to reduce his monthly maintenance payments in breach of a court order, (e) shows such obvious contempt for his wife and disregard for court orders as to create the very real possibility, if not likelihood (Ms A considers it a certainty) that once these proceedings are complete, Mr B will feel free, whenever it suits him, and if he thinks it will harass or humiliate Ms A, again to reduce if not altogether stop paying the maintenance payable, and (f) comes before the court asserting that he is a near-pauper even though the proposition flies in the face of logic and common-sense.]

- (52) *Any property, whenever acquired, of either spouse and whenever and no matter how acquired, is, in principle, available for the purposes of the provision. Thus, property acquired by inheritance, by chance, or the exclusive labours of one spouse does not necessarily escape the net. On the other hand, not all such property is automatically available either (D.T. v. C.T., Fennelly J., at p. 437).*

Continuing Obligation

- (53) *Each spouse has a continuing obligation to make proper provision for the other and the resources which are available to each of them may be taken into account, so far*

as is necessary, to achieve that objective. Each case will necessarily depend on its own particular circumstances (D.T. v. C.T., Murray J., at p. 430).

Limited Resources

- (54) *Where there are quite limited resources available it may only be possible to provide for the basic needs of each spouse. On the other hand, different considerations would also arise where one spouse was independently wealthy before the marriage and the marriage was of a very short duration (D.T. v. C.T., Murray J., at p. 430).*

Agreement Between Spouses

- (55) *It is evident that parties may well be able to compose their material and financial differences by agreement. Agreement is, in its nature, to be encouraged, a matter which is recognised in the legislation, in particular, by requiring the court to have regard to the terms of any existing separation agreement (D.T. v. C.T., Fennelly J., at pp. 433-34).*

VI

Section 20

49. Among the reliefs sought by Ms A in the divorce application are, *inter alia*, orders under ss. 13-15 of the Family Law (Divorce) Act 1996, it is necessary to turn to s.20 of the Act of 1996, which provides as follows:

- (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.*

[Court Note: Here that means that the court must ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for Ms A, Mr B and their dependent children.]

- (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,*

[Court Note: The court has had regard to the affidavits of means sworn by the parties. Both parties have been largely providing for themselves since the marriage ended and seem perfectly able to do so. Apart from 24 payments of half the monthly mortgage payments, Ms A has paid the entirety of the mortgage since August 2013 and, by the time the mortgage is paid off, will have paid by far the greater number of repayment instalments alone. Both Ms A and Mr B are in stable employment. The Circuit Court Order as to

maintenance issued on 8 October 2019; after the Coronavirus pandemic started Mr B decided of his own volition to act in breach of that Order and continues to be in breach of same: there is a very real doubt as to whether a gentleman who shows no reluctance to breach a court order and no intention to place himself in compliance with same will continue to meet his maintenance obligations in the future once these proceedings have completed and he is free to stop the payments at will unless and until he is compelled to pay them. Indeed, Ms A indicated that she has been proceeding on the basis that Mr B will not pay the maintenance once these proceedings are out of the way, though the court does not accept that that means he should not be ordered to pay maintenance. The court has already considered above Mr B's dubious claims to impecuniosity (which the court does not accept to represent the truth as to his finances). Again, it was striking in the proceedings that in his very brief considerations of the future, Mr B made no mention of a need for ready cash or of a need for the maintenance payments to be reduced and he even hinted at an ability to meet additional incidental expenses as they fell due, even though he purports to be largely impecunious. He also indicated a charge-out rate for work which Ms A considered to be fancifully low, evidence that is accepted by the court to be correct.

- (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),*

[Court Note: See (a).]

- (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,*

[Court Note: The parties enjoyed a relatively comfortable lifestyle before their separation, albeit that their marriage was greatly marred in the manner described previously above.]

- (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,*

[Court Note: The spouses are both middle-aged. Their marriage effectively lasted for eight years (over the first and second decades of this century) ending with a long-term separation that preceded the decree of divorce granted last year.]

- (e) *any physical or mental disability of either of the spouses,*

[Court Note: Neither spouse suffers from a physical or mental disability.]

