

THE HIGH COURT

[2022] IEHC 330
[2022 No. 12 CAF]

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN:

Z

APPLICANT

– AND –

Z

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 1st June 2022.

SUMMARY

This is a successful appeal against certain of the ancillary financial provision that was made by the Circuit Court when granting a divorce to the parties hereto.

Background

1. The parties in this case were married in the first decade of this century. They were divorced by order of the Circuit Court in February of this year. There are two children of the marriage, both of National School age. The marriage seems to have floundered in large part because Mr

Z, regrettably, took to drink and drugs. Ms Z said in her evidence that the experiences that her family went through as a result of her husband's dependencies were "*horrendous*".

2. This is an appeal by Ms Z against the financial (proper) provision that was made by the Circuit Court as part of the divorce. Ms Z contends that the financial provision made for her by the Circuit Court is not proper provision. She also believes that she and the courts have, to use a colloquialism that she employed, "*been given the complete run-around*" by Mr Z. She pointed to a number of matters in this regard:

- Mr Z claims that he is unable to work, yet through the accident of mail being sent to the family home, it was discovered by Ms Z just in advance of the second day on which this appeal came on for hearing that he was intending to take up work.

- Mr Z claims that he is impoverished to such an extent that he cannot provide further for his children. In fact he pays *no* maintenance as such. Instead, in lieu of maintenance he pays €50 a week towards the mortgage on the family home, by way of what might be styled 'mortgage-cum-maintenance payments'. However, €39 of this is then reimbursed to Mr Z by the State. (Ms Z thought he only got €38 in return but Mr Z confirmed in his oral testimony that no, it is €19.50 x 2). As a result Mr Z pays from his net income a total of €11 a week, ostensibly towards his mortgage but in reality as a form of maintenance. If we assume for a moment that the €11 is solely for the two children, that means that Mr Z is paying from his net income the sum of €5.50 per child per week. If this was because Mr Z was genuinely poor there would be nothing that I could do about matters (and I would be most sorry in that circumstance that matters were so). But the truth is that Mr Z does not appear to be as strapped for cash as he affects to be and the amount that he is paying from his net income (€11) towards his ex-wife and children is too low.

- at the same time as Mr Z dedicates the sum of €11 a week from his net income by way of the mortgage-cum-maintenance payments he has come to court indicating that he requires €100 for "*Food, Groceries and Sundry*" (per his updated affidavit of means). In other words he is satisfied to spend just over nine times more on "*Food, Groceries and Sundry*" each week than he pays from his net income by way of the mortgage-cum-maintenance payments. He thinks that this is reasonable. I respectfully disagree.

- of the €100 a week that Mr Z spends on “*Food, Groceries and Sundry*” a sizeable chunk goes on take-away food. When I asked Mr Z in court why this was so he indicated that (a) he does not know how to cook, and (b) he suffers from bowel difficulties (he undoubtedly does) and finds a particular cheese pizza from his local take-way to be especially palatable. But, with every respect, Mr Z cannot go on like this. He cannot ask that his children (and his ex-wife) suffer because he declines to do simple home cooking with cheap, fresh ingredients – and Ms Z’s recollection from when she attended at the doctor with Mr Z was that he was expected to eat simpler, healthier foods (which chimes with instinctive good sense).
- striking too is that at the same time that Mr Z dedicates €11 p.w. from his net income towards his ex-wife and children, he has given what he claims is a ‘loan’ (*sic*) to his present partner to pay for her motor tax. What that suggests is that there is cash floating around on Mr Z’s side when needed. Compounding this sense is the fact that at the end of the hearing Mr Z indicated that he would be willing to make additional funds available to his ex-wife. But how could he do this if he is as impoverished as he claims to be? Again, the only answer has to be that there is a degree of spare cash on his part that does not present on his ex-wife’s side.

Some Specific Issues

3. It is a regrettable fact of life that relationships break down. When there are no children the couple can split up, walk away from each other, and hopefully find fresh happiness in their newly separate lives. When there are children, things are not so simple. Yes the couple can split up, yes they can walk away from each other, yes they will hopefully find happiness in their separate lives, but neither party can walk away (nor will they be allowed by the courts to walk away) from their responsibilities towards their children. Three aspects of marriage breakdowns repeatedly (as here) throw up difficulties:

