THE HIGH COURT
FAMILY LAW

[2021] IEHC 851
[2018 No. 15 M]

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

BETWEEN:

B.P.

Applicant

-AND-

S.O.

Respondent

JUDGMENT of Mr. Justice Jordan delivered on the 18th day of February, 2021

1. When relationships flounder and fail one consequence can frequently be that sense and reason and objectivity, on the part of those involved, get lost along with the relationship. Often, one partner adopts a particularly unhealthy mindset. The knowledge of the good in the other is archived - and the relationship history can fall victim to distortion. A desire to emerge victorious and vindicated at the end of the dissolution can become omnipresent in every engagement necessary or created along the way. And good people let themselves down in the process. And so it is here.

2. While this is a claim for a Decree of Judicial Separation and ancillary relief concerning the children of the marriage, financial provision and property issues it is an involved case with a long history. The evidence in the case spanned seven days and illustrated a couple unfortunately submerged in costly high conflict litigation. Counsel for the applicant indicated at the outset of the case that a really significant issue in the case was that there were allegations of quite a heightened severity and that they had to be resolved and that they were

"a real issue in the case". In particular, there were allegations that the applicant raped and sexually assaulted the respondent.

3. After lunch on the first day counsel for the respondent indicated that the respondent was agreeable to add the following to an open offer made shortly before the hearing, in an effort to process the issues before the court: -

> "*Open offer addendum.*
>
> *(1) Not to rely on the allegations/averments that the B.P. sexually assaulted me including rape, in these proceedings or at all.*
>
> *(2) S.O. accepts that there is a difference of opinion/averment as to what happened.*
>
> *(3) S.O. accepts that B.P. did not intend to cause any harm to her.*
>
> *(4) S.O. confirms that she will not discuss these allegations in any setting save for personal, private or confidential therapeutic environment. "*

4. It was also indicated to the court that the respondent would confirm the following two statements in evidence: -

> *"(1) I do not withdraw the allegations that B.P. did these things to me, but in the hope of reaching an agreement and in the interest of moving matters forward for everybody's sake, I am prepared to undertake not to pursue them in any legal forum.*
>
> *(2) In the hope and context of an agreement being reached in respect of B.P.'s conduct towards the children in the past, I am agreeable not to pursue them with a third party such as Tusla, the CFA, the HSE and B.P.'s employer. I am also agreeable that if contacted by any such agency, that I will inform them that I do not wish them to be pursued. I very much hope that no issues as to unwanted behaviour by B.P. towards the children arises in future. "*

5. This offer will be returned to later. It was not acceptable to the applicant who denied the allegations and who naturally hoped to leave the court with his reputation unsullied.

6. Given the polarization that exists it is necessary to provide some details of the evidence in the case to put in context the findings and decision of the court.

7. The applicant and the respondent started dating in October 2009 and were married in 2010. At that time they were both working in the same professional setting. The applicant was working in a position in the same department in which the respondent was one of his superiors.

8. In or about 2011 the applicant commenced an MBA and he spent two years in a research role and eventually ended up submitting and getting the degree in July of 2017.

9. On his training scheme the applicant was due to go to Galway for the second year. He was to be in Cork from in or about 2010 to in or about 2011 - and then to Galway. The eldest son, Child X, was born in 2010 and the respondent insisted that the applicant did not go to Galway, but stay and do the research degree in Cork for the following two years.

10. In or about 2014 the couple bought the current family home. It required extensive renovation and extension. These works were completed at significant cost in or about 2016. When it was purchased the couple paid a deposit of €80,000 of which the respondent put in €40,000 and the applicant's father gave him a gift of €40,000 towards it. The remaining outlay was financed by mortgage borrowing. There are in fact three mortgages attached to the house.

11. At the time the house was purchased the applicant was working in Kildare. He would stay with his father during the week and the couple were renting a house in Cork close to the respondent's parents' home. The third child was born in or about 2015. In or about 2015 the respondent terminated the tenancy in the rental house in Cork and moved with the children to her parents' house. She stayed with them until in or about 2016- and the applicant would stay there when in Cork. He spent two years working in Kildare and prior to that he had spent a year working in Galway. When in Galway he commuted daily except for the nights when he was working late or if the weather was terribly bad or if he was very tired. When working in

in Kildare he would be there for the week and would get home at weekends if not working that weekend.

12. The second two pregnancies were particularly difficult pregnancies and births for the respondent. She had a number of health problems during these pregnancies and was on sick leave at times. The respondent was throughout all this time holding down a demanding and responsible professional position.

13. The demands of their respective jobs and a young family clearly took a toll on both parties and put pressure on their marriage.

14. There were disagreements at an early stage following the marriage.

15. When Child X was a few months old there was a disagreement concerning the church wedding. The civil wedding had taken place in or about 2010 and there was an agreement or an understanding that it would be followed by a subsequent church wedding. The respondent had some bereavements in her family in or about 201l and the church wedding was deferred. Then, according to the applicant - and this does not appear to be in dispute - the respondent decided that she didn't want to have her church wedding. There was an argument and eventually the church wedding did take place in or about 2012.

16. The applicant says that he had enormous reservations about doing his MBA in Cork. He felt that it would slow his career progression. He felt it wouldn't be necessary for the post that he was going to be looking for. He felt he wasn't a natural academic. And it involved a huge salary cut. He went from earning, around €100,000 per annum to €50,000 per annum. He didn't really want to do so. And his mentors were against it also. However, the respondent, according to the applicant, said that if he went to Galway and left her in Cork with a small child that the marriage wouldn't survive. According to the applicant the respondent basically put it on the line that if he didn't do his MBA in Cork that the marriage wouldn't survive. This Court accepts the applicant's evidence in this regard. It is a point of some small significance

in supporting the court's view that the respondent was throughout the marriage very much in control of her situation in the marriage. But it should be added that insisting on the applicant staying in Cork was an understandable position for the respondent to adopt in circumstances where she too had a busy career and was entitled to have the support of her husband available to her and to their young child.

17. Whilst living in the respondent's parents' house the couple (according to the applicant) had been sleeping separately most of the time and even in the previous property sleeping separately most of the time. They went back to sleeping together in the marital bed in September of 2016 when they moved into the new family home. Over the next few months, according to the applicant, the respondent made it clear that he was no longer welcome, and he ended up sleeping in Child X's bed most of the time. Initially it was because the children were in the bed with her but over time the applicant says that a lot of the time the respondent wouldn't want him to be anywhere near her and appeared to be "kind of disgusted" by him to some extent - and wanted him to keep away.

18. There were other strains at the time in that the behaviour of Child X was becoming very difficult to manage. Both parents were struggling with it. He was acting out. This led to an episode in February of 2017 - the applicant thinks maybe the night of the 18th or 19th of February of 2017. At bedtime Child X became agitated and started hitting Child Y and Child Z and the applicant held him to stop him hitting Child Y and Child Z. The respondent emerged from the ensuite *"to say that he was acting inappropriately and to get off Child X. And then she made a threat that she would contact Tusla and his colleague and mentor, S., in order to prevent him from getting a permanent job in Waterford if he didn't do what she said, which was to get out of the room and stay away from Child X .. "*

19. According to the applicant the respondent had not delivered such ultimatums previously although she would often joke that if he didn't behave himself he'd end up in a flat in Portlaoise visiting with the children at the weekend.

20. It was difficult to cope with Child X's temper tantrums. According to the applicant: -

> *" We tried different things. Like, I tried stern discipline. It was a disaster, it just agitated him more. Tried placating. It didn't seem to work very well. In desperation sometimes, to prevent him from injuring himself or his siblings, I would hold him and stop him from hurting himself or his siblings, and we really struggled with him. "*

21. According to the applicant he discussed Child X.'s problems with the respondent and said that he felt that they should bring him to see a child psychologist - but his efforts in this regard were resisted. Then sometime around Spring of 2017 she agreed to a child psychologist and the applicant, after some research, found a psychologist whom he thought was suitable. However, before the applicant emailed this psychologist the respondent said *"the only way that she'd agree to me contacting him was if I didn't say anything about Child X, if I said it was about parenting skills and anger management for myself.* "

22. It is the applicant's view, as he put it in evidence, that *"I think with hindsight, I think that whether there was some plan in S.O.'s head at the time for events that would transpire later on that year, that this was something that she wanted to have as part of her armoury. That's how it looks like to me in hindsight."*

23. Although an appointment with the psychologist was sought the respondent then indicated that he wasn't acceptable as he did not have a PhD - he only had a Masters level qualification.

24. One of the things that apparently happened during the episode of the threat was that the respondent took the applicant out of the room and locked the door and wouldn't let him into the children. Now enters into the narrative an issue that arose as a result of the split of the

respondent from her previous fiancé. The applicant was so struck by the threat that she had made and the consequences of what that would mean for him as a man and as a father and as a professional person and the consequences it had for their marriage, that he emailed his solicitor and told him to hold off on sending in the documentation for the mortgage to take over the ownership of a property in respect of the holiday home that the respondent owned with her ex-fiancé. She had taken proceedings in the Circuit Court and the outcome was that the applicant and the respondent would jointly take over ownership of the property which the applicant agreed to do although the property was in negative equity. He instructed his solicitor not to file the documents because he felt that the respondent was threatening to destroy him.

25. The applicant subsequently decided to go ahead with the purchase along with the respondent - and they did so. However, as he said in evidence: -

> *"But I know the fact that I hesitated or threatened not to go ahead with the purchase of the property, I know that that for S.O., I understand that for S.O. was an enormous betrayal. For her that was an unforgiveable thing to do. "*

According to him this was articulated many times (by her).

26. The applicant has always earned a lot less money than the respondent. Now he earns about €100,000 less. For periods he earned €170,000 less. When he was studying for his MBA the respondent earned €170,000 per annum more than he did. At times she earned approximately double what he earned. But the couple tried to pay for things jointly - as much as possible.

27. In his evidence the respondent stated: -

> "*S.O. seemed to be fascinated with the finances. She kept all my bank statements in her bedside locker along with all her chequebook stubs going back to 1998, even though we'd only moved into the house in 2016. And her father worked in finance and his friend was our accountant.. - - so really I was none the wiser of what was*

happening with the joint, with the family finances. I didn't see, I didn't get sight of the joint account statement, I didn't get sight of any of S.O's accounts. I knew what was happening with my account but very little else. "

28. Then the applicant's evidence concerning the breakdown of the marriage : -

(a) In the five-month period preceding December of 2017 the applicant had not been in a position to make his regular monthly contribution to the joint account from which the mortgages were paid. He had also fallen behind at work in submitting his expenses and overtime. He went to England in the first week of December of 2017 to do a course and he returned on the 8th of December. He went to a meeting in Wexford and it appears that this is when the joint account statement arrived and the respondent saw that he had not been making his regular monthly transfers into the joint account, and she was livid. She rang him and she was absolutely livid. He came back on the following Friday - the 8th of December - and she was absolutely furious with him.

(b) He had a work Christmas dinner the next night in Waterford. They booked into a hotel and the respondent eventually said that they would go on the Saturday evening at 6 o'clock. They drove down and stayed in the hotel and brought the children to Santa the next morning. Then the respondent said don't come home. Stay in Waterford - do your paperwork to get your overtime and get your expenses in. He stayed in the B&B which he stayed in when rostered for duty. The following Thursday was Child X's birthday - his 7th birthday. On the Wednesday night he told the respondent that he had got the stuff in and that he needed to come home as it was Child X's birthday in the morning. She told him he couldn't come home. After work the following day the applicant collected his father and they drove to Cork.

(c) In terms of the finances something similar had happened to a much lesser extent the year previously. In September of 2016 - again after the summer holiday expenses - the applicant fell behind on the contributions and the respondent was absolutely furious about it.

(d) Then following Child X's birthday the respondent said that the applicant couldn't stay in the house that night so he went to Mayo with his father. He came back then. He recollects that a Santa's grotto event was probably the following Sunday and they had booked the kids to go to Santa there. They brought them that Sunday. But then the respondent started shouting at him in the carpark to get away from her bag - that he had stolen enough from her - as he was putting a picture of the family with Santa in her bag because he had two of them.

(e) On the following week the applicant returned on two or three afternoons and spent some time with the children in the afternoon while he was staying in Waterford.

(f) On December 22nd 2017 the applicant picked up the Christmas turkey and ham that he had ordered and presents for the children. He had been hoping that things would blow over and calm down. Up to then the respondent had remained furious about the joint account transfers and felt *"it was terrible betrayal*".

