Record No. HM 2023 158

[2024] IEHC 126

THE HIGH COURT

FAMILY LAW

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

BETWEEN:

E.D.

APPLICANT

AND

C.K

RESPONDENT

Judgment of Ms. Justice Nuala Jackson delivered on the 16th February 2024.

INTRODUCTION

1. The social evil of domestic violence has long been recognised by the legislature and the courts in Ireland. On a national level, legislation providing for specialised and focussed reliefs in this context has been on the statute books since 1976. The Supreme Court in ***DK v. Crowley*** [2002] 2 I.R. 744 called out this social evil[1] and, furthermore, recognised the Constitutional status of the rights of Applicants and children in these circumstances to be protected.[2] On an international level, Ireland ratified the Istanbul Convention on the 8th March 2019, having signed this Convention on the 5th November 2011. The

[1] Keane J., p. 758.

[2] In the context of the examination of interim barring orders under the Domestic Violence Act, 1996, Keane J. stated: *"While the Oireachtas in upholding other constitutional rights - in this case the rights of spouses and dependent children to be protected against physical violence - is entitled to abridge the constitutional right to due process of other persons, the extent of that abridgement must be proportionate, i.e. no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated (see Heaney v. Ireland [1966] 1 I.R. 580)."*

Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.V.2011 clearly states:

> *26. The drafters wished to emphasise that violence against women seriously violates and impairs or nullifies the enjoyment by women of their human rights, in particular their fundamental rights to life, security, freedom, dignity and physical and emotional integrity, and that it therefore cannot be ignored by governments. Moreover, they recognised that violence affects not only women adversely, but society as a whole and that urgent action is therefore required. Finally, they stressed the fact that some groups of women, such as women and girls with disabilities, are often at greater risk of experiencing violence, injury, abuse, neglect or negligent treatment, maltreatment or exploitation, both within and outside the home.*
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> *27. In addition to affirming that violence against women, including domestic violence against women, is a distinctly gendered phenomenon, the signatories clearly recognise that men and boys may also be victims of domestic violence and that this violence should also be addressed. Where children are concerned, it is acknowledged that they do not need to be directly affected by the violence to be considered victims but that witnessing domestic violence is also traumatising and therefore sufficient to victimise them.*

2. The Domestic Violence Act, 2018 ("the 2018 Act"), the statute under consideration in this judgment, is reflective of the State's acknowledged commitments under this Convention. Perhaps the position is most eloquently stated by Barrett J. in ***X v Y*** [2020] IEHC 525:

> *"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."

3. The courts have also been clear in recognising the nature of the suite of potential remedies, in particular the indicia of barring orders, available to a court dealing with domestic violence issues. This was considered by the Supreme Court in ***O'B v. O'B*** [1984] I.R. 182 and in ***DK v. Crowley*** (above) and by the Court of Appeal in ***NK v. SK*** [2017] IECA 1. In ***O'B***, O'Higgins CJ referenced the potential outcomes from a breach of a barring order:

> *"Once a barring order is made the barred spouse commits an offense and may be imprisoned for six months if he or she contravenes its terms."*

Based on these outcomes, the Chief Justice concluded:

> *"These consequences indicate that the making of such an order requires serious misconduct on the part of the offending spouse – something wilful and avoidable which causes, or is likely to cause, hurt or harm, not as a single occurrence but as something which is continuing or repetitive in its nature."*

McCarthy J. also referenced the seriousness of the relief involved:

> *"... the gravity of the circumstances warranting the making o f a Barring Order are borne out by ss. 5, 6 and 7; the Gardai must be notified "as soon as practicable" of the making of the Order; a spouse who contravene the Order is liable to a term of imprisonment; and, perhaps most critically important, such spouse is liable to arrest without warrant when there is reasonable cause for believing that such spouse is committing an offence under section 6. The breadth of these provisions, bringing within the range of the criminal law with all its dire consequence what might well be innocent or, at least, trivial acts or omissions, emphasize in the most positive way the gravity of the circumstances necessary to warrant the making of a Barring Order."*

4. It must, of course, be remembered that many of these consequences attach to a safety order also. Indeed, the primary difference between these two reliefs is that one removes the Respondent from a particular place, usually a place of residence or family home, or directs staying away from such place. While the ***DK*** case involved an interim barring order, granted on an *ex parte* basis, there are *dicta* therein relating to the very serious nature of the relief involved. Keane CJ referenced the constitutional rights which are engaged, with regard, in particular, to the right to fair procedures in the context of an *ex parte* order. Of more general import, however, he stated:

> *"While the Oireachtas in upholding other constitutional rights – in this case the rights of spouses and dependent child to be protected against physical violence*[3] *– is entitled to abridge the constitutional right to due process of other persons, the extent of that abridgement must be proportionate, i.e. no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated (see Heaney v Ireland [1996] 1 I.R. 580). In reaching a decision as to whether that constitutional balance has been achieved in the legislation under consideration, it is of paramount importance to bear in mind the consequences of the order made. Thus, in the present case it results in the forcible removal of the Applicant from the family home and the society of his child on the basis of allegations in respect of which he has no opportunity of being heard, treats him as having committed a criminal offence resulting in a possible custodial sentence in the event of his non-compliance with the order and makes him liable to arrest by a garda without a warrant if the latter entertains a reasonable suspicion that he has failed to comply with the order."*

5. In this regard and in considering the balancing of the respective rights of the parties, I have found of particular assistance the judgment of Hogan J. in ***N.K. v. S.K.*** [2017] IECA 1. The issue under consideration was whether an order directing a person to leave a particular residential premises could be made pursuant to section 11 of the Guardianship of Infants Act, 1964 as amended on the basis that such an order was mandated by the welfare needs of the children.[4] Relief pursuant to the Domestic

[3] Of course, the protection available under the 2018 Act goes far beyond relief only being available in the case of physical violence.
[4] The Court of Appeal concluded that it could not.