- (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,*

[Court Note: See (a). Ms A, by agreement, acted as a homemaker. Her husband, by agreement, was the breadwinner and paid the mortgage on House 2 (House 1 was inherited property). It would be to discriminate against Ms A as homemaker if the court was to count against her the payments made by her husband as agreed breadwinner when she was the agreed homemaker. The only money that Mr B brought to the marriage therefore was his €150,000 of savings which was gifted to Ms A's siblings. However, if Mr B maintains that some sort of debt obligation arose between himself and his wife as a consequence, then he should have proceeded to recover his share of the debt if that is what he wanted; the court does not see that financing the gifting of money by a wife to her siblings somehow gives one an equitable claim to her inherited property, nor does it appear that this was ever agreed between Mr B and Ms A. Moreover, this falls to be viewed in the context of the substantial six figure damages that Mr B received, not a cent of which made its way to Ms A (and she further contends, and the court accepts, that far less than Mr B contends ever made its way to his children). This windfall, properly managed (coupled perhaps with savings), would have enabled a substantial down-payment to be made on a property or even facilitated the outright purchase of a property. The court has already indicated above that it does not accept Mr B's explanation as to how the damages were spent, nor indeed that they have all been spent. The court does not see that his mis-spending of these monies, if they have been mis-spent or even fully spent, should count against Ms A].

- (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,*

[Court Note: It does not appear that the earning capacity of either has been impacted.]

- (h) *any income or benefits to which either of the spouses is entitled by or under statute,*

[Court Note: These have been accounted for in the evidence and taken into account by the court.]

- (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,*

[Court Note: Having regard to the all of the behaviours identified above, including but not limited to physically striking his wife, Mr B has behaved towards Ms A, not least in striking her, in what seems to the court to be so discreditable a manner as to bring himself within the “*obvious and gross*” conduct contemplated by Lord Denning in *Wachtel v. Wachtel* [1973] Fam.72, at p. 90, as endorsed by Keane C.J. in *D.T. v. C.T.* [2002] 3 I.R. 334, at p. 370 (see also the judgment of Denham J., as she then was, at pp. 387-88).]

- (j) *the accommodation needs of either of the spouses*

[Court Note: Mr B is currently living with his parents but wishes to move out. The court has already considered above Mr B’s dubious claims to impecuniosity (which the court does not accept to represent the truth as to his finances, not at all). Again, it was striking during the proceedings that in his very brief considerations of the future, Mr B made no mention of a need for ready cash or of a need for the maintenance payments to be reduced and he even hinted at an ability to meet additional incidental expenses as they fell due, even though he is supposed to be largely impecunious. He also indicated a charge-out rate for work which Ms A considered to be fancifully low, evidence that is accepted by the court to be correct. The truth is that Mr B’s income appears to be notably greater than he claims and he also appears to have access to notably more savings than he maintains.]

- (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,*

[Court Note: This was not the subject of the Circuit Court order, it was not argued at the hearing of the within application and the court does not see from the affidavit of means that there is any issue arising in this regard: it seems that both spouses will seek to avail of any State pension when and as appropriate.]

- (l) *the rights of any person other than the spouses but including a person to whom either spouse is remarried.*

[Court Note: Consistent with s.20(1) the court has considered the position of the dependent children. There is no other person to whose interests the court needs to have regard.]

- (3) *In deciding whether to make an order under a provision referred to in subsection (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.*

[Court Note: The parties are divorced and the subjects only of the Circuit Court order.]

(4) *Without prejudice to the generality of subsection (1), in deciding whether to make an order referred to in that subsection in favour of a dependent member of the family concerned and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:*

- (a) the financial needs of the member,*
- (b) the income, earning capacity (if any), property and other financial resources of the member,*
- (c) any physical or mental disability of the member,*
- (d) any income or benefits to which the member is entitled by or under statute,*
- (e) the manner in which the member was being and in which the spouses concerned anticipated that the member would be educated or trained,*
- (f) the matters specified in paragraphs (a), (b) and (c) of subsection (2) and in subsection (3),*
- (g) the accommodation needs of the member.*

[Court Note: As to:

- (a) these needs appear to be met from Ms A's income and in response to an express question from the court she indicated that she was budgeting for a future in which no maintenance would be paid; nonetheless the court does not consider that Mr B should be relieved of all obligation to pay maintenance for his children;*
- (b) the children are either at secondary school or continuing education and have no meaningful income, earning capacity or property;*
- (c) none of the children suffer from a mental or physical disability, though one child has suffered from dissociative identity disorder as a result of all the disturbances that preceded the parents' separation/divorce;*
- (d) there is no such income or benefit; Ms A is entitled to some children's benefit payments;*
- (e) a standard state education at the primary and secondary levels; the cost of continuing education was not raised at hearing;*
- (f) the court has had such regard when considering those provisions ad seriatim above;*

(g) *the children need a stable environment and have that in the family home.]*

- (5) *The court shall not make an order under a provision referred to in subsection (1) unless it would be in the interests of justice to do so.*

[Court Note: The court considers that it is in the interests of justice to make such an order.]

