

**THE HIGH COURT
FAMILY LAW**

[2022] IEHC 594
[2020 No. 107 M]

BETWEEN

S.

APPLICANT

AND

D.

RESPONDENT

JUDGMENT of Mr Justice Jordan delivered on the 3rd day of February, 2022.

1. These proceedings commenced in December 2020 when the husband (the applicant) issued family law proceedings against his wife and in which proceedings he sought a decree of divorce and ancillary relief. In early January 2021 his wife issued proceedings in which she sought a decree of judicial separation and ancillary relief. Unhappy differences had existed in the marriage for some time.

2. The cases were listed for hearing before the High Court – commencing on 28th October, 2021. By agreement of the parties the divorce proceedings only were heard and the hearing took place over four days on 28th October, 29th October, 2nd November and 3rd November, 2021.

3. At the end of the hearing on 3rd November, 2021 and following submissions from both sides the court directed that a report should be obtained from X pursuant to s.47 of the Family Law Act 1995 setting out the views and wishes of the children. A report from X dated 3rd December, 2021 was subsequently provided to the court and to the parties.

4. The parties were married in 2006. At the time of the marriage they resided in a property which was owned by and held in the sole name of the husband. At that time the wife had one other property in her sole name in Ireland and an apartment abroad.
5. There are two children of the marriage, namely Child A who was born in 2008 and Child B who was born in 2009. The children currently attend fee-paying schools and that is not expected to change. In due course it is hoped that the children will attend third-level, to primary degree and possibly beyond. The parties were and are equally involved in the upbringing of the two children.
6. The husband is now 59 years of age. He is a professional with an established career.
7. The wife is now 50 years of age and is also a professional person. She was diagnosed with a significant illness in 2014 and was very ill. She received treatment and she has fortunately made a good recovery.
8. The marriage was a good marriage and a good partnership until unhappy differences arose. Both parties were hard working and dedicated to their careers and to their family. The wife's work and career clearly placed huge demands on her time and energy albeit with very high rewards in terms of income. She worked long hours in the office during the week and could end up logging on and working at home after dinner together. She was promoted to a high position at a relatively young age. She did the interview for the role shortly before the birth of Child A.
9. The husband was successful in his chosen field and earned a good income. However, that income was a fraction of that earned by his wife – and was understandably described by him as - “income wise we were chalk and cheese”.

10. The husband was very hands-on at home. His work gave him great flexibility and he was available to look after the children when their mother was otherwise occupied because of the demands of her work. A childminder was employed during the day but the husband was very closely involved in their care and in domestic chores generally. He enjoys cooking and did most of the cooking in the house – at least until the relationship deteriorated.

11. It is also important to point out that the husband was in the stronger financial position at the time of the marriage. He had a house almost paid for. He had money, investments and cash. His wife, on her own evidence and by contrast “had debt”. Through hard work and ability his wife moved swiftly through the ranks and quickly began to generate high earnings. There cannot be any doubt but that she was greatly assisted in this regard by the support of her husband – as her life partner and father to their children. Nor can there be any doubt but that the combined work and effort of both spouses – at home and outside the home – was intended to be for the benefit of the family. They were working together with the intention that their teamwork would accrue for the benefit of themselves and their family.

12. Unfortunately, the diagnosis of the wife’s illness and the subsequent treatment and all of the stress and upheaval which accompanied this caused a significant fracture in the relationship. As the wife put it, tackling such a significant illness is a difficult journey and she had hoped that her husband would travel with her on that journey – but she felt he did not. She felt that the connection emotionally was there at the start of the journey but not subsequently. She felt that her husband was a functioning person as opposed to an intimate partner. In evidence the wife did acknowledge that her husband may have felt that he was doing enough in terms of support even though she did not think so.

13. According to the husband, the illness changed the marriage relationship. It is his view that his wife decided to change her life. She made a decision and things went slowly downhill from there. In August of 2018 they both started sleeping in separate bedrooms after an unseemly argument which the husband was entirely responsible for.

14. The proceedings have resulted in allegations of misconduct by the wife against the husband – and indeed some allegations of misconduct by the husband against the wife. This is a case where there are significant assets involved – totalling (including pensions) in the region of €6.5m-€7m. A significant issue, if not the significant issue, in the case is how the matrimonial assets are to be dealt with in terms of “provision”. The court is, and must be, alert to the requirement that allegations of misconduct be proved by the party making them. When individuals are involved in an intimate and personal relationship over many years it is easy to extract events of the past and to recast those events, with some addition or alteration or change of context, to fit in with and support a new narrative. In family law cases, allegations of misconduct can frequently involve no more than one person’s word against another. Independent or some supporting evidence is desirable but may not always be available. Absent such evidence, the court must still approach a decision in relation to the allegations made on the basis of the consistency, credibility and reliability of the evidence given by the parties. When allegations of misconduct are made, the court is being invited to consider that conduct and decide if that conduct is such that it would in all the circumstances of the case be unjust to disregard it. Has one party behaved towards the other in what is so discreditable a manner as to bring himself or herself within the “obvious and gross” conduct contemplated by Lord Denning in *Wachtel v. Wachtel* [1973] Fam. 72 at p.90?

15. Insofar as this exercise is concerned, it should not be necessary to point out that such conduct ought not to be too difficult to see does exist if it is established in

evidence. After all, it should be obvious and gross misconduct and such that it would in all the circumstances of the case be unjust to disregard it.

16. In terms of the personalities of the husband and wife, the court had the benefit of detailed evidence from each and relating to them both. The following is clear:

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- (a) The husband and wife are both independently minded, strong-willed and tenacious individuals.
- (b) They are both well-educated, intelligent and able people.
- (c) They are both well-regarded members of their respective professions. Of the two, the wife has excelled in her career.
- (d) Both the husband and the wife are and have been careful about their expenditure and investments. They have enjoyed a comfortable lifestyle but have not been excessive in their expenditure. They have accumulated wealth by hard work and sensible investment.
- (e) They are both extremely good parents to their two children with whom they both enjoy a very good relationship.
- (f) The husband has a quick temper but he is not a violent person.
- (g) The couple fashioned a domestic routine which allowed the wife more time for her work while the husband was more involved in the home and with the children when they were younger. Things changed somewhat after the wife left her job.
- (h) The breakdown of the marriage has put extraordinary stress and pressure on both spouses. A significant pressure and cause of stress is the fact that neither spouse has been prepared to vacate the family home so both parties have been residing under the one roof since the fracture became

acutely evident in August of 2018 - and throughout these proceedings. The wife wished the husband to move out. The husband did not want to do so – as he felt that would mean leaving behind his home and his children. Nor for that matter was he prepared to contemplate a situation where he would become a weekend dad.

17. The court has the benefit of written submissions of the husband received on 20th December, 2021 and written submissions of the wife dated 17th December, 2021 and received on 20th December, 2021. In addition, the court has had the benefit of oral submissions on behalf of both parties on 21st December, 2021.

18. The written submissions and the oral submissions of the parties refer to the statutory factors set out in s.20(1) of the Family Law (Divorce) Act 1996 and to relevant case law in the area. The court does not intend to repeat verbatim the submissions made by the parties. The submissions made have been considered by the court and the individual factors set out in s.20(2) of the 1996 Act will be addressed below, having regard to the submissions made in relation to those factors by the parties. It is probably fair to say that the focus of the applicant's submissions is on the assertion that the interests of justice require that proper provision should be made on the basis that broadly speaking the available assets should be divided equally between the parties, including the sale of the family home and the division of the net proceeds of sale. In contrast, the focus of the respondent's submissions involves an emphasis on the "discreditable manner" in which it is alleged that the applicant conducted himself towards the respondent and an assertion that the respondent's open offer is a fair and reasonable offer. That offer is: -

- (a) That the respondent be permitted to stay in the family home and that the applicant be required to move out by a specific time.