Birthdays. One of the little children in this case recently had his birthday. He wanted a bouncy castle for the day and to invite his friends around. Mum promised him that he could (who wouldn’t?) but because she has no spare money she had to suffer the humiliation of borrowing money from a friend who she will pay back next pay-day. She also bought Junior a bike (a typical childhood expense). Dad contributed nothing. Instead he (for the first time in a long time) came up with a birthday present in the form of an excessive cash gift for Junior. (I strongly suspect – as does Ms Z – that this was simply because he wanted to look like a

benevolent father when matters came on in the High Court). There are two lessons from this tale:

– first, could Mr Z not have discussed matters in advance with Ms Z? Could he not have contributed towards the bouncy castle? Could he not have contributed towards the bike? Ms Z said in her evidence (and I believe her) that she would have been perfectly willing to state ‘The castle and the bike are from me and your dad, not just me’. Would that not have been a more sensible way for Mr Z to proceed? Instead Ms Z ran into debt with a friend and Junior was gifted a sum of money that he does not need.

– second, where did the money for the cash gift come from? If one is to believe Mr Z’s evidence he is living in penury, yet when he wants to he can come up with an excessive cash gift. Again, that suggests a fluidity of cash on Mr Z’s side that does not present on Ms Z’s side.

Christmas. Mr Z’s behaviour at Christmas was notably unfair. He contributed nothing towards the gifts traditionally gifted to all good children around the world by a particular individual. Because money is so tight, Ms Z therefore had to forego on providing a gift from herself. By contrast, Mr Z gave another cash sum as a gift to each child. One of the children wondered why he got a gift from the particular individual who leaves gifts for young children and also got a present from Mr Z yet got nothing from Mum. It was an awful predicament for Ms Z to find herself in, all because she is trying to do right. And it was an awful predicament for Mr Z to place her in – could he not just have discussed matters with her in advance and approached matters in a more adult manner? Again, Ms Z is perfectly prepared to say that a Christmas present comes from herself and Mr Z if they can just agree on a gift between them.

Activities/Joint parenting. The children of the former marriage do normal activities after school, *e.g.*, football, swimming, *etc.* Two problems present. First, these have to be financed. I do not see anything unusual in the activities that the children are doing. Nor do I see Mr Z paying anything towards the cost presenting (separate to the net payment of €11 from his weekly income achieved via the mortgage-cum-maintenance payments). Second, children have to be dropped off and picked up. Ms Z finds that she is doing all the ferrying in this regard (and of course paying for the petrol). Mr Z has refused, on grounds of ill-health, to bring his children to their activities or wait for them while he is there but is satisfied, for example, to be driven to the football pitch and collect Junior when he has access to him. That is, with respect,

unreasonable behaviour. What is clear to me as an outsider is that Ms Z is having to do all the heavy lifting of rearing two children, with Mr Z not willing to pay his due or play his part. He is satisfied to bring the children to a cinema when he has access (which of course means that he has a good time as well) but not satisfied to do any of the real work that presents in raising two children.

Entitlement of Ex-Wife to Personal Time

4. Ms Z clearly loves her children but she is both a mother *and* an individual. As a mother she is doing a great job (and I respectfully salute her for that). As an individual her chances for any form of personal life are being taken from her by an ex-husband who thinks it is okay to pay €11 from his net income by way of mortgage-cum-maintenance payments and leave everything else for his ex-wife to do, save when he has access visits. Ms Z works three days a week to earn some income, goes home and has to do all the things that go with being a single mother, and tries to cram all the activities and extra bits of child-rearing into the other four days. But she clearly is not being left a moment for herself and to do things for herself. Mr Z is happy to give (problematic) gifts for birthdays (sometimes) and also for Christmas. He is happy to bring his children to the cinema when he has access – again it is notable that a man who claims to be in penury can somehow afford the significant cost of a visit for three to the cinema and the ‘goodies’ that go with a visit to the cinema.¹ But he is not paying reasonable maintenance, he is not making due contribution towards the costs of the necessities and incidentals of child-rearing, and he is doing nothing as regards the workaday chores of parenting. He essentially wants his children reared for free by his ex-wife, making payments from his net income (by way of the mortgage-cum-maintenance payments) that are just too low.

Savings and Fuel Costs

5. Two further points might be made about the money issues presenting.

¹ The cinema visits are an obvious area for saving money. For example, a walk/cycle in different parks with Dad, a visit to free museums/galleries, a visit to the local library to borrow some books or DVDs, a drive to some scenic spot, or simply cooking home-meals with the children (including low-cost homemade pizzas) are all relatively inexpensive alternatives to cinema visits that will provide hours of treasured memories and also free up more money for the real costs of child-rearing (and those costs, Mr Z will find, seem only to rise when they get older).