VII

Conclusion

50. Returning to points 3, 4 and 6 of the Circuit Court order:

A.

EXISTING CIRCUIT COURT ORDER (POINT 3)

- "3. *On consent, an Order that the Applicant pay the phone credit for the dependent children the gymnastics fees for [STATED CHILD] and the football gear and fees for [STATED CHILD]. The parties are each to pay 50% of any educational expenses for [STATED CHILD] going forward and 50% of the school uniforms for [STATED CHILD] and [STATED CHILD]."*

INTENDED HIGH COURT ORDER

The court has little confidence that Mr B will meet any payments under Point 3 of the Circuit Court Order and notes that Ms A is budgeting on the basis that he will not. For what it is worth (and past experience in this case suggests that it may well be worth nothing), the court will amend this limb of the order so that Mr B will be responsible for 50% of any educational expenses for *any* of the children of the former marriage BUT WILL PROVIDE THAT this obligation shall only come into effect if Ms A is made redundant and/or otherwise loses her employment and/or becomes so unwell that it is no longer possible for her to continue in employment and/or circumstances present which in good faith are not in contemplation by Ms A at this time. The court intends to proceed so in order to ensure proper provision for both parties. PLEASE NOTE: in proposing to so proceed, the court is mindful both of the evidence before it but also of Ms A's assurance at the hearing that she considers from her own day-to-day experience that that she will be able to pay her own way going forwards so long as she remains employed. If Ms A has any concerns in this regard, following on the hearing she should advise the court of this at the hearing before final orders are made.

B.

EXISTING CIRCUIT COURT ORDER (POINT 4):

- "4. *An Order that the Applicant pay to the Respondent €120 per week in respect of maintenance for the dependent children [THREE NAMES STATED], to be divided equally between them, so long as they remain equally dependent, such payments to commence the 1st November 2019 and to be made by way of standing order directly into the Applicant's bank account, details already furnished"*

INTENDED HIGH COURT ORDER

The court has little confidence that, once these proceedings are finished, Mr B will continue to make even the reduced level of payments that he has settled on in breach of the Circuit Court order as to maintenance. The court notes that Ms A is budgeting on the basis that he will not so continue. The court will continue this limb of the Circuit Court order BUT WILL PROVIDE THAT this obligation shall only come into effect if Ms A is made redundant and/or otherwise loses her employment and/or becomes so unwell that it is no longer possible for her to continue in employment and/or circumstances present which in good faith are not in contemplation by Ms A at this time. The court intends to proceed so in order to ensure proper provision for both parties. PLEASE NOTE: in proposing to so proceed, the court is mindful both of the evidence before it but also of Ms A's assurance at the hearing that she considers from her own day-to-day experience that that she will be able to pay her own way going forwards so long as she remains employed. If Ms A has any concerns in this regard, following on the hearing she should advise the court of this at the hearing before final orders are made.

C.

CIRCUIT COURT ORDER

- "6. *An Order that the Family Home be sold once the youngest child ceases dependency, the proceeds of sale to be divided 40% to [Mr B]...and 60% to [Ms A] following the discharge of the mortgage. Any of the maintenance payments which may be outstanding at the date of sale are to be paid to the respondent from the Applicant's share of the proceeds of sale. Any party who incurs an expense in upgrading the Family Home in advance of the sale is to be reimbursed from the proceeds of sale.*"

INTENDED HIGH COURT ORDER

Mr B is currently living with his parents but wishes to move out. The court has already considered above Mr B's dubious claims to impecuniosity, which the court does not accept to represent the truth as to his finances. The truth is that Mr B's income and income capacity appear to be notably greater than he claims and he also appears to have access to notably more savings than he maintains. He did not ask for the maintenance to be reduced and hinted at an unexplained ability to meet incidental expenses as and when they require.