(g) When driving home on the 22nd of December the applicant rang the childminder to see did he need to pick anything up and he was told that there was no need as the respondent had done the shopping. And then the respondent rang him back to inquire what was he doing. He said he was driving home, that it was Christmas time, that this had gone on long enough and that he was coming home. He said that he had got the turkey and ham and that he was going to come home and spend Christmas with his wife and children and cook the Christmas dinner. The

respondent said *"no, you don't get to do that, you don't get to decide you're coming home"* - and the call ended.

(h) When the applicant got back to Cork the house was empty and he saw the respondent drive past with the children and she said that he couldn't see them. She said that he had to leave the house and that he had to go and leave Cork.

(i) The next day was Saturday the 23rd December and the applicant called up to the respondent's parents' house which was 500 yards away from the family home. Then the respondent said that he had raped her and that he had beat Child X.

(j) This was the first the applicant heard of the rape allegations - save for similar allegations being made against him by her parents when they called up to the family home while he was there on the 20th December 2017.

(k) The applicant later asked the respondent what she meant and she told him 2009. He said when in 2009 (these communications were in text messages). She said '*December 2009 - Christmas time at your father's house after yee'd been drinking whiskey'*.

(l) The applicant says that these allegations did not make any sense. He went back to old text messages which were still on the phone and all the text messages in 2009 between them both were those of *"love struck people who were mad about each other and wonderful times that we 're having and very complimentary."*

(m) Insofar as beating Child X is concerned the applicant gave evidence that both he and the respondent had struggled to manage Child X and both of them had slapped him. He had also that year taken to holding him or restraining him when he was at the height of his upset and the respondent sometimes disagreed very harshly with that but would sometimes say do something with him, do something - you have to manage him, you're his father.

29. It is the position that S.O. does deny slapping Child X.

30. Thereafter, the applicant was allowed very little contact with the children. Apart from a few hours with the children over Christmas - and on the 28th December with Child Y and Child Z (in a playground) - the applicant did not see the children until the 18th February 2018 when he got to see them for two hours - and that was the last time he got to see the children until the 16th May when the first court order and access period happened. For a period of 134 days from the 29th December 2017 until the 16th May of 2018 the applicant got to see the children for just two hours.

31. In April of 2018, the applicant commenced the separation proceedings and sought an access order. On receipt of these papers the respondent changed solicitors and, in a somewhat extraordinary development, moved immediately for a protection order/barring order. The information sworn before the District Court for the protection order under s. 5 of the Domestic Violence Act of 1996 was sworn on the 17th April 2018 even though there had not been physical contact between the applicant and the respondent since he called to the gate of her parents' house on the 18th February 2018 to collect the children and return them after two hours of unsupervised access. The protection order was granted - but of course the hearing was in the absence of the applicant or his advisors.

32. The first court order in relation to access was made on the 14th May 2018 and the applicant saw the children in accordance with the court order on the 16th May 2018. The respondent subsequently made an allegation that the applicant had violated the terms of the protection order at that first access meeting.

33. On the following week the 21st May was the original date for the barring order hearing in the District Court in Cork. It was actually heard on the 23rd May and was dismissed - and the temporary protection order ended.

34. The hearing in relation to the barring order application which resulted in it being refused by the District Court Judge on the 23rd May 2018 is detailed in a complete transcript which was submitted in evidence to this Court. After listening to what she described as the history of a failed and failing and disintegrating marriage the District Court Judge stated that she was quite satisfied that the parties had a child whom both parents needed to learn how to manage. She went on to say that Child X was a very challenging child and that it was a bit of a shame that the parents did not sit down together to work out what was wrong with the child or to assist the child rather than blaming the applicant entirely.

35. The District Court Judge went on to say: -

> *"In relation to the allegations of rape and sexual abuse I have to say that in relation to her evidence that S.O. was very readily confused about the dates. In September - if the parties met in September/October 2009 and were dating and courting at Christmas 2009 I find it extremely difficult to accept that she could have been sexually abused and that she would continue on in the relationship. I find her evidence in relation to the allegations of rape to be not sufficiently precise. I would take it that if she was raped that she would know precisely the date and the hour and it wouldn't be vague and I mean I don't know how their sexual relations were conducted, but if they were abnormal I would have taken it that the matter would have been raised earlier and the parties would have gone for counselling. "*

36. Then the applicant was phoned by the guards on the evening of the next day on the 24th of May 2018, with a request that he present himself for arrest for violating the terms of the protection order on the 16th May - the first access occasion. He presented himself on the following day, the 25th May, and was arrested at 10.15 a.m. for alleged breach of the protection order. Amongst the papers submitted to the court is a copy of the Custody Record. At 10 29 a.m. he was in custody and put in a cell after being searched. At 10.57 a.m. he was charged

under s. 17 of the Domestic Violence Act 1996. He was brought at 11.20 am to Cork District Court in respect of the offence charged. He was about an hour and a half or two hours in custody. He had never been arrested before and had never been in trouble with the guards or come to their attention previously. He was brought to court in the back of a Garda van. When they got to court the guards decided against placing him in the holding cell there - because they thought he wouldn't do well in there, they thought he wouldn't fit in.

37. He was released on bail after court.

38. The alleged breach of the protection order came before the District Court in January of 2019. It appears that the applicant had to plead to the charge in September 2018 and that the hearing was fixed for the 14th January of 2019. The respondent gave evidence against the applicant. The applicant defended the charge and produced CCTV footage of the incident in question. The charge was dismissed.

39. The criminal charge had consequences for the applicant. He had to make a report to his employers concerning the criminal charge. He had to seek an order in this Court for the lifting of the in-camera rule to allow him do so. In addition, he could not proceed with his appointment to a permanent post in Waterford because he failed a Garda vetting because of the pending criminal charge.

40. The applicant had to disclose the matter to the Directors of the Company. He felt obliged to inform his colleagues.

41. The applicant states, and the court accepts, that he felt devastated by having to make these disclosures. He had only started working in Waterford in August of 2016. He had hoped and still hopes to spend most of his career in his chosen field in a position of trust and responsibility and in a position of leadership. And this happened at a time when he was on a temporary contract.

42. The applicant was understandably concerned about the reputational damage and the possibility that the company could decide that they didn't want scandal and allegations and somebody who was under a cloud working in their company - somebody who was being subjected to repeated allegations - somebody who had failed their Garda vetting.

43. The applicant had interviewed successfully in a competition for a permanent position within the company in March of 2018. He had to go through a process then to get his permanent appointment, and part of that process was a new Garda vetting. He did have a Garda vetting already but this was a new Garda vetting and because he was subject to a criminal prosecution he failed his Garda vetting and could not be appointed. It was only when the case was dismissed that his employers decided to try the Garda vetting again. He passed the Garda vetting at that stage but the criminal prosecution delayed his appointment *"by certainly nine months"* according to his evidence, which evidence the court accepts.

44. The applicant had to tell the Company Directors of the position and felt he had a duty to keep his colleagues and seniors informed of the situation. In addition to the criminal prosecution he told them about the various Tusla investigations and Tusla complaints that were also occurring at the same time.

45. The Court is satisfied that the applicant dealt with the allegations throughout in an appropriate manner. He exercised a judgment in deciding on the extent of the disclosures and the court finds no fault with his judgment in that regard.

46. The Court is satisfied that the respondent well knew of the possible impact her actions would have on the applicant although she would not have known exactly how things would pan out in that regard.

47. The applicant had frequent contacts from various social workers at Tusla between June of 2018 until May or June of 2020 - and his understanding is that there have been five assessments performed. His understanding is that these assessments were based on and were

carried out because of sixteen Tusla referrals concerning himself and his children and these referrals he understands were made by or because of S.O. or her mother - he thinks one was made by her mother's friend and that there were a number made by mandated reporting professionals like Gardaí, the general practitioner, and Child X's play therapist. So there has been ongoing interaction with Tusla over that period.

48. Letters from Tusla in relation to these referrals were submitted in evidence. The applicant attended at the Tusla offices and recollected or thought that he had some sort of interaction with about eight social workers and certainly he met with two groups of social workers. There is a record of referrals being closed and fresh referrals then being made. For example the applicant said in evidence : -

> *" ... and then the next interaction, I remember, was 3rd of February 2019. It was during an overnight access occasion Child X became very agitated and upset and eventually he rang his mum on the landline and S.O. and her mother arrived and took him from access and they brought him to the Garda Station in Cork saying that I had thrown him down the stairs, and then I understand they brought him to see I think - the Garda Station directed them to the emergency department in Cork, where he was assessed by an acquaintance of S.O's and I think a referral to medical social work was made, an allegation that I had thrown him down the stairs, and then that triggered the further investigation which is the one which is closed by the letter of the 16th of April, 2019."*

49. Another referral, perhaps more routine, occurred as a result of the applicant bringing Child X to the emergency department in Cork after he had a fall at a playground resulting in a big bruise and he being a bit groggy, in the summer of 2019. That resulted in a letter from Tusla on the 15th May 2020 advising that the agency had considered the information received

and that the social work department had decided that no further action would be taken and that the case would close to Tusla.

50. On Easter Sunday, 2020 Child X had a temper tantrum when asked to share Easter eggs with his brother and sister - after he had found most of them when doing the Easter egg hunt in the garden in the afternoon. There was a serious argument between the respondent and Child X and he started acting out and knocking over chairs. The respondent asked her parents to come to the house and they did. Words passed between the respondent's parents and the applicant and he asked them to leave in circumstances where they were in violation of the public health guidelines concerning Covid. The Gardaí were summoned by the applicant to diffuse the situation. The Gardaí inquired of the applicant would he consider spending the night somewhere else. He declined - saying that this was his home and he had nowhere else to stay. This conversation took place at the home of the respondent's parents to where the applicant had followed Child X. The applicant went back along with the Gardaí to the family home and the Gardaí spoke to the respondent before leaving. That night, the respondent took the children to stay in a domestic violence shelter. The applicant's evidence in this regard is: -

> *"So Easter Sunday this year, for no reason, for absolutely no reason, to prove a point, she took the children to stay in a domestic violence centre and that was Easter Sunday."*

51. According to the applicant this Easter Sunday incident and the stay in the domestic violence centre resulted in another Tusla complaint by the respondent concerning the applicant and his behaviour towards the children.

52. As for Tusla, they have expressed the view that both parents would benefit from parenting support and they expressed the view in January 2020 that there was no identified role for ongoing social work involvement and closed the file at that time.

53. In the period that the first access order was in place, there were 40 access occasions, of which the three children attended 23. On 17 occasions it was one or two children rather than all three. Following the July 2018 order, things improved. This would have been a situation where the applicant had the children overnight, every second fortnight, and had a number of afternoon accesses as well - and access improved. The respondent and he started to make agreements about him bringing the children to school one morning a week. They ended up having to get a court order to deal with Christmas access in 2018 and then his criminal case followed in January 2019.

54. The situation concerning access is returned to later in this Judgment as it is appropriate to move to financial issues.

55. The applicant stated in evidence : -

> *"My dad has given me a number of gifts. He gifted us €20,000 for our wedding and he gifted me €40,000 towards the deposit on the family home and he gifted me, I believe it was €30 000 when I was buying the property in Mayo."*

56. He went on to say that an advance of €60,000.00 was very different and was a loan. It was not a soft loan but is money that he owes his father. The applicant said that this loan from his father in and around September 2016 came about because the respondent told him that she was very distressed about upcoming bills, that there were bills due for her legal fees in relation to her Circuit Court case against her former partner and that there were several bills associated with the ongoing extension and renovation of the family home and she said could we ask my father for a loan of some money.

57. The applicant stated: -

> *"So my father had transferred €60, 000 in lots of €5,000 to my account. I had a second bank account and I moved what I understood at the time would be an amount that would settle the final retention debts owed on the family home and I put that into my*

own account. I said this to S.O and S.O said absolutely not, that it needs to be in her long-term fixed term notice interest account so it would earn some interest. I thought that odd but I said okay and I transferred I believe it was in total at that time €14,350 to her in January 2017 and on reviewing S.O's submitted bank records, I see that she moved it from her current account to her fixed term notice account and marked it 'retention' is what it's annotated on her account. It was subsequently, in time, moved back into her - -following the breakup of the marriage - - moved back into her current account and used to pay her personal expenses."

58. The applicant says he also got a second loan from his father for legal costs - as detailed in the D v. D Schedule - apparently €148,000.

