

THE HIGH COURT

[2020] IEHC 611
[2019 No. 69 CAF &
2020 No. 91 M]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989
AND IN THE MATTER OF THE FAMILY LAW ACT 1995**

BETWEEN

Y

**APPLICANT (NOW APPELLANT/
CROSS-RESPONDENT)**

- AND -

Z

**RESPONDENT (NOW RESPONDENT
/CROSS-APPELLANT)**

JUDGMENT of Mr Justice Max Barrett delivered on 26th November 2020.

I

Introduction

1. These proceedings started out as a cross-appeal of the financial elements of a judicial separation order that issued from the Circuit Court last July. During the hearing of that appeal the parties asked if the court would also use the hearing as a basis for granting a decree of divorce. The court acceded to this request, the solicitor for Mr Y undertaking that, following the hearing of the application, and with the consent of counsel for Ms Z, he would file the divorce papers in advance of the court's judgment so that the court can properly rule on the appeal and the divorce. There is an element of 'cart before horse' in conducting a divorce hearing before the divorce papers have been filed. However, there seems no point in dragging the parties, who are short in funds, back for a full divorce hearing when through the just-described agreed steps, and following some limited further argument, everything can be ruled upon, with final orders to be agreed on a later date once the parties have had an opportunity to consider this judgment.

II

Some Background Facts

2. The fact that the within proceedings have 'morphed' into divorce proceedings means that, *inter alia*, pursuant to s.20(2)(i) of the Family Law (Divorce) Act 1996, the court has had to have regard to the conduct of the spouses, in particular Mr Y. In this regard, the court admits that it found reading about Mr Y's alleged incidents of violence towards Ms Z during the parties' relatively short-lived time together as a wedded couple, to be disturbing, even frightening. Mr Y has had the welcome decency to apologise twice in writing to Ms Z, once by a letter (since misplaced) and once by text message, for his actions towards her during their time together as a wedded couple. However, in some ways the text message of apology is as perturbing as it is reassuring, pointing to a man who considers that he is not fully well and ought to seek professional assistance.
3. The court does not propose to go through Mr Y's behaviour in detail. The allegations made against him include a physical assault while the couple were abroad, kicking Ms Z in a stitched wound following on the delivery of one of their two children, thumping her so hard in the arm that she bruised, spitting in her face, throwing a mobile phone at Ms Z's

head, threatening to kill/assault her, addressing her with the foulest of language, holding a fist up to her and demanding that she leave the family home, behaving in a controlling manner when it came to Ms Z's mobile phone usage, threatening to have her committed to a mental hospital on the basis of a long-ago episode of depression, threatening to kill himself, expressing a wish that the family home would burn down, demeaning her in front of the children, and disparaging her to neighbours and at least one girlfriend. The court notes that Mr Y avers, *inter alia*, that Ms Z's claims are "*inflammatory, untrue [and] exaggerated*" and that various of her behaviours have been challenging – though in this last regard the court notes that there is no excuse, none whatsoever, *ever*, for domestic violence or the threat of domestic violence between intimate partners of whatever gender/sexuality (be they married, living together or in some more casual relationship). And Ms Z's claims cannot all be untrue: the court has photographic evidence before it of bruising to Ms Z; it has documentary evidence before it of Mr Y's text message of apology ("*I'm f***ed up and I'm sorry for making your life hell*"); it has court records before it pointing to a barring order that issued against him from the courts; it has a professional woman who holds down professional employment, and thus is clearly a sensible person, claiming that grievous wrongs have been done to her; it has a letter of an apparent sometime girlfriend of Mr Y wishing well to Ms Z and indicating that the girlfriend had been troubled by Mr Y's behaviours; and it has the undeniable history that Ms Z eventually fled the family home and moved ten times in nine months with her children, spending some of that time in a women's refuge – what woman would put herself and two young children through such misery if she was not genuinely living in fear of her husband?

