

THE HIGH COURT

[2024] IEHC 383

[2022 No. 1M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW
(REFORM) ACT 1989

AND

IN THE MATTER OF THE FAMILY LAW ACT 1995, AS AMENDED, AND IN THE
MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996, AS AMENDED

BETWEEN

Y

APPLICANT

– AND –

X

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 20th May 2024.

SUMMARY

In this judgment I grant a decree of divorce and treat with access, custody, and proper provision.

1. No divorce is easy. But divorces where there are children under the age of majority always seem to me to be especially hard. Where there are no children of a marriage one can walk away

from a former spouse and never deal with them again if that is what one wishes. Where there are adult children of the marriage, contact with a former spouse can also usually be kept to a minimum if that is what one wishes, though there are always family events which may unavoidably draw the divorced spouses into each other's company. But where there are children under the age of majority then (typically) the parties, divorced though they may be, simply have to find a means of dealing with each other in terms of the co-parenting of their children. I mention all this because it seemed to me throughout these rather fraught divorce proceedings that Ms X has consistently sought, to borrow a phrase used by Mr Y's counsel, to 'cancel' Mr Y from his children's lives for no good reason. My sense in this regard was confirmed by the proposition in the closing submissions for Ms X that:

'[Mr Y's] controlling nature and unswerving belief in his own erroneous ideas with his total lack of respect or trust in the respondent make his participation in guardianship matters in the future a matter which the court should consider carefully'.

2. I make no criticism in this regard or otherwise of counsel for Ms X, or any of the rest of her legal team. They are highly competent professionals representing the case that their client wishes them to make. But I must emphasise that such a complete exclusion of Mr Y from the lives of his children finds no support when I consider the entirety of the evidence before me. (And I cannot but note by way of *obiter* remark that it also flies in the face of the general wisdom that it is usually in the best interests of children that they should retain access to both of their parents post-divorce.)

3. Those preliminaries aside, I turn now to the background facts. The parties were married in 2009 and separated in 2021. There are [REDACTED] children of the marriage, aged [REDACTED]. Ms X is [REDACTED]. Mr Y is [REDACTED]. Mr Y currently resides in what was the family home; Ms X lives in separate accommodation with the [REDACTED] children, having quit the family home with the children in [REDACTED]. The mode of departure was a notably unhappy one. Ms X indicated that she was going shopping with the children and never returned home. The evidence before me shows that [REDACTED] Mr Y was their primary carer as Ms X was undertaking a fulltime [REDACTED] degree [REDACTED] and running

her business. Since Ms X's departure from the family home, access by Mr Y to the children has been difficult and seems to have depended to some extent on Ms X's whim.

4. As mentioned, [REDACTED] after Ms X left the family home. [REDACTED] [REDACTED] was the subject of some dispute before me. I have generally avoided treating with this dispute as next to nothing was established on the balance of probabilities in this regard. I am mindful too that children become adults and may one day read this judgment and some things are best left unwritten. Both parents clearly love all [REDACTED] children and, with the exception of Ms X's repeated (and troubling) denial of substantial access rights to Mr Y, neither parent has ever behaved in a manner which suggests to me that it would be in the best interests of the children to have access to one or other of the parents curtailed as a consequence.

5. These proceedings involved a 10-day hearing before me. That is a long time, though when I look back over my notes I do not see that there was any time wasted by either side. The duration of the case was a product of the fact that the parties seem unable to agree on anything between them to quite a remarkable degree, even as to the historical details of their relationship. On the whole, I found Mr Y to be the more credible witness. He was often able to back up what he was saying by reference to contemporary text messages. Ms X, by contrast, painted a picture of Mr Y that was generally unsupported by any other evidence. In this regard, I respectfully adopt the following submissions made by Mr Y's counsel in his closing written submissions:

'5. It is submitted that on any objective view, the applicant has been the more accurate witness of the two principals. In respect of almost every single assertion of fact by the respondent he was able by dint of recall and research and record-keeping to establish the untruth or inaccuracy of each assertion.

6. Notably the respondent did not introduce a single document during her evidence in chief. In the face of all the documents produced by the applicant, the respondent failed to produce a single sheet of paper which... corroborated her version of events. For all of her protestations of being truthful, and the sweeping claims made in her grounding affidavit and in her direct evidence, bit by bit in the course of her cross examination she had to walk back those

claims when confronted by incontrovertible proof that those claims were overstated to the point of being untruthful.’

6. Tellingly, at one point in her evidence Ms X indicated that she was offering ‘her truth’ to the court. I was not sure and remain unsure what that means. I suppose in a sense every witness tells her, his, or their truth and the court then has to resolve where the objective truth lies on the balance of probabilities. However, a witness is surely off to a better start in terms of assisting the court if that witness seeks to tell *the* truth (and there is such a thing as *the* truth), rather than her, his, or their ‘truth’. In this regard, I cannot but again respectfully adopt the following written submissions of counsel for Mr Y who states as follows in his written submissions when it comes to the ‘her truth’ point:

‘[T]his utterance [as to ‘her truth’] was a significant insight to how the respondent approached...the case....[1] [I]t suggests a willingness to reimagine the past to suit present needs...[2] [I]t reveals a tendency to insist on being right even when she is wrong...[3] [I]t is suggestive of a willingness to imagine events which have not occurred if such imaginings suit her overall narrative’.

7. Two central issues arise for me to decide in the present proceedings, *viz.* (1) the future care and custody of the children of the marriage and the access to the children, and (2) the financial provision to be made consequent upon the divorce.

8. I turn first to the most important consideration: the children. I treat with the legal aspects hereafter. However, I cannot but preface my remarks with the observation that I consider Mr Y to have been treated most unfairly in the years since the marriage breakdown as regards the access that he has enjoyed to his children. It was clear from Mr Y’s evidence in the witness box that he loves each and all of his children, would do anything for them, and seeks to be a good father to them. No doubt like every parent he makes occasional mistakes but there is no such thing as a perfect parent and Mr Y has manifested no imperfection that would justify anything less than the fullest access to his children. Mr Y’s personality is his personality; that is who he is. It may be (I do not know) that he can be a little uptight or intense or even prone to talking through matters in exhaustive detail but that is who he is. Nothing he has done or said to this time justifies the fact that he has had the very low level of access that he has had to his children in the last three years – down to 5 per cent of the time on one estimation. Of course access, as

I have stated in previous judgments, is not a percentages 'game'. However, one would instinctively expect of a man afforded as little time with his children as Mr Y has enjoyed since the breakdown of his marriage that he must have acted previously in a manner that is damaging of them or contrary to their best interests. But nothing of that sort presents.

9. On a not unrelated note, I should also note before proceeding further that it does not seem to me that the reports of the court-appointed psychologist in these proceedings can safely be relied upon in these proceedings. The psychologist's evidence essentially proceeded on the basis that:

- (i) Ms X was at all times central to the everyday tasks associated with the raising of her children (this is not borne out by the evidence before me),
- (ii) she accepted Ms X's diminution of her husband's role in the rearing of the children (again this is not borne out on the evidence before me), and
- (iii) since the breakdown, the children of the marriage have manifested disruptive behaviour after overnighting with their father. Tellingly, the only evidence before me of such upsets was that of Ms X (about whose attitude to the truth I have already made remark). Ms X claims that such upsets were witnessed by her father and a sibling, yet neither father nor sibling were ever called to give such evidence. The court-appointed psychologist observed the children on, I believe, six occasions yet never witnessed such upsets. There was no evidence from schoolteachers that a child was manifesting upset in school (as one sometimes encounters in these cases). And despite the fact that one child was supposed to be manifesting upset for hours on end some mornings, there is no evidence before me that any [REDACTED] of Ms X, in her professional capacity, had to be rescheduled even once. As a judge I am required to proceed on the evidence before me and I can only conclude on the basis of the foregoing that the balance of probabilities points to such upsets as not having occurred or not having occurred in the manner described. (And this is a further reason for not finding the evidence of the psychologist to be especially helpful, for in the face of the evidence – or absence of evidence – it was central to her assessment of the dynamics of the family that the upsets in fact occurred as described.)

