

**THE HIGH COURT**

[2020] IEHC 525

**[2019 No. 84 CAF]**

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989  
AND IN THE MATTER OF THE FAMILY LAW ACT 1995 AND IN THE MATTER OF THE  
DOMESTIC VIOLENCE ACT 2018**

**BETWEEN**

**X**

**APPLICANT (NOW RESPONDENT)**

**- AND -**

**Y**

**RESPONDENT (NOW APPELLANT)**

**JUDGMENT of Mr Justice Max Barrett delivered on 21st October 2020.**

**I**

**Introduction**

1. This is an appeal against the granting of an interim barring order by the Circuit Court on 25 November 2019. The appeal has been unsuccessful for the reasons set out hereafter.

**II**

**Facts**

2. Although the marriage between Ms X and Mr Y continues, legally, to subsist, it has otherwise for all intents and purposes ended. During the life of the marriage, there were two children born of same, both of school-going age. Ms X also has another child born of a previous relationship. Ms X maintains that Mr Y has for a long time behaved towards her in a bullying and aggressive manner. She suggested relationship counselling on a number of occasions but Mr Y has never sought to avail of same. By the end of 2016, it was clear to both parties that the marriage had broken down.
3. By mid-2017, the parties had told the children of their intention to separate. In early-2018, Mr Y at last agreed to attend mediation which proved unsuccessful. Thereafter, Ms X maintains that Mr Y's attitude towards her hardened in the extreme and his behaviour deteriorated to the extent that she was in fear for her safety and that of her children. As a consequence she attended alone for counselling to cope with the situation and, at this time, is on medication for anxiety. Throughout this time, the parties continued to live in the family home in an atmosphere that was decidedly unpleasant, "toxic" was a word used by Ms X in her oral testimony.
4. Ms X maintains that she endeavoured to work with Mr Y, particularly in relation to the children. She tried to agree some sort of orderly schedule as regards the children. She says that Mr Y has not replied to these requests. Mr Y maintains that he has repeatedly indicated that, as a retired man, he is always free to take the children. But there is, if the court might respectfully observe, a want of engagement in that answer. Ms X cannot leave young children in Place A, B or C without knowing that they will be all right and dropped off and picked up. There has to be a more organised, pre-agreed schedule, not least where her every engagement with Mr Y has long seemed to end in dispute.

5. Ms X maintains that while Mr Y was in the house (he is gone now as a result of the interim barring order), the children were being adversely affected by Mr Y's behaviour and the ongoing tension between Ms X and Mr Y.
6. At some point in 2018, Ms X was granted some leave from work to be at home with her children. Mr Y contended that this leave was taken so that it would appear that Ms X is a caring mother. The pleadings and evidence suggest that Ms X is a most caring mother, and the court, with every respect, finds that the notion that Ms X took the leave to cast herself in a particular light vis-à-vis Mr Y to be unconvincing. Ms X appears to have taken the leave for the same reason that any right-minded person would do so: because it was there for the taking and it offered her the chance to spend more time with her children.
7. On Christmas Eve 2018, Ms X took the children out in her usual fashion. Mr Y asked what time she would be home as he wanted to take the children out later that day. She said that she would be home at 4pm and returned home almost exactly at that time. Thereafter, Mr Y took his time in readying himself to go out and when he was leaving Ms X asked what time he would be back – a normal question one would have thought and one to which most people would have responded, for example, 'I'm not sure. Maybe 6 or 7. It depends on the traffic. I'll call you if there's a delay.' Instead Mr Y came up to Ms X's face, said that he did not have to tell her what time he would be back and started storming back and forth shouting at Ms X. In the end, Mr Y became so angry that Ms X told him not to drive off with the children in a temper (presumably for fear there would be an accident). Yet Mr Y continued to be so aggressive that Ms X had to tell him that if he did not stop, she would have to call the Gardaí. So, not a great Christmas Eve.
8. By March 2019, matters had deteriorated so significantly between the parties that Ms X engaged a solicitor to write a letter to Mr Y asking that he mollify his behaviour. A letter issued from the solicitor and was notably measured, stating as follows:

*"I am advised by [Ms X]...that you have been particularly verbally abusive to her of late and of particular concern is the escalation of this behaviour and in front of the children. Whilst I appreciate that marriage breakdown is stressful for all parties it is unacceptable that you should be verbally abusive to my client and attempt to demean her in the eyes of your children. It must be very distressing for the children and their sake at least you need to address your behaviour.*

*I am further advised and troubled deeply by your threat to my client that 'things were going to get worse'. I must insist that you cease being verbally abusive to my client and if needs be please absent yourself from the house to avoid these encounters. I understand that mornings before school and the times when the children are doing their homework in the afternoons are particularly fraught".*

9. Mr Y, *inter alia*, took this letter to mean that he should leave the family home. Though it is perhaps possible to read the letter that way, the more natural way to read the letter is that it means merely to suggest that if unhealthy arguments are taking place at breakfast-time and homework-time then the best thing is to be absent at those times "to