4. What makes Mr Y's alleged actions particularly shocking (and some of them, for the reasons stated, must be true) is that he is a well-presented and articulate man in a good job that pays well above the average industrial wage and who does not appear from the evidence to have any addiction problems that might explain (they would not excuse) his past behaviour towards Ms Z – and it is the court's abiding impression from all the evidence before it that Ms Z has had a desperately hard time. Most regrettably, all that has occurred has also taken a psychological toll on at least one of the children, who has had to attend play therapy as a result. And it has engendered an understandable desire on the part of Ms Z, now that she is back in the family home and the children are making friends and settling down, that they not be moved again. Her sense is that the children have suffered enough in life already. She made clear in her oral evidence that if it was just her, she would be satisfied to move on but, as one would instinctively expect of any good mother, and Ms Z is a good mother, she wants the best for her children.
5. To his discredit (and he has expressed regret in this regard), Mr Y has sought in his affidavit evidence to disparage Ms Z by reference to her mental health, suggesting that she has behaved erratically because she suffers from bipolar disorder. In fact, Ms Z had a depressive episode many years ago, her GP stating in a recent letter that was furnished to the court, albeit not placed formally in evidence, that "*while she [Ms Z] has a past history of depression, she has been very well over the last 10 or more years, she attends*

for routine follow up with a consultant psychiatrist and remains very well". Three points might be made in this regard:

- first, to seek to disparage someone by reference to her or his mental health is to proceed on the premise that fault/shame is somehow at play when it comes to mental ill-health as opposed to any other form of ill health. The court unhesitatingly rejects that premise.
 - second, even if what Mr Y averred in this regard concerning Ms Z were true (and it is not), mental ill-health or even a delicate temperament on the part of a spouse is a cause for understanding on the part of the other spouse, not abuse by way of averment.
 - third, the privilege enjoyed by parties in court proceedings is not there to facilitate one party 'having a go' at another under the protective cloak of that privilege; when such abuses occur parties may find that their actions are, at the least, eventually reflected in such costs orders as may issue. This is the third time in recent weeks that the court has had to caution against the (ab)use of court privilege in this regard.
6. For reasons that are, to put matters at their most charitable, unclear, Mr Y managed in the past to obtain a safety and a protection order against Ms Z.

III

The Affidavits of Means

7. The affidavits of means are considered in appendices hereto which are being made available to the parties and their advisors only. Having regard to those affidavits of means the court will order a revised sum of maintenance (the figure is identified in Appendix 3) to be paid by Mr Y to Ms Z commencing from the date of the court's order. The court considers there to be notable excess in Mr Y's expenditure which should, at the least, yield savings to within the amount of the additional maintenance figure. The court also considers there to be one area in which Ms Z might usefully curb expenditure – though she has patently pared matters back far more than Mr Y to this time. Before proceeding to final orders the court has requested sight of the additional details identified in the appendices.

IV

Further Financial Considerations

- a. Circuit Court Order.
8. As mentioned above, these proceedings started out as an appeal and cross-appeal concerning the financial provision made by the Circuit Court in judicial separation proceedings in which Mr Y was the applicant and Ms Z the respondent. When it came to the financial side of the affairs of Mr Y and Ms Z, the learned Circuit Court judge ordered as follows:

"The Family Home

1. *An Order that the family home situate at [Stated Address] is to be sold, with a stay on this order to July 2025.*
2. *An Order that following the discharge of the mortgage and sale of costs the net proceeds are to be divided as to [Stated Sum] to the Respondent with the balance to the Applicant.*
3. *An Order that the Respondent has an exclusive right to occupy the family home to the exclusion of the Applicant until vacant possession is required.*
4. *An Order that the Respondent is to take over the mortgage repayments mortgage protection and house insurance and is to indemnify the Applicant in respect of same as and from September 2019.*

Maintenance

1. *An Order that the Applicant is to pay the full crèche fees as maintenance for the two dependent children and is to continue to pay an equivalent sum when the children are no longer attending the crèche. This sum is to be apportioned equally between both children. This figure can be adjusted depending on the circumstances."*

b. Breach of Court Order.