10. The effective absence of reliable psychological evidence creates an issue to which I return later below.

11. I am in no doubt from the evidence before me that Mr Y was the primary carer of the [REDACTED] eldest children between [REDACTED]. This is borne out by the objective evidence in Folder B2. It is supported by the evidence of [REDACTED] the children's childminder. And indeed, in the course of cross examination, Ms X herself admitted that Mr Y was the primary child-carer [REDACTED]. Respectfully, it does not augur well for the credibility of one's case if one starts out by denying that a spouse was the primary child-carer and that position is repeatedly undermined by reference to the objective evidence then placed before the court.

12. On [REDACTED], Ms X and Mr Y met at the home of Mr Y's brother (I will call him Mr Z) and Mr Z's wife. The marriage between Ms X and Mr Y was in trouble at this time and the meeting appears to have been an effort by Mr Z and his wife to see if matters could somehow be resolved between Ms X and Mr Y. I must admit that I consider myself to have been somewhat misled by Ms X in this regard. In her oral evidence she claimed that Mr Z and Mr Y had allied themselves against her and even that she found Mr Z to be a frightening individual. Yet under cross-examination it emerged that she had actually sent a text to Mr Z on the day after this family meeting, thanking him for his advice and even apologising for dominating the conversation. I respectfully prefer that contemporaneous evidence to the contradictory oral evidence provided in court.

13. By the summer of [REDACTED], the marriage was well and truly over. In [REDACTED], Ms X had her solicitors write to Mr Y asking him to leave the family home in exchange for continuing reasonable access to his children. Looked at in its most favourable light this letter could be read as seeking to answer the question that would immediately occur on being asked to leave the family home, namely 'When will I see my children?' Looked at in a less favourable light it could be read as carrying the implicit threat that if the recipient does not do as asked, then access to the children may not be quite so liberal. If the latter was intended, I would respectfully note that access is a child-focused exercise, not a gift to be extended or refused by one parent to another.

14. Later in the summer, the District Court (if I might respectfully observe, sensibly) invited the parties to see if they could agree interim access arrangements between themselves. Ms X

did not facilitate such agreement and even unilaterally reduced access on the basis of what she claimed were wishes expressed to her by at least one of the children but witnessed, it seems, by no one else – at least no one who gave evidence before me. In the end, the assistance of the court-appointed psychologist had to be prayed in aid.

15. I found Ms X's evidence as to her actions in [REDACTED] to be entirely lacking in credibility. She spent five nights in luxury hotels with her children, agreed to their father having them for a single night at his brother's holiday home, then claimed she had gone to the holiday home out of concern for her children, even though she had in the meantime gone golfing with a friend in another part of Ireland. It seemed to me to be entirely wanting in credibility that a mother would be as concerned as Ms X purported in the witness box to be as to her children's well-being when with their father, yet that she would at the same time entrust them to their father for an overnight stay and head off to play golf in another part of Ireland.

16. One of the couple's children has been given a particular diagnosis and admitted to a particular school. There was an effort before me to criticise Mr Y for wishing for a second diagnosis. However, it seems to me to be perfectly sensible that a second diagnosis would be sought. I see no inconsistency in this and my observation to Mr Y when he was in the witness box that if the relevant diagnosis is acted upon quickly, there can be good results; and I note that when I said this to Mr Y he nodded in agreement. He just wanted to be sure of matters. Where I do not share Mr Y's view is that he thought it untoward that Ms X should subsequently have enrolled Junior's name in a particular school without first discussing matters with Mr Y. A school enrolment is simply a school enrolment: it does not mean that the child must go to that school; and I accept Ms X's evidence that she acted as she did because she did not want Junior to miss out on the chance of getting into that school. Maybe in an ideal world the enrolment might have proceeded differently. However, we do not live in an ideal world. All that said, I do accept as reasonable the complaint voiced by Mr Y's counsel in his closing submissions as to how his client's efforts to be involved in his children's upbringing seem always to be treated:

'The assertion by [Mr Y] of his rights and obligations as a guardian of each of the children is parlayed into unwanted intrusion, a point of view which differs from that of the respondent is harassment of her, [and] efforts to communicate these points are portrayed as "bombardment"'.

17. Ms X, with respect, will simply have to accept that her children have two parents, not one, and that the children's father is fully entitled to play the fullest part in their upbringing that is consistent with a co-parenting arrangement. He has evinced no behaviours that would render his involvement in their upbringing contrary to their best interests.

18. I admit to having been most surprised by Ms X's evidence that when Mr Y had his solicitor write a number of letters to her solicitor concerning overnight access, access at certain [REDACTED] ceremonies, and access during a mid-term break, she answered (in oral testimony) that she had both never read the letters and also that she had read the letters but found reading them to be too stressful. With respect, as I have already stated, Ms X will simply have to accept that her children have two parents, not one, and that the children's father is fully entitled to play the fullest part in their upbringing that is consistent with a co-parenting arrangement. As I mentioned above, he has evinced no behaviours that would render his involvement in their upbringing contrary to their best interests. It is simply not open to her to seek to exclude the children's father from their lives in the way that she has thus far sought to do. I cannot but note in this regard, by way of *obiter* remark, that I am repeatedly presented with evidence in family cases that (save in the most exceptional cases, and this is not such a case) it is in fact most unhealthy in terms of a youngster's psychological development that he, she, or they would be deprived of access to a parent in such a manner.

19. I respectfully accept as correct the following further submissions made to me by counsel for Mr Y:

'Overnights were due to commence on [REDACTED] following over one year without overnights. The commencement or otherwise was a matter solely within [Ms X's] gift. They commenced on [REDACTED]. [Ms X] abruptly stopped overnights in [REDACTED]. Not a single complaint was made in the interim. Not one.

...

She claimed in her oral evidence that the children were distraught after returning from overnight access and it took them days to settle. She claimed [the [REDACTED] child] would be in her bed for hours on Sunday and that [the [REDACTED] child] had

many night terrors after overnights. However, once again she was unable to provide any evidence of her claims, which it is submitted are self-observed, unsupported by independent evidence. No such issues are observed from school reports.... Contrariwise the applicant gave evidence that the children were doing great following overnights.’

20. All of the evidence before me suggests that prior to the breakdown of the marriage (and there are contemporaneous texts between the parties to support this) they were mutually supportive parents. Respectfully, there is no extrinsic evidence which supports Ms X’s depiction of her husband to me as a controlling and malign individual. (In truth, the loving texts between the two suggest quite the opposite.) Nor is there any extrinsic evidence, which supports the efforts to depict Mr Y as somehow a bad father. And the reports of the court-appointed psychologist, as I have already noted, cannot usefully or properly be relied upon because they proceed on the account given by Ms X to that psychologist. If Ms X is as undependable a witness as she has proven to be, it follows that those reports, which rest on an acceptance of Ms X’s version of events, as relayed by Ms X to the psychologist, are likewise undependable.

21. I turn now to consider a number of points which have not been considered above and/or which merit further mention:

The Conception of the [REDACTED] Child

I do not propose to get into this aspect of matters. Nothing has been established on the balance of probabilities. And, nothing so established, I do not see that it impacts upon where the best interests of the children now lie or otherwise.

Termination or Otherwise of Pregnancy

I do not propose to get into this aspect of matters.