- (b) That she be permitted to buy out the applicant's interest in the family home at a fair price.
- (c) In this regard, she has offered to purchase his legal interest for €900,000 which she calculated was 50% of the net equity.
- (d) Additionally she offered to transfer 15% of her pension to his pension – which was valued at €236,000 indicatively.
- (e) Otherwise, each party should retain their own assets.
- (f) The respondent would take over the mortgage on the family home and fully indemnify the applicant in that regard.
- (g) Consequential orders - blocking orders under s.18(10), an exclusive Right of Residence Order pursuant to s.15(1)(a)(i) would follow.

19. The recent Court of Appeal decision in *N.O. v. P.Q.* [2021] IECA 177 sets out in a clear and comprehensive way the law concerning “proper provision”.

20. A starting point in relation to the law concerning proper provision is *D.T. v. C.T.* [2002] 3 IR 334. In the often-cited passage from his judgment in *D.T. v. C.T.* Murray J. observes as follows: -

“... the 1996 Act requires regard to be had to all the relevant considerations set out in Section 20 always with the objective of making proper provision. 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 (where the other spouse is the source or owner of all or the bulk of income or assets of the marriage) should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligations, continue with a standard of living commensurate with her standard of living during marriage

but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependant on receiving periodic payments for the rest of her life from her husband...”.

21. Fennelly J when dealing with the contributions made by spouses in their respective spheres says (at p.418): -

“Nonetheless, I find Nicholls L.J. persuasive in one respect. When, referring to the provision corresponding to sub-paragraph (f) at p. 605 he says: -

‘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 homemaker and the child-carer’.

It is fair to say that Nicholls L.J., in the ensuing passage, proceeded to advocate a ‘yardstick of equality’. The Act of 1996 does not, in my view, warrant the introduction of a yardstick in those terms. It certainly does not ordain an approach based on the division of assets. Nonetheless, I would adopt the language of Nicholls L.J. 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 homemaking spouse.”

22. It is the position that Murray J cited the above extract from the judgment of Nicholls L.J. with approval (at p.410) and that Keane C.J. also approved of the approach of Nicholls L.J. in this regard (at p.368).

23. While this Court must afford equal recognition to the value of the contributions made by the applicant and by the respondent during the marriage, in their respective roles, this does not mandate an exercise of identifying and ensuring an equal division of the matrimonial assets.

24. The Supreme Court in *Y.G. v. N.G.* [2011] 3 IR 717 set out a list of principles applicable to proper provision following divorce where there had been a previous separation agreement between the parties. These principles were applied by the Court of Appeal in two divorce cases *Q.R. v. S.T.* [2016] IECA 421 (unreported Court of Appeal 19/10/2016) and *C.C. v. N.C.* [2016] IECA 410 (unreported Court of Appeal 26/10/2016) where there had been previous court orders for judicial separation. In the former case, Ms. Justice Irvine, giving the judgment of the court, commented as follows in regard to cases when there are significant assets and income (at para. 68): -

“In such cases, the needs of the parties and their dependent family members are not particularly material as they are not to be confined to provision sufficient only to meet their reasonable requirements. In cases involving ample resources it is the standard of living enjoyed by both parties before the breakdown of marriage which should guide the court as to how it should make proper provision having regard to the available assets, income and property.”

Ms. Justice Irvine went on to describe the functions of a trial judge when making proper provision in such a case in the following terms (at para. 106): -

“The onus on the trial judge in the present case was to consider all of the assets potentially available and then to fashion orders for ancillary relief that would likely secure for the parties and for their lifetime the lifestyle which they enjoyed prior to the marriage breakdown”

25. In *D.T. v. C.T.* the Supreme Court addressed the role and importance of conduct – and its views were reiterated by the Court of Appeal in *Q.R. v. S.T.* Both courts adopted and applied the well-known passage from the judgment of Denning M.R. in *Wachtel v. Wachtel* [Op.cit.]: -

“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.”

26. The respondent also refers to recent decisions of Barrett J. in the High Court in the cases of *M. v. S.* [2020] IEHC 562, *Y. v. Z.* [2020] IEHC 611 and *A. v. B.* [2020] IEHC 610 in support of the argument that this Court ought to find that the applicant has been guilty of misconduct which has reached the threshold of gross and obvious misconduct such that, all other things being equal, the discreditable manner in which the applicant conducted himself towards the respondent should tend to resolve the accommodation issue in favour of the respondent.

27. In the context of domestic violence, the following statement of the legal position by Barrett J. in *X. v Y.* 2020 IEHC 525 is worth repeating: -

“A party to an intimate relationship should never have to live in the fear and/or with the actuality of domestic violence being perpetrated upon that party. There are no ‘ifs’ or ‘buts’ in this regard, no exceptions, no mitigating circumstances. Domestic violence and/or the threat of domestic violence (even where no actual

violence ensues) is always unacceptable. The court has been careful to use gender-neutral language in the foregoing to make clear that its observations apply to all intimate relationships between all persons of whatever gender/sexuality.”

28. All relationships and cases are different, and an examination of conduct will inevitably involve a consideration of the relationship and marriage in addition to consideration of any specific incident or incidents alleged by one against the other. As touched upon above, what warrants sanction will be gross and obvious - and such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it. However, by not finding such gross and obvious conduct, the court will not be condoning unedifying behaviour or shabby behaviour by one spouse towards another. It should not be necessary to say that any unedifying behaviour or shabby behaviour by one spouse towards another is wrong. A spouse, and anyone involved in an intimate relationship, is entitled to be treated with complete respect by the other partner.

29. That said, marriage, as other human relationships, is rarely perfect. Most couples seeking judicial separation or divorce will have strongly held and frequently legitimate views and opinions as to how and why the other spouse is at fault and to blame and did wrong - but misconduct must, according to the Authorities, be at the upper end of the scale before it becomes relevant to the court's deliberation in Divorce or Judicial Separation proceedings. The Court will return to this issue of misconduct and Authorities in the area when dealing with the specific allegations.

30. Section 20(1) refers to the requirement that the court in deciding whether to make certain orders under ss. 12-18 and S. 22 of the 1996 Act 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. Section 20(2) then lists certain matters which the court must have regard to. These will be dealt with in turn: -

- (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.**

The parties are in the fortunate position to have accumulated significant wealth. A D v D schedule was compiled by the parties' forensic accountants. There is a considerable measure of agreement between both sides in relation to the value of their respective assets and the combined value. There is disagreement concerning the value of the wife's shareholding in X Limited and the earning capacity of both spouses. There is also some disagreement in relation to the value of the family home – although there is no significant divergence on the valuations. As will be seen from the D v D schedule, the wife's assets are significantly more valuable than the husband's assets (after dividing the value of the family home equally between the parties). In this regard, the husband's assets on his own figures comprise of total net assets of €1.6m approximately and pensions of €0.6m approximately. The wife's estimation of the value of the husband's assets is in very close agreement with his. The wife's assets on the husband's figures are total net assets of €3.37m and pensions of €1.57m. The wife's assets on the wife's figures are total net assets of €2.76m and pensions worth €1.57m. This gives total matrimonial assets on the husband's figures of €5m (total net assets) and pensions €2.18m. The total matrimonial assets on the wife's figures are total net assets €4.34m

and pensions of €2.18m. The Pension values have increased somewhat in the latest valuations to €.66m and €1.6m.

The significant difference between the value of the assets relates to the tax treatment of the retained profits or accumulated assets in X Limited.

Of note also is the fact that the value of the accumulated assets or retained profits in X Limited as of 31st December, 2022 is expected to be €2.3m although this may be reduced by drawings of the wife from the company between now and then.