For all the reasons identified previously above, and given the revised provisions as to maintenance the court will: (a) make no order as to the sale of the family home; (b) require that hereafter Ms A shall meet the entirety of the mortgage payment each month (which she has in any event been doing); (c) order that as soon as is reasonably possible after (I) the final mortgage payment is made and the mortgage debt thereby cleared or (II) the mortgage debt is otherwise cleared by or for Ms A, whichever is earlier, the family home shall be transferred into the sole ownership of Ms A without any need for any consent or agreement of Mr B in this regard. The transfer process may be entrusted exclusively to a solicitor of Ms A's choosing.

51. More particularly, the court intends to order as follows:

- (1) it will affirm the Circuit Court order as regards (a) the granting of the decree of divorce and (b) custody and access.
- (2) it will change point 3 of the Circuit Court order so that Mr B will be responsible for 50% of any educational expenses for *any* of the children of the former marriage BUT WILL PROVIDE THAT this maintenance obligation shall only come into effect if Ms A is made redundant and/or otherwise loses her employment and/or becomes so unwell that it is no longer possible for her to continue in employment and/or circumstances present which in good faith are not in contemplation by Ms A at this time.
- (3) it will continue point 4 of the court order as ordered by the Circuit Court BUT WILL PROVIDE THAT this maintenance obligation shall only come into effect if Ms A is made redundant and/or otherwise loses her employment and/or becomes so unwell that it is no longer possible for her to continue in employment and/or circumstances present which in good faith are not in contemplation by Ms A at this time.
- (4) it will change point 5 of the Circuit Court Order by (a) changing the word "*with*" to '*with or without*' and (b) deleting the words "*until the youngest child ceases dependency*".
- (5) it will delete point 6 of the Circuit Court Order and substitute the following order:

"From the month in which this order issues, the Appellant [Ms A] shall pay the full amount of the mortgage payment each month. As soon as is reasonably possible after (a) the final mortgage payment is made and the mortgage debt thereby cleared or (II) the mortgage debt is otherwise cleared by or for Ms A, whichever is earlier, the Family Home [(ADDRESS TO BE STATED)] shall be transferred into the sole ownership of Ms A without any need for any consent or agreement of Mr B in this regard. The transfer process may be entrusted exclusively to a solicitor of Ms A's choosing."

- (6) it will delete point 7 of the Circuit Court order.
- (7) it will amend point 8 of the Circuit Court order by including, after the word "*children*" the following text, '*, for so long as the relevant child is a legally dependent child,*'.
- (8) it will affirm points 9-11 (inclusive) of the Circuit Court order.

VIII

Barring Order

52. Ms A asked of the court that it also issue a barring order against Mr B.
53. Section 7(1)(a) of the Domestic Violence Act 2018 allows a "*spouse of the respondent*" to apply for a barring order. Section 2(1) provides that the word "*spouse*" includes "*a person who was a party to a marriage that has been dissolved, being a dissolution that is*

recognised as valid in the State". What section 2(1) achieves is that a person positioned as Ms A finds herself can seek a barring order under s.7(1)(a) of the Act of 2018.

54. Section 7 of the Act of 2018 provides, *inter alia*, as follows:

"(2)(a) Where the court, on application to it, is of the opinion...that there are reasonable grounds for believing that the safety or welfare of the applicant or a dependent person so requires, it shall, subject to section 12, by order (in this Act referred to as a 'barring order')...(ii) whether the respondent is or is not residing at a place where the applicant or the dependent person resides, prohibit the respondent from entering the place until further order of the court or until such other time as the court shall specify".

55. The court notes that the definition of "dependent person" in s.2(1) of the Act of 2018 includes, *inter alia*, "any child...of the applicant...who is not of full age".

56. It will be clear from all that the court has recounted and said in the previous pages that the court is of the opinion that there are reasonable grounds for believing that the safety or welfare of Ms A and her dependent children requires that it issue the barring order sought.

57. Section 7(3) of the Act of 2018 provides that a barring order "may, if the court thinks fit, prohibit the respondent from doing" any or all of the following:

"(a) using or threatening to use violence against, molesting or putting in fear, the applicant or a dependent person;

(b) attending at or in the vicinity of, or watching or besetting, a place where the applicant or a dependent person resides;

(c) following or communicating (including by electronic means) with the applicant or a dependent person".

58. Having regard to the evidence before it, the court thinks it fit that Mr B should be prohibited from doing all of the foregoing.