6. First, Mr Z appears to be able to put money aside in the EBS by way of savings. Mr Z indicated in evidence that these savings are more apparent than real because he has been delving into them to meet the rising costs of fuel/heating. However, to delve into savings one has to have made savings and it seems telling that Mr Z has been able to make savings whereas Ms Z cannot do so.

7. Second, Mr Z indicated in his evidence in the witness-box that one of the challenges presenting for him cash-wise at this time is the rising cost of fuel. I do not doubt that the rising cost of fuel is a genuine problem already being encountered by many, and sadly a problem that I expect will come even more to the fore when the cold weather returns. However, it was striking how quick Mr Z was to say in effect that rising fuel costs should *necessarily* lead to him continuing his present low level of support without exploring the potential for savings in his current expenditure. In all the money that is spent on take-away food, in all the money wasted by not cooking fresh food, in the money spent on his new partner's motor tax, in the discretionary expenditure on motor parts (which Mr Z claims was for his new partner's motor-car but his ex-wife claims was for 'nixers' but which in any event is still further sign of there being money for Mr Z to spend), in all the money spent on cinema entertainment during access visits, in the money spent on a TV streaming service, is it truly the case that some savings cannot be made which would free up funding for Mr Z's heating costs *and also* for Mr Z's children? (I assume in passing that Mr Z is not suggesting that he should go warm while Ms Z and his children go cold – after all, the startling rise in fuel costs affects them too).

Ill-Health and Work

8. Turning to Mr Z's ill-health, I am very sorry that he has suffered ill-health. However, I cannot but respectfully note that his problems seem to have been caused by excessive drinking, illegal drug-taking and a very poor diet – and it seems that he continues at least occasionally to drink and consistently to have a poor diet. Ms Z clearly believes that Mr Z has done some 'nixers' in his old line of trade despite his protestations of inability to work due to ill-health. Mr Z denies this but it was notable that between the two days on which the two hours were found to hear this matter, Mr Z was clearly intending to take up work. This would never have come to light had the letter regarding the new job not been mailed to the old family home in error and opened by Ms Z – and I fully agree with Ms Z that it is most unlikely that the court would ever have learned of this from Mr Z had he not been caught out; in truth I do not think

that I would ever have been told. (For the avoidance of doubt, I should note that the letter to Mr Z that was opened by Ms Z was opened inadvertently).

9. Mr Z proffered in court the first page of a letter from the Social Welfare Services Office concerning his application for Partial Capacity Benefit. This letter, he maintained, established that he cannot take up new work. It is not clear why I was not given the whole letter. In any event the page that I was given is difficult to follow and at points self-contradictory. What I *think* it means is that if Mr Z takes up work he will get a lower level of benefit, though it surely says something that a High Court judge is struggling to make sense of what the Social Welfare Services Office has committed to writing in terms of its response to Mr Z. The key parts of the page of the letter that was handed up to me in court read as follows:

“Dear Mr Z

I am writing to you about your application for Partial Capacity Benefit (PCB).

Please note this letter is to inform you of the outcome of your medical assessment, you do not have permission to start work

[I do not quite know what this sentence means. I think what is being said is that the doctor who conducted the assessment does not recommend a return to work. But the letter later moves on to contemplate both that there may be a return to work and that the letter is a letter of approval, presumably approval of part payment of benefit upon a return to work.]

With this scheme, a person’s restriction on capacity for work can be assessed and categorised as mild, moderate, sever, or profound.

In your case, your restriction on capacity for work has been assessed as ‘Severe’ This means that should you wish to work you can continue to get 75% of the personal rate of invalidity pension which you currently get, and 100% (all) of any increase you get for an adult or

child dependent if applicable. However, increases are subject to review and may be reviewed as part of your PCB application This medical opinion is valid for 3 years months [sic].

[This last paragraph suggests that Mr Z having been classed as ‘severe’ *can* return to work and retain 75% of his benefits. So, with respect, I do not see how the letter can be proffered as meaning that there can be no return to work.]

...

If you are beginning employment please contact the Partial Capacity Benefit section to confirm your return to work....

[Again, this last paragraph suggests that Mr Z *can* return to work and retain 75% of his benefits. So, with respect, I do not see how the letter can be proffered as meaning that there can be no return to work.]

Please note that this letter is an approval on medical grounds only and you need to meet all qualifying criteria before the claim can be put into payment.