X Limited is the company set up as a result of the exit agreement entered into by the wife when she left her job. The exit agreement is also referred to as a termination agreement and evidence was heard to the effect that the monies paid to the company represent compensation for her loss of her job. The wife has drawn a salary from this company since her previous employment ended but substantial monies have accumulated in the company as retained profits. In her report the respondent's accountant (Ms. B) indicated that the projected funds in the company as at 31st December, 2022, when the payments cease, will amount to €2.3m. It was indicated in evidence however that the final payment to the company may be in November of 2023. In any event, it does appear that the projected funds after the final payment is made will be €2.3m.

The wife's current salary which she draws from the company is €180,000 per annum which is €8,325.75 net per month.

The husband's income for the year ended 30th September, 2019 was €158,810 with investment income of €2,815.00 giving a net income of €89,240.00 or a monthly income of €7,437.00. There was a significant drop in income in 2020 due to the impact of the Covid-19 Pandemic. His income recovered in 2021 and the draft figures contained in his accountant's report indicate that income received was within 10% or so of the income earned in 2019.

It is probable that the applicant will generate income going forward in the region of €150,000 per annum (gross).

He will be 60 years of age in 2022 and his current main contract is for a period of seven years and expires in 2024. There is no guarantee that he will be rehired. It is submitted on his behalf that if he is not rehired that this will have a devastating effect on his capacity to earn.

The court does not accept that the applicant's future income is in jeopardy. It is clear that the applicant is an experienced professional working in an area where there is work available to him past the normal retirement age should he wish to continue working. As a matter of probability the court is quite satisfied that he will secure work while he is willing and able to work.

The respondent's current employment situation is unusual. She is drawing a salary from the company. It is available to provide services to her previous employers by virtue of the termination agreement. Under the agreement the respondent must remain available to her previous employers if required to provide assistance. She can also carry out

certain other duties which would involve an extra payment. In addition to being available to her previous employers if required, the respondent must be available to give advice to the team and to certain departments of the business she previously worked for. She cannot take on other work unless her previous employers agree to it and she cannot work for competitors for the duration of the agreement. After the expiration of the six-year period of the agreement there is no continuing arrangement unless another specific agreement is put in place – and she simply has the status of a retired senior staff member of the business she previously worked for.

There was evidence from the managing director of the respondent's previous employers that there is demand for professionals with the experience and qualifications of the respondent and that it is a busy market.

It appears that the respondent did have one other job after leaving, for which she got permission from her previous employers, and which paid circa €10,000 per annum. The duration of this particular job is not entirely clear on the evidence.

The respondent also gave evidence that she has sought a position of a regulatory nature with another company. This position, if she obtains it, would apparently be paid at the rate of €200 per hour but the number of hours was not identified. The respondent did indicate that she did hope in future to apply for other positions.

The evidence of the managing director of the business she previously worked for was that the respondent was bringing in (or earning) over €1m for some of the years she was there. There was no dispute about the fact that her earnings in her former position were

very high and it appeared to be common case that her earnings were in the region of €1m per annum gross for some years at least before her retirement. Her Form 11 Tax Return Summary for Year of Assessment 2013 recites a Taxable Income of €1,267,571 and that for 2014 recites a Taxable Income of €1,125,813.

The respondent has been at the very top of her profession and has the capacity to obtain employment and earn a good income should she decide to work – and depending on the amount of work she decides to do. On any view of the evidence the respondent is in a position to earn an income equivalent to and probably greater than that of the applicant. It does seem probable that she will be in a position to command an hourly rate elsewhere in excess of the hourly rate available from the position with this other company she mentioned - in circumstances where there is a demand for professionals of her experience and the hourly rate which she was receiving whilst working for her previous employers was clearly greatly in excess of €200 per hour.

But even if she obtains work at €200 per hour for twenty hours per week her earnings will be equivalent to or somewhat above the income of the applicant.

It is also the position that the respondent is only 50 years of age and is nine years younger than the applicant.

The respondent's earning capacity in terms of what she is likely to have in the foreseeable future is greater than the applicant's. Her earning capacity at present is controlled by the Exit Agreement and is as set out above.

The court does accept that the work which the respondent was doing in her former position was arduous and that professionals working in such a position routinely retire in or around the age of 55. The court accepts that any future employment which the respondent may decide to take on is likely to be easier in terms of the nature of the work and the demands on her time – and for that reason will not generate anything like the income which she was in receipt of whilst working in her former position.

Overall however, when one looks at the income, the earning capacity, the property and the other financial resources which the applicant and the respondent have or are likely to have in the foreseeable future, one is driven to the conclusion that some provision requires to be made for the husband out of the wife's assets in order that proper provision be made for him.

(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 spouses or otherwise).

The applicant and the respondent do need to accommodate themselves in separate accommodation after divorce and they will need to finance their lifestyles and look after their children. It is the position that the combined assets are sufficient to allow for all of this provided that an adjustment is made by making some provision for the husband out of the wife's assets.

- (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.**

The position is that the family enjoyed a very comfortable but not extravagant standard of living before they commenced to live apart and before the proceedings were instituted. The resources available are sufficient to allow this to continue without either spouse suffering a diminution in their standard of living but this will require some provision to be made for the husband out of the assets held by the wife.

- (d) The age of the spouses, the duration of their marriage and the length of time which the spouses lived with one another.**

The parties were married in 2006 and are aged 59 and 50 years respectively. They did not reside together prior to the marriage and have lived apart since circa August of 2018 under the one roof - having started to sleep in separate bedrooms in August of 2018. The relationship broke down on a gradual basis after the respondent's illness in 2014. The marriage was certainly at an end by August/September 2018. While both spouses have continued to live in the family home since then they do so at sufferance. They live apart - using separate bedrooms and separate sitting rooms and avoiding one another.

- (e) Any physical or mental disability of either of the spouses.**

The respondent was diagnosed with a serious illness in March 2014 and she underwent prolonged treatment and then surgery in September 2014 followed by further treatment.

She gave evidence in relation to her treatment and the affect it had on her. She returned to work in late 2014/2015 but she suffered further ill-health in 2016. She had surgery in 2018. She received a payment of €600,000 from a critical illness policy in relation to the diagnosis of the illness and she received a further €100,000 critical illness payment towards the mortgage on her former home.

The evidence is that the respondent has made a good recovery. No medical evidence was called to suggest that the respondent is at present suffering from any physical or mental disability. That said, she has survived a significant illness and this and her history of ill-health is of some relevance. The respondent is legitimately entitled to take the view that she should take life easier in terms of the demands on her mind and body – and in particular insofar as employment is concerned.

The applicant enjoys good health.

- (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 contributions made by either of them by looking after the home or caring for the family.**

It is the position that each of the spouses worked outside the home and earned income from their work. They also worked at home caring for the two children and attending to the household chores. There was childminding help available in the early years. As

already stated, the wife earned substantially more than the husband but there was considerable teamwork involved. The husband's work flexibility and ability to be at home in the evenings before his wife, and to look after the children's needs when they were younger, allowed his wife to work the long hours demanded of her. The husband and wife played equally important roles but in different ways. It is the position that the main asset of the family is the family home. It is a valuable property worth in the region of €1.9 to €2m. It is also the position that the respondent provided most of the money to purchase and renovate the property. The property was purchased in June of 2013 and cost €1,310,000.00 together with stamp duties and legal fees totalling €21,894.00. A further €550,000.00 was spent on the refurbishment of the house. The respondent's accountant calculated that 88% of the purchase and renovation costs were contributed by the respondent. The remaining mortgage as of 31st August, 2021 was €159,842.00. A total of €1,818,803.00 has been identified as the amount of the repayments on the mortgage together with the direct expenditure, including the cost of the refurbishment. According to the accountant's report the respondent funded €1,601,648.00 which is 88% of the expenditure. €1,410,182.00 was funded directly and that is 77.5% with 10.5% funded by joint funds - €191,466.00. However, in referring to joint funds the respondent's accountant included as a joint contribution a payment of €250,000.00 which is more properly regarded as a contribution by the applicant. In this regard, the former family home was sold in 2014 and the net proceeds of €617,818.00 were lodged to the parties' joint household account. A sum of €250,000.00 was used to reduce the mortgage attaching to the new family home. However, the former family home was the property of the applicant. The court does not accept that the respondent had a beneficial interest in this property or in the proceeds of sale. The court is not persuaded by the respondent's evidence in relation to the acquisition of a beneficial interest through the

expenditure of money on improvements in the house. Indeed, the evidence in relation to such expenditure was very weak. The court does not accept that the respondent funded 88% of the expenditure on the house but the court does accept that the major portion of the expenditure was funded by her – probably close to 80%. To some extent this discussion in relation to the expenditure is unnecessary in circumstances where the house is registered in joint names and when it is agreed that each party is entitled to an equal share of the substantial equity in the house.