59. The barring order will apply in respect of the family home, a place in which Ms A has a legal and beneficial interest, which interest is not less than that of Mr B.

60. The barring order shall continue in existence until further order of the court.

IX

Further Hearing and Costs

61. The court will seek to schedule a further quarter-hour (15 minute) physical hearing of this matter within 20 working days of the within judgment issuing at which time the court will run through with the parties the order that it will issue, in case there is anything that is unclear from this judgment. Please note that this further hearing is not an opportunity for either party to appeal the terms of this judgment.

62. As each party has represented themselves the court will make no order as to costs.

**TO THE APPELLANT/RESPONDENT:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Ms A/Mr B

*I have dealt in the previous pages with various issues presenting in this application. Much of what I have written might seem like jargon. In this section, I identify briefly to each of you some key elements of my judgment and the orders that I intend to make. **This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated and what I intend to order.** To protect your privacy, I refer to you as 'Ms A'/'Mr B'.*

To begin with, I was and continue to be taken aback by Mr B's behaviour towards Ms A throughout the hearing. I have never before seen such a sustained and bitter attack by one person on another. It does Mr B no credit that he acted so. Ms A is the mother to Mr B's children and a good mother too: she deserves respect for that alone. But for any human to verbally attack any other human as Mr B did in court is uncalled for. It left me in no doubt as to how frighteningly unpleasant home life must have been when Mr B was around and what a toll his behaviour must have taken on Ms A and the children. That Mr B struck Ms A during their marriage is awful; that he sought to explain this away in court was, I regret to say, shameless.

I do not, with respect, believe Mr B's evidence that he is living in the straitened circumstances that he contends for. It makes no sense that an employed man who is living with his parents and who has amassed savings of the scale that he amassed in the past, working in an industry where the court accepts 'cash in hand' payments to occur, should suddenly be unable to save money.

I do not, with respect, believe that the damages that Mr B received in the past were dissipated as he contends. My sense from the evidence is that Mr B does have monies set aside but, in any event, I do not see that his manner of dissipating the damages should count against Ms A; quite the contrary. It was striking in the proceedings that at the hearing Mr B made no mention of a need for ready cash or of a need for the maintenance payments to be reduced and even hinted at an ability to meet additional incidental expenses as they fell due, even though he is supposed to be largely impecunious. He also indicated a charge-out rate for work which Ms A, who is undoubtedly familiar with the truth of Mr B's earning capacity from the time when they were a couple, considered to be fancifully low; her evidence in this regard is accepted by the court as by far the more credible. Thus not only do I consider Mr B's savings to be under-stated; I consider his income to be under-stated.

I am, with respect, unconvinced that Mr B will make payment for such incidental expenses as are asked for by Ms A. He has paid nothing so far. He indicated that payment would be made if requested in the future, but with difficulty. I am in little doubt but that any approach made by Ms A in this regard would be used by Mr B as a further opportunity to harass and humiliate her, whether or not payment was ultimately forthcoming. I am, with respect, unimpressed by Mr B's glib response that no payment of incidental expenses was previously made because no payment was sought by Ms A. He has made it impossible for her to approach him; and it was obvious that expenses would and do continuously arise to

be met for his children. Mr B should have been to the fore in seeking to meet those expenses.

I am also, with respect, unconvinced that Mr B will continue to pay maintenance in the future. Already this year he elected of his own volition to reduce the maintenance being paid. For Mr B to reduce the maintenance payment was to breach a court order. That is a serious matter. Yet Mr B shows no remorse for having acted so. I have little doubt that he would reduce the maintenance further (or stop payment altogether) if he thought it suited him to do so. He has shown no appreciation of the significance of, nor respect for the existence of, a maintenance order. His dishonourable breach of a court order also shows, unfortunately, that he is not a man whose sense of honour can be relied upon by the court.