*avoid these encounters", not at all times. That, if the court might respectfully observe, was a sensible suggestion. Unfortunately, the letter elicited a somewhat tart response which read, inter alia, as follows:*

*"I strongly deny [Ms X's] completely fabricated claims. I also note your acceptance of your client's word as though it is absolute fact just because she said so....*

*In relation to you being deeply troubled by the allegation that I made a threat to your client, I can understand how this would deeply trouble you if it actually happened which I again strongly deny. It is clear how a snowflake can be turned into an avalanche just by your client giving you false information...with no evidence whatsoever and nothing more than hearsay to the extent that you suggest I leave the family home....*

*I do however take your warning very seriously and will be happy to address the court with actual evidence in [judicial separation] proceedings, or any other motions which you bring, to show the actual reality of the situation....*

*I would ask that when your client brings further allegations to your attention, that you verify them in some way first prior to writing me letters with warnings and asking me to leave my home".*

10. Mr Y took much the same stance in this application, *i.e.* that he is a man much maligned by an estranged wife who is proceeding maliciously against him for underhand reasons. Maybe there are people who are sufficiently Machiavellian and/or malevolent to conduct themselves so, though Ms X, when in the witness box, did not seem to the court to be such a person. In any event, as will be seen later below, there are a number of reasons why the court, having read the pleadings and, more importantly, spent a day listening to, and looking at, both Ms X and Mr Y in the witness box, favours Ms X's version of events.
11. Mention having been made above of breakfast-times it is perhaps worth touching on how these went. Ms X would get up at about 6.30am, get herself ready for work, then get the children their breakfast and ready them for school, with one last run upstairs to brush teeth and comb hair before heading off. Mr Y would come downstairs and sit on a couch directly across from the breakfast counter, or sometimes, it seems, at the breakfast counter, supping on a vitamin drink and just looking on, saying nothing. His evidence was that he did this because if he spoke there was an argument. But the best way to avoid an argument would have been simply to head off for a cup of coffee or a walk around the nearest park, not to sit as a silent person staring on as successive breakfasts unfolded. The court accepts Ms X's evidence that she found this silent staring discomfiting; it must have been.
12. In any event, returning to the chronology of relevant facts, the above-quoted solicitor's letter appears, on Ms X's account, to have had no positive effect. Instead, by the summer of 2019, Ms X maintains that she was the victim of threatening and abusive tirades from Mr Y on an almost daily basis. And the ill-effect of Mr Y's actions and of the incessant

arguments was even affecting her outside the house: she described in her evidence how on some days she would drive to work and be so consumed in her mind with what was going on and what it meant that she would sometimes pull into her parking-space at work and have no idea how she had got there, so lost was she in her thoughts.

13. Ms X seems finally to have reached the end of her tether on 3 June 2019. On that day she returned home at 8pm with the children, following an outing with them. After she put the children to bed, she returned downstairs to the kitchen. Mr Y followed her into the kitchen and, Ms Y maintains, in an extremely aggressive manner, put his hands on the kitchen counter and demanded to know why Ms X had not told him that she was not going to work the following day. Ms X indicated that she had advised Mr Y of this (there was a family reason why she had structured her day so). Mr Y then began shouting again and told Ms X that she would get her "comeuppance", phraseology which alarmed Ms X and made her fear for her safety.
14. At or around this time Ms X had contacted Women's Aid, an organisation that seeks to help women and children faced with domestic abuse. Through them she had learned what options were available to her, and so she went to the District Court on 4 June and, the District Court being very busy, attended again on 5 June and obtained a protection order against Mr Y. The court finds it very difficult to believe that a woman would twice attend at the District Court in a state of some angst to seek protection from a husband unless she was genuinely possessed of a level of fear. Ms X holds down a good job, is a responsible woman and a sensible mother; it just does not ring true that she would take herself off to the District Court and tell a pack of lies (with all the risks that telling lies in court entails) in order to get a protection order to which she knew herself not to be entitled, all in a calculated and protracted bid to put Mr Y out of the family home. Maybe the person exists who would act so; Ms X did not seem to the court to be such a person.
15. Ms X was advised by the District Court registrar to deliver a copy of the protection order to her local Garda station. She did so, explained that she was fearful about serving the protection order personally, and the Gardaí undertook to do so, and did so that night. (The Gardaí consistently come across well in how they dealt with both Ms X and Mr Y).
16. On 6 June, Ms X left for work early due to work commitments, returning home in the afternoon where she assisted the children with their homework. In her affidavit account of the events of that day, she avers, *inter alia*, as follows:

*"The Respondent paced around me for a full hour, in a circuit from the sitting room to the kitchen, to the playroom, to the dining room again and again. When I stepped away from the children for a second, he came over to them, trying to interfere. When I sat down again, he stood over me, glaring at me, with his hands on his hips in a threatening manner. I felt extremely uncomfortable and threatened by his behaviour. However, I forced myself to ignore it as I knew the Protection Order to have been served and that the Respondent was obviously annoyed. Later that evening...[h]e raised the issue of the service of the Protection Order on him. I*