But the expenditure is relevant – not least because it does show a commitment in 2013/2014 in terms of the relationship which the applicant and the respondent enjoyed. The exercise also illustrates a substantial benefit which the husband has derived from his wife's income and assets. His share in the family home is one illustration of the benefit which the husband received arising from the teamwork in which he and his wife participated in as a couple.

- (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.**

In his submissions, the applicant says that there is no evidence to suggest that either spouse has suffered adverse effects on their earning capacity by reason of marital

responsibilities which they assumed during the period when they were living together. The respondent does not differ in this regard although pointing to the change in family life brought about by her illness and its consequences.

(h) Any income or benefits to which either of the spouses is entitled by or under statute.

There is children's allowance payable in the sum of €280.00 per month which the wife lists as part of her income in her affidavit of means of 27th October, 2021. According to the applicant in his submissions, historically this allowance would seem to have gone into savings. The respondent in her submissions refers to her being traditionally in receipt of the children's allowance which she says is in the sum of €234.00 per month.

Whatever the actual amount is, the children's allowance is not a contentious issue. The court will not interfere with the payment of the allowance to the mother in circumstances where the money is apparently going into savings for the children in any event.

The applicant indicates in his submissions that it would seem likely that each party may be entitled to old age contributory pension upon them reaching 66 years of age. No evidence was given in this regard. Whatever the position, it is not a source of contention between the parties.

- (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.**

The court will deal later with the specific allegations made by both parties – and in particular the allegations made by the wife against the husband.

The court is not satisfied that the respondent has proved any conduct on the part of the applicant which is such that this Court could or should conclude that it would in all of the circumstances of the case be unjust to disregard it.

No credible or convincing evidence was produced to prove that the husband is or was violent or a person whom the wife was in fear of. The court is satisfied on the evidence that the husband is a man with a short temper who has let himself down by losing his temper on a few occasions during the marriage. He ought not to have done so.

This court cannot determine who said what to the other in the heat of arguments, much less know the context for what was said. However, and importantly, the court is satisfied that the husband never assaulted his wife - nor did he ever make any real threat to do so.

It is necessary also to observe that the evidence proves that the husband and wife worked extraordinarily well together as a team until the wife suffered a serious illness. The marriage then ran into difficulty and failed quickly afterwards.

(j) The accommodation needs of either of the spouses.

This contentious issue concerning accommodation and the existing family home will be dealt with later in this judgment in greater detail. The fact of the matter is that the spouses are fortunate to have the resources which will allow both of them live in good accommodation suitable to their needs.

(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.

It is the position that the most obvious benefit which each of the spouses will lose by reason of the grant of a decree of divorce is the entitlement on death to a share in the estate of the other. Such loss is probably more significant for the husband than for the wife. This is because more of the assets are presently in her name than in his and in particular in the area of pensions where she has significantly more pension funds than he. Should she predecease him, it is likely that considerable lump sum payments would be made into her estate. The wife has suggested that 15% of her pension assets should be transferred to the husband but it is correct to say that this would still leave her with considerably more pension funds available to her than to him and in circumstances where he is likely to be drawing down on his pension funds much sooner than she will. It is also the position that she has more time available to her to build up further pension assets. In this regard, and although it was not explored in any detail, the managing

director who gave evidence did say that the company is an efficient pension planning vehicle.

The court is satisfied that a pension adjustment order is required as part of the making of proper provision for the husband.

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

No issue arises under this heading.

Section 20(5) provides that: -

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

The allegations of misconduct and the effect of misconduct

31. Irvine J., in *Q.R. v. S.T.* [2016] IECA 421 considered the issue of personal misconduct. At para. 55 of her decision, she observed:-

‘As to the type of personal conduct that might lead to the imposition of what has often been described as a financial penalty upon the offending party, the authorities advise that it is only conduct which can be described as “obvious and gross” that should result in either the imposition of a financial penalty or the denial of provision.’

32. In concluding her analysis of the caselaw on this point, at para. 58, Irvine J. stated: -

'Finally, the summary of cases in which personal conduct was considered material to the exercise by the court of its discretion, which is to be found in the decision of Burton J. in S v. S [2007] EWHC 2793 (Fam) at para. 38 would tend to suggest that conduct must be truly exceptional before it should be considered unjust to be excluded. These include, inter alia, cases where the husband attacked the wife with a razor, the wife shot the husband intending to endanger his life and where the husband's serious drink problem and disagreeable behaviour resulted in the forced sale of the family home and other serious financial consequences for the wife.'

33. It is worthwhile considering the *S v. S.* decision referred to by Irvine J.

Burton J. there observed: -

'Conduct.

37. It is common ground that for conduct to be taken into account in the assessment of financial provision/property adjustment, either by way of enhancement of the position of the 'innocent' party, or reduction or elimination of the entitlement of the 'guilty' party, such conduct must be exceptional. The statutory provision in s25(2) I have already set out in paragraph 22 above, namely by reference to subsection (g) that the court shall have regard to conduct " if that conduct is such that it would in the opinion of the court be inequitable to disregard it ". The exceptional nature of this course is referred to by Lord Nicholls in Miller at para 65, and again by Baroness Hale at para 145:

"It is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J. in Wachtel v Wachtel [1973] Fam 72 at 80 the conduct had been 'both obvious and gross' ... It is simply not possible for any outsider to pick over the events of a marriage

and decide who was the more to blame for what went wrong, save in the most obvious and gross cases. "

34. Burton J. gave an overview of the cases where such obvious and gross misconduct occurred, as follows, at para. 38: -

'I have been told by Counsel that there are only rare cases in the reports where this has occurred. I have been taken to what I believe must be all of them. The examples given include:

i) Armstrong v Armstrong [1974] SJ 579: wife shoots husband with his shotgun with intent to endanger life.

ii) Jones v Jones [1976] Fam 8: husband attacks wife with a razor and inflicts serious injuries: there are financial consequences (wife rendered incapable of working).

iii) Bateman v Bateman [1979] 2 WLR 377: wife twice inflicts stab wounds on her husband with a knife.

iv) S v S (1982) 12 Fam Law 183: husband commits incest with children of the family.

v) Hall v Hall [1984] FLR 631: wife stabs husband in the abdomen with a knife.

vi) Kyte v Kyte [1987] 3 AER 1041: wife facilitates the husband's attempted suicide.

vii) Evans v Evans [1989] 1 FLR 351: wife incites others to murder the husband.

viii) K v K [1990] 2 FLR 225: Husband's serious drink problem and "disagreeable" behaviour led to the forced sale of the matrimonial home and serious financial consequences to the wife.

ix) H v H [1994] 2 FLR 801: serious assault and an attempted rape of wife by husband: and financial consequences because the consequent imprisonment of husband destroyed his ability to support her.

x) A v A [1995] 1 FLR 345: husband assaults the wife with a knife.

xi) C v C (Bennett J. 12 December 2001 unreported): wife deliberately drugged husband to make him very sleepy and then while he was in a somnolent state placed a bag over his head, which she held in such a way that the husband could not breathe. Although it was found that the wife did not have an intent to kill, Bennett J. concluded that the husband did believe that she was trying to kill him, and that her aim was to make him so believe.

xii) Al-Khatib v Masry [2002] 1 FLR 1053: husband guilty of "very grave" misconduct in abducting the children of the marriage in contempt of court.

xiii) H v H [2006] 1 FLR 990: very serious assault by husband on wife with knife, leading to 12 years imprisonment for attempted murder and with financial consequences, namely destroying her Police career.'