9. Mr Y is in breach of the maintenance order. That is a serious matter. Court orders must be obeyed. If some reason arises why that cannot be done, the appropriate thing to do is return to court, not just to construct a maintenance regime of one's own devisement. Mr Y's failure to pay the monies owing pursuant to court order has meant that his estranged wife has suffered an unanticipated loss of income at a time when she has pared back expenses considerably. It has also placed her in a most embarrassing situation *vis-à-vis* the crèche, to which monies are now owing. It is not appropriate that Mr Y would deprive his estranged wife, and hence in effect his children, of necessary maintenance in order that he can continue to pay for his sports TV subscription, his social expenses, his gym membership, his take-away food orders, etc. As a parent it is his moral duty to place his children's interests before his own. That is what countless fathers and mothers in this country do every day, and that is what society rightly expects of Mr Y too. It is also, of course, his legal duty to obey court orders, and Mr Y should carefully note the following: unless he pays all of the outstanding maintenance by 03 December, the court will schedule a hearing in early-December to consider whether he is in contempt of court and, if so, what consequence/s should follow. Mr Y should carefully weigh the implications for himself and his career if the maintenance goes unpaid.

c. Mr Y's Proposed New House.

10. The 'problem' that led to Mr Y bringing his appeal is this. Since the separation, Mr Y has fallen in love with a new partner. They are currently sharing an apartment together. However, an uncle of Mr Y has agreed to sell to Mr Y some land at a greatly discounted price and Mr Y wishes to build a new house on that land for himself and a new baby due to arrive later this year. But because he is listed as a mortgagor on the family home that

he shared with Ms Z, and notwithstanding the fact that he is on a good salary, no bank will give Mr Y the home loan that he needs to build the new house. So, in his appeal, he asks that this Court order the sale, in the immediate to short term, of the family home that he shared with Ms Z, she would take 80 per cent of the sales price (or a stated sum, whichever is the higher) and maybe buy a new home or else rent a property.

11. There are three serious problems with the just-mentioned proposal. First, even with 80 per cent of the sales price (or the stated sum, whichever is the higher), Ms Z would not be able to buy a house anywhere near where she now lives and where the children she had with Mr Y are at crèche/in school. Second, Ms Z is in a profession which, though esteemed by the public, does not get very well recompensed. Consequently, and this is critical in terms of what Mr Y now proposes, she would not be able to get a mortgage loan to top up whatever cash in hand she received from the home sale so that she could buy a house anywhere near where she now lives. Third, she would therefore have to move from the family home with her two children to rented property, with all the uncertainties that life in rental accommodation brings, essentially so that Mr Y can move from rental accommodation to his own property with his new partner and child. The court is unsympathetic to an application that would see an abused wife and her two children (one now receiving therapy) cast into the uncertainties of rental accommodation in order that a previously abusive husband can ensconce himself in a new home of his own.
12. The court is sorry for Mr Y's new partner and their child-to-come that they should be in a position where they are in rented accommodation and without quite enough money to see them ensconced in the new home that Mr Y aspires to build for them all and that they doubtless all wish for each other. And, for the avoidance of doubt, the court makes no criticism, none whatsoever, of Mr Y, that he has entered into a second relationship, of course makes no criticism of his new partner, and wishes both Mr Y and his new partner well with their new child when he or she arrives. Following on the breakdown of his marriage, Mr Y is perfectly free to pursue a new relationship and he has exercised that freedom as he has. But Mr Y went into his new relationship with his eyes open and knew that at all times he had to support his judicially separated wife and his two children. He cannot, with respect, now: seek to offload onto his estranged wife and his two existing children all the uncertainties that his actions have brought into his life; seek for himself the comfort of moving from rental accommodation to his own home, at the price of casting his estranged wife and his two existing children into all the uncertainties of a life in rental accommodation; or hope to advance his position by presenting in court a list of cheapish houses that he has downloaded from *daft.ie* and to which he thinks his estranged wife might move if she were to get a home loan when the simple truth is that on her present income she is ineligible for a home loan of the necessary scale; indeed, and this is critical to the outcome of the within application, it does not appear from the evidence that in her present circumstances she would be granted a home loan at all.