59. The applicant stated that there is very little outstanding to the builder because: -

"To be honest, most of the things on the snag-list my father has done. There is some rubble that needs to be removed but things like he had to hang the shower - not the shower curtain but the shower screens at some point. So there is probably not much outstanding, really".

60. The architect's bill is due.

61. The applicant prepared an analysis of his bank statements in relation to the couple's joint account since it was opened. He explained why he did this: -

"So I have been troubled about the fact that I reduced my mortgage payments for five months in 2017 - and for I believe it was two months in 2017. I have been accused of financial abuse. I have (been) accused of being a sponger and I didn't believe that that was the truth of the matter. I didn't understand my finances. I didn't understand our joint finances. And so I went through this process really to reach an understanding of our finances and how this had all happened."

62. For the three-year period prior to the 22nd December, 2017 the analysis prepared by the applicant of the joint bank account statements indicates, according to his evidence, that his net payments into the joint account were €38,000 approximately whereas S.O.'s were €21,000.00 approximately.

63. His analysis dealing with the period from the 23rd December 2014 to the end of September 2020 indicates, according to his evidence, payments into the joint account of €126,000.00 approximately with withdrawals of approximately €6,540.00 leaving his net payments into the joint account totalling approximately €119,500.00. According to the applicant's evidence, S.O's net contribution in the same period was approximately €85,000.00.

64. The applicant is not an accountant, but the court accepts that his evidence in relation to the joint account is his opinion of the state of play in relation to the joint account based on his knowledge and study of the paperwork. In this regard the court finds that there is no evidence to justify any suggestion that might be made, or has been made, that the applicant was not a good provider or in any way wanting in terms of his financial obligations to his family.

65. In relation to the rape allegations, the applicant stated that all allegations of rape had to be withdrawn because: -

> *" .. (this) must happen because we can't move forward as a family while these dreadful allegations have been made and continue to be made. That a line needs to be drawn under this, a stop needs to be called. And on that basis then we can move on with our lives as a family".*

66. He explained why the offer made (open offer addendum) by S.O. in this regard was unacceptable: -

> *"In New Year's Day this year S.O. accused me of sexual assault. Within the week she sought to have my father reported for physical abuse of our children. On Easter*

Sunday of this year she brought the children to stay in a Domestic Violence Shelter, and as recently as the beginning of September of this year she sought to be released from an obligation not to make a referral to Tusla about me and my children during the trial access agreement period. The allegations that have been made are heinous, they go to the heart of my integrity as a man and as a father and as a [professional person] and whatever else you want to call me. They can't be allowed to stand, they must be withdrawn and this has to stop. And those - what you have just read out there, Mr. McCarthy, does not achieve that and doesn't come anywhere near it."

67. In response to the open offer addendum the applicant put the following counterproposal : -

"B.P. requires S.O. to acknowledge the following; That she was not raped by B.P., that he did not drug her, that he did not sexually assault her, that he has not assaulted any of his children and that he never groomed them in the sense of sexual abuse or exploitation, that he did not engage in financial wrongdoing. If those acknowledgements are made, B.P. undertakes never to publish the contents of this document whether in writing or verbally. It would be a requirement of the B.P.'s undertaking that S.O. would undertake never to make allegations to anyone whomsoever, whether in writing or verbally, which are inconsistent with this document. If she were to do so B.P. will not be bound by the undertaking offered herein. If further allegations are made by S.O. in the future B.P. will be entitled to apply to the High Court to be permitted to disclose these acknowledgements".

68. This "core" dispute concerning the serious allegations and the applicants demand that they be withdrawn is one which the Court will return to later.

69. As long as his name is removed from the mortgages on the family home the applicant stated that he is happy that the respondent have the family home - provided he is paid some

money - and on the basis that she would retain the contents of the family home as well as both cars, the art collection and the "cash reserves". The lump sum payment he is seeking is €350,000. The applicant, as part of this proposal, is prepared to take over responsibility for the debt due to his father and the debt due to the builder, architect and engineer. The applicant wants to be released from the mortgage on the holiday home.

70. The applicant stated that he needs the €350,000.00 because his hope is that the children will be with him half the time and they need to have a second home and that second home needs to be as comfortable and appropriate for them as possible although it will be more modest certainly than the current family home.

71. The applicant is presently contributing €2,200.00 per month to the mortgage of the family home.

72. In cross-examination Mr. Corrigan put it to the applicant that: -

> *"In fact, Mr. P, isn't it correct that in your affidavit of the 6th of April of 2018 at para. 37 and 39 you're the one who raised and brought into the domain of this Court allegations of sexual abuse and rape, isn't that correct?"*

73. The applicants averments on affidavit concerning the respondents parents having accused him of having stolen from his wife, of repeatedly sexually assaulting her, allegations by them in respect of his conduct to the eldest child and a threat made by them of reporting him to Tusla with a view to preventing him obtaining a permanent post in Waterford were opened to him. His averments concerning his wife having accused him directly of abuse of her and Child X, allegations of rape and assault by him on her and allegations of refusal to make the mortgage repayments by him were quoted to him.

74. The applicant accepted that he was the one who brought to this court's attention these allegations. It was he who first brought the court's attention to the allegations that had been made against him.

75. While much play was made by the respondent in her case about the applicant first bringing the allegations into the case the simple fact of the matter is that the allegations are in the case because the respondent made them and has refused to withdraw them. This is returned to later in the judgment.

76. In cross-examination and when being asked to explain the preconditions in the original open letter, demanding withdrawal by the respondent on affidavit, and in the subsequent changed wording the applicant said the following:

> *" ... what we were trying to do there is S.O. is not the only person who has called the guards. S.O. is not the only person who has called Tusla. S.O. is not the only person who has made threats. In the process, this dysfunctional chaos is not - S.O is not the only agent in that. And that what I am seeking from her is that she will undertake to call off other agents that are contributing to this".*

77. Later, he stated: -

> *" ... basically, what I was trying to achieve there was that S.O. would undertake that she, and other people that are involved in the process of allegation making would stop and that she would undertake to be the person who makes the others stop too".*

78. Mr. Corrigan put it to B.P. that the earlier proposals had preconditions which were impossible to comply with and that the later proposal had preconditions which left the applicant in control in terms of deciding whether S.O. had made further reference to the recent history allegations. B.P. disagreed.

79. Responding to questions as to why he had prepared the financial analysis in relation to the joint bank account B.P. stated : -

> *"All of the allegations that have been made against me trouble me terribly. As well as the more heinous allegations, the allegations of financial abuse have bothered me. I didn't understand them. I didn't have a good grasp of my personal financial situation*

or of our joint financial situation as a couple. To me, it didn't make any sense. I knew I had missed and reduced some transfers to the joint account but I knew I was always broke and I was always paying for stuff. And I think I had an expectation going to trial in February that somebody else would do this and I realised when we got to February and it hadn't been done, that nobody was going to do it unless I did it myself. So that's why, when we were adjourned in February, I just got to work."

80. He went on to say later : -

" .... but you do realise, you do recall that S.O.'s father works in finance and he had already done a joint account summary at the time of the separation. Actually, before we separated, he did a summary of the joint account without informing me. And I think it's in S.O's first affidavit of means, it includes a joint account summary prepared by her father."

81. He went on to say that: -

" ... this was done in December before S.O left. He didn't inform me that he was doing that. I found it after S.O. left, in her bedside locker and then I went on call that weekend and when I came back, all my financial documents and S.O.'s financial documents were gone. They were all taken while I was away on call. So, happily, I had taken photographs of them. But there's a version of that joint account summary appears in S.O's first affidavit of means prepared by her father. So that would be (her father's) version of this from an earlier date."

82. It was also put to the applicant in cross-examination that if the respondent had to pay him €350,000 then he would end up having €350,000 plus €46,000 - €396,000 worth of assets of which €350,000 would be cash and the respondent would be minus €10,000.

83. Turning back now to custody and access. This Court made an order in relation to access in line with the recommendations of the Section 47 Report on the 19th July, 2019. The

respondent had been living with her parents and the children were with her since December 2017. Then on the 19th August, 2019 she moved back into the family home on a part-time basis, principally staying with the children overnight during access and a minority of other nights, more often if the applicant was away for work.

84. According to B.P. her moving back in "totally undermined and changed the character of access". The court accepts his evidence that: -

> *"S.O. would be there for the majority of the day and would be present during my interactions with my children, would be countermanding and criticising things I would say to the children. Then she would give the children her electronic devices and they would go to her bedroom and watch them for long periods of time. And at night time, she would always take Child X, often Child Y and, more rarely, Child Z into her bed with her. So although I had other overnight access with my children, I was in the same house but they were in bed with their mother".*

85. This regime continued until the date the hearing commenced apart from one night in the week prior to the hearing when the respondent did not stay. Furthermore, during the three month lockdown from March until June, for three months, the respondent moved back in on a full-time basis.

86. Child X has been engaging with a Play Therapist since the springtime of 2019. There was also a referral for Child X to the Child and Adolescent Mental Health Services (CAMHS) and he was seen by a Consultant Child Psychiatrist, in September 2019. Then in autumn of 2019 the parents agreed to engage with a Child Psychotherapist. With the assistance of the Child Psychotherapist a trial access period was arranged for the month of August 2020 with a variation of the Court ordered access - and a fundamental difference which was that during the trial access period the children would remain in the family home and both parents would

alternate. This trial access period ended on the 1st September, 2020 and enjoyed some limited success.

87. The respondent's parents' house is not far from the family home and Child X would on occasion leave and just go over the gate and go to his grandparents and would not return. On other occasions he was not brought to this trial access. There were a number of occasions where he left and didn't return and a number of occasions where he was never brought to access. The father gave evidence that:

> "*Child X being a very clever and strong willed nine-year-old is open to manipulation and suggestion, and my strong belief is that he was encouraged to leave access or not to come, and rewarded for doing so."*

88. On the 1st September, 2020 there was an incident where the applicant collected the children from school and Child X got out of the car and proceeded to walk across the city with his father driving alongside him except for a small place where he could not do so (he went right on a road where the applicant could not take a right turn so he had to loop back). He got alongside Child X again and when they got to the family home he continued up to his grandparent's house. Following that incident, on the Child Psychotherapist's advice, the trial access period was ended and the parties reverted to the regime that preceded it.

89. The applicant is seeking joint custody of the children - joint residential custody on an equal basis. He also envisages jointly employing a childminder. His father has purchased a house in Cork, near the children's school, and the plan is that when everything is settled he will buy the house from his father and in the interim, while he is waiting for that to happen, he will rent it from him.

90. In relation to a joint childminder the applicant gave evidence about the benefit of employing a childminder jointly and said that *"I think it's good, it gives the children stability and it will help with the transition from one home to another*". He also pointed out that they

had jointly employed childminders for short periods over 2020 and he felt that it was something that could certainly work.

91. In cross-examination the applicant said that his hierarchy of priorities was: -

(1) The children.

(2) Dealing with the allegations that had been made.

(3) Getting a just financial settlement.

92. He said that he was not going to hold up the hearing of the case waiting on bank accounts that seemed to never be going to come. When it was put to him that the preconditions of settlement which he imposed showed his true motivation and hierarchy he said: -

> *"Well, the key source of the stress for our children has been the level of conflict, the level of hostility and dysfunction and the inability to .... function as a family and co-parent and have joint access. What is at the heart of driving all that misery are the allegations. "*

93. He said: -

> *" ... really, what transformed this case was the evidence, the sworn evidence that S.O. gave in information when she was - in her application for a barring order and obtaining of a temporary protection order. That act of going in and swearing those allegations, those allegations then had to be dealt with - either those allegations had to be found to be true and valid and I would have to deal with the consequences of that or those allegations would have to be withdrawn. Once that information was sworn, it had to be dealt with. "*

94. He later stated: -

> *" ... I'm very willing to hear - like, the fact of the matter here is we're at an impasse. There are allegations that have been sworn before the District Court and before the High Court and that leaves us in the situation in which we are in where we have to*

deal with those allegations or they have to be withdrawn and we're trying to find a solution that can address that. And you've pointed out the deficits in the solution that we have proposed this week and I would be very open to your input in getting a better solution."

95. When asked did he think that it mattered to the children whether the allegations were withdrawn or proven or ignored the applicant stated: -

"I think it matters to them what the character of, what their parents are, the character of their father are (sic.). I think it matters to them whether their father has a criminal record or not. I think it matters to the children whether their father can continue in a position, in a position of trust. So I think it matters to the children what kind of man I am."