*told him that I would not discuss it and would only discuss the arrangements for the children."*

17. Mr Y's pacing/prowling cannot but have been alarming. It was not clear from the pleadings or from Ms X's evidence why she elected not to speak with Mr Y about the protection order, but presumably she decided that it would do no good to have that conversation.
18. Notwithstanding the protection order, Ms X maintains that Mr Y continued to act in an intimidating manner towards her, undermining her in her dealings with the children (as, for example, when, consistent with medical advice, she indicated that one of her children should avail of a particular therapy, and he was dismissive). This undermining, Ms X maintains, has continued even after the barring order, with Mr Y, when dealing with his children, being dismissive of aspects of the public health advice concerning the Coronavirus pandemic. On one occasion, when husband and wife were in the family house and a dispute arose over Mr Y encouraging one of his children to sit down and watch cartoons on television in the midst of the pre-school rush, Mr Y, Ms X avers, "*glared at me and then smiled in a menacing manner. He shouted at me, I told him not to and he replied 'I have to protect myself'*", an episode that Ms X found sufficiently worrying that, though she does not like to disturb the Gardaí, thinking they have enough to be doing, she nonetheless relayed to the Gardaí at her local Garda station.
19. Two of Mr Y's breaches of the protection order are such that there are now two criminal prosecutions pending against him. In his evidence, Mr Y's attitude was that he has never been in trouble before now and that the trouble he finds himself in is all as a result of his separated wife's malevolent machinations against him. With respect, however, it does not matter that Mr Y has never been in trouble before now: one judge has seen fit to issue a protection order against him, another judge has seen fit to issue an interim barring order against him, and this Court is affirming that interim barring order. Court orders do not issue simply for the asking, breach of a court order is a serious matter, and Mr Y will find that even though his past may be free from trouble with the law, his future will be blighted with legal entanglements, if he does not do as the interim barring order requires.
20. At some point, Mr Y decided, for reasons unclear, that he needed a safety/barring order against Ms X and applied for same. The return date for that application occurred during the summer of last year and was the prelude to a strange episode. At the return date hearing, the fact that Ms X was due to take a holiday in mainland Europe with her three children came up. The judge asked if Mr Y had any objection to the holiday, Mr Y indicated that he did not, and the judge indicated that he thought the space would be good for everyone. Somewhat astonishingly, when Ms X got to her holiday destination, an email popped up in her Inbox indicating that Mr Y was coming the following week to stay a few miles away and asking when he could have access to the two younger children (his children with Ms X). Mr Y indicated in court that his holiday had been long planned but two points fall to be made in this regard. First, the fact of Mr Y's imminent holiday to almost the same place as Ms X is a matter which should have been disclosed to the judge

who presided at the return date hearing. Mr Y will find, if he does not know this already, that if he 'plays coy' with a judge or is found by a court to have 'played coy' with a previous judge, that does not typically bode well in court proceedings. Here the court cannot but conclude that Mr Y did 'play coy', perhaps (though the court does not know this) because he knew that the judge would have a view if he learned that far from the holiday putting a space between the parties, Mr Y was determined to narrow that space by flying out to the same country and staying but a few miles away from where Ms X was due to reside with the children. Second, given that the judge had said that space between the two parties would do everyone good, surely the prudent and decent course of action would have been for Mr Y to take his holiday if he had to take it, and enjoy himself alone for 2-3 weeks without seeing his children, rather than intruding himself into the very space which the judge had stated would be beneficial for everyone concerned.

21. Ms X avers, *inter alia*, as follows, of this episode:

*"I say and believe that this email was sent before I landed in [my holiday destination]. I was looking forward to spending time with our children in an environment where I wasn't being put in fear for my safety and in which I could enjoy time with the children without being constantly watched and followed around the house, as I had been. This email changed that and effectively ruined my holiday and prevented me from having the well-needed breathing space to allow me to recover from months of emotional and psychological abuse. I had access to a copy of my protection order, but I wasn't assured that it was valid in...[Stated Destination] and therefore for the entire holiday, I was anxious, stressed and in fear of what [Mr Y]...would do in...[Stated Destination] during that time."*

22. Testament to Ms X's character and her maternal concern for the well-being of her children and her recognition of their need for a continuing relationship with their father, she nonetheless allowed Mr Y to have access to them on ten of the days of the holiday. "As a consequence", she avers, "the anticipated 'breathing space' did not occur".