35. The above reference to the law in this area is a necessary backdrop to a consideration of the allegations of misconduct made in this case because it illustrates the gravity of the conduct which courts have held warrants sanction, whether described as "truly exceptional" or "gross and obvious". It is probably an understatement to describe the above examples of such misconduct as very serious misconduct.

36. However, before one arrives at the point of making a decision on alleged Misconduct, it is of course necessary to see what facts have been proved as a matter of probability.

37. The respondent sets out details of alleged violence and cruelty by the applicant towards her in an affidavit sworn on 6th January, 2021 which is the grounding

affidavit in her application for a decree of judicial separation. She refers back to these details in her replying affidavit in the divorce proceedings which was sworn on 6th May, 2021 and confirms that the earlier affidavit represents the truth of her experiences at his hands. In the later affidavit she refers again in detail to the alleged assault in the family home after midnight on 2nd November, 2020.

38. Essentially the respondent alleges that she has been subjected to threats of violence, assaults and abuse at the hands of her husband during the marriage.

39. Although focussing on the incident in the parking lot and the incident in the family home in November of 2020, the wife did stand over the other allegations made in the affidavit when giving oral evidence.

40. The wife said that the husband threatened her during an Easter holiday in April of 2010. She says that he physically threatened her again on 5th June, 2014 which was during the treatment of her illness. There was also evidence given in relation to an incident in the hospital in July 2014 when the wife alleges the husband had been abusive and behaving inappropriately in the hospital ward and that this caused her considerable upset, distress and anxiety. In relation to this particular incident it appeared from the evidence that the husband got angry and irate when he discovered that the magazine which he had purchased in the shop did not contain the gift or enclosure which should have been with it. This behaviour on the part of the husband understandably caused the wife to be taken aback and an argument between both ensued. The evidence did not establish that the husband was abusive towards his wife when that incident occurred but did show that there was a row and words exchanged between both.

41. Insofar as the April 2010 and June 2014 alleged threats are concerned, the husband replied to these allegations in the affidavit which he swore in the judicial separation proceedings on 24th May, 2021 and he stood over his reply when giving

evidence. He denied subjecting his wife to verbal and emotional abuse, mental cruelty and demeaning behaviour and he denied the accusations made against him. In addition, he said that it was he who was subjected to abusive behaviour by his wife and in that regard he averred that she had physically assaulted him on more than one occasion during the marriage. He denied that he subjected his wife to threats of violence and temper rages in the manner alleged, or at all. He denied that he threatened his wife as alleged in April of 2010 or otherwise.

42. In evidence the husband denied making any threats to his wife but did acknowledge wrong behaviour in the parking lot and in the family home in November of 2020 (and these incidents will be dealt with separately below).

43. The wife also alleged that the husband, during another tirade of abuse, threatened her with physical harm. The context of this incident, according to the wife, was verbal abuse being received by her in 2016 about her leaving her job.. This allegation, like the earlier allegations, was stoutly refuted in evidence by the husband. It is however clear that the husband was not happy about his wife leaving her job because it was such a highly paid position and he also felt that the decision was made without his participation. This did lead to heated argument between both.

44. In considering the allegations of misconduct the court has looked at all the evidence presented and has had the benefit of listening to the sworn evidence of both parties.

45. In so far as the alleged threats and alleged violence by the husband towards the wife are concerned, there was no independent or supporting evidence and the evidence produced was not persuasive.

46. Insofar as the alleged threats in April 2010 and June 2014 are concerned, they are simply not proved.

47. Turning then to the two more detailed incidents. In her affidavit the wife describes the incident in August of 2018 and says that she and her husband were in the car in August of 2018 on the way back from a holiday: -

“...when the respondent assaulted me in front of our children. The respondent hit me and physically dragged me from the car in a restaurant carpark. The respondent’s behaviour was erratic and irrational and he was unconcerned that the incident had happened in front of our children. I say that we separated in August 2018 after this incident.”

48. In evidence the wife described how her husband had come around and pulled her out of the car and “drove the car off at high speed with the children in it.”

49. In replying to his wife’s affidavit the husband dealt with this incident (in his affidavit sworn on 24th May, 2021) as follows: -

“I also refute the accusation that I assaulted [my wife] in August 2018 in the manner as alleged. However, I admit that a verbal altercation between [my wife] and I occurred at that time. we were returning from a holiday ... my wife drove my motor vehicle on the journey home. When we stopped for some food at a restaurant which had once been a petrol station, and which I was familiar with, I asked my wife to park the car in an area which would have avoided the location where the fuel pumps had previously been in order to avoid any potential damage being done to the car. My wife refused to do so, and when I asked her to vacate the motor vehicle to allow me to park the car, she would not do so. At this point, I became annoyed at my wife’s actions and regrettably, I raised my voice to her. The children became upset and I quickly got them out of the car, and we entered the restaurant without my wife. For the avoidance of doubt, at no point did I hit or drag my wife from the car as alleged

by her. Contrary to what has been alleged, I say that I deeply regretted losing my temper in the presence of the children. It is admitted that we separated in August 2018 and commenced residing in separate bedrooms”.

50. In his oral evidence the husband went on to say that his wife actually parked the car and he vehemently denied that he assaulted her or pulled her out of the car. The husband acknowledged in evidence that he was at fault in relation to the incident and said he was stupid in doing what he did and in particular by yelling at his wife to get out of the car.

51. Thus, there is no doubt but there was an incident in the parking lot nor is there any doubt that the husband’s behaviour was unacceptable and wrong. He should not have lost his temper and he should not have shouted at his wife. However, the court is not persuaded by the wife’s evidence in relation to the alleged assault and did not find her evidence credible in this regard. In fact, the court is satisfied that the wife sought to embellish the incident which did occur with a view to supporting the narrative which she wished to convey to the effect that her husband did in fact assault her during the marriage and was/is a violent person whom she fears.

52. Before turning to the incident which occurred on 1st November, 2020 the court will deal with the alleged punching incidents. In her affidavit the wife says that the respondent punched her in the back on 23rd September, 2020 when she was getting the children ready for school and that he refused to moderate his behaviour in front of the children.

53. In his evidence to the court the husband said that his wife had hit him years before on two occasions but that he never hit her. In his affidavit which was sworn on 24th May, 2021 the husband averred at the end of para. 20 that his wife “physically assaulted him on more than one occasion during our marriage”.

54. Insofar as these allegations and cross allegations of assaulting one another are concerned there was no reliable or persuasive evidence before the court to persuade it that any such assaults by the husband or by the wife did occur.

55. Some time was also spent at hearing in relation to the events of 1st of November, 2020. In her affidavit of 6th January, 2021 the wife referred to that incident as follows at para. 26: -

“My husband assaulted me again on 1st November, 2020. He threatened to throw me down the stairs. He then proceeded to push me into a corner. I fell to the ground and he stood over me screaming at me to get out of the house. He used foul language and threatened to go into my bedroom. I was terrified and I called the gardaí. I say that I obtained an ex parte Protection Order against him on 2nd November, 2020 in the District Court. He has appealed this decision. I say that I am in constant fear of my husband and his next outburst.”