V

Some Other Points Presenting

13. Three further related points arise from the arguments at the hearing:

- first, Mr Y expressed the view in his oral testimony that he has suffered by having to remove himself from the family home to his home county. But there could be no question of his staying in the family home after the behaviour he historically exhibited towards his estranged wife, even if not all of what is alleged against him is true, though some of it (on the evidence before the court) undoubtedly is – bruises do not just happen, a barring order does not issue for the asking, and a wife does not just suddenly elect to flee with her children from the family home. So Mr Y had to get out of the house; indeed one of the more reprehensible features of his treatment of Ms Z is that for a time Mr Y stayed in the family home and effectively forced Ms Z to remain away from same with the children. It follows from the foregoing that he gets no kudos for leaving the family home, and if leaving the home took him from one county to another then that, with respect, is what just had to be done.
- second, criticism was levelled at Ms Z because at this time she is working part-time so as to spend more time with the children while they are very small. She has indicated that once they are a little older she intends to return to full-time work (though the court's sense is that 'full-ish', *i.e.* more hours, rather than full-time employment, is more likely – someone needs to be around to keep a watchful eye as the children grow older and the temptations for them to err increase). The nature of Ms Z's profession is such that 'full-ish' employment will be possible. The court therefore rejects the criticism made of Ms Z that she is not yet working full time. In truth, it reflects singularly badly on Mr Y that having cast his children into their mother's near full-time care (he sees them two weekends a month) he now, in effect, seeks to criticise her for caring for them.
- third, it was contended at the hearing that if Ms Z were to remain at the family home until 2025 and rear there the children that she and Mr Y had together, she would be in her fifties by the time it came to move on and would likely not have the best career prospects – the unspoken end-proposition of this sequence of reasoning being that it might then be more difficult to persuade a judge that she should leave the family home, so it is better that she and the children leave now. In fact, the court sees a question to arise as to whether it is more appropriate that Ms Z would not leave the family home until the younger of the two children of Mr Y and Ms Z finishes secondary school. As regards the 'squandered career prospects' point, if Ms Z's employment prospects are squandered by virtue of her having raised Mr Y's children (and it seems unlikely to the court that as a lone mother rearing two children she will manage to achieve the full employment and related earning capacity that she might have managed in a two-parent household), she will have squandered those prospects in the selfless care of the children of herself and Mr Y. So what Mr Y is contending is that he is satisfied for Ms Z to interrupt her career so as to look after the children, provided she and they are cast into the uncertainties of rental accommodation in order that he can build a house, his fear being that if Ms Z stays in the family home to rear their children she might in the future derive some advantage by virtue of having done so. That is a singularly self-centred

sequence of logic that the court does not see to offer a proper basis on which to make the orders that Mr Y came seeking on appeal.

VI

Section 5

14. Turning to the divorce side of matters, the parties were married in the early years of the last decade. They separated a few years before the end of last decade. When it comes to granting a decree of divorce to issue, s.5(1) of the Act of 1996 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."

15. It is clear from the uncontroverted evidence of Mr Y that items (a) and (b) are satisfied. The court proceeds to a consideration of item (c), i.e. the issue of 'proper provision'. But first, it turns to section 5(2) of the Act of 1996, which provides as follows:

"Upon the grant of a decree of divorce, the court may, where appropriate, give such directions under section 11 of the Act of 1964 as it considers proper regarding the welfare (within the meaning of that Act), custody of, or right of access to, any dependent member of the family concerned who is an infant (within the meaning of that Act) as if an application had been made to it in that behalf under that section."