23. Matters took an odd turn on everyone's return home after the holidays. One evening, one of Ms X's children indicated that an intention to head out to the local park to play. It was a summer evening so there was still light even though it was late-evening and Ms X, who had not seen her children all day, following on an unexpected near day-long excursion with their father, said that she would also walk to the park:

*"At that point [Mr Y]...took his phone out and started to record me. He stated that he was in fear for his safety. [This was so unusual an assertion that when Ms X was recounting this episode in her oral evidence, the court stopped Ms X and asked if she meant that she had said she was in fear for her safety, but no, it was Mr Y who said it.]...I say that having [Mr Y]...video me while sitting in my own home watching TV and stating that he was in fear for his safety was a terrifying experience. It told me that the Respondent would stop at nothing to drive me out of my home. [It suggests to the court that Mr Y was, at the least, behaving in a disturbingly eccentric manner]. [Two of my children]...were in the house and witnessed this*

*incident, I was so frightened by [Mr Y's]...actions that I telephoned the Gardaí. [Mr Y]...continued to record me when I was explaining to the Garda[i] that I had a situation in the house. I believe that [Mr Y]...was trying to provoke me. I was so frightened when I phoned the Garda[i] that I couldn't get the words 'I have a protection order' out....Instead, all I could ask was for the two Gardaí that I [had]...been dealing with. After my call to the Gardaí, [Mr Y]...stood close by pacing back and forth, I didn't know what he was going to do next and I was terrified. The fear I felt for my own safety and my children's safety was unbearable."*

24. It appears from the oral testimony that Ms X eventually took out her phone to record Mr Y's strange behaviour. The court has no view on whether she ought to have done this or not; it may be that she thought the whole scenario so odd (and it was decidedly odd) that she wanted a recording of same in case it was later denied.
25. The staring treatment at breakfast-time also resumed at this time. The court respectfully does not accept as true the evidence of Mr Y that he sat where he did and kept quiet because he did not want to cause a row. He did not need to sit where he did, he did not need to be where he was, he knew that Ms X found his behaviour unsettling, he knew that she had offered that they do breakfast on different days, but he went ahead and did as he did anyway, and there was no shortage of rows. Why would Mr Y do as he did? Perhaps in his own mind he thought he had reason for doing so, but if he did think that, he was wrong. The court cannot but conclude that he was acting in a most malignant manner towards Ms X in sitting down each morning while breakfast was ongoing and staring silently at her.
26. One Friday morning in autumn 2019, Ms X was about to leave the house with the children, drop them to school and then head off to work. Mr Y, however, demanded that she have a 'discussion' with him in which she was not to speak:

*"If I tried to speak he shouted at me and told me to 'desist'. [Mr Y]...was very threatening towards me. He came up to the island [this seems to be a counter in the middle of the kitchen], put his hands on the counter and told me to 'desist', 'I don't have to listen to you, I don't have to hear what you have to say, now desist'. His behaviour was confrontational, threatening and aggressive. I didn't speak as I was in fear, terrified to the point that I didn't ring the Garda[i] as I didn't know what he would do if I took out my phone"*.

27. The same day she emailed Mr Y and asked him to stop with the confrontational incidents, noting the effect that they were having on the children.
28. The following month, one of the younger children got some sort of night-time vomiting bug. The two children share a bedroom and Mr Y decided to sit in there until the sick child had gone asleep. At some point, Ms X popped into the room to see that all was well:

*"When I walked into the children's bedroom...[Mr Y] was sitting on the chair in the corner on his phone in a dark room. It was disrupting the children from their*

*sleep....I asked [Mr Y]...[if he would] let the children sleep as his phone was keeping them awake. At this point, he looked up from his phone and glared at me in a menacing manner. In a very aggressive tone, he told me to 'be careful', 'you were told to be careful'. There was such hatred in his tone that I got a shock hearing it. He continued to sit in the chair and continued to tell me to be careful. Both children were looking at me. I again asked [Mr Y]...could he let the children sleep. He told me to be careful again and to leave the room. He put his hands on the chair as if he was going to get up, in a very threatening manner. I was very frightened by this but, as I didn't want further confrontation in front of the children, I left and went into my own room which is next door to the children's room [leaving the door open, as is her habit]. [Mr Y]...also left the children's room and sat on the stairs to the attic. He continued to stare into my room. I was afraid to close the door as I did not know what he was going to do next. I didn't know what to do, so I stayed in my room. [Mr Y] sat on the stairs watching me for over thirty minutes."*

29. Mr Y indicated in his evidence that he sat on the stairs waiting to hear that his unwell child (who snores) had gone asleep. The court respectfully finds this unconvincing. First of all, his unwell child had some sort of vomiting bug, not a serious illness, so with Ms X lying in bed next door to the children and readily available if the sick child needed anything, the child had adequate adult attention. There was no reason why Mr Y could not go downstairs and come up in half an hour's time to see that the child had nodded off to sleep. The family house is not so big that he would not hear if the sick child shouted out, or indeed if Ms X was called into the room by the child. Instead he seated himself in a position where he was staring into Ms X's room after he had told her repeatedly to "be careful" and put her in fear of some kind of imminent attack. It cannot but have been alarming and frightening for Ms X, and Mr Y cannot but have known that his actions would have that effect on her.