96. Later he said: -

" ... you know, as the Mediator in her report makes reference to a line in the Section 47 report, which I haven't read, but in the Mediator's report she described in the Section 47 report S.O.'s parents telling Child X that their father is a bad man. That has to stop. And you can't - so like, the Section 47 author has found that the children are being told I am a bad man and, really, what this all comes down to is what kind of man my children's father is. Am I a bad man or am I a good enough man? That's why the allegations have to be dealt with, because the children are being told that I am a bad man. And that's what the Section 47 author says, so don't tell me that's not happening. "

97. When asked *"and you want vindication?"* the applicant stated: -

"*I don't want vindication. I have been quite clear. What I want is for this chaos to stop. I want us just to try and function as a family, to stop involving the Gardaí and the Child Protection Services on a monthly basis in our lives, to enjoy our children*

and to stop this war. And I didn't start this war, S.O. and her parents started it. It needs to end and we need to get on with life. "

98. Later, the following : -

Question - " *... in trying to resolve them, we come back to your proposition that this has to stop, but it only has to stop on your terms*. "

Answer - "*No, Mr. Corrigan, I have just said to you please work with us so we can find a solution. We just need a workable solution that gets our family out of this corner that we 've been painted into.* "

99. And later the applicant states : -

" *... I don't know how many ways I have to say it to you that we just need to find a solution that gets us out of the impasse that has been created by these sworn allegations of heinous behaviour against me. We just need to find a way out that allows us to move on with our lives*. "

100. The applicant pointed out that the key difficulty at the heart of all of the dysfunction are the allegations that have been made against him. He said that he was here to deal with the matters and told Mr. Corrigan that this was his opportunity to put the matters to him and he was prepared to deal with them. In response, Mr. Corrigan asked the applicant did he understand the open offer addendum which was read out at the very start of the case where his wife said that she was not relying upon the allegations in the proceedings or at all, and so on, and he is asked did he understand that - and the applicant answered "*yes*".

101. Mr. Corrigan then moved on to the time off work taken by the respondent which the applicant said he heard about through the grapevine.

102. And back then to financial matters. The applicant is presently on the top of his pay scale. His affidavit of means sworn on 29th October 2020 gives a salary of €175K plus extra

payments of €34K and expenses of €7K. There is also rental income of €15.6K. After a deduction for unpaid leave of €5,439.12 his annual income is stated to be €226,242.88.

103. There is a period of probation when one is promoted and B.P.'s permanent contract came in August 2020. His plan is to wait until that probationary period ends. The contract in question is not very popular with the employer because if he doesn't bill the employer doesn't get paid by the private companies either - so he is keeping his powder dry on that and he wants to get insight into how much the private income potential is. If he is on a contract, like S.O. is, then he cannot bill the private company. And if he cannot generate an invoice then the employer cannot charge the insurance company. The general manager would be very disappointed if he were to switch to a contract because of the implications it would have for the employer and B.P. feels he owes her a great debt as she has been enormously supportive to him.

104. The special payment the applicant receives is about €3,500 per annum which he gets for being on a one in five on-call rota. Also the structured overtime payments at the weekend for doing being available on a Saturday and Sunday or a Bank Holiday Monday - for which he gets three hours of pay (and time and a quarter on a Saturday, double time on a Sunday and a Bank Holiday Monday). And then other payments or call out payments if he's asked to meet a client - and he is paid an hourly rate for the time he is called in. There is also some mileage and reimbursable expenses, which have not arisen during the Covid-19 Pandemic. So there is the salary, the special payments, possibly some mileage and reimbursed expenses and the possibility of a small private income. B.P. was appointed as a lecturer in October of 2020 - affiliated with UCC but the work is done in Waterford. He gets paid per tutorial - there is up to one tutorial per week while the students are there. They have students from UCC from probably thirty to forty weeks of the year and he can give them one tutorial a week and he

thinks the rate is €94 per tutorial. So if he gives thirty tutorials a year the payment would be approximately €2,700 gross.

105. There have been talks of people in B.P.'s position - of everybody being offered a single contract at €252,000. There would not be a retrospective payment as in S.O.'s situation.

106. The applicant is therefore highly paid and in secure employment with a current annual income of €226,000, approximately €232.000 if there is no unpaid leave.

107. The respondent's pay from X for 2019 was €298,000. Her salary at the time was €250,000 approximately thus suggesting extra payments of €48,000. S.O.'s cohorts were offered pay restoration with retrospective payments.

108. In her affidavit of means sworn on 27/10/20 S.O gives her rental income for 2019 at €31,592.00.

109. S.O. is also in highly paid secure employment and her income as can be seen is significantly higher than that of the applicant.

110. The applicant was questioned in relation to gifts from his father and in particular about the disputed loan of €60,000 which was transferred from the father's account to the respondent's account in €5,000 instalments - totalling €60,000 between September 2016 and December 2016. According to the applicant they paid the respondent's father €21,000 immediately after his dad loaned the money in order to repay a loan that the respondent's father had given them without any loan documents.

111. In cross-examination he is asked ; -

> Question: "*Is it your evidence that between you and, where it applied, S.O received money from your father, that it was never the practice to have loan agreements drawn up, repayment schedules, interest rates, default?"*

Answer: *"No, the only loan agreement I have seen regarding the parents was the one that S.O and her parents seem to have signed the day that her affidavit of means was filed last week. "*

112. Then Mr. Corrigan referred the applicant to the letter of the 18th November, 2016 from his father to he and S.O. in which he stated that "*I have given a gift of €10,000 which is not repayable to my son, B.P, towards his purchase and works of their new home.*" and then confirmed that he had no claim and will never have against the family home. It was put to B.P. that he had told the court a moment ago that there was no documentation at all in relation to the payment by his father of the money to him and he was asked to explain, "*that lie*". The applicant explained the position as follows; -

" *... so my recollection is that this was something that was required so that we could get approval for the mortgage to take over, I think another property. So because of the amount of debt we were in, the bank were unwilling to allow S.O to take over the mortgage on her own, so I went on the mortgage. The bank asked us for a letter from my father saying that he had no interest in the family home following the money that he had given me. So that's not - so this is something that was written two years after the money was given. So the money was given in December 2014 and the letter was written on the 18th of November 2016 to fulfil the request from a bank. So it's not - it's a letter to satisfy a requirement the bank has for us to get another mortgage, it's not a letter of agreement ...* ".

113. When asked to explain "*your lie to the court*" the applicant protested and said that he had not lied to the court and that he had forgotten about the letter. He said it was an honest mistake because he forgot about it. The applicant went on to protest; -

"*In fairness S.O. was dealing with the bank in terms of trying to take over this mortgage. The bank requested her to do it. S.O. asked my dad to do it and he did it,*

and at the time he was transferring €60,000 over to us as a loan. So I mean, I think this is really bad faith. When my father has been asked - not only has he given us money, he has been asked to give a letter to say that he has no interest in the house to facilitate S.O settling a dispute with her ex-fiancé and now you're using it against me ..."

114. It was pointed out that the letter was written after the first two payments of €5,000. It was put to the applicant that it was reasonable to take the view that the letter refers to the first two instalments of the €60,000. The applicant said no; -

"*because the purpose of the first €I0,000 was to fund a bank draft of €7,000 which I made out to S.O. for her father to discharge her legal bills in relation to the holiday home for cash. Her father thought he'd get a better deal from the solicitors for cash. So that sum was eventually refunded to me following a phone call from the Solicitor's accountant the following July and I placed it in the joint account. So, no, that's not what the €10, 000 was for. It was to satisfy S.O's legal bills in relation to her Circuit Court cases against Mr. Q* " .

115. The applicant made the point that the letter was written by his father for the purposes of satisfying a requirement of AIB in order to relieve the respondent of her difficulties with her ex-fiancé. It was then pointed out to the applicant that the letter from his father was sent by him to R. L., Business Manager, Bank of Ireland on the 11th November 2018.

116. Having checked his emails the applicant said that his memory was jogged and that it seemed to him that they were in the process of trying to do the third mortgage drawdown and that the bank saw the first €10,000 land in his account from his father and they asked for a letter saying that his father had no interest in the house and that it was a gift. His father wrote the letter saying that and he sent a copy to R. L. and S.O. - in fact there were two versions of the letter one that said he was a son and the other which did not (as the bank had asked that

the reference to the son be put in the letter). The letter satisfied the bank and it moved things along in terms of the mortgage application. He went on to say that there was probably a letter that the bank would have required at the time of the purchase of the property related to the €40,000 that his father gifted to him then - and he recalled a similar letter was required by the bank back in 2005 when he purchased his property in respect of his investment property - the bank would have required a similar letter from his father with regard to the gift. The applicant accepted that he had understood the question about loan documentation when asked but that he gave the wrong answer- "*I was incorrect*".

117. At Thanksgiving of the year when the €60,000 was advanced by the father there had been a row at a family gathering when the father announced that he was buying a property for the younger brother, P. According to the respondent the €60,000 came about as a result of her asking the applicant's father to patch things up with the applicant said this was not correct because Thanksgiving was November and the first lodgement was in September. The applicant's sister-in-law is American and celebrates Thanksgiving and it was after Thanksgiving dinner in front of the family that his father announced that he was going to buy them a house. The applicant then said that he couldn't recollect the year so the €60,000 could have been advanced perhaps ten months later but he didn't think there was any connection or relationship between the row and the advance.

118. Much time was occupied on the issue concerning the letter to the Bank. The court will return to the issue of family loans later. For now, the court will say that it accepts the evidence of the applicant that he was incorrect as opposed to lying about the correspondence.

119. This correspondence was available to the respondent. Furthermore, the court accepts as probably correct the reason he says the letter came about in the first place. Banks do not want their security relegated or diluted. Furthermore, what the letter said about the advance

does not alter the true nature of the transaction even if it provided to the Bank the priority it required.

120. The applicant when dealing with the CCTV made the point that:

"*the footage from the first access ... was valuable, ... because it was used in evidence in my defence of my criminal prosecution. So when there was a problem I would get out into the driveway where I could be under the CCTV, and so we could have, we could have a clear document of what was occurring.*"

121. The applicant, in response to the question as to whether he accepted any responsibility for the chaos that existed in relation to access said that; -

" *... this chaos and mess is my responsibility and my wife's .. .. . Like, our children's welfare is our responsibility and what they have been exposed to is our responsibility*."

122. The applicant pointed out to Mr. Corrigan that "*in the period from the 3rd of February 2019 until the 19th of July 2019, of seventy five access occasions Child X was brought only eight times. He missed sixty-seven out of seventy five access occasions ...* " The applicant went on to point out that "*the access orders have not been complied with, not even close. And the access order that Judge Jordan made last July was not made on the understanding that the respondent would be not only present for all overnight access but in bed with the children every night for overnight access. So, no. And then to say that I'm being inflexible .... you 're entitled to your opinion but I disagree.*" He later stated ; - *" .. for two and a half years I have asked for the access orders to be complied with. They have not. None of - - the only period where the access orders were mostly complied with were the period from August 1st 2018 until February 3rd 2019. At that point the access order was largely complied with. Other than that it has been mayhem.* "

123. Dealing with the house which the father purchased the following extract is relevant; -

> Question ... "*When did this idea of your father providing a house for you, whether it's temporarily and you buy it from him or not, when did that plan come up.*
>
> Answer: *"So September of last year. Oh sorry, the plan for buying the house? Ehm, it actually - - January 2018, so right at the start.* "

124. His recent affidavit of welfare was put to the applicant and in particular the question concerning the change in the living arrangements to which he replied in the affidavit; -

"I am seeking joint residential custody with the children on the premise that we will both be residing in Cork and that they will spent periods of time at my residence and the respondent's residence."

125. The applicant also pointed out that that sentence had remained unchanged since the first affidavit of welfare was signed. He accepted that he had not said in the affidavit that his father had purchased a property in Cork near the children's school. The applicant was criticised in cross examination for not being more forthcoming with the respondent and the Child Psychotherapist in relation to the house in circumstances where it was an issue insofar as the children's welfare was concerned - and he said that he was not sure that telling people about the house his father bought in Cork advanced his children's welfare. He did accept that the house being proposed was important.