16. The court proposes to continue with the custody and access arrangements contemplated in the Circuit Court order of 30 July 2019 SAVE THAT the court considers that its order should reflect the reality of what now occurs, viz. that point 2 under the heading "*Custody and Access*" in that court order should be deleted and the last line in point 4 under that heading should likewise be deleted.

VII

Some Law

17. The court notes its observations at Part IX of its judgment in *M v. S* [2020] IEHC 562.

VIII

Section 20

18. Among the reliefs sought by Mr Y in the divorce application are orders under ss. 13-15 and 17-18 of the Act of 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 Mr Y, Ms Z and their two small 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. It is clear that Ms Z has pared her expenditure back considerably and is already having to rely on various forms of state assistance. The court considers these issues in more detail in the Appendix.]

- (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: Mr Y's affidavit of means reflects the expenses that he incurs both pursuant to the judicial separation order and in the context of his new relationship and pending new child. Ms Z's affidavit likewise reflects her new position as a lone mother. She is not in a new relationship and, her hands full with two young children and with a significantly curtailed social life, does not anticipate at this time that she will enter into a new relationship for some time. The court considers these issues in more detail in the Appendix.]

- (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 by domestic violence. The court considers the detail of the living costs and arrangements in more detail in the Appendix.]

- (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. Although their marriage continues legally to subsist, in reality it came to end about four years after it started. It does not appear from the evidence that the parties previously lived with each other.]

- (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: The court considers these issues in more detail in the Appendix. The court notes that apart from two weekends per month, Ms Z is and will be in effect the sole carer for the two children of the marriage.]

- (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: There was no impact on the earning capacity of Mr Y. Primary care of the children has seen Ms Z remaining in part-time employment at this time and her profession is such that she should be able to pursue 'full-ish' employment (she thinks full but, again, the court considers that 'full-ish' but not quite full employment is more likely), rendering it, it would seem, unlikely that she will ever attain the income that she might have earned in a two-parent household with each parent facilitating the other in holding down full-time employment.]

- (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 Ms Z's affidavit of means 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: Mr Y has behaved towards Ms Z in what, to put matters mildly, is so discreditable a manner as to bring himself easily 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 - 388). However, save in the limited form identified later below (in circumstances which may or may not eventually present), and even though it seems much-merited, funds are so tight between the parties at this time that the court has elected not to engage in a *Wachtel*-style reduction.]

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

[Court Note: These were a central focus of the appeal proceedings. For the reasons identified previously above, the court does not see that proper provision requires a change in the present circumstances which leave Mr Y (and his partner and future child) in rental accommodation but in a dual-income household, and Ms Z (and Mr Y's two existing children) enjoying a continuity of existence in the family home in the area where the children are being reared and with no real alternative available where (a) to cast them into the uncertainties rental accommodation so that Mr Y can move into his own accommodation is not a path that recommends itself to the court for the reasons previously stated, and (b) Ms Z, in her current financial position is ineligible for a home loan mortgage that could be used to supplement the proceeds from a sale of the family home to buy her suitable alternative accommodation.]

(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: Mr Y is to be the beneficiary of a defined contribution pension. Ms Z appears from her affidavit of means to have been a member of two pension schemes (one for herself and one for her children, presumably in the event that she pre-deceases them before they have reached a certain stage in life). There has been no quantification of the respective pension pools and no argument as to how the pensions are to be treated. The court will hear argument in this regard before proceeding to final orders.]

(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: No separation agreement appears from the evidence to have been executed between the parties.]

(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) this is considered in more detail in the Appendix;
- (b) the children have no income, earning capacity or property; they appear to have standard child savings accounts, though no details of the amounts in same has been provided;
- (c) neither child suffers from a mental or physical disability, though one child has been undertaking play therapy following on the disturbances that preceded the parents' separation and now divorce;
- (d) there is no such income or benefit; children's benefit payments have been factored into the mother's income;
- (e) a standard state education at the primary and secondary levels is contemplated;
- (f) the court has had such regard when considering those provisions *ad seriatim* above;
- (g) the court is mindful that the children need a stable environment and have that (at last) in the family home which is close to their school/crèche and where they each have friends, family and a growing network.]