56. The wife swore an Information on 2nd November, 2020 before the judge of the District Court under the Domestic Violence Act of 2018 in support of her application for a Protection Order. The sworn information in support of the application is set out in the Information as follows: -

“[My husband] has been threatening to physically harm me and he has gotten worse this year. Since Covid has started his behaviour has got more erratic the threats are more often. We are in the process of separating. Last night I went to speak to him and [he] said he didn't want to talk and told me to get out. He asked me did I want him to pull me out and did I want him to throw me down the banister and stairs. He pushed me into the corner of the room and I was on the ground and he stood over me shouting at me to get out, get out. He said I was only crying so the kids would be scared. The kids were in bed. He said I

shouldn't have gone into his room and I said it wasn't his room. He said I never come into your bedroom but I will go into your bedroom in future and he told me to fuck off. I called the guards as I was afraid of him and what he might do to me and didn't feel I was safe."

57. The Protection Order which was granted by the District Court on foot of the Information sworn by the wife prohibited the husband from using or threatening to use violence against, molesting or putting in fear the wife, and granted a return date for a summons for a Safety/Barring Order against the husband returnable to 12th March, 2021.

58. By letter dated 10th March, 2021 the husband's solicitors wrote to the wife's solicitors as follows: -

"Dear Madam,

We refer to the above and to the application listed in the District Court on the 12th inst.

In respect of same, we are making the following proposal on a without prejudice basis, in order to resolve the matter.

1. That the matter is adjourned on continuing order for a period of three months to enable negotiations to take place with a view to resolving issues and agreeing terms of separation.

Or, in the alternative:

2. That our client will consent to a Safety Order being put in place, for a period of six months.

Our client does not accept that there is any basis for your client's application to the court but is prepared, on a without prejudice basis, to agree to either of the foregoing in the interest of progressing matters herein."

59. By letter dated 11th March, 2021 the solicitors acting for the wife responded as follows: -

“Dear Colleague,

Further to your letter of 10th inst. and subsequent discussions between counsel we confirm agreement that a Safety Order against your client will now issue by consent which will be valid until 12th October, 2021.

The District Court application will therefore be concluded on this basis tomorrow when our junior counsel will attend to advise the court accordingly.”

60. It is necessary to pause here to state the obvious. The Protection Order was granted on foot of an Information sworn by the wife and on an *ex parte* basis. There was no hearing *inter partes* in relation to the incident alleged and this was because there was a without prejudice compromise on the terms outlined above.

61. Submissions on behalf of the wife at p.7 of the written submissions dated 17th December, 2021 dealing with the conduct of each of the spouses state as follows:

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“The [wife] gave evidence of a number of incidents of physical abuse of her by [the husband] over many years, prior to and during her illness, including incidents which took place in front of the children. The matters were stoutly denied and challenged by [the husband]. This much however is clear and undisputed: - The [wife] obtained a Protection Order ex parte in the District Court on 2nd November, 2020. The [husband] appealed this decision but did not proceed with the appeal. The [wife] was granted a Safety Order against the [husband] by the District Court in March 2021. The [husband] consented to the Safety Order being granted.

It is submitted that the evidence bears out the [wife's] complaints that the [husband] was emotionally, and often actually, unavailable to her at the time of her acute medical crisis that he was intolerant of her illness; that he was, and remains, opposed to the scheme of arrangement negotiated with her former employers and utterly unsympathetic to her wish to mind her health and mind her two young children and give them everything she could for as long as they needed it.

More concerningly, it is clear on the evidence that the [wife] is, and remains, afraid of the [husband] and that she has objective justification for that fear."

- 62.** Insofar as this submission is concerned, the court is satisfied that: -
- (a) Both of the children are well adjusted and well cared for children who are extremely attached to both parents and doing well. Their attachment to their father and his ongoing close involvement in their lives since birth is completely at odds with the suggestion that he is an abusive and violent husband and that they have been witness to such behaviour.
 - (b) The attempted reliance on the Protection Order granted on an *ex parte* basis, and the Safety Order which was granted on consent and on a without prejudice basis, is misconceived and if anything serves to illustrate the weakness of the evidence available to support the allegations of gross and obvious misconduct.

- 63.** In his replying affidavit dated 24th May, 2021 the husband deals with the incident which occurred on 2nd November, 2020 as follows: -

"...it is accepted that [my wife] sought and obtained an ex parte Protection Order against me before the District Court on or about 2nd November, 2020 arising from an incident which occurred on 1st November, 2020. However, I say

that the details of the incident as provided by [my wife] are misleading. While I accept that I did push [my wife] which is deeply regretted by me, it is denied that I threatened to throw her down the stairs or that I stood over her screaming to get out of the house in the manner as alleged or at all. I say that on that day [my wife] had informed the children that we were separating. I say that this was done in my presence but without any consultation with me prior to this announcement being made by [my wife]. I say that I was dismayed with [my wife] about this as I understood that we previously agreed that we would not say anything to the children about separating until such time as issues between us were more defined and then we would have something specific to say to the children. Later that evening, while I was working in my office, which is located in the attic, and after the children had gone to bed and were asleep, she came up and stood in the doorway of my office. She started complaining about the slow pace of our separation. I informed [my wife] that I considered it best if all further communications in relation to our separation were conducted through our solicitors. [My wife] refused to drop the subject matter. I repeated the fact that I was not going to discuss the matter with her any further and requested her to leave the office as I was in the middle of preparing my workload for court the following day. At that juncture [my wife] refused to leave and regrettably, I started to push her out of the room. She resisted. I, therefore, stopped and as I did so she fell to the floor. I very much regret my actions and the way in which I handled the situation. However, this was an isolated incident and I did not intend to cause nor did I cause any injury to [my wife]. I say and believe that [my wife] deliberately came to the home office with a view to provoking an argument with me, and she has manipulated the truth of the said incident for

her own personal advantage. I do not believe that the said incident constituted sufficient grounds for the making of the said Protection Order. I say that on the return date before the District Court, and the Safety Order application that I agreed to a Safety Order being put in place on very specific terms which had been agreed between our respective solicitors.”

64. In her evidence in court the wife explained that she had gone up to the study that night late to get the dog and to talk to her husband about the incident which occurred earlier. The conversation commenced, according to her, by her saying “is this where he is” – *i.e.* the dog. Then she said that she wanted to talk to him about the incident earlier – but he did not. He then threatened to throw her down the stairs to which she replied “you got to be kidding”. He then started to complain about the case as he had to prepare an affidavit of means and had so much work to do. The wife then gave evidence that he pushed her into the corner on the ground and “he was hitting me” to which she was reacting by calling on him to “stop, stop, stop, stop, stop”. When it was put to her that she would not have contemplated going up to the attic office if she was terrified of her husband she said that she made the choice and paid a heavy price for doing so.

65. She went on to say that she got up and left and he was then talking to her – a normal conversation had resumed.

66. The wife was cross-examined in relation to the Information she swore concerning the incident. She was cross-examined about the fact that she had not detailed previous physical assaults. The wife dealt with this by indicating her view that it was a summary of the position and that the lady she had been speaking to had asked her to pick one occasion – that is the lady who typed up the Information. After it was typed up the Information was shown to the wife but she thought that she could give more detail at a later stage.

67. As far as the sworn Information is concerned, the court does accept that it is in the nature of a summary of the position and it would be unreasonable to expect para. 2 to recite a full history of older events. However, a noticeable and inexplicable omission from the Information [and indeed from her affidavits] is the allegation that her husband hit her during the incident and that she was shouting at him to stop. If indeed the husband did hit his wife, then this Court is satisfied that the Information sworn the following day would have referred to the fact that he did so.