126. On this point concerning the failure to reveal details of the new residence, the Court attaches no significance to this. The relationship between both sides is and has been so damaged that all trust ceased to exist after Christmas of 2017 and it is understandable that the applicant decided to limit the flow of information to what he considered was required of him. It was clear that one of the parties would have to leave the Family Home and find another residence. Either party was entitled to make arrangements in that regard without the other

having a veto or say in their choice although the Court is ultimately required to look at the arrangements in terms of the welfare of the children. This Court is satisfied with the arrangements concerning the new residence of the applicant.

127. The applicant was questioned about his assertion that his wife and her parents threatened to tell Tusla and his mentor with a view to destroying his career. He said that he did not know what "*the internal workings of S.O's mind and decision processes are. From my point of view it appeared that she expressed that that was her intent and then she followed through on it*". He said there was no reason for him to doubt her intent because she did exactly what she said she was going to do. He said "*She said it in February, ... her parents said it in December 2017. They were very clear, they spelled it out what they were going to do, and that's what they did, they tried to do and they failed*". He went on to say "*I am not saying any of this makes any sense. It doesn't. None of this makes any sense, and I can't explain it to you and I have just decided to accept it and try and deal with it constructively and get control of the situation. I cannot explain it."* The applicant said that *"there has been no reason for me to doubt her intent because she did exactly what she said she was going to do. "*

128. The applicant indicated that he did not think it was constructive for the respondent to be seeking the Child Psychotherapist's permission to refer the September school run incident to Tusla notwithstanding the agreement that there would be no such referrals during the trial period and he went on to say; - "*I think that making sixteen Tusla referrals is not constructive and not in our children's best interests*."

Evidence of the Respondent.

129. In examination in chief S.O. confirmed the open offer addendum and went on to say that she was not prepared to withdraw the allegations on affidavit in the manner that had been demanded and stated: -

"*I do not, I am not prepared to perjure myself. I am not prepared to withdraw them in the manner that has been demanded*. "

130. Referring to the reason for making referrals in one way or another to Tusla the respondent stated in relation to her intention when doing so that: -

"*I simply want the mistreatment of Child X in particular to stop and for the children to be protected*. "

131. She went on to say in relation to what she hoped to achieve: -

"*I hoped that B.P. would be able to see that his actions were causing harm and that he would therefore stop*".

132. The respondent was asked specifically did she stand over and rely upon all of the averments that she had made in the affidavits in these proceedings and she said that:

"*I do stand over everything that I have said in my affidavits*. "

133. Counsel for S.O. explained that she was not resiling from the comment that she was "*not relying on the allegations"* although standing over everything she said in her affidavits. Counsel said that she was not withdrawing the allegations and she was not prepared to withdraw them on affidavit because she was not going to engage in perjury. He went on to say that "*in the context of the evidence which I'm advancing before this court, I'm advancing all of the evidence which the respondent has put on her affidavit but she's not saying that there's any part of that that is untrue or to be corrected ..... she is relying on the contents of those affidavits but not in relation to the allegations against the applicant .... She is not withdrawing her averments, which is her sworn evidence about these matters. She's relying upon the affidavits and her sworn evidence but she's not relying on the allegations as being a factor in these proceedings or at all*."

134. The respondent went on to explain that;

"*I do not wish to rely upon these allegations because while these things have happened, they are in the past, there has already been an opportunity to air them, I have dealt with them, I do not believe it's going to happen again and I simply wish to move on*"

135. She confirmed that she did not wish the court to take these allegations into account in the ultimate decision.

136. There is something quite absurd about the position adopted. Firstly, the court is being asked to decide on child welfare issues where one parent is standing over her sworn affidavit evidence that the other parent raped her and sexually assaulted her and in the same breath states that she does not wish the court to take these allegations into account. And this where there are also allegations by her against the father of child abuse. Secondly, although not withdrawing the allegations it appears to be suggested by the respondent that the applicant has no reason to raise and to visit the allegations and defend himself against them. It appears to be suggested also that the court should not concern itself with their veracity because the accuser although standing over the allegations does not wish to rely upon them. The position adopted by the applicant is completely untenable and is an affront to Justice.

137. The respondent explained that she had cancer and required treatment when she was a student in her early 20's. She had two fairly major operations to remove the tumour and nodes and then later to revise it and she required therapy in St Luke’s Hospital. She was admitted there for one week on two separate occasions and she has ongoing follow-up. She explained that she takes her treatment and monitors tests and attends for follow-up - but on a day-to-day basis it has no impact for her. She does however have difficulties securing life assurance and critical illness cover - and was unable to do so in the past. She is covered however on the mortgage protection policies for each of the three individual mortgages on the family home.

138. Because of the difficulty with life assurance and with the help of her parents the respondent says that she purchased an apartment in Wicklow which she lived in for a few years and she made a decision to invest in another property and to try to maintain the two properties as investment properties when she moved away. Her thinking was that if anything happened to her that basically those properties could be "*a proxy for life assurance and critical illness cover*"

139. Insofar as the allegations were concerned the respondent was asked about the applicant's evidence that she made the allegations against him with the specific intent to ruin his career and was asked had she ever any desire to ruin his career and she said "*absolutely not*".

140. The respondent said that she was reasonably healthy during pregnancy with Child X but had two very difficult, unhealthy pregnancies with both Child Y and Child Z - and she was critically unwell at around the time the decision was made to deliver Child Y.

141. As a result of having to take unpaid leave before Child Y and Child Z were born and/or as a result of their births the respondent did not have a salary during the periods of unpaid leave and could not make pension contributions.

142. The respondent explained her view that the €60,000 said by the applicant to be a loan came about as a result of the row which the applicant had with his father about his father's proposal to buy a house for his younger brother who had become engaged - the father having sold a property in London for upwards of €600,000. The respondent said that she was never a party to the money being transferred by the applicant's father into the applicant's sole account and she was never a party to a conversation about a purpose or a request for the money. She said that she did not know about this money prior to the first payment. She said that she first heard about the money on one day when the applicant returned home and announced to her

that his father had started putting money in his account. She said that the applicant never identified it as a loan over the years.

143. In relation to the Child Psychologist, the respondent, said: -

"*After the extremely significant incident in February 2017, B.P. agreed that he would go and get anger management classes or support, and he went off to source somebody to provide that support to him. And then he came back with the suggestion of the Child Psychologist and around about the time that he suggested Child Psychologist, B.P.'s narrative changed and he said that the problems lay with Child X and with me and not with him. And he tried to put labels on Child X. So I became concerned about the story which he may have already told to the Child Psychologist, because he said that he had already had a conversation with him*. "

144. The respondent did go on to say that she did remember saying that the Child Psychologist didn't have a doctorate but she said that "*my concern around him was that B.P. had already had a conversation with him. I did not know the content of that conversation but I know that B.P. had just manipulated the narrative and had started to blame Child X and myself*. "

145. The court does prefer the applicant's evidence concerning the Child Psychologist because his evidence is credible on this whereas the respondent's is not.

146. Referring to the significant incident the respondent described it as follows: -

"*As a mother, this was an extremely difficult episode and it is not easy to talk about either. In February 2017, one evening, I had been getting the children ready for bed Child Y and Child Z were in their beds, Child X, was ready for bed but in his room. I went into the ensuite bathroom. I did not hear any noises. Child X came into me. He was very upset*. "

147. The respondent went on to say that she believed that the issue which needed assistance was the way in which the applicant managed Child X. She said that the applicant did agree to go to anger management or parenting skills class. On this point the Court is satisfied that it was obvious to the respondent at this time, as it was to the applicant that the behaviour of Child X did call for Professional input and assistance. His behaviour was presenting difficulties for both parents and neither could manage his outbursts. The court does not accept that the respondent believed as she now says that the issue which needed assistance was the way in which the applicant managed Child X. The issue was the behaviour of Child X and he needed professional help in that regard - and both parents needed professional help in terms of properly managing the difficult behaviour of their son.

148. The respondent said that she had encouraged Child X to go for access and that she had not rewarded him for not going. She denied coaching Child X for meetings with the Section 47 team and denied asking the childminder to make false allegations concerning the applicant physically abusing the children and to say that he was not safe to look after the children.

149. She said that she felt that the applicant's allegations in this regard were terribly unfair and that she felt hurt because they were untrue but that she did not expect them to be withdrawn on affidavit if they were to be withdrawn. Nor had she asked for them to be withdrawn.

150. The respondent explained how the applicant had told the children about the termination of the trial access period at the end of August 2020 instead of waiting for both of them to tell the children together. She said she felt undermined about this.

151. When referring to maintenance payments the respondent accepted that she had a very significant salary and significant income. She said she felt that the fact or principle of maintenance was important - *"I think it is important for the children."* The logic of this statement is unclear. What difference does the principle of maintenance payments make to the

three children if the children are going between both houses and both parents and when both parents are financially secure? What is the need for a maintenance order if it is not a financial need or a way to ensure proper provision is made for a child [or a dependent spouse or partner]? If a maintenance order in respect of children is clearly not necessary, particularly where one is looking at a co-parenting regime, then it should not be made as a matter of course. That might suggest the court lacked confidence in the devotion of the parent, against whom it is made, to the children and might also suggest fault where none exists. It is true that maintenance orders will usually be appropriate in order to create certainty and security going forward. The situations where maintenance orders are not required or appropriate will be rare but the court is satisfied that this is such a case. Both parents have worked hard to create careers that are very well remunerated. Either parent can easily provide more than adequately for their children out of their own resources. If the position of either parent's finances deteriorates in the future while any of the children are dependents then the responsibilities of the other parent may change and can be addressed by a maintenance application if that is necessary.

152. The respondent accepted that she should pay the outstanding debts to the engineer, the architect and the builder. The court considers the parties should pay and share equally the bills due.

153. The respondent also said that she was agreeable to the recommendations that the Child Psychotherapist made in relation to access, in principle. She is concerned about whether the access will work. For example, she is concerned that if she cannot get Child X to go to school this will be compounded if he is going directly from school to his father - and she is concerned about being unable on foot of Child X's emotional issues to comply with the Child Psychotherapist's recommendations. She did say that she was prepared to do whatever it takes to ensure access works. She said that she was happy to work with the Child Psychotherapist and the Play Therapist who would also work with the applicant through any difficulties. She

complained about the applicant's lack of flexibility surrounding access and about his attitude when she was late for access. For example - *"historically he would shout and scream and make threats"* - and threaten that *"I'll see you in court"*.

154. In the evidence of the respondent there does appear to be a lack of appreciation of her obligation to comply with court orders concerning access and of the fact that the applicant has had reason to be unhappy with her approach in that regard on numerous occasions and over protracted periods.

155. The respondent said that she did not believe that the applicant was correct in his evidence that she had made sixteen Tusla referrals. Furthermore, she said that any referrals to Tusla were so that any mistreatment of the children would end and that the parents would be supported to end any mistreatment of the children. The evidence of the respondent in relation to the Tusla referrals is less than convincing. The referrals were in essence all directed against the applicant. They were all or almost all unnecessary because there was no physical or emotional abuse. Almost all because the playground bump on the head referral does appear to have been a routine type referral as a result of the subsequent hospital attendance.

156. What Tusla actually saw was a situation where two parents were struggling to deal with a young son's behaviour problems and failing although doing their best. Although expert in their own fields, the expertise did not make them any more qualified to be parents than anyone else. They both needed help and support which they were slow in seeking out and getting. And Tusla also saw parents struggling with a difficult breakup of their marriage. It was concerned for the welfare of the children in the context of an emotional and stressful parental separation. Tusla made recommendations including parenting supports and pointed out that it was important for the children that both parents continue to work together to provide a safe, stable and loving home environment. The court can identify in its correspondence a

level of exasperation in Tusla about the number of and frequency of referrals being made to it in this high conflict marital separation.

157. The respondent went on to say that she believed that they would both need the assistance of the Child Psychotherapist and the Play Therapist and she said that she herself had a therapist and that she was going to continue with her. She said that in a year's time she would like the five of us to be functioning like any other normal family albeit across separate homes.

158. The respondent said that the litigation with her previous intended was about his non-payment of his contribution towards a joint mortgage and that the settlement of the litigation meant that she was left with the property and the mortgage. She said there was a financial settlement towards the unpaid share of the mortgage contributions historically. She said that her attitude from that point on was the same as her attitude had been before that but now she held it more strongly - that if there was an agreement that mortgage repayments needed to be 50/50 then that should be upheld. In relation to the non-payment of his contributions the respondent said that "*so in 2016, when it first happened, my attitude was to have a conversation with B.P. and we came to an agreement that it wouldn't happen again. And when it happened again in 2017 I felt an enormous betrayal of trust."* The respondent said in answer to a specific question that it was not correct to say as the applicant had said in evidence that she brought the whole marriage down in late 2017 because of the five-months of non-payment of contributions to the mortgage. She agreed that the applicant had stated on affidavit that *"the marriage had ended in around the time of Child Y's birth*".