Violence legislation was not being pursued. However, the result sought to be achieved in the context of the 1964 legislation would arguably be similar insofar as it would result in the removal of a person from the premises concerned.[5] The court made a careful analysis of the nature of barring order reliefs:

> *64. Over and above these considerations, the removal by court order of a person from their existing place of abode is always a serious matter, often with far reaching implications for the individual concerned. In a family law context there are, of course, regrettably many circumstances where such a step is necessary, inevitable and constitutionally justifiable, not least to protect the personal safety and integrity of the other spouse and children. But a mandatory exclusion order from a property owned or partly owned by a spouse is a matter of profound significance and clearly engages the constitutional rights of the party affected.*
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> *65. Even though the exclusion order will have been made in camera proceedings, the very fact that the party excluded is compelled to move house – sometimes, as here, at relatively short notice - is likely to cause not a little social embarrassment and sends its own signal to the excluded spouse's circles of friends and acquaintances, thereby impacting, at least to some degree, on that spouse's good name as protected by Article 40.3.2 of the Constitution. Perhaps even more to the point, the right of lawful abode in one's own dwelling is a feature not only of the protection of personal property rights which is also protected by Article 40.3.2 but is also part of the fabric of rights associated with the guarantee of inviolability of the dwelling protected by Article 40.5.*
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> *66. Indeed, it was considerations of this general nature which were to the fore when the Supreme Court stressed the importance of fair procedures in the administration of the granting of barring orders under the 1996 Act in DK v. Crowley [2002] IESC 66, [2002] 2 I.R. 712. As Keane C.J. stated ([2002] 2 I.R. 712, 759-760):"In particular, the order ultimately made by the court dealing*

[5] Clearly, the other consequences of a barring order under the Domestic Violence legislation (e.g. right of arrest, statutory criminal offence etc.) would not arise in the context of an order under the 1964 legislation but enforcement would be through the usual range of reliefs for breach of a court order.

with the custody of the children of the marriage may necessarily be affected by the absence of one spouse from the family home for a relatively significant period as the result of a barring order : necessarily , because the paramount concern of the court on such an application will be the welfare of the children and the removal of one spouse from the home by legal process for a relatively lengthy period , even though subsequently found to have been wrongful, may be a factor to which the court may have to have regard in determining a custody issue."

67. All of this points to the necessity of ensuring that any order made excluding a spouse from a family home outside of the special jurisdiction conferred by the 1996 Act must have a secure and clear legal basis. This in its own way is illustrated by The People (Director of Public Prosecutions) v. O'Brien [2012] IECCA 68, a case where the Court of Criminal Appeal was required to address the issue of whether members of An Garda Síochána could lawfully effect an arrest of a person in a dwelling under s. 30 of the Offences against the State Act 1939 where it was found that the Gardaí were not lawfully present. Hardiman J. observed: "... Article 40.5 by guaranteeing the "inviolability" of the dwelling reflects long standing constitutional traditions in both common law and civil law jurisdictions…. This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-enforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee. In these circumstances, clear, direct and express language would be necessary before this Court would be prepared to impute to the Oireachtas an intention to override such carefully protected constitutional rights: cf. by analogy the comments of Henchy J. in Director of Public Prosecutions v. Gray [1987] I.R. 173, 281 and those of Griffin J. in Murphy v. Greene [1990] 2 I.R. 566, 577. Certainly, we cannot find in the general language of s. 30 of the Act of 1939 any

words which would allow us to presume that the Oireachtas contemplated that an arrest under that section might lawfully be made by members of An Garda Síochána of an occupant of that dwelling in circumstances where the arrest took place in the dwelling and where the Gardaí had, objectively speaking, no authority to be present."

These most useful dicta must inform my consideration of this application.

THE APPLICATIONS BEING MADE

6. The Applicant herein issued proceedings for a decree of judicial separation and ancillary reliefs in that context by Special Summons dated the 12th December 2023. On that same day, the Applicant sought domestic violence relief by way of *ex parte* application and I made a safety order in that context together with granting liberty for short service of a motion to be returnable for the 15th December 2023. This motion seeks a number of reliefs (being claimed by way of interim reliefs under section 6 of the Family Law Act, 1995) namely:
    (a) A barring order together with the additional orders which may be allied thereto under section 7(3) of the 2018 Act as against the Respondent;
    (b) In the alternative, a safety order pursuant to section 6(2) of the 2018 Act as against the Respondent;
    (c) Primary care of the children of the parties pursuant to section 11 of the Guardianship of Infants Act, 1964 as amended;
    (d) That a report pursuant to section 47 of the Family Law Act, 1995 or section 32 of the 1964 Act be ordered (an Order in these terms was made by consent at an early stage in the proceedings);
    (e) Directions pursuant to section 11 of the 1964 Act.