*The Proposed Family Intervention;
the Allegations as to Ms X's Mental Health*

Some of Mr Y's communications (he knows which ones) around the time of the breakdown were, to use a *very* mild term, imprudent. Mr Y has expressed regret for them. I do not see that it impacts upon where the best interests of the children now lie or otherwise.

The Selection of Text Messages

Mr Y is skilled in the use of computers. He designed an algorithm which picked out text messages (from the countless numbers sent between the parties) that he considered would be useful in these proceedings. Counsel for Ms X has complained about this. Respectfully, I do not see any basis for complaint. It has not been established that Mr Y sought via the algorithm to mislead, it has not been established that he has misled, and it was always open to Ms X to exhibit any texts which presented a different picture to those proffered by Mr Y. Notably, she has not done so. Instead I am presented with the evidential scenario which I have described above, *i.e.* all of the evidence before me suggests that prior to the breakdown of the marriage (and there are contemporaneous texts between the parties to support this) Ms X and Mr Y were mutually supportive parents. Respectfully, there is no extrinsic evidence which supports Ms X's depiction of her husband to me as a controlling and malign individual. (In truth, the loving texts between the two suggest quite the opposite.) Nor is there any extrinsic evidence which supports the efforts to depict Mr Y as a bad father.

Reliance on Reports of Court-Appointed Psychologist

The reports of the court-appointed psychologist, as I have already noted, cannot usefully or properly be relied upon because they proceed on the account given by Ms X to that psychologist. If Ms X is as undependable a witness as she has proven to be, it follows that those

reports, which rest partly on an acceptance of Ms X's version of events, as relayed by Ms X to the psychologist, are likewise undependable.

Personality Tests

Ms X has sought to place reliance on personality tests administered to Ms X and Mr Y by the court-appointed psychologist. These suggest Ms X to be warm, friendly, sympathetic, valuing harmonious relationships, and uncomfortable with confrontation, and Mr Y to be self-assured, confidential, forceful, and likely to be described by others as self-reliant and controlling. Even if I accept these results as entirely correct, that does not change the fact that Ms X has come to court and presented a version of events that is entirely unsupported by extrinsic evidence. By contrast, Mr Y has come to court and presented a version of events that is supported by extrinsic, often contemporaneous evidence. As a judge I must proceed on the evidence before me and what I consider to have been established on the balance of probabilities before me.

The Emails to the Court-Appointed Psychologist

Mr Y indicated in his evidence that at one point the court-appointed psychologist felt that he was over e-mailing her. I was not especially surprised by this behaviour. Mr Y considered that a correct picture of his behaviours was not being presented to the psychologist and wished her to have the truth when she wrote her report. Did he over email her? *Possibly* – though to me his behaviour smacks of the natural desperation of a father who was worried that he could yet be deprived of access to his children for no good reason. And he was right to be concerned. As I mentioned at the outset of my judgment, Ms X has had her lawyers suggest to the court the proposition that (in effect, without much if any supporting evidence) ‘his participation in guardianship matters in the future a matter which the court should consider carefully’, *i.e.* that he should – to borrow from the oral submissions of Mr Y's counsel be ‘cancelled’ as a presence in his children's lives. There is no basis in the

evidence before me on which I could properly conclude that such a draconian step would be in the best interests of the children.¹

Privacy

Ms X kept a form of personal diary on a home computer. Mr Y came across it – it is not entirely clear how – and read it. It would have been better if he had stopped once he realised what he was reading. It is also possible that he read one or more emails between Ms X and a third party about particular treatment. This was intrusive behaviour and is to be deplored. However, I do not see that one could properly conclude that because one spouse reads another spouse's diary and/or some email correspondence that that points, on the balance of probabilities, to that spouse being a controlling person (as opposed to one who might better heed the other's privacy).

22. Since the breakdown of her marriage, Ms X – I cannot but respectfully conclude on the evidence before me – has sought consciously to exclude Mr Y from the lives of his children. This, despite the fact that the evidence before me, as considered previously above, shows that he was the primary carer [REDACTED] and at all times before (and, to the extent allowed to him, since) the collapse of his marriage, a significant and supportive presence in their lives. It seems to me that in all the circumstances it is undoubtedly in the best interests of the children that I should make an order which restores the *status quo ante* between the parties, establishing a co-equal parenting arrangement which sees them enjoy equal access to all of their children. I propose to invoke the assistance of Professor Sheehan, a professional well known to the court and counsel (or a professional of like standing), to meet with the parties and devise a

1. That said, there is one aspect of Mr Y's behaviour where he will need to watch himself. It is an issue that I find often arises between divorced couples. The problem is this. Divorce is final. The marriage is over. So while the parties, where they have children and are co-parenting, have to remain in contact with each other, that contact should be confined to the children and really be quite brief. Mr Y has been in the habit of sending his separated (and soon-to-be former) wife messages in which he seeks to involve himself in her life. With respect, those days are now over. He must keep his views on her doings to himself. He no longer has any part to play in his wife's life or business. So his messages to her should be short and succinct, confined to *e.g.*, pick-up and drop-off times and incidental issues such as *e.g.*, 'A has a headache and I gave him some paracetamol at 3 p.m.', 'Y is finding her maths homework hard and needs some help with long division', 'Z really wants to go to that sleepover: I can bring her if that helps'. Without wishing to be prescriptive, I would respectfully suggest to Mr Y that if he finds that an email or text message goes over three sentences, he should stop and ask himself if he is writing too much. If some major issue presents then – and I am not generally an aficionado of this line of approach but I believe it is necessary here – I would suggest (and it is a suggestion only) that he considers having his solicitor engage with her/his/their counterpart regarding any (if any) such issue. By keeping his messages short and having his solicitor engage on anything (if anything) of substance I would hope that that will help to bring some calm to the turbulence that has hitherto presented between the parties.

revised access schedule. I am mindful that I do not, for the reasons already stated, have reliable psychological evidence before me as to access. So, if Professor Sheehan or such like professional as is engaged has any observations to make concerning the proposed revised access I would be grateful to receive such observations before finalising my order (and after hearing any, if any, further submissions that the parties might wish to make concerning any such observations). That said, I expressly note that at this time, save as regards the report of the court-appointed psychologist (which I cannot properly rely upon for the reasons previously stated), I do not see anything in the evidence before me to suggest that a week-on/week-off arrangement with an equal split during holiday periods, and an equal split of the day on ‘special days’ ([REDACTED] days, *etc.*) would be less than in the children’s best interests or impracticable. The revised system that is settled upon should commence as soon as is consistent with the children’s best interests, *i.e.* if they need to be eased into the increased access (and here again I will be guided by Professor Sheehan or such person with like expertise as is appointed pursuant to this judgment, subject to any further submissions from the parties on such guidance), so be it.

23. I turn now to matters financial.

24. As I understand Ms X’s evidence she is seeking to retain ownership of [REDACTED], the family home, and the site at [REDACTED], with the applicant to retain the [REDACTED] properties that he owned when he got married.