(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.]

IX

Conclusion

19. Having regard to all of the foregoing, the court will grant the decree of divorce sought and order as follows:

a. Custody and Access

20. The court will leave the arrangements unchanged from what the learned Circuit Court judge ordered save to the extent indicated above (those changes falling to be effected not because of any error on the part of the learned Circuit Court judge but merely to the current realities).

b. The Family Home

21. The court identifies in Bold italics below the four orders made in this regard by the Circuit Court, along with its own conclusions, viz:

"1. *An Order that the family home situate at [Address Stated]...is to be sold, with a stay on this order to July 2025*".

Court Note: Having re-read the pleadings and considered the various arguments made at the hearing, a question arises on the part of the court as to whether it is appropriate that the children should move from where they live as they move into secondary school. This aspect of matters was not addressed at hearing and the court will hear further argument, before making final orders, as to whether the year in which the younger of the two children of Mr Y and Ms Z finishes secondary school is the better time for the sale to take place.

The court is mindful in this regard that ordering matters so means that Ms Z, a lone mother, will live in the existing family home with the two children she had with Mr Y, and the children will continue to enjoy the continuity in the place of residence/schooling/friendships that (thanks to Mr Y) was for a while deprived of them (leaving one child in need of therapy); Mr Y's child-to-come will, albeit perhaps living in rented accommodation, at least have the advantage of growing up in a household where there are two incomes, those two incomes doubtless presenting a comparative plenitude of money that do not present in Ms Z's current lone mother household.

"2. *An Order that following the discharge of the mortgage and sale of costs the net proceeds are to be divided as to €100,000 to the Respondent with the balance to the Applicant.*"

Court Note: The court considers that proper provision, for reasons that will become apparent at point 4 and in the Appendix, requires that there be a 80/20 split of any net proceeds.

"3. *An Order that the Respondent has an exclusive right to occupy the family home to the exclusion of the Applicant until vacant possession is required.*"

Court Note: This Court will make like order.

- "4. An Order that the Respondent is to take over the mortgage repayments, mortgage protection and house insurance and is to indemnify the Applicant in respect of same as and from September 2019".

Court Note: This Court has respectfully taken a different approach to the learned Circuit Court judge. Because Ms Z is living in the home and Mr Y is not, it has ordered what is in effect a 80/20 split of the mortgage, insurance and property-related costs. Given that he will remain as joint owner, the house is a form of investment for Mr Y and he ought to contribute to the cost of that investment. When the property is sold, the fairest split in light of the shared investment costs (with Ms Z additionally benefitting from having resided there) the court considers that proper provision lies in ordering a 80/20 split of the net proceeds. Although one would hope that any net proceeds which accrue to Mr Y as a result of that split of same will offset any mortgage costs met solely by him in the period before the court's order takes effect, any (if any) deficiency in this regard can be treated as a *Wachtel*-informed deficiency contemplated, countenanced and sanctioned by the court to reflect Mr Y's historically "*obvious and gross*" behaviour towards Ms Z, as considered previously above.

c. Maintenance

22. The Circuit Court ordered "*that the Applicant is to pay the full crèche fees for the two dependent children and is to continue to pay an equivalent sum when the children are no longer attending the crèche. This sum is to be apportioned equally between both children. This figure can be adjusted depending on the circumstances*". As time marches on, and with one child now at school, it seems no longer appropriate to tie the maintenance to the level of the crèche fees without quantification. The court will therefore revise and increase the maintenance payable by Mr Y for the reasons, and to the level stated, in the Appendix.

d. Additional Orders

23. As to the additional orders sought in the special summons that issued after the hearing of the within matter, the reliefs sought at points 2), 3) and 4) ought properly to be the subject of argument prior to the court making its final orders.