30. Three days later, another alarming episode occurred:

*"I was getting the children ready for school, preparing lunch, etc. as usual....When we were all dressed and ready to go, I mentioned to the children to go. We were all in the hall when I realised the children didn't have their school bags and I went back into the kitchen for them....[Mr Y] was carrying the bags and heading straight for me. I asked him to put the bags on the counter so I could pick them up. He slammed them down on the counter and shouted at me that he didn't have to do what I say. He had his hands on his hips and was threatening towards me. He was right in front of me, putting me in fear and fearing for my safety. His manner and tone were so aggressive and spiteful that I put my left hand out to prevent the children from coming into the kitchen so that they didn't have to see this abusive behaviour to their mother from their father. I asked him to calm down and stated that he shouldn't shout at me and to stay calm. He shouted at me again that he doesn't have to do what I say. The children were standing behind me and I shielded them from the threatening behaviour. I took the bags and left the house. I dropped the children off to school and made sure they were okay with what had happened."*



31. It is not entirely clear to the court why Ms X did not just take the bags from Mr Y instead of asking that he place them on the counter first. In her oral testimony she seemed to indicate that Mr Y was charging at her with the bags, so perhaps that was why. Regardless, what followed her request was so frightening to her that she again called to the local Garda station. The Garda on duty told her to return home, and to await the squad car which would be there imminently, but not to go into the house, which Ms X would not have done anyway ("*I...do not feel safe going back to the house when the Respondent is there alone*", she avers at one point in her affidavit evidence). The Gardaí soon arrived and eventually decided to arrest Mr Y. One of the female Gardaí who attended at the house "*advised me to seek a barring order from the District Court due to the abusive and threatening situation in the family home*".
32. In total, as mentioned, Mr Y has been arrested twice by the Gardaí. At the hearing he noted that on one occasion Ms X texted him, post-arrest, to see if he would be available to collect the children which he considered to point to Ms X being unafraid of him. Ms X indicated, however, that she was afraid that if she picked up the children, instead of Mr Y, without first arranging matters so, this would be cause for yet another explosive argument. Her explanation seems perfectly credible.
33. Ms X subsequently applied for a barring order before the District Court. While waiting to enter the court, she considered that Mr Y started staring again at her and her eldest child and moving around as they did so that he could keep them in his line of view. Mr Y's solicitor who was present with his client indicated to the court that he did not believe this had occurred. Ms X indicated that if the CCTV footage from the area was obtained it would be seen that she was telling the truth. The court does not see that a great deal hangs on this, though given Ms X's general credibility the court is inclined to believe that it did occur and that the solicitor did not notice (and looking at one's client to see who he is looking at is not what a solicitor would typically be doing), with the result that the solicitor could honestly give a statement of what occurred that diverged from Ms X's just-as-honestly given evidence.
34. The District Judge took the view that he did not have the jurisdiction to deal with the application before him and struck out all the summonses before him and discharged the protection order. Thereafter, Mr Y returned to the family home, the old tensions resurfaced, the arguments resumed, and the children began to react. There was also an odd episode in which Mr Y, upon his return, took a shower and began singing loudly, something he had never done before, and which Ms X found unnerving; from the evidence it seemed like a moment of passive-aggressive triumphalism following on Mr Y's return. Ms X's miserable existence and fear of attack also resumed. She decided to seek relief from the Circuit Court, the possibilities sought including, *inter alia*, an interim barring order. In her grounding affidavit she averred, *inter alia*, as follows:

*"Following the decision of the District Court...to decline jurisdiction...[Mr Y] returned to the house. I tried to reach out to him, by email...to arrange time with the children and stressed the importance of clear communication and the importance of*

*us working together for the children....I am not at all reassured by [Mr Y's]...response....*

*Since he has returned to the family home...[Mr Y's] behaviour has deteriorated further. He is drinking a lot and takes over the sitting room for his drinking. He continues to sit and watch me in a menacing manner as I look after the children, particularly in the mornings and I feel very threatened by this. I have no sense of security or peace in my home....[Mr Y] continues to watch my every move which creates a tense atmosphere in the house. The psychological stress and emotional abuse is causing me stress and anxiety resulting in sleepless nights and panic attacks, which, I fear, will have a long-term impact on my health....[Mr Y] is...trying to break my spirit. He stays up late at night, drinking. I am in a constant state of fear as I have no idea what he is going to do next....*

*I am now, again, on constant alert, not knowing what's going to happen and what [Mr Y]...is going to do next. The pattern of emotional abuse continues as do the threats, intimidation, and abusive behaviour. I have engaged with a counsellor to help me deal with the ongoing stress of my situation and to help me to assist the children in coping with the dysfunctional environment in which they now live."*

35. Ms X comes across in the foregoing, if the court might respectfully observe, as a fearful woman who is, to use a colloquialism, 'at her wit's end' in terms of dealing with Mr Y's impossible and intimidating behaviour and with the constant threat of imminent harm.
36. After careful consideration, the Circuit Court, unsurprisingly, granted the interim barring order that is the subject of the within appeal.