25. At all times throughout the proceedings I was singularly unconvinced by Mr Y’s claim that the [REDACTED] business was somehow a joint concern. It just isn’t. There could be no [REDACTED] business without Ms X. And anything that he has done to assist never seems to me to get beyond how one would pretty much expect a husband to behave:

- he left his job in [REDACTED] to live with his wife in [REDACTED] when she went to work there; however, unless he was going to separate from his wife this was to be expected and nothing more than many spouses have done for their ‘other half’ in the course of a relationship;
- he claims to have worked with [REDACTED] but it was clear from [REDACTED] evidence that (as one would instinctively expect) his true relationship was with Ms X;

- he discharged a revenue liability [REDACTED] (this should, I consider, be repaid);
- after he left his job each day he would take over from the [REDACTED]; I see nothing in this other than natural love and affection. If we were to drill down into that level of detail, I am sure that some of the profits from the practice at this time went into the family outgoings, so to that extent Mr Y was helping himself and his children as well as Ms X.
- he helped to a limited extent in some of the physical work in preparing the [REDACTED] to open; again, I see nothing in this other than natural love and affection.
- if he is to be believed he was a critical player in helping Ms X to prepare for [REDACTED]. I do not accept this. To my mind, Ms X is clearly an academically gifted woman and takes full and sole credit for her academic achievements.
- he claims to have played an equal part in [REDACTED], an entity in which he was neither director nor shareholder (albeit that his wife, as one would expect of a wife then well-disposed to him, suggested to Mr Y that he was an equal party. I do not see anything more to this than an assertion that as a couple they were ‘in things’ together);
- he claims to have identified suitable premises for [REDACTED] [REDACTED] but, with respect, even if he did, so what? And as to the negotiations with the architect, again I see nothing more in this than the occasionally (though not invariably) beneficial interventions of a husband based on natural love and affection.

26. I note too that Mr Y’s interventions such as they were have not always been helpful, not least when [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

27. The parties own a family home with mortgage. Their respective estimates of the value of the home were (allowing for the mortgage) [REDACTED]. The

estimates are almost the same and I will go with the lower value, just to allow for a 'bad day' in terms of selling value, so, [REDACTED].

28. As to Mr Y's [REDACTED] properties the parties were within [REDACTED] of each other in terms of value [REDACTED]. The estimates are almost the same and I will go with the lower value, just to allow for a 'bad day' in terms of selling value, so, [REDACTED].

29. Each of the parties have taken out term loans in their own names. I consider that they should each consider to bear the expense of their respective loans [REDACTED]. I do not see any reason why either spouse should pick up the expense of the other in this regard.

30. I deal with the value of [REDACTED] hereafter. I understand that there continues to be a director loan of €[REDACTED]. It is not clear to me whether this is a loan by the company to a director or by a director to the company. Either way it seems to me that it should be repaid in the manner contemplated when the loan issued.

31. There are some miscellaneous matters: cars (each party it seems to me should just retain their own car), a deposit due back (this should be split evenly), the [REDACTED] loan (this will have to be repaid and if it was to [REDACTED] will have to be repaid by [REDACTED] on the agreed terms), the [REDACTED] shares (these should be split evenly), and the [REDACTED] shares (again these should be split evenly).

32. Both parties have roughly equal pension funds and should each retain these to their respective benefit, albeit that there is some advantage to Mr Y in my so proceeding.

33. The foregoing sees a broadly even split between the parties; these matters are never perfect splits. My view as to loans is that these should be repaid in whatever manner was originally agreed.

[REDACTED] I turn to [REDACTED] which contains [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

35. On the balance of probabilities I accept the lower values placed on the [REDACTED] properties. These were furnished by [REDACTED] and justified by him in a thoroughly sensible manner. He was able to point to similar properties in [REDACTED] [REDACTED] which were not seeking and/or expected to make the types of money that the higher values on the [REDACTED] properties would see them receive. He also made due allowance for the fact that the properties might not sell to [REDACTED]. His approach seemed to me to be commercially sensible and sensibly conservative. By contrast, the higher values seemed to me to require a high end-purchaser paying ‘top dollar’ for [REDACTED] properties in small towns; I found this whole approach unconvincing and not possessed of the commercial sense and sensible conservatism that [REDACTED]. That leaves one with values of [REDACTED].

36. Price Waterhouse Coopers (PwC) gave helpful evidence as to how to value an [REDACTED] [REDACTED]. It is a challenging process but among the factors of relevance are the following:
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

37. PwC gave a current value to [REDACTED] of €0 which seemed and seems to me to be, with all respect, not at all credible.² Admittedly, the PwC valuation is borne out somewhat by the evidence of Ms McShane, which shows a heavy debt servicing requirement [REDACTED] [REDACTED]. Ms X also gave evidence as to the tight margins in the business. And there is also the € [REDACTED] personal guarantee that she has been required to give to the bank.

² [REDACTED]

But a value of €0? That seemed and seems to me to be scarcely credible and I cannot but note in this regard that:

- Mr [REDACTED] (Mr Y's accountant) valued [REDACTED] (without the properties) at [REDACTED], treating it as a going concern with the goodwill value of Ms X's being there.
- Mr [REDACTED] (Ms X's accountant) used a fire sale/vacant possession valuation approach that [REDACTED] had never come across
- Mr Sweetman has no previous involvement in the sale of [REDACTED].
- Mr Johnson by contrast based his valuation, *inter alia*, on [REDACTED] informed evidence.
- [REDACTED] considered that [REDACTED] has a significant value.
- Mr Johnson considers that [REDACTED] has value if, like [REDACTED] Ms X remains working in it for a time.

38. Most unexpectedly, at a late stage in the proceedings Mr Z entered *en scène* and made an offer of [REDACTED], provided that Ms X continues to work there for a salary. There are a number of problems with this proposal, leaving aside the issue that these were *in camera* proceedings and I still do not know how so pertinent an intervention could have been made without knowledge of what has been transpiring in the course of the proceedings. That aside, there are two fundamental problems with the proposal. First and foremost, Ms X wishes to be divorced from Mr Y and to have little to do with him and little or nothing to do with his family going forwards. Second, all that the offer shows is that [REDACTED] is worth [REDACTED] to Mr Z (and that only if Ms X continues to work there, an end-result that, given the first point just made seems singularly unlikely to come about). The combined effect of the first and second points is that I consider it safest simply to disregard Mr Z's offer; it is predicated on an end-result that I do not see happening. All in all it seems to be that the safest current value to place on [REDACTED] is that calculated by Mr Johnson, viz. [REDACTED].

39. One aspect of matters that seemed to me to receive surprisingly limited attention during the proceedings is the curious state of Ms X's personal finances. By way of summary:

- she was unable to quantify her present income in any detail;
- she was unable to quantify her present supplier/legal expenses;
- she claimed to have borrowed € [REDACTED] from her father at the same time that she spent € [REDACTED] on a holiday home, while separately owing € [REDACTED] on a personal contract purchase agreement; I note that there is no vouching for the parental loan and am (respectfully) mystified at the notion that one would borrow € [REDACTED] to get by and almost simultaneously engage in a lavish € [REDACTED] expenditure on a holiday home;
- she failed to provide any evidence to support her claim that her business is loss-making; and the accounts from 2022 suggest an annual profit of € [REDACTED];
- there is no evidence before me to suggest that the loan to value ratios under the [REDACTED] loan agreement are not being maintained which suggests that the business cannot be underperforming to the extent claimed; and
- she claims to be in dire straits financially but is able to sustain payments of [REDACTED]. for childcare, cleaning costs of [REDACTED]. and [REDACTED] p.m. for a new car.

40. Leaving aside the curious state of Ms X's personal finances, a matter to which I return later below, I see the financial position to present being, on the balance of probabilities, as set out below (leaving out the roughly even split of the bank/term loans, miscellaneous and pension matters that I have outlined previously above). Again, my general approach has been to achieve a roughly equal division of assets between the parties, while leaving the [REDACTED] in effect to Ms X: there would be no [REDACTED] without her and for all that Mr Y has sought to present it as a joint business I do not see that it was ever truly such. He has his own career and employment as [REDACTED], he helped out in the way that one would expect a husband to do, and he did not do anything beyond that. The notion that he [REDACTED] brought some sort of commercial genius to the operation and direction of the [REDACTED] seems to me to be fanciful. That leaves one in the following position:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

41. I consider that the [REDACTED] and properties should go to Ms X [REDACTED] and that the family home, [REDACTED] should go to Mr Y [REDACTED]. That is shy of a 50/50 split but it seems the fairest way of dividing the properties between the parties in such a way that Ms X is free to run her [REDACTED] unencumbered by involvement with Mr Y or his family (and it is *her* practice and fundamentally the fruits of her intellectual and daily labour), and Mr Y is also properly provided for. Ms X should also repay the [REDACTED] paid by Mr Y to meet Ms X's [REDACTED]. There does not seem to be any private (non-business) joint bank accounts that require to be split between the parties; if there were I would have ordered a joint split of these.