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

Dear Mr Y/Ms Z,

*I have dealt in the preceding pages with various issues presenting in this application. Much of what I have written might seem like jargon. In this section, I identify briefly below some key elements of my judgment, in particular 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 each of you to understand some key elements of what I have stated.***

I have referred to you below and elsewhere in my judgment as 'Mr Y' and 'Ms Z'. This is to preserve your privacy.

I am, to put matters mildly, very taken aback by Mr Y's alleged behaviour towards Ms Z during the marriage (some of which alleged behaviour I consider must have occurred).

I am unimpressed by Mr Y's efforts to disparage Ms Z by suggesting that she has behaved erratically because she suffers from bipolar disorder. In point of fact, she had a long-ago episode of depression. But, regardless, to seek to disparage someone by reference to her mental health is to proceed on the premise that fault/shame is somehow at play when it comes to mental ill-health. The court unhesitatingly rejects that premise.

Your respective affidavits of means are considered in the appendices to my judgment. Those appendices are being made available to you only. Having regard to the affidavits of means, I will order that increased maintenance be paid by Mr Y to Ms Z commencing from the date of my order. However, before proceeding to final orders I have requested sight of certain additional details.

Mr Y is currently in breach of the maintenance order. That is a serious matter. Court orders must be obeyed. It is not appropriate that Mr Y would deprive his estranged wife, and hence in effect his children, of necessary maintenance in order that he can continue to pay for his sports TV subscription, his social expenses, his gym membership, his take-away food orders, etc. As a parent it is, with respect, Mr Y's moral duty always to place his children's interests before his own. It is also, of course, his legal duty to obey court orders. PLEASE NOTE: unless Mr Y pays all of the outstanding maintenance by 03 December, I will schedule a hearing in early-December to consider whether Mr Y is in contempt of court and, if so, what consequence/s should follow. Mr Y should carefully weigh the implications for himself and his career if he is found to be in contempt.

There are three serious problems with Mr Y's proposals regarding the sale of the home in which Ms Z and the children currently reside. First, even with 80 per cent of the sales price (or the stated sum, whichever is the higher), Ms Z would not be able to buy a house anywhere near where she now lives and where the children she had with Mr Y are at crèche/in school. Second, Ms Z is in a profession which, though esteemed by the public, does not get very well recompensed. Consequently, she would not be able to get a mortgage loan to top up whatever cash in hand she received from the home sale so that she could buy a house anywhere near where she now lives. Third, she would therefore have to move from the family home with her two children to rented property, with all the uncertainties that life in rental accommodation brings, essentially so that Mr Y can move from rental accommodation to his own property with his new partner and child. The court is instinctively unsympathetic to an application that would see an abused wife and her two children (one now receiving therapy) cast into the uncertainties of rental accommodation in order that a previously abusive husband can ensconce himself in a new home of his own.

Three further related points arise from the arguments at the hearing:

– first, Mr Y expressed the view in his oral testimony that he has suffered by having to remove himself from the family home to his home county. But there could be no question of his staying in the family home after the behaviours he historically exhibited towards his estranged wife, and the court accepts at least some of those behaviours to have occurred. So Mr Y had to get out of the house; and if leaving the house took him from one county to another then that is what just had to be done.

– second, criticism was levelled at Ms Z because at this time she is working part-time so as to spend more time with the children while they are very small. She has indicated that once

they are a little older she intends to return to full-time work (though the court's sense is that 'full-ish', i.e. more hours, rather than full-time employment, is more likely). The court therefore rejects the criticism made of Ms Z that she is not yet working full time. In truth, it reflects badly on Mr Y that having cast his children into their mother's near full-time care he now, in effect, seeks to criticise her for caring for them.