159. It is not quite clear when or why the marriage did end on the evidence of the respondent. It may be that the respondent considers this question irrelevant but it is difficult to assess the evidence and decide on the issues without considering what led to or preceded the breakdown. It may be that her answer is to be extrapolated from her evidence and from the presentation of her case - and that she asserts that the marriage ended because of the applicant's

treatment of their eldest son and because of the crimes he committed against her. But there does appear to be some difficulty in this regard as the respondent is not now pursuing the serious allegations of rape and sexual assault which she has made against the applicant. That difficulty aside, the court does not find the allegations made by the respondent against the applicant in relation to mistreatment of Child X or in relation to crimes allegedly committed against her credible.

160. In fact, it does appear that the non-payment of the contributions to the mortgage by the applicant was what precipitated the split ultimately although it is also clear that there were difficulties in the marriage for some time before then. These difficulties were because of an emerging level of incompatibility which was exacerbated by the stresses of demanding careers and by the demands of parenting three young children - one of whom had behaviour issues that were difficult to manage or control. Involved were two strong and competitive personalities whose differences increased with time - and there then arrived a point in time where the respondent decided the marriage was over. That decision was one she was perfectly entitled to make and was probably a true reflection of the state of the relationship at that time - without having to attribute fault to either spouse.

161. However, the manner in which the respondent acted after arriving at that decision in December of 2017 is lamentable - as her subsequent behaviour was wrong in so many respects. And it was avoidable and would have been avoided if she had instead been more reasonable in approaching a fair resolution to the various problems that the marital breakdown gave rise to. Instead she embarked on a campaign which, judging by the evidence before the court, was in all probability designed to paint the applicant in the worst possible light. It was intended to coerce him to capitulate to her demands in respect of the property, the children and all financial and related matters - or failing that to help secure victory in court.

162. Mr. McCarthy put the following question and received the following answer from the respondent in cross-examination: -

> "*Now Ms. O, I want you to imagine, if you will for me, that B.P. had accused you of sexually abusing one of your children and that he had sworn on affidavit to that effect and had raised it in the course of the District Court application, and then I want you to imagine that B.P. then said to you, actually, look, let's not mind about that, lets agree to differ and I am sure you didn't mean any harm when you sexually abused one of my children, let's just settle the case. I put it to you that that would be a nonsense for B.P., to expect him to engage with that?"*
>
> Answer: *Judge, this hypothetical scenario does not actually reflect what happened, because it was not me who brought up these applications in this forum in the first instance; it was actually B.P.. B.P. brought these allegations to the legal forum, he brought them to professional colleagues of mine who reported them back to me and he has brought them to the Child Psychotherapist, Child X's therapist. So the hypothetical case that Mr. McCarthy is putting to me does not reflect the actual sequence of events*. "

163. This Court fails to comprehend the sense of grievance asserted by the respondent about the applicant bringing up the allegations "*in this forum in the first instance*". The simple fact of the matter is that the allegations are in this case because the respondent made them. They were not and are not allegations which the applicant could or can ignore or leave unchallenged.

164. Later when asked: -

> Question - "*Is it your evidence now that although it did happen to me, that B.P. had no intention to cause you any harm when he did these things to you*?"

Answer - "*What I meant by this is that B.P. has a different code or understanding by which he lives than I do and I can accept that because it is my desire to move on*."

165. When asked: -

"*How is that you can accuse your husband of raping you and in the same breath say that I accept that he meant no harm?*

Answer - *"When it was first discussed between myself and B.P. that was not how I felt, but I have had an opportunity over the past period of time to deal with the harm that it caused me, and now going back over it does not do anybody any good, most particularly the children, and I simply want to move on so that we can co-parent together to the best of our abilities*. "

Question - "*I will just ask you again. How is it that you can maintain even to this day that you were raped, which is an assault on your person, which is an invasion of you and your person, how can you maintain that and say to the High Court, I also maintain in my head that the person who I say assaulted me, coerced me, meant no harm?*"

Answer - "*Again, it has been a long time. It has been several years. This is not how I felt when it first happened, but I have had the opportunity of time and the focus simply has to be on the children, not on these things that have happened, that simply won't happen again. The focus simply has to be on the children and the future.* "

166. The following exchange later took place between Mr. McCarthy and the respondent : -

"*I want to suggest to you that there is almost nothing worse could be experienced by a person than to be raped. Do you accept that?*"

Answer - "*Again I have to say it is a terrible thing to happen to a person, but I do not know if it is simply the worst thing to happen. "*

Question - "I actually said there is almost nothing worse?"

Answer - "*Again, it is a terrible thing to happen to a person*. "

167. The respondent denied wrongly accusing anybody of rape but did agree that one of the reasons why it is so awful to be wrongly accused is that it is an act that carries huge opprobrium in civilised society, of civic society. Later the respondent stated: -

"*I have to say I stood up for myself after an act was committed against me, but I did so between myself and B.P. and subsequently, with my therapist. B.P. has brought these allegations into this forum. B.P., I believe, brought these allegations to my professional colleagues, because they reported them back to me. And they certainly did not hear them from me in the first instance. B.P. brought it to the Child Psychotherapist I did not. The fact that these issues are being discussed is on foot of B.P.'s actions.* "

168. It was the put to her: -

"*One of the reasons why it is such an awful thing to be accused of is because you will be held in contempt by civic society, you could go to jail for a long, long time. I suggest to you could lose your job over it. I want to suggest you could lose the society of your children over such a thing. They are all things that can flow from an accusation of rape which is false, they can flow*".

169. And the respondent answered: -

"*They can flow. But I am not and have never sought retribution for this I am simply seeking to move on*."

170. It was put to the respondent that because the consequences of an allegation such as that are so extreme and severe and lifelong, potentially, that one had to be extremely careful and circumspect about making such allegations in the first place, to which she replied:

"*I think it would have been better if B.P. had not brought these allegations to this forum or any other forum in the first instance. I am not responsible for the consequences of B.P 's actions in bringing these allegations outside of our private conversations and to my subsequent therapeutic conversations*." S.O. went on to say : "*I did not ask for these actions to happen to me. I did not ask to be harmed by it. And I equally did not ask to speak about it in this forum. It was B.P. who brought it into the legal forum in the first instance.''*

171. Once more, in this sequence of questioning it does appear that the respondent wishes to ignore that the reason there is any mention of the allegations is because she made and repeated those allegations.

172. The applicant swore the affidavit in which he referred to the allegations of rape which had been made by his wife against him (and of her parents having accused him of having repeatedly sexually assaulted her) and concerning the allegations made against him in respect of Child X - on the 6th April 2018. It was pointed out to the respondent that she had applied for a protection order on the 17th of April of 2018 and had sworn an information in that regard - after she had read the applicant's affidavit containing the recital of the allegations of rape and sexual assault. It was put to the respondent that she could have replied to the allegations by saying she never said any such thing or I know I said those words in the heat of the moment but I don't rely on them or she could have said they are beneath my dignity to reply to such nonsense or she could double down and say - not only is it true, but by reference to that, I now need the protection of the court.

173. In reply the respondent said "*this was a very difficult time and B.P. brought into that motion things that I had never intended or wished to be aired in a public forum. As I have said, he equally brought them to other fora. I have heard about these allegations from professional colleagues and have not spoken to any professional colleague about these allegations. I have*

heard them from the Child Psychotherapist and it was the applicant who brought them to the Child Psychotherapist. B.P. is bringing them to everybody's forum. " The information she swore was then put to her. It was put to her that 2016 was scribbled out and 2009 was inserted and she said that the District Court Judge did this- *"it is my recollection that the Clerk typed and when I sat in front of the Judge she asked was this the first time it had happened and I said it had happened in 2009 and she changed the date.*"

174. For completeness, the information reads –

> "*My husband was sexually abusing me from September 2009 to March 2017. He drugged me. I left the family home with our children on the 22nd of December 2017 and went to live with my parents as he was hitting and restraining Child X aged 7. On the 18th. Of February 2018 he was grooming our children. He was telling them secrets. He is stalking me . He is tracking where I am via my work mobile I think. He is sending me emails at work. I fear for my safety and that of my dependent children aged 7, 4 and 2*."

175. When it was pointed out that she was in California in September of 2009 she answered by saying that she did say to the District Court Judge either December or Christmas time 2009 but she only changed the year and I did not correct her. Referring to the incident at Christmas time in 2009 she says that it was discussed between the applicant and herself and that he both apologised and minimised and said it would not happen again and he blamed whiskey. When being asked if there was any objective external circumstance which might corroborate her claim that she experienced rape at the hands of the applicant in 2009 she said that she only spoke to the applicant about it.

176. The respondent is then referred to the texts between herself and the applicant in the period of November/December and into January of 2009. The texts run to a book of 34 pages in total and were submitted to the court. The respondent was taken through some texts between

the 22nd November 2009 and the 31st December 2009 - all of which are loving communications and are wholly inconsistent with any cooling whatsoever of her relationship with the applicant as a result of what she said she experienced. In response the respondent said that she addressed it with him and that he apologised, he minimised, he blamed the whiskey and he said it would not happen again and she chose to accept that. She said she distinctly remembered the conversation the following morning and that she is quite sure that the applicant also remembers it. The respondent said that she did not recall using the word rape in 2009;

> "*I do not recall if I used that word, but I do remember saying that it was without consent."*

177. It was put to her that the following matters were consistent with the rape not having happened: -

(a) Continuing to date the applicant,

(b) Becoming engaged to him and marrying him.

(c) Deciding to have children with him.

(d) No report to the Gardaí.

(e) No diary entry or other contemporaneous writing.

(f) Not telling any friends or family.

(g) Buying a house together.

(h) Waiting for eight and a half years before articulating the complaint.

178. The respondent's response was essentially that she was deeply in love with the applicant and that he had said that it would not happen again and that she believed him and was not looking for retribution. She said she had articulated to him the following morning and they discussed it, he minimised it, he apologised and blamed the whiskey and said it would not happen again and she made the choice to move on, rightly or wrongly- "*and in this process,*

I am simply asking to do the same thing. This is in the past. It is not going to happen again. I have dealt with it. I simply wish to move on. "

179. Later in evidence –

"*You then said, in your later affidavit, I think, you say that you experienced the same occurrence of matters between September 2016 and March 2017, isn't that so?*"

Answer - "*That is correct*."

Question - "*Okay. And you mention that the applicant had sex with you against your ... without your consent while you were asleep, so again without your consent, and that you also experienced digital rape, isn't that so?"*

Answer - "While I was asleep. And what more do you need to know about it? I was asleep."

Question - "*So I want to suggest to you that didn't happen either?"*

Answer - "*Judge it happened and I was asleep".*

180. The respondent went on to say that "*when it happened again in 2016/2017, I spoke to my husband. I am not responsible for his actions. These things happened. I am simply trying to move on. Regardless of these actions, B.P. and 1 have three small children that we need to coparent together for a long time to come ...* ".

181. It was pointed out to the respondent that in her affidavit sworn on the 11th of May of 2018 she had stated that *"I was forced to have sexual intercourse with the applicant, or, in the alternative, the applicant had sexual intercourse with me while I was asleep. My objections went un-noted by the applicant and he would at all material times respond: 'I am just making love to my wife in my bed, in my house'* ". She said that she had been advised that the paragraphs in the applicant's earlier grounding affidavit needed to be responded to and that it was not her choice to bring the allegations to this forum or to any public forum, including professional

colleagues. She accepted that she had also told her parents about the allegations. However, she said it was the applicant that put it in an affidavit and on advice she responded to it.

182. In relation to the use of the word grooming the respondent stated that "*Tusla uses the word grooming to describe other forms of coaching .... not just sexual*. " She added that she accepted, "*as I did in the District Court, that in a legal circle, perhaps it pertains to one particular interpretation of the word, but Tusla and the HSE websites all describe, and documents all describe the word grooming in several contexts."* She went on to say that her intention was to describe "*on the 18th of February 2018 that B.P engaged in coaching the children."*

183. When it was pointed out to her that the applicant had not seen his children since Christmas (since early January) she pointed out that she had offered him many times from the beginning of January onwards but that he ignored all her text messages. The respondent also said that "*it was not my intention in text messages to only offer supervision"* (i.e. to only offer supervised contact).