A cross-motion has been issued by the Respondent wherein the following reliefs are claimed:

(i) A protection order pursuant to section 10 of the 2018 Act as against the Applicant;

(ii) A safety order pursuant to section 6 of the 2018 Act as against the Applicant;

(iii) That a report pursuant to section 47 of the Family Law Act, 1995 or section 32 of the 1964 Act be ordered (see (d) above);

(iv) An order regulating access with the children together with other orders relating to the welfare of the children (in particular in relation to the provision of information concerning the children to the Respondent and directing joint decision making pertaining to the children.

7. The parties have sworn a significant number of Affidavits and Notices to Cross-Examine were served in respect of such Affidavits and oral testimony was heard consequent upon such Notices to Cross-Examine. It has been the, perhaps, inevitable consequence of the number of Affidavits filed and the cross-examination upon same that the allegations have become more detailed and expansive.

8. It is not disputed that the parties were married in 1999. They have two teenage children with whom both enjoy a very close relationship. It is clear that both parties have and have had a hands on role in the day to day care of the children. The Respondent has been unambiguous in stating that the Applicant is a devoted mother although he does assert that her desire to control has, *inter alia*, resulted in unilateral decision making on her part in relation to issues pertaining to the children. I believe that there is some justification for this view (and her actions in this regard intensified during the course of the application before me). However, I have been impressed that, despite the relationship challenges which the parties currently have, their respect for each other as parents continued. There is no doubt that the attitude and reservations of the Applicant in relation to the Respondent's day to day role in the children's lives was expressed in much more negative terms in her affidavits than was the case in cross-examination.

9. The relationship of the parties would appear to have had challenges over the years but not unduly so. The evidence of the Applicant was that she noticed changes in the behaviours of the Respondent although the precise timing of these changes remains unclear to me. While much was made of events involving third parties in or about

February 2023 (concerning a break into a property), it does not appear to me that there was much significance to these events in terms of the relationship of the parties at the time of their occurrence. There is no doubt that a revisionist view of these events was supported by a long email correspondence from the Respondent in July 2023 but I formed the view that this email was an expression of contrition in the context of a difficult relationship breakdown and may have been somewhat factually exorbitant in that context.

10. The matters of concern to me arose from in or around June 2023. This date is important as the application for *ex parte* relief was not progressed until the 12th December 2023, almost six months later. There were undoubtedly relationship changes between the parties prior to this date and this caused the Applicant to access messages on the Respondent's mobile telephone. This resulted in her becoming aware that he was involved in an extra marital relationship and that this was in the context of a homosexual relationship. It would appear that this resulted in a more or less instant instructing of a private investigator by her to ascertain further information concerning the Respondent's activities. Her evidence was: "… I looked at [his] phone for the first time in 35 years and I found out that he had a date, what I thought was a date with a man in Dublin. So then that's when I hired the private investigator." The private investigator concerned provided affidavit and oral evidence in the context of the within proceedings. His first period of observation upon the instruction of the Applicant would appear to have shown the Respondent meet with a man and have a conversation with him in the Respondent's car and then proceeding on to meet another man, with whom, it would appear, he spent the night. There was much detail of luggage carried and the movement of same and of unidentified items put into a bag. The gait of the second man also was referenced in detail. I found this evidence unhelpful. The matters described could be entirely innocent and to view them otherwise would have required a considerable degree of supposition. It would appear that based upon these observations, the Applicant again accessed the Respondent's mobile telephone messages a number of days later. I was provided with descriptive details of digital messages over a period of approximately four to five days in June 2023 which indicated that the Respondent was engaging in homosexual activities and that he was engaging in the taking of illegal drugs. It would appear that there was some degree of overlap between the sexual activities of the

Respondent and the taking of illegal drugs with the Respondent engaging in what is known as 'chemsex'.[6]

11. The Applicant was, understandably, very upset by these discoveries. I have formed the view that the Applicant's distress was based upon her discovery of homosexual activity on the part of her husband and also by her discovery of his drug taking and the circumstances of the former being engaged upon in a drug-related context. While the discovery of an extra-marital relationship can be distressing for a spouse and this takes on a further dimension in the context of a changed nature of the sexual relationship concerned, it is not for me to make any adverse finding in this regard in the context of an application such as the present. I agree entirely with the dicta of Barrett J. in ***X v Y*** [2020] IEHC 525 at paragraph 49.

12. However, illegal drug taking is a most serious matter and sexual activity linked to such drug taking is of a different calibre to that which I should properly not enter into judgment upon.

13. There was no dispute between the parties that the Respondent had engaged in and was engaging in extra marital relationships. There was no dispute that the Respondent had engaged in illegal drug taking and that this had been done in the context of sexual activity. However, the degree of such activity was much disputed. The Respondent asserted that this was in the realm of experimentation only while the Applicant's assertion was that this was a much more frequent practice to the extent of being habitual. It is impossible for me to determine this issue with any precision but the evidence of the Respondent was that he had continued to take drugs until sometime in November 2023 and that he had not done so since that time. His attitude and approach to drug testing indicates to me that he most likely continued to take illegal drugs for a somewhat longer period but it must be clearly stated that from the first return date of the Applicant's motion herein, being the 15th December 2023, the Respondent readily volunteered to undertake regular drug testing and this has continued since that time and,

[6] The Oxford English Dictionary defines "chemsex" as "sexual activity (especially group sex between men at parties arranged for this purpose) sustained, enhanced or facilitated by the use of disinhibiting and stimulant drugs, and often taking place over several days; the practice or habit of engaging in this type of sexual activity."

as reported to me, the results have been negative. There was some considerable dispute in relation to the appropriate drug testing given the nature of the substances concerned but, on the balance of probabilities, I find that the Respondent has fulfilled his undertaking to this Court that he will refrain from illegal or irregular drug use.