68. In his own evidence concerning the incident the husband said that he was preparing his work late that evening/night in his attic office. He recollected being on his knees getting something out of a box when his wife came in – even though she knew it was his area of work. He said he knew something was going to happen after the incident at lunch when his wife told the kids they were getting separated. He said that his wife was pressing him to issue proceedings but that he wanted to stay in the house to be with the kids. He said she was at the door and was giving out that things were not progressing and he told her that he did not want to talk about it. He asked her to leave. She refused. Voices were raised. He attempted to push her out and was stupid to do so. He pushed and she stopped pushing and she fell over [this differs somewhat from his averment on affidavit where he said he stopped pushing]. She then left. He went back to work. Sometime later he went down to put the bins out and he saw that there were two guards with his wife in the kitchen. He said that it was his belief that his wife deliberately came up to incite a row for the purposes of escalating a fractious relationship and that she had succeeded in doing so and called the guards.

69. In relation to what he is alleged to have said the husband stated that he had said to his wife you'd love me to threaten you and throw you down the stairs and she changed that to the version in the Information.

70. The husband said that he suspected that his wife was recording at the time but that she did not hand the recording over. He acknowledged that this was a mere suspicion on his part. However, the husband did describe a subsequent incident which occurred in the family home about six months prior to the hearing. He gave evidence that he was sitting at the island in the kitchen having a cup of tea. His wife's jacket was hung on a chair and her phone was there. He looked at it and the voice memo was running/recording on the phone although she was not in the house. His wife walked in on him as he was looking at the phone and he asked her what she was doing. He said she was flustered and said to him "you tried to set me up with the guards". He understood this reference to be in relation to his wife thinking that he had recorded the incident in the attic. He says that he thinks she felt that this might have been so because he did record the conversation which he had with the guards in the house on the night in question. He said his wife became aware of this recording of his conversation with the guards because he lent his iPad to his daughter B and the recording was on it. He went on to say that he did not have time to record the incident in the attic because he was on his knees on the floor searching in a box for something when his wife arrived up and his phone was on the desk.

71. It appears from the evidence of the husband that his wife did not have any confirmation that the incident in the attic was not recorded by him until he gave his evidence in that regard during the hearing and before she gave evidence.

72. It will be seen from all of the above that allegations and descriptions of incidents occurring between one spouse and another in high conflict family law litigation can become complex, tangled and involved. As it frequently boils down to one person's word against another without any corroborating evidence a court is very

often dealing with an allegation and a flat denial. It must form a view on the reliability and credibility of competing testimony.

73. Insofar as the incident in the attic is concerned, the court does not find the wife's version of events credible. The court is satisfied that the wife did go up to the attic that night and did remonstrate with her husband about the lack of progress in the separation - and did this with the intention of doing so. She would not have done so if she was a woman in fear of a violent and threatening husband particularly after the incident which had occurred earlier in the day. Her version of events in relation to what occurred is an embellished version. The husband did respond to her unwelcome presence in the wrong way. He pushed her and she did fall over as a result of that pushing. However, he did not strike her nor did he intend to assault her or harm her. Instead, there was an altercation and confrontation between two strong willed and determined individuals. The husband was determined to hold his ground and stay in the family home. The wife was determined to get him out and to find a basis for doing so.

74. In terms of what took place in the attic, the husband should not have used any physical force against his wife no matter what provocation he felt. He ought to have stepped back and exercised restraint as a mature adult. It is little comfort to his wife that the husband is ashamed of his behaviour in the parking lot and in the attic.

75. Taken together, this Court is satisfied that the alleged misconduct during the marriage would if proved constitute misconduct which would trigger sanction under Section 20(2)(i). Such threats and domestic abuse cannot be ignored or tolerated.

76. However, the wife has failed to prove the serious allegations which she has made that the husband has been threatening or violent or abusive to her or that she has been in fear of him. The evidence simply does not prove the type of gross and obvious conduct which is, according to the Authorities, that contemplated by Section 20(2)(i).

The company

77. The exit agreement which the wife negotiated with her former employers where she was in a senior position involves a termination agreement with her providing services to the business through the company known as X Limited. The agreement negotiated is apparently similar to that negotiated and entered into with other senior staff who retire. Under the agreement the wife retired and in return is to receive a specified sum for six years – beginning in 2017 and running until 2022 inclusive. X Limited was incorporated as the entity that was to receive these profits. The wife owns 100% of the company. She qualified for the arrangement due to her illness and was able to avail of the early retirement due to sickness provisions contained in her contract.

78. The company receives the funds arising from the exit arrangement and an annual salary is payable to the wife and has been drawn from these funds. It is stated that this will continue to be the case. The retained profits/net assets of the company as at 31st December, 2020 was €1,435,241.00. The estimated value of the net assets as at 31st August, 2021 is €1,832,320.00. If the wife withdraws this money from the company her accountant says that the funds would be subject to income tax. It is the after-income tax amount which the wife asserts is the value of the retained profits/net assets in the company.

79. The projected funds in the company as at 31st December, 2022 when the payments cease will be €2.3m according to the wife's accountant. She says that this is sufficient to provide the wife with a continuing salary level of €164,286.00 for the following 14 years until she reaches retirement age.

80. The husband's accountant's report applies a capital gains tax rate to the funds in the company. Capital gains tax would be applicable in the event of a *bona fide* liquidation. If the company was to be liquidated the exit agreement would terminate

and no further payments would be made to the wife/the company. The wife says that it is her intention for the company to continue to provide an income for herself into the future given that the exit agreement income will cease in 2022. Her accountant says that capital gains tax is not the appropriate tax to apply in circumstances where no liquidation is envisaged.

81. Thus, the difference in value attributed by the wife's accountants to the value of the shareholding and that attributed by the husband's accountant depends on the actual taxation treatment which will apply to the extraction of the funds from the company.

82. In evidence the wife's accountant asserted the view that the income tax rate would be payable on all the money which was extracted. The husband's accountant was of the view that when the consulting arrangement with the previous employers ends the company could be wound up and that capital gains tax would be payable at the rate of 10% on the first million euro and 33% on the balance of the monies to be extracted. The husband's accountant was of the view that entrepreneur relief (10% rate on the first one million) would be available if the company was wound up as it is a trading company.

83. There was agreement that if monies are extracted at the present time then the appropriate tax to apply is income tax. There was also agreement that if the company was wound up then the capital gains tax rate would be that applicable to the distribution of the assets. The wife's accountant was not as optimistic as the husband's accountant that entrepreneur relief would be available on the first million of assets. However, she did accept that there was nothing within the relevant Irish legislation which expressly excluded or prohibited the claim for such relief. She was concerned on

the equivalent taxation provisions in England and how the Revenue authorities in that jurisdiction had approached such claims.

84. On behalf of the husband it is asserted that the value of the wife's interest in the company in the foreseeable future is the sum of €2.3m minus the deduction of tax at whatever rate the court considers is appropriate, having regard to the professional evidence which it has heard.

85. Insofar as the submissions are concerned, the court is of the view that: -

- (a) Having regard to the terms of the agreement it is correct to view any further payments to the company until the agreement ends as the wife's income or almost all of her income between now and the end of the agreement. Meanwhile, the husband will also be earning his income.
- (b) In all these circumstances the court will adopt the above figure of €1,832,320 as of the 31st. August 2021 as the retained profits/assets in the company on which any division of assets should be based.

86. The exit agreement is clearly carefully thought out and structured from a tax point of view. On the evidence it is clear that the wife will have the option of liquidating the company and availing of the capital gains tax rate on the distribution of the assets in the company following the expiration of the agreement.