[This is the point at which the letter seems self-contradictory. It will be recalled that the letter commences with the assertion that “*Please note this letter is to inform you of the outcome of your medical assessment, you do not have permission to start work*”, yet now states “*Please note that this letter is an approval on medical grounds only*”. It really is very difficult to know in the face of this self-contradiction what this letter means to say. Certainly I do not read it as conclusive evidence that Mr Z cannot return to work.]”

10. There was a submission by counsel for Mr Z – Mr Z did not give evidence in this regard – that Mr Z was recently minded to start work but is not up to it. Ms Z submitted that the truth is that Mr Z has presently abandoned his plan to resume work because he has been caught out and

wants to maintain the pretence that he can never work again so as to make sure that ‘proper provision’ is set at the lowest level possible. I must admit that I was more inclined on such evidence as there was to believe Ms Z’s version of events. There was clearly an enquiry by Mr Z as to partial capacity benefit and the letter quoted above seems on balance to indicate that if Mr Z takes up work he will get a lower level of benefit but not that he is frozen out of the job market for good and forever.

The Family Home

11. At an early stage in his life, Mr Z appears to have been doing rather well. It is his excessive drinking, illegal drug-taking, and very poor diet that seem to have damaged his prospects and health. Thus, as a younger man he managed to buy a house for €285k, get a home-loan for €125k and somehow had €160k to put towards the house himself. However, Mr Z has been out of work since 2007 or 2008 (both dates were referenced by Ms Z in her evidence) whereas Ms Z was not.

12. Mr Z, per his updated affidavit of means, is paying €50 per week towards the mortgage on the family home by way of the mortgage-cum-maintenance payments. But Mr Z cannot have it both ways. He cannot claim that he is paying maintenance *and* paying the mortgage when the so-called mortgage payments are in truth maintenance payments. The €50 is paid once a week, Mr Z gets and pockets the €19.50 x 2 discussed above, with the result that he is paying €11 p.w. from his net income towards the upkeep of his family, or €5.50 p.w. per child if one treats the money as going solely to his children.

13. Following the collapse of the marriage, Mr Z was homeless for a time, *possibly* (though I doubt it myself) by choice – it was said a couple of times in court that ‘he had to go homeless’ to get a HAP payment; however, this may have been a ‘slip of the tongue’ and for my part I struggle greatly to believe that anyone would choose to go homeless. In any event Mr Z is in receipt of the HAP payment now and I accept the submission by Ms Z that her ex-husband is singularly unlikely to lose this payment (or any alternative that might be substituted): the State seeks to combat homelessness not deliberately to create it.

Circuit Court Order

14. Before turning to Ms Z's proposal, I turn to the order of the learned Circuit judge. She issued an order granting the divorce, granting joint custody of the children with primary care and control to Ms Z, and making the following ancillary financial provision:

- “...2. *An Order that the Respondent continue to discharge 50% of the mortgage on the family home. [There is no separate order as to maintenance so it seems that the Circuit Court judge viewed this payment as sufficient by way of upkeep (maintenance) payment.]*
3. *A property adjustment order pursuant to s.14(1)(a) transferring ownership of the family home into joint names. In this regard the court notes that the Applicant is already jointly responsible for the mortgage on the said family home.*
4. *An order pursuant to s.15(1)(a) providing for the conferral on the Applicant [of] the right to occupy the family home to the exclusion of the Respondent and an order directing the sale of the family home when the youngest child of the marriage ceases to be dependent.*
5. *An order directing that the net proceeds of said sale be divided equally between the parties.*
6. *An order directing that the County Registrar or her nominee may sign in lieu if necessary and an order lifting the in camera rule as appropriate and if deemed necessary.*
7. *Pursuant to section 17(2) a nominal minimal pension adjustment order in respect of the Applicant's pension.*
8. *Pursuant to s.17(3) of the Family Law Divorce Act 1996 an order directing the Trustees of [Stated Employer Pension Plan operated by Ms Z's employer] to pay to the dependent children 100% of any contingent benefit payable in respect of the said scheme for the duration of their dependency.*
9. *An order pursuant to s.17(20) of the Family Law Divorce Act 1996 directing the trustees to take such steps as may be necessary to give effect to the above orders.*

10. Pursuant to s.18(10) an order and cross-order that neither spouse shall on the death of either of them be entitled to apply for an order under this section.

Liberty to Apply. No Order as to Costs.”