14. It is accepted that the Applicant confronted the Respondent with the behaviours referenced above in mid July 2023. The Respondent admitted to same in substance if not in degree. It would then appear that life continued relatively normally in the context of the challenges of relationship breakdown. There was a family holiday abroad which both attended. There was normal interaction about child-related issues and, in particular, school related issues. It is clear and, indeed, understandable that the Applicant made investigations about the nature and ramifications of the Respondent's socio-sexual behaviours. Some of these were made using online sources which are less than reliable. In any event, the Applicant appears to have formed the view that the Respondent had an addiction problem while the Respondent did not consider his issues to be of such a nature. This was a cause of dispute between them. I have had no evidence to support whether the Applicant or the Respondent was correct in this regard. In relation to drug-taking, addiction and testing, I heard most useful and informative evidence from Dr. Piper of Randox Toxicology who distinguished between addiction to a drug and addiction to the effects brought about by taking a particular drug. I must conclude that these behaviours occurred, at least, over a number of months, probably longer; that the Respondent's failure to attend for treatment (which he did not consider he needed) was a cause of distress and deep frustration to the Applicant; and that the Respondent, upon giving undertakings to this court in December 2023, appears to have achieved negative testing thereafter, which would tend to support a lack of addiction. I formed the view that the Respondent classified the Applicant's insistence upon treatment to be an attempt to control him and that he was resistant to such control in the context of the deterioration of their relationship.

15. There has been dispute between the parties as to the amount of time the Respondent actually spent in the family home prior to these events in circumstances in which he has another house elsewhere ("the alternative property") which he uses, occasionally according to him and extensively according to the Applicant. I do not believe that much turns on this as it is common case that the Respondent lived in the family home in the

context of contact with the children. I formed the view that the children were relative strangers to the alternative property and that the hub of family life for this family, and the place where the children primarily had their relationships with their father was the family home and in the context of a variety of excursions emanating from the family home (as is normal with most families). The Applicant was very clear in her evidence that she had no difficulty with the children having overnight access with their father in the alternative property, subject to negative drug testing. I found this evidence most confusing. The Applicant asserted that drug taking and the other activities complained of had occurred in this alternative property to the point that it was alleged that a participant in these activities had broken into the property and stolen items. There was a suggestion by the Applicant, which the Respondent denied, that this intruder was looking for drugs. In such circumstances, it is clear to me that concerns for the safety and welfare of the children in this place would extend beyond the Respondent himself being drug free. The Applicant's evidence clearly demonstrated that she had no such fears, causing me to doubt her assertions regarding safety fears arising from the Respondent's behaviour. Her evidence concerning the children's connection with the alternative property I found unconvincing. They clearly have a very close bond with the family home and I must note the proposed educational plans of the elder child in this regard, in particular.

16. Correspondence about separation commenced in September 2023 and I have concluded that there is nothing untoward or unusual in this correspondence. There is an oblique reference to "serious issues" in the first letter and that "recent events have taken a serious toll on our client's health and welfare" but, notably, not her safety. This correspondence makes it clear that High Court proceedings are contemplated and that it would be preferable to resolve these by agreement rather than contest. This is a perfectly appropriate letter. The response is likewise appropriate referencing the preference for settlement and the children's welfare being paramount. The matter of High Court proceedings is referenced and that same would be premature. However, it is clear that the possible issuing of proceedings had been addressed by both parties in this correspondence and therefore I was unable to understand the Applicant's continued references to her expectation of a negative response by the Respondent in this context which was part of her motivation for seeking *ex parte* relief. Litigation had been 'on the table' for a number of months before the *ex parte* application.

17. I have set out below certain other factual issues which arise herein. However, it is clear that the Applicant decided to retain the private investigator once again in November 2023. I am unclear as to why she decided so to do but I believe it can only have been in order to ascertain if the Respondent's previous lifestyle was continuing. There was clearly a deterioration of relations between the parties in the period post-August 2023 but this appears to have been for many reasons including the breakdown of their relationship, issues arising in relation to the business in which they are both involved (although the extent of such involvement is in dispute) and, undoubtedly, the Applicant was still upset and angry about her discoveries concerning the Respondent's behaviour. It is difficult to determine the extent to which the family was directly impacted upon by the socio-sexual activities of the Respondent. He seems to have been living what could only be described as a double life but, of course, there are events which occurred which the Applicant attributes to his lifestyle but I do not believe this linkage to be proven. By way of example, much was made of a car crash which the Respondent had one morning and whether this was due to drug intoxication. That it was or was not can only be supposition, but it is clear that the Applicant continued to accede to the Respondent driving her and the children after this time, including carrying out school runs. The significance of the car crash seemed to be being viewed in a different light in the context of this application than was the position in the months prior thereto. When cross-examined about the Respondent's continuing to drive the children over the summer months and beyond, the Applicant, very fairly, said: "I didn't think he would hurt [child's name]. I don't think he would hurt [child's name]. I don't think he is ever going to hurt the children. I am praying. I can only believe that there are no drugs being taken". Cross-examined as to whether the Respondent is a good father and not a threat to the children, the Applicant replied: "That's right. I never said he was a bad father. I have never said anything bad about him". When asked about the need for protection of the children, the Applicant replied: "Because of the tension, all of that." There is no doubt that the behaviour of the Respondent indirectly impacted upon the family in that it was clearly imposing a degree of chaos into his life and I believe may have impacted upon his demeanours. In addition, there is no doubt that these behaviours impacted upon the Applicant causing her distress, anxiety, disillusionment and worry.