### **III**

#### **Some Reasons for Favouring Ms X's Evidence**

37. One of the complaints made by Mr Y in this application was that Ms X has been believed by previous judges despite the fact that all she has done is to make a series of unsubstantiated and allegedly false allegations, all with a view to ousting him from the family home. So it may assist if the court indicates that this is not just a case of 'he says/she says' with the court effectively tossing a coin in terms of whom it believes. There are at least four substantive reasons why the court favours the evidence of Ms X of that over Mr Y:
  - first, it seemed to the court, when observing Ms X in the witness box, that she had experienced very real fear at times in her dealings with Mr Y that he would or, on occasion, was going to attack her, and that she is genuinely afraid that if he returns to the family home he would return to his old behaviours and place her again in a position of fear.
  - second, what Ms X described seemed, if the court might respectfully observe, and without in any way diminishing her experiences, to be a pattern of behaviours that one might almost instinctively expect. Thus, she claimed (and the court believes)

that she suffered Mr Y's behaviours for a number of months, it eventually became too much and she contacted Women's Aid, they counselled her on the options available to her, and she thereafter sought court remedies to assist her in dealing with the home situation that confronted her. That was a sequence of events which just sounded like the 'normal' reactions and actions of a woman caught up in a situation which ought not to have confronted her.

- third, Mr Y repeatedly indicated that various allegations made by Ms X were quite simply untrue. However, Ms X holds down a responsible job and has had a number of promotions at work. That would suggest that she is a responsible woman not prone to sensationalism or strange behaviour. And her demeanour and evidence in the witness box buttressed the court's sense that Ms X was telling the truth (and a sorry truth it was).
- fourth, Mr Y contended that he is the victim of a calculated plot against him by Ms X who has set out in a contrived way to tell a whole series of lies so as to see him ousted from the family home. Ms X may well want Mr Y out of the family home (she clearly does if she got an interim barring order), but it was the court's decided impression from her evidence that this was because the atmosphere in the family home was toxic and his behaviour repeatedly had her in fear of her safety. It was not the court's impression that Mr Y is the victim of some contrived concatenation of lies.

#### **IV**

##### **Section 8 of the Domestic Violence Act 2018**

38. The interim barring order was granted under s.8 of the Domestic Violence Act 2018, subsection (1) of which provides as follows:

*"(1) Where the court, on application to it for a barring order or between the making of that application and its determination, is of the opinion, having taken into account any order made or to be made to which paragraph (a) or (d) of section 15(2) relates, that there are reasonable grounds for believing (a) there is an immediate risk of significant harm to the applicant or a dependent person, and (b) the making of a protection order would not be sufficient to protect the applicant or a dependent person, the court shall, subject to section 12, by order (in this Act referred to as an 'interim barring order') – (i) direct the respondent, if residing at a place where the applicant or the dependent person resides, to leave the place, and (ii) whether the respondent is or is not residing at a place where the applicant or the dependent person resides, prohibit that respondent from entering the place until further order of the court or until such other time as the court shall specify" [Emphasis added].*

39. A few points might be made about the underlined text.

40. First, it is the "risk of significant harm" that needs to be "immediate", not the "harm". In other words, a court must ask itself whether the "risk" is "immediate", i.e., (to borrow from the *Oxford Online English Dictionary*, a perfectly legitimate tool to bring to bear in

the context of statutory interpretation) “*proximate...[or] close, [or] near*” in time or nature? Moreover, given that the clear purpose of the Act of 2018 is not just to address domestic violence but to seek also to eliminate what the Oireachtas clearly perceives to be a pernicious evil, it seems to the court that the widest possible interpretation falls to be given to what is “*immediate*” in any one case.

41. Second, the more the court focuses on the word “*significant*”, the more it considers that, at most, that word can only mean to exclude harms that are so utterly and completely trivial and/or contrived in nature or substance that a reasonable-minded person would conclude that in truth no harm had been suffered at all – and in deciding whether a harm is so trivial or contrived in nature a court should ever be mindful that the scale of a harm is not just measured by a discrete act complained of but rather is informed by all the behaviours and circumstances that surround and inform that act, as well as the fear of future reoccurrences of same. In truth, once any harm is established the court would expect that in practice there will be few if any real-life circumstances in which such harm is found not to be a “*significant harm*”. The narrowest reading of the word “*significant*” is, it seems to the court, especially appropriate and merited in the context of the purpose of the Act of 2018, a measure which seeks not just to address domestic violence but to seek also to eliminate what the Oireachtas clearly perceives to be a pernicious evil.
42. Third, as to the concept of “*harm*”, the court respectfully considers that, consistent with the purpose of the Act of 2018, a measure which seeks not just to address domestic violence but to eliminate what the Oireachtas clearly perceives to be a pernicious evil, the word “*harm*” falls to be given the widest possible reading, so as to embrace (to borrow from the *Oxford Online English Dictionary*) any “[e]vil (*physical or otherwise*), [or] hurt, [or] injury, [or] damage, [or] mischief”.
43. One point made for Mr Y was that at the time of the Circuit Court hearing, there was no ‘order made or to be made to which paragraph (a) or (d) of section 15(2) relates’. But so be it if so: the existence of any such order is not a prerequisite to the granting of relief pursuant to s.8(1), the Circuit Court need only have regard to such order aforesaid if that order has been made or is to be made, and here there is nothing to suggest that the Circuit Court had regard to anything to which it ought not to have had regard when coming to its decision to issue the here-impugned interim barring order.