What Ms Z Has Come Seeking

15. Ms Z complains that:

- the learned Circuit Court judge was excessively sympathetic to Mr Z, given his ill-health.
- the expectation is that she will work 5 days a week *and* at the same time be a full-time carer to her children which she finds simply un-doable when she is getting no practical assistance from her ex-husband, the end-result being that she has had to drop her work to 3 days a week and now finds herself in near-penury as a result of the mortgage-cum-maintenance payments arrangement.
- maintenance is being paid in the form of mortgage payments (yielding the too-low payment of €11 from Mr Z’s net income by way of the weekly mortgage-cum-maintenance payments).
- she will be 66 years old when her last child ceases to be a dependent and will have no prospect of getting a mortgage and will be faced with selling a house to which she has long contributed and on which she will in the meantime be paying for all the upkeep when in the same timeframe her husband will have HAP-funded accommodation and is paying nothing by way of ongoing upkeep on the family home.

16. I have noted above other unfairness that arises:

- Mr Z essentially wants the court to treat his mortgage payments as a form of maintenance payment (and so not order separate maintenance payments) *and also* give him full credit for making mortgage payments (even though he makes no maintenance payments and gets cash-back on the mortgage payments, all at a time when Ms Z is responsible for all the upkeep on

the house from her net income and where Mr Z is in receipt of HAP payments which seem most unlikely to cease).

– there seems consistently to be more cash floating around on Mr Z’s side than his ex-wife’s side, and there is considerable potential for savings, not least in his weekly expenditure on “*Food, Groceries and Sundry*” (at a rate just over nine times higher than the net cost to him of his weekly mortgage-cum-maintenance payment) and in the amount that he spends when his children have access visits (when in truth that level of expenditure is not required).

Some Law

a. Section 5.

17. The legal starting-point in divorce proceedings is s.5 of the Family Law (Divorce) Act 1996, as amended, which provides as follows:

*“5.—(1) Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that— (a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least two years during the previous three years, (b) there is no reasonable prospect of a reconciliation between the spouses, and (c) **such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family, the court may, in exercise of the jurisdiction conferred by Article 41.3.2° of the Constitution, grant a decree of divorce in respect of the marriage concerned.**”* [Emphasis added].

18. It is with item (c) that the court is concerned in this appeal. 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 pp. 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)...”.

19. Although these observations of Hardiman J. are helpful, ultimately what they point to is that what presents in the ‘proper provision’ context as it presently pertains under Irish law is a Lockean-type *tabula rasa* on which a judge brings her or his professional experience and knowledge to bear.

b. Some Case-Law of Relevance

20. I was not referred to any case-law by either side in this case, but I am familiar from previous divorce cases with, *e.g.*, 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 have previously been analysed by me in some detail in my own decision in *M v. S* [2020] IEHC 562 and the reader is respectfully referred to that analysis. Since that judgment was delivered, the Court of Appeal gave a helpful judgment in *N.O. v. P.Q.* [2021] IECA 177, which also undertakes a helpful analysis of previous authorities. It seems to me that by virtue of these cases the key principles identified in Bold below can be identified.

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.

Noted.

(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.

Noted.

(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.

Noted.

(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.

I am satisfied that it is in the interests of justice to make the orders indicated later below.

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] A.C. 593.

Noted.

(6) Irish law does not establish a right to a ‘clean break’. However, it is a legitimate aspiration.

(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. Where the amplitude of resources makes it possible, the desire of the parties for financial finality should not be frustrated.

This is not a case where a clean break is appropriate: the available resources are not such as would make this feasible.

Certainty and Finality

(8) The Oireachtas, in declining to adopt the ‘clean break’ approach to the extent favoured in England, did not intend 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.

Noted.

(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.

As will be seen later below, I believe that certain amendments are necessary to the Circuit Court order to achieve the necessary fairness. At the moment Ms Z is confronted with no little unfairness in how she has been treated and what is expected of her.

(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.

Noted. The circumstances of this case do not so permit.

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 she or he considers a just resolution in all the circumstances.

As will be seen later below, I believe that certain amendments are necessary to the Circuit Court order to achieve that just resolution. At the moment Ms Z is confronted with no little injustice in how matters have hitherto been resolved.

(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.

Here the relative poverty of both parties is a clear limiting factor. However, it is clear from the evidence before the court that there is extra money on Mr Z's side, that there is a certain extravagance in his expenditure (from which clear savings can be made), with the result that the provision made in the Circuit Court order does not, in my respectful opinion, satisfy the standard of proper provision.

(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.

Noted.

(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 .