18. There were further factual allegations made by the parties. I have considered these and would analyse as follows:

(i) That the behaviour of the Respondent was unpredictable and that his mood was volatile. There is reference to 'persistent and insidious assaults" on the Applicant and that the Respondent's behaviour was 'relentless". There were allegations of abusive telephone calls and screaming. There were allegations of paranoia on the part of the Respondent. In her submissions, the Applicant made particular reference in this regard to Paragraph 14 of her Affidavit of the 12th December 2023 and Paragraphs 16, 38 and 43 of her later Affidavit of the 18th December 2023. Paragraph 14 consists of hearsay in relation to scientific matters and was contradicted by the evidence of Dr. Piper from Randox Toxicology. It is a matter of concern to me that the allegations being made became more extreme and expansive as the number of affidavits proliferated.[7] The preponderance of the averments and allegations in the paragraphs referenced above contained in the later affidavit were generalised in nature and the more specific averments in relation to particular events between the parties did not seem to support the extremes of behaviour in these generalised averments. This is particularly the case in relation to Paragraph 43 above. Whatever level of disagreement arose between the parties, the evidence including its elaboration in cross-examination does not support there having been "persistent and insidious assaults". There were undoubtedly rows between the parties between August and November 2023 but these were clearly bilateral in nature. It is averred that there was a diabetic needle found in the boot of the Respondent's car and this is stated to have been seen on the 8th December 2023. While, on balance, I believe this needle was so found, it remains unexplained why such an event was not deposed to in the first Affidavit sworn by the Applicant on the 12th December 2023 as this seems a most relevant fact in the application under consideration.

[7] There were 12 Affidavits sworn in the context of this motion and a total of 15 Affidavits before the Court in these proceedings (the additional Affidavits being the Affidavit of the Applicant grounding the proceedings and her Affidavit of Means and Affidavit of Welfare). In addition to cross-examination of all deponents, I heard the oral testimony of Dr. P of Randox Toxicology.

(ii) The Applicant stated that she was "petrified" of the Respondent and in fear but there were actions on her part which contra-indicated this. There were prolonged periods of normal family life including a holiday abroad. There were social interactions and circumstances in which activities between the parties and the family were engaged in by the Applicant with the Respondent, sometimes at her request. There were unfortunate reactions and actions on her part which might reasonably give rise to an expectation of a negative reaction on his part which she nevertheless engaged in - in this regard I would reference admitted verbal abuse (and on the Respondent's case physical abuse), accessing his telephone messages and retaining a private investigator on two separate occasions. There were also averments that the *ex parte* application was due to fear as to what would occur when he became aware that she was instituting proceedings but the institution of proceedings had been referenced in correspondence as far back as September 2023 with no particular adverse reaction save for a letter in response from his solicitor advocating amicable compromise which the Applicant's letter sought also.

(iii) The Applicant alleged an occasion when she felt confined to a room due to the Respondent keeping his arm on the door to prevent it being opened. I believe that there was an attempt at a conversation about separation at that time with which the Applicant did not wish to engage.

(iv) I queried an averment regarding spitting, which is a most degrading and derogatory action. I was informed that this word was being used in relation to a manner of speech rather than a physical act.

(v) The Respondent alleged that the Applicant had used foul and abusive language to him. The examples of the language used were extreme in nature and particularly so having regard to the Respondent's sexuality. She admitted this verbal abuse, fairly stating that she was "not proud of some of the stuff I have said but this happens". I fully agree with the Applicant that such things happen and must be taken in context. However, I do find that verbal abuse of this nature

tends to negate assertions of fear for one's safety and the portrait of an environment of fear and anxiety due to unpredictability of behaviour;

(vi) The Respondent alleged a physical assault by the Applicant and exhibited a photograph of asserted injury to his neck due to pressure having been imposed and nail marks. The Applicant's denials on affidavit were opaque and conditional. I formed the view, on the balance of probabilities, that there had been a physical altercation on the occasion in question.

(vii) The Respondent alleged that the Applicant was controlling and that the application before me was in the context of her efforts to exercise such control and that she was making the application for litigation advantage and as a strategic step rather than due to any risk to her safety and/or welfare and indeed any such fear;

(viii) A letter from the Applicant's General Practitioner was produced to me. Some of the conclusions therein are contrary to the evidence given to me by the Applicant, particularly under cross-examination. In particular, this is the position in relation to the children. Her evidence was that the Respondent is a good father to the children, that he helps with them, that he calms them down. She clearly stated that she had no difficulty with overnight access provided there was appropriate negative drug testing. This is perfectly sensible and necessary in the circumstances. Under no circumstances should children be exposed to the potential symptoms of drug taking during times when they are in the care of any adult.

19. The Respondent herein made a comprehensive open offer at the commencement of the hearing. The Applicant submits that, based upon the wording of sections 6 and 7 of the 2018 Act, this is not something relevant to my consideration of the applications of the Applicant herein as the date of her application is the date of issuing of her motion for relief being the 12th December 2023. I have no doubt that that is the date of the application by her but I do not believe the relevant evidence is frozen in time as of that

date for two particular reasons - first, the wording of section 5 of the Act and secondly, to so hold would be to give a Respondent a behavioural *carte blanche* once the application issued, absent the issuing of a new application for every new event.