## V

### **The Circuit Court Order**

44. The Order issued by the Circuit Court states, *inter alia*, as follows

*"THE COURT DOTH ORDER*

*That the Respondent do leave the Family Home/Residence of the Applicant at  
[Stated Address]*

*on or before 6pm on [Stated Date]*

*AND that he be PROHBITED FROM entering that Family Home/Residence save for...[stated] afternoons when the Respondent collects the children from school, he then can attend at the Family Home/Residence of the Applicant with the children, having collected the children from school, but leave immediately on the Applicant returning home but no later than 6pm or wheresoever the Applicant may from time to time reside, or to which she may resort for visits, until further Order of this Court and further that he be prohibited from using or threatening to use violence against, molesting or putting in fear the Applicant attending at or in the vicinity of, or watching or besetting a place where the Applicant resides...".*

45. It was submitted for Mr Y that the Circuit Court judge could not have made such an order if, to borrow from s.8(1) of the Act of 2018, that judge perceived an "immediate" risk of significant harm to present. How could she have contemplated some level of interaction between husband and wife, if there was an "immediate" risk of significant harm presenting? Two points, it seems to the court, might usefully be made in this regard. First, this point ignores the nature of the harm perceived to present here, viz. psychological abuse and/or unusual behaviour which had Ms X afraid, following a couple of what she perceived to be near moments of danger, that there was a flare-up imminent in which she might be attacked. Those flare-ups seemed to present in the 'pressure cooker' environment within the home and the Circuit Court judge may quite reasonably have concluded that the risk of a flare-up in delivering children safely home from school and departing the moment that Ms X got home was unlikely to yield an explosion because there would only be momentary interaction. Second, there was perhaps an element in the Circuit Court judge's order of not letting the perfect be the enemy of the good, *i.e.* it might be preferable that there be zero interaction between husband and wife, but the children still had to be collected from school and brought safely home, the husband had the requisite availability, the wife did not, and the Circuit Court judge sought simply to weave the best solution possible from the various threads presenting.
46. In passing, there was mention in Ms X's evidence that since the interim barring order was made, Mr Y has (troublingly) taken occasionally to parking his car by her house in such a way as to stop Ms X driving out from the driveway onto the road. Though it is not a matter that falls to be resolved in this application, the court would respectfully remind Mr Y that the interim barring order, among other matters, bars him from "*putting in fear the Applicant [Ms X, by] attending at or in the vicinity of, or...besetting a place where the Applicant resides*". The court, respectfully, does not believe Mr Y's explanation that he has been parking as he has to avoid parking in a puddle.

## **VI**

### **The Martial Arts/Boxing Point**

47. There was suggestion on the part of Mr Y that Ms X has trained in martial arts and boxing and that she would be well able to look after herself if Mr Y attacked her and thus she could not be in fear of an attack by him. It turned out that the martial art qualification was a Red Belt from when Ms X was a young teenager and that her boxing experience extended to one bout in a charity event some years ago. But even if Ms X was possessed

of the highest ability in martial arts and/or boxing, this whole line of argument is profoundly wrong and objectionable. There is no context in an intimate relationship in which domestic violence is permissible. The fact that a spouse/partner might be able to hit back at a spouse/partner who perpetrates (or who might perpetrate) one or more acts of domestic violence is an irrelevance in this regard. 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.