I have already considered the deficiencies that present in terms of the financial arrangements that pertain following on the Circuit Court order and return to certain aspects of same in my concluding section later below.

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.

The standard of living of Mr Z, following on a period of homelessness, now seems commensurate with what he enjoyed prior to the divorce. By contrast, Ms Z is having to survive on fewer days' work each week (because she has to look after the children and Mr Z is doing nothing practical to assist in this regard), the only maintenance that she receives is in mortgage-cum-maintenance payments with Mr Z paying in effect from his net income €5.50 per child per week – a level of contribution that is too low. In addition Ms Z is somehow expected to find the money for back to school payments, and to self-fund birthday parties and (at this time) certain Christmas presents. She cannot enjoy takeaway food and has no savings, whereas Mr Z eats takeaways regularly and has managed to put savings away (albeit that this ability is now affected by rising fuel costs – though this is a rise which affects his ex-wife and children just as much as him).

(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.

No new factor presents. Thanks to his excessive drinking, illegal drug-taking, and very poor diet, Mr Z regrettably has poor health; however, this was known to the Circuit Court judge.

(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.

There is no inherited property at play in this case.

(18) Where one or both parties are in receipt of income, but their joint assets are not of such significant value as is the case here, 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.

Mr Z's income comprises his invalidity benefit, living alone allowance, and HAP payment (the last of which strangely does not feature in his updated affidavit of means). Ms Z has income from her employment. The sole substantial family asset is the mortgaged family home. I have already considered the deficiencies that present in terms of the financial arrangements that pertain following on the Circuit Court order and return to certain aspects of same in my concluding section later below.

(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.

Noted. I have already considered the deficiencies that present in terms of the financial arrangements that pertain following on the Circuit Court order and return to certain aspects of same in my concluding section later below.

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.

Mr Z appears not to have worked since 2007 or 2008 (his ex-wife referred to both dates in her evidence). Ms Z has been and remains in active employment outside the home, as well as being a homemaker.

(21) Lord Nicholls, in *White v. White* [2001] 1 A.C. 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.

As well as being a mother, Ms Z is an individual. Yet because of her ex-husband’s unwillingness to give any practical assistance, because of his too-low maintenance payments (by way of the mortgage-cum-maintenance payments), and because of what I must respectfully observe is his failure thus far to see what is properly expected of him as a father (and he continues to be a father), Ms Z is in effect being required to rear the children of her former relationship completely by herself and essentially for free. In short, her responsibility is presently being punished and her ex-husband’s irresponsibility is being rewarded. Divorce severs the tie of marriage, not the links of fatherhood, and fatherhood post-divorce, even where one is not the primary carer, carries continuing responsibilities which extend beyond paying maintenance payments (or mortgage-cum-maintenance payments) at a level that is just too low and providing occasional trips to the cinema during access visits.

(22) In *Cowan v. Cowan* [2002] Fam. 97, a so-called ‘ample resources’ case, Thorpe LJ, at pp. 118-19, summarised his understanding of *White v. White* [2001] 1 A.C. 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).

This is not an ample resources case.

(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.

Noted. I have already considered the deficiencies that present in terms of the financial arrangements that pertain following on the Circuit Court order and return to certain aspects of same in my concluding section later below.

‘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.

(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.

(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.

(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.

(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.

(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*”.

(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.

(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.

(32) In *White v. White* [2001] 1 A.C. 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., in *D.T.*, 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.

I do not have any further observations to make arising from the above that have not already been made.

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.

I have already treated with the commensurate lifestyle point. The marriage was not a marriage of short duration, nor was it a marriage of the longest duration. It was a marriage that yielded two children.

(34) A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party.

In the context of these proceedings the key point to be drawn in this regard is that while one may feel some level of sympathy for Mr Z that he appears to some extent to have ‘self-destructed’ by drinking in excess, taking illegal drugs, and having a very poor death, one must not allow this natural sympathy see him compensated to the detriment of Ms Z.

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.

Noted.

(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.

I am so satisfied when I make the amendments/variations to the Circuit Court order described later below.

(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 marriage in this case seems to have floundered in large part because Mr Z took to drink and drugs. I did wonder when Ms Z said in her evidence that the experience of living with Mr Z through his dependencies had been “*horrendous*” whether we were about to stray into *Wachtel*-style territory. But the evidence went no further, and I have not brought *Wachtel* to bear in this case.

Date of Valuation of Assets

This did not arise as an issue and so I do not consider this aspect of matters.

Ad Seriatim Consideration

(38) 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.