184. In January 2017 the respondent gave an interview to the Irish Independent - a day in the life type of piece. It was put to her that this was in the period where she said that the applicant had been sexually assaulting her - effectively a resumption of what she had experienced in 2009 - and she said yes - it was published in January 2017. The text of the article was handed into court. Part of it, which was complimentary to the applicant, was put to the respondent –

> *Q - Okay? Now I appreciate this is a puff piece for a newspaper and I am not suggesting it is anything other than that. But I do suggest to you that if it is the case that you had been experiencing what you spoke about before lunchtime, that you might have kind of chosen not to mention your husband. You could have constructed*

this without reference to B.P. without giving anything away, as it were. Do you accept that?"

Answer: "*No, Judge, I do not really accept that. In fact, this was also discussed at the District Court and at the time that this piece - - which is essentially factually incorrect, it is a puff piece, as Mr. McCarthy said - - at the time that I had this interview with the journalist, at the end of the interview she said to me: 'You haven't mentioned your husband,* (well, sorry, that's hearsay, said Mr. McCarthy) ... *she said well, to rephrase it then, by the end of the piece it was noted that I had not mentioned my husband and so I added in pieces about my husband. But clearly, Judge, I was trying to keep the family together at this point. I was clearly not going to say anything that would enrage him or, equally, I would not have intentionally omitted him because I was still invested in our marriage and our family at this stage.*"

185. The respondent's objection in relation to the baptism of Child Z was as follows;

"*It (the proposal) says: 'Child Z will be baptised in the Roman Catholic Church in Spring 2020. He will have two godparents. Each parent will choose one of the godparents. ' And you say 'No' with an asterix. There is no asterix over any other response that I can see. Why did you say no to that?"*

Answer: "*I said no to that because I think that by the time Child Z is baptised, I would like for myself and B.P. to be in a better co-parenting position so that it might be an enjoyable day for our nuclear family of five and perhaps some of the extended family also.*"

She accepted that it was not unreasonable that each parent would get to nominate a godparent. Her objection was in relation to the timing around the applicant's proposal and she would like for it to be an enjoyable family occasion and for that to happen.

186. When pressed as to her opinion on whether or not the children were safe with the applicant after December of 2017 in circumstances where the applicant had looked after the children on at least three occasions in 2017 when the respondent travelled abroad (Paris, New York and Rome) the respondent said that her mother provided support during those periods when she was abroad and that it was her position that the applicant had hurt Child X in particular - and when pressed; -

"As a consequence, in your view were they safe with him or not?

Answer: "It was my opinion that B.P. had hurt Child X. "

187. The respondent was asked about the period of 54 nights between the 29th of December and the 18th of February and the 84 days following the 18th of February during which the applicant did not see his children. In response she made the point that he did not try to see the children –

"*He did not communicate with me about seeing the children. During that period of time, after the episode of coaching, I next received a motion for access in the, I think you clarified the District Court, which was then withdrawn. And then a motion to appear in the High Court for an interim access order for the children*. "

188. The respondent accepted that the District Court application was withdrawn as a consequence of access having been made available on the 18th February for two hours. The respondent accepted that when the matter came before the High Court on the first occasion that her position before the High Court was that access shouldn't happen unless it was supervised and Judge Faherty had to rule on that. The respondent said that she was very fearful for the children - "*I recall being very fearful for the children. I recall how their behaviour was and how they spoke after spending two hours alone with their father and they were clearly coached by their father*".

189. It was put to her that the evidence of the Child Psychotherapist was that there was a need to change the narrative and that this narrative was "*Principally that the children aren't safe with their dad and Child X isn't safe with his dad*." The respondent disagreed with that and said that it was not broadly the narrative. The respondent was asked what is the narrative then; -

> Answer: "*Judge, in the summer of 2019, after the last order that was made by you, judge, our family was in a crisis for a period of time and that crisis in and that crisis involved Child X running away on multiple occasions and B.P. accusing me of being in breach and the children saying, because they had heard it from the applicant, that I was going to go to jail if I was in breach of access. And that led to me moving into the family home with the children in the summer of 2019 and it has been my goal on an ongoing basis since then to provide reassurance to Child X in particular, that he can have fun with his dad and I have worked very hard on that for the last year or so that we have all been living in the family home together*." When pressed on the point the respondent said "*It is not my evidence that Child X is not safe to be with his father.*" The witness went on to say "*What I was going to say was that what is different now that the Child Psychotherapist and the Play Therapist have undertaken to work with us and we have undertaken to work with them. And so it is my belief in that context that Child X is and will be safe with his father.*" The respondent made the point that she believes that Child X is still anxious - "*What I would like to say is that Child X is still anxious .... he has school anxieties, he has other anxieties*. "

190. The respondent was asked to explain why she moved back into the family home after this Court made an order in July of 2019 on the assumption that the applicant was in the family home and that she was living with her parents and if the children weren't with their dad they would be with her - and in circumstances where it was put to her that she did not tell the court

"*By the way, Judge, if you make the order that I don't want you to make, I am going to spike the guns of the court by just moving back home?*" In response the respondent said that was not the correct narrative and that it had not been her intention to return to the family home with the children when the order was made but that; -

> "*I did return to the family home with the children but there is a context for that. Subsequent to the order that you made, Judge, I did my very, very best to comply with that order. Child X ran away from the family home, from his father during access twenty-four times that I know of, he ran late at night. He ran on dark roads. He ran barefoot. I found him in a park one day. And most of the time that he ran away from the family home, B.P. called and told me I was in breach. It didn't matter where I was, if I was at work, if I was out of the city. And the children, in particular our daughter, was saying, repeatedly saying; 'Mummy will go to jail if Child X does not come for access*.' *B.P. was shouting at me about jail. B.P. was shouting at me about returning to court in September. It was a crisis point for our family. The only option that I could see available to me to support access was to return to the family home. And since then, I have been actively trying to support Child X to rebuild and facilitate and repair his relationship with his father by repeatedly telling him over that period of time that he will enjoy his time with his dad*."

191. The respondent did accept that Child X sometimes sleeps in her bed during access - "*When his father is not there or when we are in a different sleeping environment, he almost never sleeps with me*". It was put to her that she was consciously or unconsciously, as the Child Psychotherapist said, sabotaging the Wednesday morning exercise of the applicant taking charge of getting Child X up and about and ready for school with everybody else because he was in his mother's bed. The respondent did not accept this.

192. The respondent reiterated that her problem with the Child Psychologist was not his qualifications but rather that the applicant had had a conversation with him and was endeavouring to blame her and Child X as opposed to the truth, "*Which was that he agreed to seek help for himself*."

193. The respondent did accept as true the assertion that she did threaten to tell his supervisor or mentor at work. The respondent agreed that this was in relation to the February 2017 episode. The respondent said that she "*said it to B.P. in the hopes that instead of thinking like a parent or a family member, he might think and see the gravity of what he had just done to our child. At the same, I remember saying to him if a parent at work came to you and described this scenario, what would you do? And his response, was to say that he would go to social work. So my intent was to get B.P. to think about the gravity, to see the gravity of what he had just done to our son.* " The respondent went on to say; - "*I also said to the applicant if a parent described this scenario to you, what would you do? And he said; 'I would go to social work'. I was trying to get him to see the gravity of what he had just done to our son, which you say he denies today but he admitted at the time.* "

194. The respondent, referring to her request for the restoration of her pension, said *"If this was something that B.P. objected to, this was not the most important piece of the settlement for me*.

195. The respondent said that she purchased her property in Wicklow in 2000/2001 with the help of a loan of €62,500 from her parents. There was no interest accruing on the loan and she said she had always indicated to her parents that she would begin to repay it at the time at which the mortgage had been repaid, if not in advance of that. She then referred to the loan note executed on the 27th of October of 2020 in relation to the loan of €118,000 (which did not include the €62,500). The loan note essentially dealt with the legal costs and ancillary costs in relation to the court proceedings. The respondent accepted that the €62,500 was not referred

to in the affidavit of means which she swore in July of 2018 - even though she said "*I can see that it is not in the third schedule. But it is a very real debt. It is a debt that B.P. knows about. It is a debt that has been there since the time of purchase of the apartment*. " When the Court enquired of her how was it that a debt due to her mother in respect of legal fees of €30,000 (at that time) was mentioned in the affidavit in the third schedule but the €62,500 alleged debt was not. The respondent replied "*It was an honest mistake, Judge, because that debt exists*. "

196. After some confusion the respondent explained why there was a loan or debt in respect of legal fees due to her parents of €158,000 in the affidavit of the 27th of October of 2020 in addition to the debt to the parents in relation to the Dublin property of €62,500. The respondent said that she had received a consultancy payment of €41,000 and transferred €40,000 of that to her parents to repay legal bills to that point - and this brought the €158,000 back down to the €118,000. She said that the €118,000 covered her up to Day 6 of the proceedings.

197. The respondent sought to explain the €30,000 accountancy fees for services provided by her father's friend's firm. She said that it is not any longer his friend's firm but had been. In relation to the €30,000 debt she said "*Well there has been a number of analysis and, historically, they did income tax returns for myself and B.P. for a number of years and I am embarrassed to say that we have not paid them. Around the time my father was retiring, it was my understanding that the non-payment of that bill had to become part of his retirement package so I negotiated it with them and this is the negotiated fee and I will accept to pay this fee. It refers to work both in helping me to prepare (for the case) as well as income tax returns for both of us in advance of the separation and for me subsequent to it*. "

198. The respondent was taken through her affidavits of means and the point was made that her income appears to be understated quite significantly at various stages. In response she

apologised and said that she simply forgot to include some things. She stated in relation to the September 2019 second schedule being incomplete in relation to income; -

> "*Yes, I accept that. As I said, throughout this, it has been my intention to be honest but I recognise that I - - in fact, by the time that I saw B.P. 's first affidavit of means I hadn't even remembered that I had shares in my name. But, yes, there are incomes now that I have in my most up-to-date affidavit of means that are not in the previous ones*."

199. The respondent explained her reluctance to sell either of the properties which she had acquired before she got married as she felt she needed them for security in circumstances where she had suffered from a cancer that might recur - "*it is not so much if, but when a recurrence of the cancer issue that I had previously*". She also pointed out that the applicant had a property in Mayo with a net equity of €170,000- and a rental income as she had. He had a good income and did have a life assurance policy. The respondent was not sure what the current rent per month of her two properties is. It is difficult for the court to comprehend how the respondent can say she does not know the rents - in circumstances where she clearly does pay heed to her assets and finances.

200. The respondent indicated that she had checked her salary scale and that the correct figure was somewhere around €263,000. It was put to her that this was another example of "*continued inaccuracy of her sworn evidence on paper*" and she replied, "*I clearly have made some errors in the affidavit of means and I put my hand up and I recognise that*".

201. She said that it was not intentional.

202. Unfortunately, the respondent's omissions and "*lack of knowledge*" and indeed the inclusion of some purported "*debts*" point to a concerted effort by her to present an understated picture of her assets and income. Although the applicant has not proved to the satisfaction of the court that the advance of €60K from his father was a debt to be repaid, the court finds the

respondent's presentation of her figures to be more objectionable as there are several issues of concern and inaccuracy which appear deliberate and an attempt to conceal the true value of her assets and income.

203. In relation to the prosecution in January of 2019 the respondent said the guards told her that "*if I withdrew my statement that any future statements would be viewed in the context of a previously withdrawn statement. And I discussed that with my solicitor or I sought legal advice on the matter*." In relation to that prosecution she said that if he was convicted he would have to declare it to a supervisory body and this would have involved a discussion with the supervisory body but she did not believe it would have had a significant impact on his career - "*there are already individuals who have a conviction for something or other. They sometimes have to have a conversation with the supervisory body about it.*" She accepted that it would have caused some trouble for his occupation, "*there is no doubt about that*" - if he was convicted. She went on to say that it wasn't correct to say that she had no hesitation in turning up to see him prosecuted: - "*What I was trying to do was look out for the welfare of myself and the children and the B.P.'s behaviour at that point, as reflected in the statement that I had made to the Gardaí, was simply all about access and around handovers*." The respondent said that the applicant's behaviour at that time had continued to be awful with shouting and abusive comments and denigrating comments and making threats - all in front of the children at handovers and she simply wanted for that behaviour to end.