42. That leaves me with the matter of Ms X's income and the prospects of maintenance payments. With respect, the evidence presented to me by Ms X as to her ongoing income is incomprehensible to the extent that it is known to me. When Ms X treats the court with the transparency it deserves in terms of understanding her income, the court will be better able to assess whether any maintenance requires to be paid to her. One cannot come to court, present it with the limited and mixed information that has been forthcoming from Ms X as concerns her personal finances and expect the court to conjure up a solution that would involve the payment of money to her by way of maintenance when the court has no real sense as to what Ms X's current income is, save that it may well be higher than Ms X purports and that which Mr Y enjoys. I cannot therefore make any order other than nil maintenance at this time, though it is always open to Ms X to seek an upward variation in that amount by reference to what I would hope will be clear, credible, and complete evidence as to her income and outgoings. I note that in deciding on any (if any) future application for an upward variation of maintenance a court may conceivably have regard to the fact that, although I have sought a roughly even split between the parties of the family assets, Ms X is the beneficiary of the discrepancy in that split. I should also note in passing that I do not exclude the possibility that Mr Y may yet seek maintenance given the cost to him of the intended increased access arrangements. I call the observations in this paragraph the 'Temporary Nil Maintenance (Pending Further Information/Application(s)) Rationale' hereafter.

43. Turning to the law, s.3(1) of the Guardianship of Infants Act 1964 provides, *inter alia*, that 'Where, in any proceedings before any court, the... guardianship, custody or upbringing of, or

access to, a child... is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.’ Under s.3(2), ‘In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V.’ Pursuant to s.3 of the Act of 1964, I turn now to assess the best interests of the children in accordance with Part V of that Act, in particular s.31 of same. Section 31 provides, *inter alia*, as follows:

- 44. (1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.**

[I have so proceeded.]

- (2) The factors and circumstances referred to in subsection (1) include:**

(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child’s upbringing and, except where such contact is not in the child’s best interests, of having sufficient contact with them to maintain such relationships;

[I have explained at length the difficulties that have presented in this case as regards Mr Y enjoying due and proper access to the children and why increased access seems to me, on the evidence before me at this time, to be in their best interests.]

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

[The children are so young that I am not sure that these views can meaningfully be obtained. Moreover, Ms X’s challenging approach to the issue of access means that the children have had so much exposure to Ms X and so little to Mr Y that I am not convinced that their responses could be other than coloured by the distorted access experience to which they have been subjected. Regrettably,

the appointed psychologist's reports are unreliable given that she proceeded on Ms X's depiction of how matters sit between her and Mr Y (a depiction that is not borne out by the totality of the evidence before me). As indicated previously if in devising the revised access arrangements, Professor Sheehan or like professional has any observations to make as to what is proposed, I would be grateful to receive same and will of course invite the parties to make any submissions on same that they might wish to make. I am, however, keen that matters should proceed as quickly as is commensurate with the children's best interests. On the evidence before me Mr Y is being largely excluded from their lives and there is no reliable evidence before me to suggest that this is consistent with their best interests.]

(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;

[I would make much the same points as I make at (b).]

(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;

[See my response to (a)-(c).]

(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;

[I do not see any of these to be an issue.]

(f) the child's social, intellectual and educational upbringing and needs;

[See my response to (a)-(c).]

(g) the child's age and any special characteristics;

[I have had regard to the ages of the children and also to the diagnosis concerning the [REDACTED] child and to [REDACTED] of the [REDACTED] child to the extent it presents. Please see also my response to (a)-(c).]

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;

[There is no household violence or safety issue presenting with regard to either parent. I would be concerned as to the well-being of the children if they continue to be denied meaningful access to their father.]

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

[Such is the level of disagreement between the parties that I believe that only the most prescriptive provision as to how access is to operate in the future will work. I would and will encourage Professor Sheehan or whatever like professional is engaged to propose such prescriptive provision, which I will then rule on.]

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

[As should by now be clear Ms X's level of willingness to facilitate such a close and continuing relationship seems very low.]

- (k) the capacity of each person in respect of whom an application is made under this Act—**
 - (i) to care for and meet the needs of the child,**
 - (ii) to communicate and co-operate on issues relating to the child, and**
 - (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.**

[No issues have been identified to me in this regard.]

...

- (5) In any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child.**

[These proceedings involved a 10-day hearing before me over a protracted period. That is a very long time, though when I look back over my notes I do not see that there was any time wasted by either side. The duration of the case was a product of the fact that the parties seem unable to agree on anything between them to a quite remarkable degree, even as to the historical details of their relationship. Now that we have reached the judgment stage it seems important to me that the restructuring of the access arrangements should proceed as soon as possible, with the involvement of Professor Sheehan or a like professional. Again, I would refer to my observations at (a)-(c).]

45. Turning to matters financial and drawing on, *inter alia*, *M v. S* [2020] IEHC 562 and *N.O. v. P.Q.* [2021] IECA 177 which between them also refer to, *e.g.*, the decisions of the Supreme Court in *D.T. v. C.T.* [2002] 3 I.R. 334 and *Y.G. v. N.G.* [2011] 3 I.R. 717 and the High Court in *M.K. v. J.K.* (No 2) [2003] 1 I.R. 326, it seems to me that the following propositions arise. The propositions are stated in Bold text; my observations appear in plain text immediately after each block of Bold text. I have proceeded in accordance with all the propositions stated.

CLEAN BREAK?

46. (1) When, following the 15th Amendment, the Oireachtas came to introduce divorce legislation, it was modelled to some extent on modern English divorce law. There is, however, an important difference. English legislation embodies the ‘clean break’ principle laid down by the House of Lords in *Minton v. Minton* [1979] A.C. 593 (*D.T. v. C.T.*, Keane C.J., at p. 362-363).

47. Noted.

48. (2) Irish law does not establish a right to a ‘clean break’. However, it is a legitimate aspiration (*Y.G. v. N.G.*, Denham C.J., at p. 729).

49. This is a case in which the scale of resources makes it possible to effect what might perhaps be described as a clean break in terms of asset division. As to the prospects of maintenance, I refer to the Temporary Nil Maintenance (Pending Further Information/Application(s)) Rationale.

50. (3) The absence of specific statutory machinery for the making of ‘clean break’ provision should not preclude the court from seeking to do so in appropriate cases. In the case where the amplitude of resources makes it possible, the desire of the parties for financial finality should not be frustrated (*D.T. v. C.T.*, Fennelly J., at p. 419; see also *Y.G. v. N.G.*, Denham C.J., at p. 729).

51. See (2).

CERTAINTY AND FINALITY

52. (4) Keane C.J. did not believe that the Oireachtas, in declining to adopt the ‘clean break’ approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties (*D.T. v. C.T.*, Keane C.J., at p. 364).

53. See (2).

54. (5) The principles of certainty apply to family law as to other areas of the law. Certainty is important in all litigation. Certainty and consistency are at the core of the legal system. However, the concepts of certainty and consistency are subject to the necessity of fairness. Consequently, each case must be considered on its own facts, in light of the principles set out in the law, so as to achieve a just result. Thus while the underlying constitutional principle is one of making proper provision for the spouses and children, this is to be administered with justice to achieve fairness (*D.T. v. C.T.*, Denham J., at p. 382).