All that said, given that I am going to change the arrangements as regards the family home, I will continue the existing maintenance obligations but will stipulate in each case that the obligation on Mr B to meet any such obligation will only take effect if Ms A is made redundant and/or otherwise loses her employment and/or becomes so unwell that it is no longer possible for her to continue in employment and/or circumstances present which are not in good faith in contemplation by Ms A at this time. I will proceed so to ensure proper provision for both parties. **PLEASE NOTE: in so proceeding, I am mindful both of the evidence before me but also of Ms A's assurance at the hearing that she considers from her own day-to-day experience that she will be able to pay her own way going forwards so long as she remains employed. If Ms A has any concerns in this regard, following on the hearing she should advise me of this at the hearing before final orders are made.**

Given all of the foregoing, I will also: (a) make no order as to the sale of the family home; (b) require that hereafter Ms A shall meet the entirety of the mortgage payment each month (which she is in any event doing); (c) order that as soon as is reasonably possible after (I) the final mortgage payment is made and the mortgage debt thereby cleared or (II) the mortgage debt is otherwise cleared by or for Ms A, whichever is earlier, the family home shall be transferred into the sole ownership of Ms A without any need for any consent or agreement of Mr B in this regard. The transfer process may be entrusted exclusively to a solicitor of Ms A's choosing.

(3) I consider that Mr B's behaviours have had a most damaging effect on Ms A and the children, one of whom succumbed to a dissociative identity disorder as a result of all the trauma that has arisen. I am of the opinion that there are reasonable grounds for believing that the safety or welfare of Ms A and the dependent children of Ms A and Mr B requires that I issue a barring order against Mr B. This order will last until further order is made.

(4)

Lest he be tempted to disobey court orders in the future, Mr B should note that to disobey a court order is a punishable matter.

I would respectfully suggest that each of you might wish to consult with a solicitor before I make final orders, though it is a matter for each of you as to whether or not you do so.

I will seek to schedule a further **quarter-hour (15 minute)** physical hearing of this matter within 20 working days of the within judgment issuing at which time I will run through with you the orders that I intend to issue, in case there is anything that is unclear from this judgment. **Please note that this further hearing is not an opportunity for either of you to appeal the terms of this judgment.**

Yours faithfully

Max Barrett (Judge)

ADDENDUM

There was a brief further hearing of this matter on 15 December 2020 prior to the making of the court's final order.

At that hearing:

(i) Ms A indicated, in response to a query from the court, that she was the signatory to a memorandum in writing of 5 March 2008, included in documentation furnished to the court by Mr B, indicating that the money gifted by Mr B to her brothers and sisters *was* done in return for an interest in House 1. The main text of the judgment, in particular paras. 30(b) and 49(2)(f) must therefore be read accordingly, *i.e.* as a result of contributing the monies gifted at that time Mr B *did* acquire an interest in House 1 at the time of making the gift. The memorandum of 5 March 2008 followed on the effecting of the arrangement between Ms A and Mr B but preceded the commencement of the within proceedings. The nature/extent of the interest conferred upon Mr B is entirely unclear from the memorandum. However, in terms of 'proper provision', the memorandum is of little consequence as the court has, in any event, at all times factored in the making/sum of the gift when determining how best to make proper provision. Unfortunately, the sum quoted in the memorandum does not at all tally with associated correspondence from the financial institution as to the bank drafts which were purchased for (and encashed by) the siblings. For the benefit of the parties and any court that might later consider any aspect of these proceedings, the court has set out in Appendix A the thinking that it has brought to the cash figures at issue in the within proceedings and also to the issue of proper provision. The court read through the substance of Appendix A at the brief further hearing.

(ii) Ms A indicated that it was her intention shortly to make a will leaving House 2 to her children. She asked that in the order now to issue the court would include provision in its

order which would make clear the court's intention that in the event that she dies and the mortgage protection policy pays off the mortgage, (a) House 2 will form a part solely of her estate, and (b) any sale or transfer or other dealings with House 2 (i) can be done to and/or by any executor/administrator of Ms A's estate, (ii) the choice of any solicitor/s and/or other professional advisors entrusted to effect any such sale, transfer or dealing being a matter exclusively for such executor/administrator to decide in her or his discretion, and (iii) all of the foregoing to be effected without the need for any consent or agreement of Mr B. Consistent with the need to make proper provision, the court will make this order.

So as to ensure the utmost clarity as to the order being made, the court indicated that it would issue this brief addendum to its judgment. Both parties were invited to make submissions at the hearing. Ms A's submissions are recounted above. Mr B indicated solely that he was not consenting to any order being made by the court.

PLEASE NOTE: The court is mindful that both parties represented themselves throughout the appeal and would respectfully suggest that it would be useful for each of them to engage a solicitor to explain the substance and consequences of the order that will now issue. Whether the parties do so is, however, a matter for each of them.

16th December 2020.