SUBMISSIONS OF THE PARTIES

20. Both parties made most useful submissions which I have considered fully. The Applicant referenced the context of the 2018 Act having regard to the State's obligations under the Istanbul Convention. The nature of the 2018 Act (as a consolidating statute) and the amendments included therein are set out. Reference is made to the mandatory language in section 7 of the 2018 Act but, of course, the language in section 6 is also expressed in mandatory terms. There is a comprehensive analysis of the ***O'B*** decision and as to the guidance it may afford in an application under the 2018 Act particularly with regard to the role of conduct. The Applicant makes submissions in relation to the appropriate rules of statutory interpretation to apply and the use of context in circumstances of ambiguity. In relation to the appropriate statutory interpretation rules, reference is made in both submissions to the dicta of Murray J. in ***Heather Hill Management Company v. An Bord Pleanala*** [2022] IESC 43 and the reference to McKechnie J.'s dicta in ***Brown, Minister for Justice v. Vilkas*** [2018] IESC 69 therein. However, I do not believe that the 2018 Act is ambiguous or obscure. I agree with the submission of the Respondent in this regard. Indeed, much of the obscurity contained in previous iterations of domestic violence legislation in Ireland has been addressed therein. Most notably, conduct is not confined to the Long Title but rather the role of all relevant circumstances, including conduct, is clearly provided for in section 5 of the 2018 Act. The Applicant's submissions included a clear submission in respect of the application of section 5 principles in this case and of the evidence in this context as do the Respondent's submissions.

THE STATUTORY FRAMWORK

21. The basic test to be applied for the granting of a safety order under section 6 of the 2018 Act or a protection order under section 10 of the 2018 Act[8] is that there are reasonable grounds for believing that the safety or welfare of the Applicant or a dependent person so requires. The statutorily prescribed test for a barring order is expressed in the same terms, albeit that the reliefs concerned are very different in consequence, given that the latter obliges the Respondent to leave and/or stay away from a place. Therefore, what is the essential difference between the circumstances in which these reliefs will be granted?

22. The relationship between the conduct of a Respondent and the granting of domestic violence relief has long been a source of controversy given the lack of reference to a causal link between a Respondent's behaviour and the requirements of the safety and welfare of an Applicant and/or the dependent person under sections 6 and 7 of the 2018 Act as referenced above. The issue of such causal linkage was considered by the Supreme Court in the ***O'B*** case in the context of the Family Law (Protection of Spouses and Children) Act, 1981 with all members of the court indicating that there was a requirement for such linkage, albeit that there was some differences in emphasis as to whether misconduct was required on the part of the Respondent or simply that there was conduct on his part which challenged the safety and welfare of other family members.

23. This requirement of conduct was deemed essential by the Supreme Court in circumstances in which the only reference to conduct in the 1981 Act (and this was also the position in the Domestic Violence Act, 1996) was in the long title to the statute.[9] There is no such reference to conduct in the 2018 Act. Therefore, in the context of the legislation, which is under consideration in this application, the 2018 Act, what is the role of conduct and what is the necessity for a causal link between the behaviour of a

[8] In the context of the applications under consideration here, there is no legal distinction between a safety and a protection order and the term safety order shall be used to encompass both such reliefs.
[9] The use of the Long Title in the context of statutory interpretation is now long established and, in this context, I make reference to Dodd, "Statutory Interpretation in Ireland", paragraphs 3.03 – 3.07.

Respondent and the requirements of the safety and welfare of an Applicant and dependent persons?

24. In considering this issue, there are a number of factors to be taken into consideration:

(i) The 2018 Act is expressed to be, *inter alia*, a consolidating statute. In this regard, I refer to the dictum of Finlay CJ in ***Harvey v. Minister for Social Welfare*** [1990] 2 IR 232:

> *"The Act of 1981 being a consolidation Act, there must be a rebuttable presumption in law that it does not alter the law. This does not mean, it seems to me, that a consolidation Act, thought passed by the Oireachtas on the basis that it consolidates the existing law only, is not capable, unambiguously, of altering the law and, if it does, effect must be given to that alteration."*
>
> (underlining added)

It is clear that there were many alterations made to the law relating to domestic violence in the 2018 Act as has been set out in the submissions of the Applicant herein. Among these amendments is section 5 of the 2018 Act mandating that the court shall have regard to all the factors and circumstances that it considers may have a bearing on the application and thereafter setting out a list of circumstances which shall be considered where relevant.

(ii) If a qualitative review of all relevant circumstances arising, including conduct, is not undertaken, how else may a court determine whether the relief sought should be granted (whether the safety or welfare "so requires") or whether a safety order or a barring order[10] is to be granted in circumstances in which both are sought as alternatives as in the present case?[11]

[10] The wording of section 6(2) (safety orders) and section 7(2) (barring orders) is substantively the same. The reference in section 7 to section 15 of the 2018 is not engaged in this instance as an application for relief pursuant to section 11 of the Guardianship of Infants Act, 1964 (as amended) is expressly before me.

[11] It is to be noted that there is no jurisdiction to grant reliefs in the alternative, absent such alternatives being sought and, in this regard, I would refer to sections 6(7) and section 7(11) of the 2018 Act. This is referenced further below.