55. Noted.

56. (6) A court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s.22 of the Act of 1996, where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit (*D.T. v. C.T.*, Murray J., at p. 411).

57. Noted.

BROAD DISCRETION

58. (7) While s.20(2) of the Act of 1996 lists in detail the factors to which the court is required to have regard in making the various financial orders provided for in Part III of the said Act, it is obvious that the circumstances of individual cases will vary so widely that, ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what she or he considers a just resolution in all the circumstances (*D.T. v. C.T.*, Keane C.J., at p. 365; see also Murray J., at p. 422).

59. Noted. Given the absence of agreement between the parties and the dissatisfactory position presenting in terms of what is known of Ms X's current income this is a case in which I have had to invoke that relatively broad discretion.

60. (8) Normally, even in cases where the parties might be considered to enjoy a substantial degree of financial comfort, the finite resources of the parties will be an underlying prescriptive factor in the exercise of a discretion as to how those resources can be applied in making proper or fair provision for both spouses (*D.T. v. C.T.*, Murray J., at p. 402).

61. Noted.

62. (9) The Oireachtas, in choosing the approach it enshrined in s.20, made a considered decision to confer upon the court a duty of a particularly broad discretionary character. This requires the court to pass judgment on the presence and, where they are present, the weight it attributes to an extremely wide range of specified considerations (*D.T. v. C.T.*, Fennelly J., at p. 414).

63. Noted.

64. (10) The matters listed in s.20(2) of the Act of 1996, are designed to ensure that the court will have regard to all the wide variety of circumstances which should, in the interests of justice, be weighed in the balance when considering what is proper provision. The starting point in that regard must be, on the one hand, to the resources and on the other to the needs, obligations and responsibilities of the parties. There is no stated limitation on the financial resources or on the "*financial needs, obligations and responsibilities...*" to be considered by the court and which may be available for the purpose of making provision. They may extend to resources or to needs, obligations or responsibilities which either spouse "*is likely to have in the future*" (*D.T. v. C.T.*, Fennelly J., at p. 416).

65. Noted.

FINANCIAL NEEDS

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

67. In the division of assets I have sought to achieve a commensurate standard of living for both spouses (albeit that the establishment of two households where there was one may make a replication of the previous standard of living difficult or impossible to attain). As to the prospects of maintenance, I refer to the Temporary Nil Maintenance (Pending Further Information/Application(s)) Rationale.

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

69. No such need presents here.

70. (13) “Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances. In one case, where a couple had worked a farm together, which the husband had inherited, the wife on separation sought 50%, however, the order given by a court was 75% to the husband and 25% to the wife. This is a precedent to illustrate an approach, but the circumstances of each case should be considered specifically.” (*Y.G. v. N.G.*, Denham C.J., at p. 732).

71. There are no such inherited properties here.

72. (14) Where one or both parties are in receipt of income, but their joint assets are not of such significant value as here, the first task of the court will almost certainly be to consider what the financial needs of the spouses and the dependent children are. At one end of the spectrum, there will be cases in which, at best, no more than basic

subsistence requirements at the most can be met. At the other, there will be both substantial assets and income available and the court will be concerned with the proper distribution, in terms of the section, of the available assets so as to ensure that proper provision is made for the spouses and any dependent children (*D.T. v. C.T.*, Keane C.J., at p. 365).

73. I have reasoned through my analysis in this regard previously above.

74. (15) The Act of 1996 does not require the assets of the spouses to be divided between them and the dependent children in every case. There will be cases in which it would be solely concerned with the appropriate level of the maintenance to be paid by one spouse to the other and as to what is to happen to the family home. But in cases where there are substantial assets brought into being in circumstances where it would be unjust not to effect some form of division, the court will inevitably find itself having to determine, where the parties are unable to agree, how the assets should be divided and whether that division should take the form of a lump sum order or a property adjustment order (*D.T. v. C.T.*, Keane C.J., at pp. 365-366).

75. See (14).

NON-DISCRIMINATION

76. (16) The work of a spouse in the home cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or the breadwinner during the course of the marriage (*D.T. v. C.T.*, Murray J., at p. 406).

77. Noted.

78. (17) Nicholls L.J., in *White v. White* [2001] 1 A.C. 596, emphasised that the whole tenor of English divorce legislation was the avoidance of a discriminatory approach: the fact that, as often happened, the wife had devoted the greater part of her time to looking after the children and caring for the home generally, was no ground for confining her share of the family assets, in the event of a breakdown of the marriage, to so much of the assets as met her 'reasonable requirements'. That is also the law in Ireland (*D.T. v. C.T.*, Keane C.J., at p. 368).

79. Noted.

80. (18) In *Cowan v. Cowan* [2002] Fam. 97, a so-called ‘ample resources’ case, Thorpe LJ, at pp. 118-19, summarised his understanding of *White v. White* [2001] 1 A.C. 596 as follows, “*Disapproved is any discriminatory appraisal of the traditional role of the woman as homemaker and of the man as breadwinner and arbiter of the destination of family assets amongst the next generation. A calculation of what would be the result of equal division is a necessary cross check against such discrimination.... Disapproved is any evaluation of outcome solely or even largely by reference to reasonable requirements.*” Provided that it is always borne in mind that in ‘ample resources’ cases an equal division of the assets is emphatically not mandated by the legislation, Keane C.J. considered that there should be no difficulty in adopting a broadly similar approach in this jurisdiction. (*D.T. v. C.T.*, Keane C.J., at pp. 368-369).

81. By making a roughly equal split of the available assets, it seems to me that proper provision can be made for each side and fairness and justice achieved. As to the prospects of maintenance, I refer to the Temporary Nil Maintenance (Pending Further Information/Application(s)) Rationale.

82. (19) When a court is exercising its discretion in making provision for spouses on an application for divorce, the following should be considered: (i) in making such provision a spouse who has worked principally in the home during the course of the marriage should not be disadvantaged in the making of such provision by reason of that fact; (ii) both spouses are entitled, in principle, to seek that the provision made for them provides them with a measure of independence and security in their lives and there is no reason why, in principle, a non-earning spouse should be confined to periodic payments. The extent to which this can be achieved in practice will depend on the circumstances of the case, the resources available and the exercise of judicial discretion in taking into account all the factors referred to in s.20; (iii) a court has power to direct the payment of lump-sum payments where this is considered an appropriate means of making proper provision for one or other of the spouses; (iv) all the resources, assets and income of the applicant and the respondent) should be taken into account (*D.T. v. C.T.*, Murray J., at pp. 410-411).

83. Noted.

‘BREADWINNERS’ VERSUS ‘HOMEMAKERS’

84. (20) The role of the dependent homemaker and child carer, usually the wife, is not to be disadvantaged in the distribution of assets by reason of having a non-economic role (*M.K. v. J.K. (No 2)*, O’Neill J., at p. 349).

85. Noted.

86. (21) In Irish society today, it can no longer be assumed that the husband and wife [in mixed-sex marriages] will occupy their traditional roles in which the husband has been the breadwinner and the wife the home builder and carer. The roles may on occasions even be reversed and, in many instances, both husband and wife will be in receipt of income from work. In those cases where one spouse alone is working and, in the result, a significantly greater responsibility for looking after the home has devolved on the other, it is clear that under s.20(2)(f) of the Act of 1996, the court must have regard to that as a relevant factor (*D.T. v. C.T.*, Keane C.J., at p. 366).

87. Noted.

88. (22) A court is obliged by virtue of s.20(2)(g) to have regard to the financial consequences for either spouse of his or her having relinquished the opportunity of remunerative activity in order to look after the home or care for the family (*D.T. v. C.T.*, Keane C.J., at p.366).