This I have done in this judgment.

(39) 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.

This I have done in this judgment.

Lump Sum

This did not arise as an issue and so I do not consider this aspect of matters.

**Proper Provision
(not Division)**

(40) 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.

Noted.

(41) 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.

Noted.

(42) 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.

Noted.

(43) The scheme established under the Act of 1996 is not a division of property. The scheme provides for proper provision. 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.

Noted.

(44) 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.

Noted.

(45) 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 his/her financial liabilities and obligations, continue with a standard of living commensurate with his/her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that he/she can live an independent life and have security in the control of his/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 his/her former wife/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.

I have already considered the deficiencies that present in terms of the financial arrangements that pertain following on the Circuit Court order and the concerns and return to certain aspects of same in my concluding section later below. I am unconvinced for the reasons stated at point (21) above, and when one has regard to the facts of this case as a whole, that Ms Z's personal dignity as an individual is presently being properly respected. She is a great mother but she is more than a mother: she is a human being in her own right and at this time thanks to maintenance that is too low and (I must regrettably observe) an unhelpful ex-husband she is not getting the chance to lead the fullest life that she can lead as both an individual *and* as a mother following on her divorce.

(46) 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).

It seems to me, if I might respectfully note, that this is an especially useful observation by Fennelly J. Often in divorce cases, to use a metaphor, the parties need two cakes on which properly to survive as they go their separate ways but, in terms of assets, have only one cake between them. A divorce court cannot make two full cakes out of one full cake, it can only give some of the one full cake to each party; in doing so, as Fennelly J. observes, it must (and can only) do what is “*proper*” in the sense of ‘*appropriate*’, *i.e.* fair or just in all the circumstances presenting. With the necessary amendments/variations that I will make to the Circuit Court order I believe that the necessary fairness and justice can be achieved in this case.

(47) 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.

Noted.

Continuing Obligation

(48) 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.

This is especially pertinent when it comes to Mr Z and the fact that there is clearly some money floating around (and some extravagances to be curbed, with monies thereby released) that can be put to use in terms of meeting this continuing obligation to make proper provision.

Limited Resources

(49) 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.

This is a case where there are limited resources but with more careful shepherding of same it is possible to make more proper provision.

Agreement Between Spouses

(50) 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.

There is no such agreement here.

c. Section 20

21. It is necessary to turn also to s.20 of the Act of 1996, which provides as follows:

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

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

(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,

[I have identified these previously above]

(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),

[I have identified these previously above.]

- (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,*

[I have considered this 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,*

[I have considered this previously above.]

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

[I have considered Mr Z's ill-health and his availability for work previously above.]

- (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,*

[I have considered this aspect of matters previously above.]

- (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,*

[I have considered the arrangements as they operated previously above.]

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

[I have mentioned Mr Z's entitlements in this regard above. In addition to her private employment income, Ms Z receives the Children's Benefit and a Working Family Payment.]

- (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,*

[I have addressed this aspect of matters in my consideration of *Wachtel* above.]

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

[Each spouse needs separate accommodation. Ms Z is in the family home (with the children). Mr Z is living in HAP-funded accommodation. The shares of the house to be enjoyed by the parties following on the eventual sale of the family home is a matter to which I return in my concluding section later below.]

- (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,*

[Ms Z's employment pension scheme has been considered in the Circuit Court's order and there is no need to make any amendment/variation in this regard.]

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

[No other such rights have been raised as an issue.]

- (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.*

[There is no such agreement.]

- (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. (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.”*

[The only order being made in this regard concerns Ms Z’s employment pension scheme. This has been considered in the Circuit Court’s order and there is no need to make any amendment/variation in this regard.]

- (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.

[For the reasons identified previously and later in this judgment, this predicate presents.]

Conclusion

22. I respectfully do not see how the court could, if it let the Circuit Court order stand as is, be said to making proper provision in circumstances where: (i) no maintenance has been ordered; (ii) mortgage payments are being made in lieu of maintenance payments (by way of the mortgage-cum-maintenance payments) with an ex-husband (thanks to the €19.50 x 2 cashback mentioned above) consequently paying from his net income €5.50 per week in maintenance (if one treats the €11 as being expended on them), a level that is just too low where there is clearly more money and the potential for savings in unnecessary expenditure on his side; (iii) all the upkeep on the family home is being made paid by Ms Z who also pays towards the mortgage but the expectation remains that Mr Z should take an equal share in the family home when it is eventually sold; (iv) Mr Z is having the children he shares with Ms Z reared essentially for free by Ms Z, without this saving being in any way reflected in the eventual division of the house. Ms Z has asked that, in all the circumstances, the family house be divided 70/30 in her favour when it eventually comes to be sold. For all the various reasons stated above I do not see that I could be said to be making proper provision unless I vary the order of the learned Circuit Court judge to so provide.