(iii) How are the constitutional rights of all parties to be balanced, as envisaged in ***DK*** and as discussed in ***NK v. SK*** referenced above, absent an analysis of the conduct of the Respondent, assessed in the light of the harm (actual or potential) to an Applicant and/or the dependent persons?

(iv) What is the role of section 5 of the 2018 Act which directs that "all factors and circumstances" which the court thinks should have a bearing should be taken into account in an application for "a specified order", which includes barring and safety orders, before proceeding to set out a list of factors to which a court should include in its consideration "where relevant"?

25. It is my view that the 2018, far from relegating the issue of conduct to brief mention in the Long Title to the statute, makes conduct front and central and gives it an express statutory role. This is clear from the section 5(2) list of relevant factors many of which relate to the conduct of the Respondent:

> *'5. (1) Nothing in subsection (2) shall be construed as limiting the power of a court to make a specified order under this Act.*
>
> *(2) In determining an application for a specified order, the court shall have regard to all the factors or circumstances that it considers may have a bearing on the application including where relevant:*
>
> *(a) any history of violence inflicted by the Respondent on the Applicant or a dependent person;*
>
> *(b) any conviction of the Respondent for an offence under the Criminal Justice (Theft and Fraud Offences) Act 2001 that involves loss to, or is to the prejudice of, the Applicant or a dependent person;*
>
> *(c) any conviction of the Respondent for an offence that involves violence or the threat of violence to any person;*
>
> *(d) whether any violence inflicted by the Respondent on the Applicant or a dependent person is increasing, or has increased, in severity or frequency over time;*

(e) any exposure of any dependent person to violence inflicted by the Respondent on the Applicant or any other dependent person;

(f) any previous order under this Act or the Act of 1996 made against the Respondent with regard to any person;

(g) any history of animal cruelty by the Respondent;

(h) any destruction or damage caused by the Respondent to—

(i) the personal property of the Applicant, the Respondent or a dependent person, or

(ii) any place where the Applicant or a dependent person resides;

(i) any action of the Respondent, not being a criminal offence, which puts the Applicant or a dependent person in fear for his or her own safety or welfare;

(j) any recent separation between the Applicant and the Respondent;

(k) substance abuse, including abuse of alcohol, by the Respondent, the Applicant or a dependent person;

(l) access to weapons by the Respondent, the Applicant or a dependent person;

(m) the Applicant's perception of the risk to his or her own safety or welfare due to the behaviour of the Respondent;

(n) the age and state of health (including pregnancy) of the Applicant or any dependent person;

(o) any evidence of deterioration in the physical, psychological or emotional welfare of the Applicant or a dependent person which is caused directly by fear of the behaviour of the Respondent;

(p) whether the Applicant is economically dependent on the Respondent;

(q) any matter required to be considered by the court under, and in accordance with, subsections (2) and (3) of section 29;

(r) any other matter which appears to the court to be relevant to the safety or welfare of the Applicant and any dependent person.'

26. In this regard I would reference section 5(2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (o), all of which relate to the conduct of a respondent.

27. It therefore seems to me that the 2018 Act requires the following approach to applications:

A. Are the requirements of the safety and/or welfare of the Applicant and/or the dependent members in jeopardy? If they are not, no further inquiry is required and no relief should be granted. If they are, then a court must move on to consider whether the specified relief sought or, if more than one such relief is sought, which of the specified reliefs which are sought should be granted i.e., what does the safety and/or welfare, as applicable, of the Applicant or a dependent person require?

There is no statutory definition of "safety" and the definition of "welfare" in the 2018 Act is not exhaustive, simply stating that it "includes physical and psychological welfare". In this regard, I have found the judgments in ***O'B v. O'B*** to be instructive. O'Higgins CJ stated:

> *"The use of the word "safety" probably postulated a necessity to protect from actual or threatened physical violence emanating from the other spouse. The word "welfare" is not so easy to construe. I incline to the view that it was intended to provide for cases of neglect or fear or nervous injury brought about by the other spouse."*

Griffin J. stated:

> *"Neither safety nor welfare is defined in the 1976 Act or in the 1981 Act. "Safety" must necessarily be referable to violence or threatened violence on the part of the spouse sought to be barred, but as it is conceded that no question of actual or threatened violence arises in this case it is not relevant to this appeal. "Welfare" ordinarily refers to health and well-being, and in respect of a spouse this would include both physical and emotional welfare. In the case of a child, it would in addition include moral and religious welfare."*

B. A court must consider whether the relief sought or which of the reliefs sought is required in the circumstances and it is in this context that the requirements of section 5 of the Act become operative and it is in this context that the relief(s) being sought and the severity their consequences must be weighed against the actions of the Respondent and all other relevant factors and circumstances and, in particular, the factors expressly listed. In this regard, I would add that the court is not permitted to grant a lesser or more severe order in place of that sought if it considers the alternative remedy to be more appropriate. Sections 6(7) and 7(11) preclude this. However, there is no statutory preclusion to the Applicant seeking safety and barring orders in the alternative as the Applicant has done herein. The balancing of rights occurs in the context of this second step. It must additionally be stated at this juncture that the very severe nature of the barring order relief and its potential consequences should not in any manner be allowed to diminish the seriousness of a safety order and its potential consequences. While the latter does not control attendance at a particular place and, arguably, requires only that a person behave as one ought to behave in any event, the protection afforded thereby to the Applicant and/or dependent members and the potentially serious consequences arising in the event of breach/alleged breach of such an order in terms of the gardai's power of arrest and the possibility of subsequent criminal prosecution and conviction must not be forgotten or understated. All of the reliefs available under the 2018 Act are serious reliefs aimed at addressing serious situations where protection is required. However, it is my view that the 2018 legislation clearly requires a court when asked for relief under the statute to consider the appropriateness of the specific relief(s) sought in the particular case with the section 5 factors to inform what a court considers should have a bearing on the application.