89. Noted.

90. (23) In assessing the “*proper provision*” under Article 41.3.2°, the court must look at both aspects of a spouse’s role in the family, *i.e.* the two sides of the coin. Thus the court must have regard to the role of the spouses in relation to the welfare of the family, to their contribution in looking after the home or caring for the family: s.20(2)(f). On the other side of the coin, the court must have regard to the effect on the earning capacity

of each of the spouses of the marital responsibilities assumed by each, and the degree to which the future earning capacity of a spouse was impaired by reason of the spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family: s.20(2)(g). By this total approach to the family role of a spouse and its effect, formal recognition is given to the role of caring for the family (*D.T. v. C.T.*, Denham J., at p. 381).

91. Noted. Here, among other factors, I have sought to recognise the considerable home and family care undertaken by Mr Y at a time when Ms X was [REDACTED].

92. (24) Article 41.3.2° of the Constitution and the Act of 1996 clearly require that value be placed on the work of a spouse caring for dependents, the family and the home. A long-lasting marriage, especially in the primary childbearing and rearing years of a woman's life, carries significant weight, especially if the wife has been the major home and family carer (*D.T. v. C.T.*, Denham J., at pp. 402-03).

93. Noted.

94. (25) In ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the courts should, in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner. The value to be attached to their respective contributions in those circumstances is, perhaps, underscored by Article 42.1 of the Constitution which refers, *inter alia*, to the “*duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children*” (*D.T. v. C.T.*, Murray J., at p. 407).

95. Noted.

96. (26) Where substantial assets and income have accrued to one spouse in the course of the marriage, the court should take them into account in determining the proper provision to be made for the other spouse. They are available in order to make a proper provision for the other spouse. In the case of a wife who has worked primarily in the

home, she is just as entitled as her husband to have the ‘fruits of the marriage’, taken into account by the court in determining what provision should be made for each of them (*D.T. v. C.T., Murray J.*, at p. 409).

97. Noted.

98. (27) Section 20(2)(f) obliges the court to give due weight and consideration to the respective roles of the breadwinner and the homemaker, *i.e.* such weight as is appropriate in all the circumstances. It does not erect any automatic or mechanical rule of equality. Nor does it institute any notion of family resources or property to be subjected to division. Several considerations militate against the adoption of such rules of thumb. The children of the marriage have to be considered and their provision by one spouse may mean that property should not be equally divided. One or both of the parties may have entered into new relationships, possibly involving children. The supposed ‘breadwinner’ or ‘homemaker’, as the case may be, may not, depending on the circumstances deserve to be placed on an equal footing. It is only with the greatest care, therefore, that one should formulate any general propositions (*D.T. v. C.T., Fennelly J.*, at pp. 417-418).

99. Noted.

100.(28) In *White v. White* [2001] 1 A.C. 596, Nicholls L.J. observes, at p. 605, that “*If, in their different spheres, each [spouse] contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer*”. Fennelly J. adopted this language to the extent that he argues for equal recognition of the value of the contributions that may have been made during the marriage, in their respective roles, by the money-earning spouse and the home-making spouse (*D.T. v. C.T., Fennelly J.*, at p. 418).

101. Noted.

OTHER RELEVANT FACTORS

102.(29) Other factors to which the court is obliged to have regard is the standard of living enjoyed by both parties before the breakdown of the marriage, their respective ages and the duration of the marriage (*D.T. v. C.T.*, Keane C.J., at p. 366).

103. In terms of the division of assets, see (11). I do not see that the parties' ages or the duration of the marriage are hugely relevant factors. Both are in employment, both are roughly middle-aged, and the marriage was neither of short nor (very) long duration.

104. (30) A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party (*Y.G. v. N.G.*, Denham C.J., at p. 718).

105. Noted but of no practical consequence in this case.

CONDUCT OF PARTIES

106.(31) The conduct of the parties will be relevant where, in the opinion of the court, it would be unjust to disregard it (*D.T. v. C.T.*, Keane C.J., at p. 366).

107. I do not see that there is any conduct issue presenting, save for the generally regrettable manner in which Ms X has approached the degree of access allowed to the children by Mr Y since the breakdown of the marriage.

108.(32) Ultimately, when all these factors have been assessed by the trial judge, he or she must be satisfied that any financial orders made constitute proper provision for each of the spouses, and the dependent children, within the meaning of the Constitution and the Act of 1996 (*D.T. v. C.T.*, Keane C.J., at p. 366).

109. I am so satisfied for the various reasons stated throughout this judgment.

110.(33) As to when it would be “unjust” within the meaning of s.20(2)(i) to disregard the conduct of each of the spouses, in *Wachtel v. Wachtel* [1973] Fam. 72, Denning MR said, at p. 90, that: “*There will no doubt be a residue of cases where the conduct of one of the*

parties is... ‘both obvious and gross’, so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life ... in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place.” Keane C.J., in *D.T.*, agreed with the view expressed by Lord Denning in *Wachtel* that the court should not reduce the financial provision which it would otherwise make to one of the parties save in cases where misconduct has been “obvious and gross”. (*D.T. v. C.T.*, Keane C.J., at p. 370; see also Denham J., at pp.387-388).

111. See (31).

DATE OF VALUATION OF ASSETS

112.(34) As to the time at which the assets should be valued, the language of s.20(2)(a), and, in particular, the reference to “*property ... which each of the spouses concerned has or is likely to have in the foreseeable future*” is more consistent with an assessment by the court of the value of those assets as of the date of the hearing. Any other construction would seem to give rise to the possibility of injustice to either party. That was also the view taken by the Court of Appeal in *Cowan v. Cowan* [2002] Fam. 97, at p. 122 (*D.T. v. C.T.*, Keane C.J., at pp. 369).

113. Noted.

(35) The assessment of assets must be as of the date of trial or appeal. This is consistent with the wording of the statute which refers to “*circumstances exist*”, “*the income...which each of the spouses concerned has or is likely to have*”, “*the financial needs which each of the spouses has or is likely to have*”. However, while the assessment of assets is at the date of the trial or the appeal, there may be important factors relevant to that sum to be taken

into consideration in determining the proper provision for the spouses. *E.g.*, the fact that a considerable sum of money was acquired by a spouse after their separation, the basis for such a new acquired sum, or the existence of a deed of separation, may be very relevant (*D.T. v. C.T.*, Denham J., at p. 383).

114. Noted.

115.(36) Assets should be assessed as at the date of trial. However, there may well be circumstances as to their relevance as an asset base in providing proper provision. Thus, if the parties had no joint enterprise (such as a farm or business or professional practice) and one party after separation commenced and achieved success in a wholly new area, that may be a circumstance applicable to the determination of the asset base relevant to proper provision. While the factors set out in s.20(2)(a)-(1) must be applied, it may affect the benchmarking of fairness (*D.T. v. C.T.*, Denham J., at p. 384).

116. Noted.

AD SERIATIM CONSIDERATION

117.(37) In determining proper provision, it is mandatory for the court to have regard, in particular, to the factors set out in s.20(2) of the Act of 1996. The relevance and weight of each factor will depend on the circumstances of each case. Best practice is to consider all the circumstances and each particular factor *ad seriatim* and give reasons for their relative weight in the case (*D.T. v. C.T.*, Denham J., at p. 381).

118. I have engaged herein in the said process of *ad seriatim* consideration.

119.(38) What the court of first instance must do is go through the various factors set out in s.20(2) *seriatim* and deal with the circumstances of the case in the light of these factors insofar as they are relevant to the circumstances of the case, assessing in the light of the evidence, the weight to be attached to each factor. Having completed that exercise, the court must then, in the light of s.20(5) of the Act of 1996, consider in a residual way and on the basis that the court's discretion is not confined solely to the factors set out in s.20(2) but must have regard to whether or not an order which the court

might be disposed to make, having weighed up the various factors in s.20(2), should not be made unless it would be in the interests of justice to do so (*M.K. v. J.K. (No 2)*, O'Neill J., at p. 350).