23. Ms Z has also asked that her ex-husband: (a) pay €100 to her in advance of each child's birthdays so that the money can sensibly be spent. Again, Ms Z is perfectly happy to state that all presents that are co-funded in this way come from both Mum and Dad. So there is no great additional expense in this regard. Mr Z is simply being asked to co-fund a present/party instead of separate presents; (b) pay €200 (€100 per child) to her in advance of each Christmas so that the money can sensibly be spent on presents. Again, Ms Z is perfectly happy to state that all presents that are co-funded in this way come from both Mum and Dad. So there is no great additional expense in this regard. Mr Z is simply being asked to co-fund presents in a sensible manner; and (c) contribute to back-to-school expenses that parents continue to incur at the beginning of each school year (when they return their children to what purports to be a free education system). For all the various reasons stated above I do not see that I could be said to be making proper provision unless I amend the order of the learned Circuit Court judge to so provide. I will order that each birthday payment be paid at the latest one month in advance of a birthday, that the Christmas payments be paid by 25th November in any one year, and that back-to-school payments of €200 (€100 per child) be paid by 31st July each year. The birthday, Christmas and back-to-school payments are in addition to what the Circuit Court has already

ordered. These revised payment arrangements will commence forthwith on the making of the court's order.

24. Save for the changes indicated above the Circuit Court order will not be changed.

25. I know that the changes that I intend to make will require Mr Z to cut back in other areas of expenditure. However, he cannot expect that his children will be reared for next-to-free and that next to all of the cash to pay for their rearing will somehow be generated by Ms Z. Being a parent is great fun; it is also a costly responsibility. Mr Z, with the greatest of respect, needs to bear more of the cost and, I must regretfully observe, to act more responsibly than he has done hitherto.

**TO MS Z AND MR Z:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Ms Z and Mr Z

In the previous pages I have written a judgment about your case. The judgment contains legal language and you may find it a less than easy read. I am aware that family law judgments touch on important issues in people's personal lives. So I now typically add a 'plain English' note to the end of my family law judgments explaining briefly what I have decided. That seems to me to be the least that you deserve. This note, though a part of my judgment, is not intended to replace the detailed text in the rest of my judgment. It is merely intended to help you understand better what I have decided. I have referred to you as Ms Z and Mr Z in my judgment. This makes my judgment (and this note) a bit impersonal but it is done to preserve your anonymity.

Ms Z has asked that, in all the circumstances, the family house be divided 70/30 in Ms Z's favour when it eventually comes to be sold. For the reasons stated in my judgment I will order this.

Ms Z has also asked, and (for the reasons stated in my judgment) I will order, that Mr Z:

(1) pay €100 to Ms Z in advance of each child's birthdays. (Ms Z is happy to state that all presents that are co-funded in this way come from Mum and Dad. So there is no great additional expense in this regard. Mr Z is being asked to co-fund a present/party instead of both parties giving separate presents. Mr Z will need to pay the €100 at the latest one month before each birthday).

(2) pay €200 (€100 per child) to Ms Z in advance of each Christmas. (Again, Ms Z is happy to state that all presents co-funded in this way come from Mum and Dad. So there is no great additional expense in this regard. Mr Z is simply being asked to co-fund presents in a sensible manner. Mr Z will need to pay the €200 by 25th November each year).

(3) contribute to back-to-school expenses at the beginning of each school year. I will order that Mr Z pay €200 by 31st July each year to help meet these expenses.

Please note that the payments at (1), (2), and (3) are in addition to what the Circuit Court ordered. The revised payments arrangement will commence immediately.

Save for the changes indicated above, the Circuit Court order will not be changed.

I know that my orders will require Mr Z to cut back on other expenses and that cutting back on spending is always hard. However, with the greatest of respect, he cannot expect that his children will be reared by Ms Z without meaningful assistance. Being a parent is great fun. It is also a costly responsibility. Mr Z, with every respect, needs to bear more cost and (I must regretfully observe) act more responsibly than he has done to this time.

I respectfully commend Ms Z for all her efforts to this time.

I wish you both and your shared children the very best in the future.

Yours sincerely

Max Barrett (Judge)