87. As a matter of probability, the court is satisfied that the wife will opt for the most tax efficient method of protecting the value of the retained profits/assets in the company when the agreement ends. It is probable that the company will be liquidated and that capital gains tax will be paid on the retained profits/assets.

88. Having heard the evidence of both accountants and of the parties the court is not in a position to say with certainty whether or not entrepreneurial relief will be claimed. However, the wife is cautious in her business dealings and is more likely to be

cautious in her approach to taxation when liquidating the company than not. In the context of the terms of the termination agreement involved and the nature of the services provided and work done by the wife for her previous employers pursuant to the agreement, or lack thereof, the court is of the view that claiming entrepreneurial relief would amount to an aggressive strategy in terms of the tax treatment involved and is not something which a risk averse person like the wife would contemplate. The court is satisfied that the correct approach is to allow for the deduction of tax on the figure for retained profits/net assets of €1,832,320.00 as of 31st August, 2021 at the rate of 33%. On that basis the value of the retained profits/assets for the purpose of a division of assets exercise is €1,832,320.00 less capital gains tax at 33% which is €1,228,000.00.

Decision

89. The Court is satisfied to grant a Decree of Divorce under Section 5(1) of the Act and pursuant to Article 41.3.2 of the Constitution.

The children

90. As already stated, both children are much loved by and very attached to both parents. The report of X speaks for itself. There will be an order for joint custody of the children with a shared parenting regime in place and in accordance with the suggestions of X. There should be an element of flexibility built into the arrangements in circumstances where the father will require some flexibility of arrangements on occasions by reason of work commitments. In this regard, the evidence before the court suggests that the father intends to acquire and to have a home in proximity to the mother's home so flexibility of arrangements ought not to be difficult. Furthermore, the father's evidence is that his sister and her husband (both retired) are willing and able to assist him on occasion in relation to child care arrangements. This facility of family

support will assist in providing any necessary flexibility in circumstances where the relationship between the children and their extended family is to be fostered and encouraged. Likewise, the arrangements should have an inbuilt flexibility for the mother. Again, the evidence is that she has family support available to assist and it is again important that the relationship between the children and the extended family on the mother's side be fostered and encouraged. Agreed holiday arrangements ought to provide enough flexibility and opportunity for the children to meet relatives who reside some distance away. It is also expected that both parents will be able to agree on additional flexibility on some weekends if the children are "down the country" on a knock for knock basis.

91. The parents are to share equally the education, health, extra-curricular and ordinary costs of bringing up children. Each parent will obviously be responsible for looking after the children and their needs whilst in their care.

92. The court will direct both sides to reduce an agreement in relation to child care to writing in accordance with the suggestions of X and the court will, if necessary, decide on any issue in dispute in that regard (and will also grant liberty to apply as part of the court order).

93. In addition, the parties are encouraged to agree on a facilitator as the first port of call in the event that an issue arises in relation to childcare arrangements.

The Family Home

94. The family home is in a good location and underwent a full renovation project in 2014 after it was purchased – which included a contemporary extension to the rear and an attic conversion. The substantial expenditure on the renovation project

is dealt with above. The valuer for the wife values the property at €1.9m and the valuer for the husband values the property at €2m.

95. The current mortgage on the property is circa €160,000.00. It is slightly less than that figure.

96. This Court determines the value of the property at circa €1.96m and determines the net value after the mortgage is paid off at €1.8m.

97. Arrangements to sell the house were at an advanced stage in mid-2021 at a price of €1.87m. This sale ultimately fell through in circumstances where the husband felt that they would do better by going to the market as opposed to proceeding with a sale to the purchasers who had made an off-market offer. Although a willing participant with her husband until the time he changed his mind, the wife decided, after he changed his mind, that the family home would be sold only if and when a judge might so direct (letter dated 6th July, 2021 from the wife's solicitors to the husband's solicitors).

98. The husband's preference is that the house be sold and that the proceeds of sale be split equally between he and his wife. The husband is optimistic that the property would fetch €2m on the open market – and possibly more. The wife has now decided that she wishes to remain in the family home and she is prepared to pay the husband €900,000.00 for his interest in the family home and indemnify him in respect of the mortgage.

99. Insofar as a proposed sale of the family home is concerned, the court is of the view that: -

- (a) The family home was created as it currently exists at significant cost. It would be foolish to have the house sold on the open market when the professional advice is that the price likely to be achieved is not much more than the actual cost.

- (b) A sale on the open market would involve disposal costs which should be avoided if possible.
- (c) A sale on the open market would have the effect of sending both parents out into the market where they would compete with one another (and others) for any houses available on the market. Indeed, there is a possibility that the parents would each endeavour to buy the family home – although it seems more likely that the wife would try to buy it than the husband (having regard to their age and available resources).
- (d) It is sensible that the two girls have the benefit of one familiar house.
- (e) It would be unfair to ignore the fact that the wife contributed most of the costs of acquisition and restoration of the family home.
- (f) On balance, the court will direct that the wife buy out the husband's interest in the family home for the sum of €900,000.00. For the avoidance of doubt, she is also to be responsible for the mortgage on the property and is to indemnify her husband in that regard. The transaction and the payment of the sum of €900,000.00 by the wife to the husband is to be completed within six weeks of the date of this judgment.

100. An inventory of the contents of the family home is included in the papers.

The contents of the family home are to remain in it and belong to the wife save for: -

- (1) The contents of the attic office which the husband is entitled to.
- (2) The husband's personal belongings.
- (3) Any specific item or items listed on the inventory which is and can fairly be described as being of extra special sentimental value to the husband.

For the avoidance of doubt, the court's decision is that most of the contents listed on the inventory are to remain in the family home. The court is taking into consideration

in fashioning the overall provision to be made for the husband the fact that the contents do have a value although no evidence was given as to the actual value.

Pension

101. By Agreement of the parties a Report on the Pensions, authored by a Consulting Actuary and dated 25th January, 2022, was provided to the Court on 28th January, 2022. The court considers it proper having regard to all of the circumstances that a pension adjustment order or orders are required in favour of the husband. The court considers it proper to have the pensions of both equalised. In this regard the wife's pensions are now worth €1,600,949.00. The Pensions of the husband are now worth €659,998.00.

102. The court will make a pension adjustment order/orders directing that the Pensions of both parties be equalised. The Consulting Actuary states that this would be achieved by giving the husband a 29.4% share of the wife's total pension funds which is about €470,476.00. Again, the court will grant liberty to apply so that the appropriate pension adjustment order(s) can be made in that regard if not ready for ruling now.

Lump sum

103. In order to buy out her husband's interest in the family home the wife will have to arrange finance or use her savings and investments along with some drawings from the company and/or additional finance. However, her assets are substantial and her financial position is secure. The court considers that it is proper to make a lump sum payment order in favour of the husband having regard to the total assets in the wife's hands after the orders referred to above. In this regard and having considered the evidence the court will direct that the wife pay to the husband a lump sum of €280,000 on or before the 31st day of January, 2024.

104. The wife is to retain sole ownership of the apartment abroad and the parties are to retain their other assets save as provided for above.

Legal costs

105. This Court is alert to the fact that both parties have incurred substantial legal costs. The court will, if necessary, hear submissions in relation to costs. However, it is the present intention of the court to direct that both parties bear their own costs and it will need to be persuaded that a different approach ought to be adopted.

106. It is the intention of the court to grant mutual blocking orders along with an exclusive right of residence to the wife in respect of the family home and the court will hear submissions in relation to any further consequential orders sought and decide in that regard in light of the submissions made in the event of a dispute.

107. Any subsequent application to the court under a liberty to apply provision will be dealt with on its merits and may result in an order for costs being made in respect of that application against one of the parties if the court finds such an order appropriate.