– third, it was contended at the hearing that if Ms Z were to remain at the family home until 2025 and rear there the children that she and Mr Y had together, she would be in her fifties by the time it came to move on and would likely not have the best career prospects – the unspoken end-proposition of this sequence of reasoning being that it might then be more difficult to persuade a judge that she should leave the family home, so it is better that she and the children leave now. In fact, the court sees a question to arise as to whether it is more appropriate that Ms Z would not leave the family home until the younger of the two children of Mr Y and Ms Z finishes secondary school. As regards the 'squandered career prospects' point, what Mr Y is contending is that he is satisfied for Ms Z to interrupt her career so as to look after the children, provided she and they are cast into the uncertainties of rental accommodation in order that he can build a house, his fear being that if Ms Z stays in the family home to rear their children she might in the future derive some advantage by virtue of having done so. That is a singularly self-centred sequence of logic that I do not see to offer a proper basis on which to make the orders that Mr Y came seeking on appeal.

Orders to be Made

I will grant the decree of divorce sought and also order as follows:

Custody and Access. *I will leave the custody/access arrangements essentially unchanged from what the Circuit Court ordered. I will make some incidental changes to reflect the current reality of how access/custody currently works.*

The Family Home. *I identify in Bold italics below the four orders made in this regard by the Circuit Court, along with my own conclusions:*

“1. An Order that the family home situate at [Address Stated]...is to be sold, with a stay on this order to July 2025”. *Having re-read the pleadings and considered the various arguments made at the hearing, I would question whether it is appropriate that the children should move from where they live as they move into secondary school. This aspect of matters was not addressed at hearing and I will hear further argument, before making final orders, as to whether the year in which the younger of your two children finishes secondary school is the better time for the sale to take place.*

“2. An Order that following the discharge of the mortgage and sale of costs the net proceeds are to be divided as to €100,000 to the Respondent with the balance to the Applicant.” *I consider, for reasons that will become apparent under point 4 below, requires that there should be an 80/20 split of any eventual net sale proceeds.*

“3. An Order that the Respondent has an exclusive right to occupy the family home to the exclusion of the Applicant until vacant possession is required.” *I will make a similar order.*

“4. An Order that the Respondent is to take over the mortgage repayments, mortgage protection and house insurance and is to indemnify the Applicant in respect of same as and from September 2019”. *In this respect, I respectfully take a different approach to the Circuit Court. Because Ms Z is living in the home and Mr Y is not, I will order what is in effect a 80/20 split of the mortgage, insurance and property-related costs. After all, given that Mr Y will remain as joint owner, the house is a form of investment for Mr Y and he ought to contribute to the cost of that investment. When the property is sold, the fairest split in light of the shared investment costs (with Ms Z additionally benefitting from having resided there) lies in ordering a 80/20 split of the net proceeds. Although I would hope that any net proceeds which accrue to Mr Y upon any eventual sale will offset any mortgage costs ever met solely by Mr Y before my order takes effect, any (if any) deficiency in this regard can be treated as reflective of the court’s displeasure at how Mr Y has historically abused Ms Z.*

c. Maintenance

I will revise and increase the maintenance payable by Mr Y for the reasons, and to the level stated, in the appendices to the judgment.

d. Additional Orders

In his divorce summons, Mr Y has sought certain additional orders concerning your estates on death, your future earnings/inheritances and the costs of these proceedings. These aspects of matters were not considered at the hearing and ought properly to be the subject of argument prior to my making my final orders.

I will ask a court official to liaise with your lawyers so that a date can be agreed for any further argument and also the final form of the orders that I propose to make.

Separately, PLEASE NOTE that if I do not receive confirmation from Ms Z’s lawyers on or before 03 December 2020 that Ms Z has received the full amount of the outstanding maintenance payable to her, I will schedule a hearing-date in early-December to consider whether Mr Y is in contempt of court and what ought to be done about it. Mr Y should carefully weigh the implications for himself and his career if he is found to be in contempt.

Is mise le meas

Max Barrett (Judge)