## VII

### Sexuality

48. One of the points that Mr Y made was that his separated wife has fallen in love with someone else and that she wants him out of the house so that her new love can move in. That is not something that could never happen and hence was a matter which could appropriately be raised – though it was the court's decided impression from Ms X's evidence that the reason she wants Mr Y out of the family home is that he has long had her living in constant fear of imminent harm, *i.e.* it is not the court's impression that Mr Y is the victim of a web of lies and machinations. What the court found less than appropriate was the emphasis that was placed by Mr Y on the fact that Ms X's new love is another woman, as though this somehow matters (it does not).
49. In this last regard, by way of general, *obiter* note all practitioners (and the court, for the avoidance of doubt, does not mean to point to or criticise any of the practitioners in the within application) are respectfully urged to be careful when it comes to raising issues as intimate as sexuality in the courtroom. Why is care needed in this regard? There are at least three good reasons why: (1) sexuality is an inherently personal and private matter; unless it is of relevance in the context of particular court proceedings (and there must be few enough proceedings in which it is relevant) it ought not to be raised or discussed; (2) because sexuality is an inherently personal and private matter it is generally for each of us in life to reveal our sexuality to as few or as many people we want; save insofar as relevant (and, again, there must be few enough civil proceedings where a detailed consideration of intimate matters is relevant) court actions are not intended as a vehicle through which to expose/discuss a person's sexuality and/or the sex life or practices of consenting adults; and (3) although family law proceedings are *in camera*, the judge, the registrar, the judicial assistant, any security person and at least some of the lawyers present are strangers to the parties; all litigants are entitled to assume in coming to court that they will not be required to reveal more of themselves before strangers than is necessary for the due despatch of whatever application the court has been asked to adjudicate upon; one does not squander all entitlement to privacy on entering a courtroom, even if it is for *in camera* hearings.

50. The court does not mean to suggest in the foregoing that relevant issues cannot be raised in court proceedings; relevant issues can always be raised. The court also does not mean to suggest in the foregoing that a person should ever feel any embarrassment or shame as regards either their sexuality or whatever consensual adult sexual relationships they engage in (there is no cause for embarrassment or shame); its concern is simply to ensure that to the greatest extent possible, individuals should retain the right, *at their election*, to reveal the details of inherently personal and private aspects of their lives to as few or as many people as those individuals want.

## VIII

### Conclusion

51. Having regard to all of the foregoing, the court respectfully declines to vary the order of the Circuit Court. There was abundant evidence to support the making of the order, there was no legal reason why the order could not be made, the statutory basis and factual conditions to justify the order presented, and there is no flaw in the form of the order made.

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

*Dear Appellant/Respondent,*

*I have dealt in the preceding pages with various issues presenting in this application. Much of what I have written might seem like jargon. In this section, I identify briefly some key elements of my judgment and what it means for each of you. **This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.***

**TO THE APPELLANT:** *Given the conflicting evidence of yourself and your separated wife as to the events which led up to the interim barring order, your appeal turned to a large extent on which of the two of you I was more inclined to believe. I must respectfully advise you that for the following reasons I was more inclined to believe your separated wife's evidence over yours:*

*(1) it seemed to me, when observing your separated wife in the witness box, that she had experienced real fear at times in her dealings with you and that she is genuinely afraid that if you return to the family home you would return to your old behaviours and place her again in a position of fear.*

*(2) your separated wife described what seemed to me to be, and without in any way diminishing your separated wife's experiences, a pattern of behaviours that I would almost instinctively expect. Thus, she claimed (and I believe) that she suffered your behaviours for a long number of months, it eventually became too much and she contacted Women's Aid, they counselled her on the options available to her, and she thereafter sought court remedies to assist her in dealing with the situation at home. That is a sequence of events which rings true.*

*(3) you repeatedly indicated that various allegations made by your separated wife were entirely untrue. However, your separated wife holds down a responsible job and has had a number of promotions at work. That work history suggests to me that she is a most responsible woman, not prone to sensationalism or strange behaviour. Her demeanour and evidence in the witness box further buttressed my sense that she was telling the truth.*

*(4) it was contended for you that you have been the victim of a calculated plot against you by your separated wife who has set out in a contrived way to see you ousted from the family home. Your separated wife clearly wants you out of the family home (so much so that she got an interim barring order); however, it was my decided impression from her evidence that this was because you have long had her living in fear of imminent harm. It was not my impression that you are the victim of a web of lies.*

*As well as preferring your separated wife's evidence to yours, I do not see any reason in the legal arguments, capably advanced by your solicitor, as to why the interim barring order should not or could not have issued. Nor do I see any flaw in the form of the order that issued from the Circuit Court. As a result of all the foregoing, I have decided to leave the Circuit Court order unvaried and in place.*

*I find it troubling that, since the interim barring order issued, you have taken to parking occasionally outside the family house in such a way as to block the driveway. In this regard, I would respectfully remind you that the interim barring order, among other matters, bars you from "putting in fear...[your separated wife, by] attending at or in the vicinity of, or...besetting a place where [she]....resides". With all respect, I do not believe the explanation that you have been parking as you have to avoid parking in a puddle.*

***TO THE RESPONDENT:*** *I found your evidence to be more convincing than that of your separated husband and see nothing in the evidence or in law to suggest that the Circuit Court judge erred in making the interim barring order. Nor do I see any error in the form of the Circuit Court order. I will not therefore make any changes to that order.*

*I find it troubling that, since the interim barring order issued, your separated husband has taken to parking occasionally outside the family house in such a way as to block the driveway. In this regard, I have reminded him above that the interim barring order, among other matters, bars him from "putting [you] in fear [by]...attending at or in the vicinity of, or...besetting a place where [you]....reside".*

*Yours faithfully,*

*Max Barrett (Judge)*