120. I have so proceeded.

LUMP SUM

121. (39) There is nothing in the Constitution or legislation which prohibits a lump sum as part of a financial ancillary order. In considering whether such an order is applicable, the provisions of the Act of 1996 must be applied (*D.T. v. C.T.*, Denham J., at p. 382).

122. Noted.

123. (40) The Constitution would require that the making of lump sum payments be ordered if, in the particular circumstances of the case, the court considered in its discretion that that was the appropriate manner by which proper provision should be made for the spouse in question (*D.T. v. C.T.*, Murray J., at pp. 409).

124. Noted.

PROPER PROVISION (NOT DIVISION)

125. (41) Under s.20(1) of the Act of 1996, “*the court shall ensure that such provision as the court considers proper having regard to the circumstances exists*” will be made for the spouses and any dependent children. Thus this duty requires the court to make proper provision, having regard to all the circumstances (*Y.G. v. N.G.*, Denham C.J., at p. 730).

126. Noted. This is what I have sought to do.

127. (42) The Act of 1996 enables the court to make a variety of financial and property orders; the purpose of the making of these orders upon the granting of a divorce

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

128. Noted.

129. (43) In English matrimonial law, the court in divorce proceedings is primarily concerned with dividing assets as fairly as possible between the parties rather than making proper provision for the spouses and their dependent children. Such an approach could not be adopted in this jurisdiction, where the appropriate criterion is the making of proper provision for the parties concerned (*M.K. v. J.K. (No 2)*, O'Neill J., at p. 348).

130. Noted.

131. (44) The scheme established under the Act of 1996 is not a division of property. The scheme provides for proper provision. It is not a question of dividing the assets at the trial on a percentage or equal basis. All the circumstances of the family, including the particular factors referred to in s.20(2) are relevant in assessing the matter of provision from the assets (*D.T. v. C.T.*, Denham J., at p. 383).

132. Noted. As to the prospects of maintenance, I refer to the Temporary Nil Maintenance (Pending Further Information/Application(s)) Rationale.

133. (45) It is not the case that in making financial provision for spouses their assets should be divided between them. Neither the Constitution nor the Act of 1996 requires that, expressly or implicitly. It is rather that a spouse should not be disadvantaged by reason of the fact that all, or nearly all, of the assets and income in the marriage are those of the other spouse. It also means that in cases where there are very substantial assets belonging to one spouse which greatly exceed any conceivable day-to-day needs of either spouse, whatever their standard of living, those assets should not as a matter of course remain with the spouse who owns them, with the other spouse being confined to depending on periodic payments (*D.T. v. C.T.*, Murray J., at p. 408).

134. Noted.

135. (46) Proper provision should seek to reflect the equal partnership of the spouses. Proper provision for a spouse who falls into the category of a financially dependent spouse should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet his/her financial liabilities and obligations, continue with a standard of living commensurate with his/her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that he/she can live an independent life and have security in the control of his/her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependant on receiving periodic payments for the rest of his/her life from his/her former wife/husband. [‘In principle’ because in many cases the resources or circumstances of the parties will dictate that the only means of making future provision for the spouse in question will be by periodic payments from the other spouse] (*D.T. v. C.T., Murray J.*, at p. 408).

136. As should by now be clear, the course of action that I intend to take seeks to reflect the equal partnership of the spouses, to ensure that each is not only in a position to meet their financial liabilities and obligations, but also to continue with a standard of living commensurate with their standard of living during marriage, and indeed to enjoy what may reasonably be regarded as the fruits of the marriage. As to the prospects of maintenance, I refer to the Temporary Nil Maintenance (Pending Further Information/Application(s)) Rationale.

137. (47) The court must do what is “proper” in the sense of ‘appropriate’. This is synonymous with what is “fair” or “just”. In the moral sense, this is a clearly stated objective. In practice, it requires the court to weigh in the balance the infinite variety and complexity of the elements of human affairs and relationships and to arrive at a just result (*D.T. v. C.T., Fennelly J.*, at p. 413).

138. Noted.

139. (48) Any property, whenever acquired, of either spouse and whenever and no matter how acquired, is, in principle, available for the purposes of the provision. Thus, property acquired by inheritance, by chance, or the exclusive labours of one spouse

does not necessarily escape the net. On the other hand, not all such property is automatically available either (*D.T. v. C.T.*, Fennelly J., at p. 416).

140. Noted.

CONTINUING OBLIGATION

141. (49) Each spouse has a continuing obligation to make proper provision for the other and the resources which are available to each of them may be taken into account, so far as is necessary, to achieve that objective. Each case will necessarily depend on its own particular circumstances (*D.T. v. C.T.*, Murray J., at p. 409).

142. Noted.

AGREEMENT BETWEEN SPOUSES

143. (50) It is evident that parties may well be able to compose their material and financial differences by agreement. Agreement is, in its nature, to be encouraged, a matter which is recognised in the legislation, in particular, by requiring the court to have regard to the terms of any existing separation agreement (*D.T. v. C.T.*, Fennelly J., at pp. 412-413).

144. There is no agreement here.

SECTION 20

145. Section 20 of the Act of 1996 provides as set out in the Bold text that follows; my comments appear in plain text.

146. **20. – (1) In deciding whether to make an order under section 12, 13, 14, 15 (1) (a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.**

147. I have treated with this aspect of matters above.

148. (2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters: (a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,

149. I have treated with this aspect of matters above.

150. (b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage or registration in a civil partnership of the spouse or otherwise),

151. I have treated with this aspect of matters above.

152. (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,

153. I have treated with this aspect of matters above.

154. (d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another,

155. I have treated with this aspect of matters above.

156. (e) any physical or mental disability of either of the spouses,

157. Neither spouse suffers from any such disability.

158. (f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made

by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,

159. I have treated with this aspect of matters previously above.

160. (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,

161. I do not see that this is an especial issue here.

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

163. Given the scale of the private assets available in this case, I do not see that this is an especially relevant factor; I note, however, that the children's benefit payments go to Ms X.

164. (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,

165. I have treated with this aspect of matters above.

166. (j) the accommodation needs of either of the spouses,

167. It seems to me that these can be adequately met by the division of assets that I have identified. As to the prospects of maintenance, I refer to the Temporary Nil Maintenance (Pending Further Information/Application(s)) Rationale.

168. (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,

169. It does not appear from the evidence that there is any such benefit.

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

171. No other such rights have been raised as an issue. As to the prospect of maintenance, I would simply refer to the point now repeatedly made above in this regard, *e.g.*, in my answer at (j).

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

173. There is no such agreement.

174. (4) Without prejudice to the generality of subsection (1), in deciding whether to make an order referred to in that subsection in favour of a dependent member of the family concerned and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters: (a) the financial needs of the member, (b) the income, earning capacity (if any), property and other financial resources of the member, (c) any physical or mental disability of the member, (d) any income or benefits to which the member is entitled by or under statute, (e) the manner in which the member was being and in which the spouses concerned anticipated that the member would be educated or trained, (f) the matters specified in paragraphs (a), (b) and (c) of subsection (2) and in subsection (3), (g) the accommodation needs of the member. (5) The court shall not make an order under a provision referred to in subsection (1) unless it would be in the interests of justice to do so.

175. Noted. I have so proceeded. Again, as to the prospect of maintenance, I would simply refer to the point now repeatedly made above in this regard, *e.g.*, in my answer at (j).

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

177. Noted.

Conclusion

178. I will grant a decree of divorce between the parties and make the orders as to access and proper provision identified above.