ORDERS AND DIRECTIONS TO BE MADE

28. For the avoidance of doubt, I wish for it to be clear that I consider the granting of relief of any nature under the 2018 Act to be indicative of a serious situation having arisen such as requires court intervention. This is so in the case of any of the statutory reliefs granted under that legislation. As previously stated herein, while it may be considered that a safety or protection order requires no more than that a person to act as they ought

reasonably to do in any event, the relief must be seen in the light of the totality of its consequences including the very important consequences in the event that it is breached.

29. On the facts as determined by me, I find that the actions of the Respondent have adversely impacted upon the welfare of the Applicant, as the term welfare is defined in the 2018 Act. I found his attitude to his behaviours to be naïve, dismissive and somewhat arrogant. He simply seems to refuse to or to be unable to comprehend the understandable anxiety caused to the Applicant and I believe that this jeopardizes her welfare also. I do not believe that it is reasonable to conclude that the Applicant's safety was put at risk by the Respondent. I believe the actions of the Applicant herself so indicate. She delayed taking any action for a very long period of time, normal family life continued to a substantial degree over this time and events involving argument were bilateral. Certain of the admitted actions of the Applicant do not support a finding that she believed her safety to be at risk. I believe both parties are strong willed and both wanted their wishes to prevail. There are inconsistencies in the Applicant's position on affidavit and her oral testimony was much less damning of the Respondent. Generalized descriptions, principally in later affidavits, were not demonstrated by accounts of specific events. However, I find that the Respondent has been careless of the welfare of the Applicant and this is particularly reprehensible in light of her previous illness.

30. So what relief, if any, is required to address this? In this regard I must apply section 5 of the 2018 Act, looking at circumstances generally as referenced above and also considering the specific issues listed in section 5(2) of the 2018 Act. In this instance, the following arise: (j) there is a recent separation between the parties but I do not see this has having a particular bearing on this application rather it is a background to the family circumstances which now pertain; (k) is engaged in the context of the substance abuse of the Respondent but the impact of this abuse on the family I find to have been primarily indirect in nature; (m) is clearly engaged as the Applicant does perceive a risk to her arising from this behaviour; (o) I have had regard to the medical report from the General Practitioner and also to the Affidavit and oral testimony of the Applicant and the interaction of these evidential sources; (r) other relevant matters include the immediate undertakings given by the Respondent and his willingness to have ongoing

participation in drug testing; the open offer made by him which affords protection to the Applicant and minimal time in the family home and this only the context of access with the children to whom both parents are undoubtedly devoted and who are clearly most attached to their home environs (the alternative property being at some considerable remove and not a place which they have attended with any regularity).

31. In this regard, I am of the view that relief against domestic violence, namely a safety order, is appropriate for the protection of the welfare of the Applicant. I make such an order pending further order of this court. This order is to encompass all three elements per section 6(2) save that correspondence by email to a dedicated address to be established is permissible in relation to arrangements for the children.

32. I do not belief that the Respondent is in fear of the Applicant. I do not believe that his safety or welfare is at risk save in the context of his own voluntarily undertaken activities.

33. I note that the Respondent has proffered an undertaking to the court (on a without prejudice basis) to reside away from the family home save for the exercise of access. I accept this undertaking which I believe to be in keeping with the welfare of the children.

34. All access will be subject to negative testing for drugs, using hair or urine samples as is appropriate for the substance which is being tested for. I have previously ruled in this regard. Access shall be terminated if a positive result is received. Any positive drugs test, in addition to resulting in a suspension of access, will, of course, also trigger the undertaking to remain away from the family home which undertaking provides for such attendance only for the purposes of exercising access.

ACCESS

35. [REDACTED]

36. All decisions pertaining to the children to be joint decisions and both parties to keep the other parent informed of all important information pertaining to the children.

37. Liberty to apply when Prof Sheehan's report is available and generally.

38. The applications which I am considering are interim applications for relief in the context of much wider proceedings. It is evident that the parties' marital relationship is at an end, they confirmed this in their December agreement to so inform the children and this has been done. The litigation intensity to date has undoubtedly had a significant impact on them and also, it is my view from evidence and submissions herein, it must have impacted on the children. I therefore believe that it is imperative for the wellbeing of this family that the proceedings progress without delay so that relationships can be recalibrated to the new, separated parents situation. To achieve this, I believe careful case management is desirable. I will therefore direct that the Respondent swear, file and serve his replying affidavit in the substantive proceedings, his affidavit of means and affidavit of welfare within three weeks of this date, that both parties vouch in accordance with the Practice Direction of this Court by the 8th April 2024 and I will list the matter for further case management at 10.30 am on the 19th April 2024 to review progress. Hopefully, Prof Sheehan's report will be available or imminent by that stage also. I appreciate that these time limits at optimistic but, given the involvement of both parties in the main business, I consider them realistic.

39. I will reserve the costs herein to the hearing of the action.