204. The respondent was pressed about the fact that she didn't succeed in getting supervised access. She didn't *succeed* in getting a barring order. She didn't succeed in having the applicant convicted and a few weeks later she had the stairs episode which must have been manna from heaven to her as she could have another go at the applicant and as a consequence he did not see Child X except for eight times out of the seventy-five further access occasions. In response the respondent said that this was simply untrue and that the stairs episode was a

terrible incident and had an awful effect on Child X and his willingness to attend access with his father. Eventually she was able to get him to come and play in the garden of the house but problems continued and then on the second next overnight visit with his dad he ended up in the emergency department having sustained a head injury and concussion at his father's hands outside a playground where his father described to her that he had restrained him outside a playground. To suggest to her that this was *'manna from heaven'* to her is simply "*abhorrent*" for this was about the children and in this context, most primarily about Child X and the awful episode he suffered on the staircase and awful emotional consequences for him as a result of that episode on the staircase.

205. The respondent accepted that she did contact the Gardaí in relation to the stairs incident because she was fearful in that the applicant told her that he would have her back in court on Monday morning - the Gardaí came to her "*they did not meet Child X but they did ask me for permission for them to speak with Child X. But on that occasion, he did not meet the Gardaí, no*". *"I involved the Garda because B.P. was threatening me with a return to court on Monday morning and I was simply trying to help my son, who had phoned me in such a state of distress, after a one-hour altercation with his father on the staircase."*

206. In re-examination the respondent said that the applicant knew about the loan from her parents for the apartments because in the early days of her courtship he had been in the apartment and she said to him that there was a loan to her parents that needed to be repaid for it - "*he has always been aware of it*".

Expert Evidence

207. The Court heard evidence from the Section 47 authors: Family and Practitioner Assessment and Therapeutic Services. In addition to their oral evidence, the Court has the benefit of two detailed and comprehensive reports which they co-authored and submitted to the Court, dated the 20th July, 2018 and the 17th June, 2019. Ms. A holds a degree in Applied

Psychology and Criminal Psychology from University College Cork, a Diploma in Family Therapy from University of Limerick and a Doctorate in Clinical Psychology from the Queen's University Belfast. Ms. B. holds a Bachelor of Social Science degree from University College Dublin and a Diploma in the Psychology of Adolescents from University College Cork. Both authors are highly experienced in dealing with child care issues.

208. Both reports contained clear advice for both parents in addition to providing recommendations to the Court. In the earlier report the authors recommended that Child X needed an urgent referral to play therapy/child psychotherapy to look at his way of managing his emotions and to help him understand those emotions. They pointed out that both parents needed to be supportive and involved in this work, as required by the therapist. In their later report they pointed out that this therapeutic intervention was advised for Child X in the report of July, 2018 and that it was beyond excusable that it had only just commenced about nine months later.

209. In their recommendations in the earlier report the authors stated the following: -

> "*Both of these parents are highly qualified in their fields, this may lead professionals working with them to believe that they know exactly what to do with regards to their own children. This is a dangerous trap to fall into. They are extremely hurt, upset parents of three young children and need to be advised and guided through this difficult time. We very strongly suggest that both need to attend for parenting management classes to help them understand their children's experiences and to see how best to manage them ...*"

210. In their first report the authors include the following paragraph at the end of their clinical opinion section: -

> "*Social work have no child protection concerns in this case and have recommended mediation and parenting support. This team concur with this .... "*

211. In the final paragraph of their first report the authors state : -

"*Both parents love their children dearly, the hopes and wishes they have for their children are commendable. This team urges them to take a step back, get help and support themselves, allow independent trained professionals help their children and family by taking the assistance and guidance offered*."

212. In their second report of June, 2019 the authors stated that they had gathered from discussion with both parties that there had been multiple court appearances since the relationship breakdown, with limited progress in matters. They stated that "*continued adversarial engagement is not productive for either and not helping these children to adjust to their new family structure*. "

213. The authors recommended that all denigrating of a parent needed to cease immediately by parents and their entire extended family. They urged a recalibration of the focus of the parents in circumstances where they felt that much of the parents' thinking was very legal and lacking consideration for the welfare and mental health of their children. In the clinical opinion section of the second report the authors commence by pointing out that: -

"*The intense venom towards the other parent is powerful and ever present in discussion with either. In this team's view, it preoccupies their thinking and inhibits a more neutral way of relating with the other. In this team's opinion, there is no level of trust or respect between these parents, an underpinning element if these parents are ever going to parent their children in a non-conflict and more unified manner.*"

214. They went on to point out that: -

"*These children are living two totally separate lives, their parents are unable to share even the simplest positive gesture/idea, unless this changes these children are on a most difficult trajectory*."

215. Towards the end of the clinical opinion section in the report, the authors point out that children whose parents can establish effective and respectful co-parenting and communication are largely protected from the adverse effects of family separation and adjustment. They make the point that the creation of separate worlds, physically and psychologically for any child is harmful, it obliges them to have a less integrated experience of their attachment figures and compels them to split themselves psychologically and physically between their parents.

216. The views and opinions of both experts as expressed in their reports and in their evidence before the Court are well founded. Although both parents appear to have made some effort to recalibrate their focus in the interests of their children and to at least moderate the level of hostilities between them it is an unfortunate fact that the evidence before the Court does show that both have some considerable distance to go in this regard.

217. In their most recent report, the authors pointed out that they were not aware of any child protection concerns in the family at that time but emphasised, as indicated above, the need for both parents to change their behaviour and approach to one another for the sake of the children.

218. The Court is concerned with the child welfare assessment which is at issue in respect of the three children. It is in that context that the Court is concerned with the clinical opinion and recommendations of the above experts. Suffice it to say that, for the reasons clearly articulated by the authors, this Court shares the view expressed in the final sentence of the 2019 report and hopes that the parents "*can integrate the guidance, recommendations and professional services available to them into a new way of parenting and relating with one another in order for ... an access rotation to come into being as positively as possible*."

219. This Court does however feel it necessary to say the following in relation to the creation of a climate which will permit the order of this Court concerning custody and contact

to work properly for the sake of the children. There cannot be any doubt but that the mother has deliberately obstructed contact between the children and their father at times since the separation occurred - and especially in the initial stages. As time has passed by the mother's actions in this regard have altered - but there remains a pattern of behaviour designed to limit and to control contact between the children and their father. At a basic and perhaps subconscious level, for example, there has clearly been a climate of hostility towards the father emanating from the mother and the maternal grandparents which has impacted in a negative way on the ability of the relationship between the eldest child and his father to strengthen. His angry and difficult behaviour on occasions has resulted in both parents having had difficulty managing him at the time of those outbursts. It is also clear that the father has resorted to physical restraint on occasions and in circumstances where he ought to have taken advice and learned a better way of dealing with the incidents. Indeed, both parents do require and have required assistance in this regard and both parents ought to have secured therapeutic intervention for the eldest long before they did. The mother has had an opportunity to exploit the father's difficulties in this regard to her advantage by, to put it at its mildest, doing very little to assist the healing of the relationship between father and son following the father's physical interventions - and instead using those incidents to wrongly suggest physical abuse by the father. The eldest sometimes resists contact with his father and at other times is slow to engage with his father for fear of upsetting his mother. The mother's behaviour is not conducive to mending the rift between the eldest and the father and is also causing the eldest to be conflicted.

220. This Court is satisfied that the mother has a very significant influence on each of the children insofar as their attitude and behaviour towards their father is concerned. If the mother behaves in the future as she has behaved in the past then she will be able to frustrate the court

order in relation to contact. But if she does so she must be prepared to face the consequences as the court cannot tolerate anything less than full co-operation and respect for the court order.

221. It is of course true that the father is also a significant influence on the children insofar as their behaviour and attitude towards their mother is concerned. The father's behaviour towards the mother in the presence of the children has on more than one occasion been belligerent and unacceptable. When the mother and father have come together at handovers since the separation there have been several unseemly incidents of varying degrees of belligerence between both and these incidents have obviously impacted on the children. They see parents at war with one another instead of the parents showing a level of friendship and civility, even if feigned, for the sake of the children. But overall the Court is satisfied on the evidence, and as a matter of probability, that the mother has placed much more significant obstacles in the way of the children's contact with their father than he has done in terms of their relationship with their mother. The evidence does not indicate that the father has been proactive in this regard in the way the mother has been.

222. In the interaction with the Section 47 authors, Author 1 pointed out that the mother had articulated concerns about the father's capacity to manage his anger and "*she also had concerns about his mental health*". She said that the father did not have any concerns about the mother's physical care of the children.

223. How the respondent saw fit to call into question the mental health of the applicant is something of a mystery. There is not a scintilla of evidence to suggest that he suffers from any mental health issues save perhaps the stress and strain of the marital breakdown and its aftermath - which has impacted on both he and the respondent. In fact, the applicant has shown remarkable strength of character and admirable coping skills in dealing with the allegations and district court proceedings which the respondent has had visited on him.

224. Author 1 felt that Child X had been exposed to the negative language about his father "*between members of his mother's family*" - and she agreed that it was likely that the mother may have both articulated that he was the *'baddy of the piece'* or at a minimum, not discouraged anyone to believe that he was the baddy of the piece.

225. Author 1 accepted as correct the proposition that when the eldest said he was "*not sure if his mother wants him to have more time with his father*" that what he was telling her or coding to her, or whatever, was that "*his mum doesn't want him to see his dad, that's his view of it*?". Author 1 accepted that she did not see any basis for the suggestion that access should be supervised.

226. The court has also had the benefit of the oral evidence and a comprehensive psychotherapy report (dated 4th February 2020 with an Addendum dated 3rd November 2020) from the Child Psychotherapist. She is an Adult Child Psychotherapist with considerable experience in dealing with children, and parents in conflict.

227. The Child Psychotherapist gave evidence that after writing up the first proposed trial access plan the mother made more adjustments than the father. However, once the access started off there were moments where it seemed it was sabotaged by the mother. She instanced Child X being brought to his grandparents' house with the other children so that she could tell them the narrative that the Child Psychotherapist had recommended. But Child X did not return from the grandparents' house and the Child Psychotherapist explained to the mother that having the talk in her parents' home, where Child X would run to, really set it up to fail. The Child Psychotherapist also made the point that she was unaware of something of some importance when advising the father that if Child X did run to his grandparents' house that the father should not force him to return but allow him to remain there as Child X was receiving treats in the grandparents' house - for example he adores Lego and he had a lot of Lego at his grandparents' house so it was a home from home and it didn't entice him to return to his father's

home. She had not thought that needed spelling out - "*so that was probably another area of, maybe, unintentional sabotage*".

228. The Child Psychotherapist also referred to the fact that when the father tried to get Child X ready for school and he would go upstairs Child X would stay in bed with his mother - "*so that may be considered another unconscious sabotage, because if the mother wanted to support the father in getting Child X to school she would get up out of bed so that Child X would do so. But she remained in bed and all the father could do was knock on the door every fifteen minutes and Child X would stay in bed. So it was very difficult for him to get Child X to school*."

229. The Child Psychotherapist had the following to say in relation to what the parties must do if any of the children did not go to access and did not go to school: -

> "*The reality is, unless they have that talk about the narrative, that the father is not the bad guy, and that Child X can see that both of his parents are working together, they are always going to have difficulty in transitioning, difficulty with school. Judge, the play activities I mentioned in my addendum, in one play activity the request was that the father sing a lullaby to Child X. So he started to sing a song from when, I believe, Child X was around two and he mentioned that – Child X then mentioned that he used to play the ukulele and as he sang the song, Child X became very dysregulated, walking around, you know, berating his father, saying, you know, mean things. It was actually really sad to watch. The father continued to sing the song, sing the lullaby, even though he was being berated and eventually, after a minute and a half Child X, although he didn't face his father, he became more regulated and in that what I could see is the perseverance of the father, even though Child X was being cruel, that he stayed singing that song and that Child X managed to self-regulate. So I think if the obstacles are taken away and the parents hold the same narrative, I see*

so much hope and I truly believe this can work and the only way it won't is if each sees the other as the enemy. "

230. Dealing with a question as to the view that a court order must be complied with to the letter of the law and whether she understood that point of view the Child Psychotherapist said in reply to Mr. Corrigan: -

"*Judge, I understand why the father would hold that view, because when I learned that Child X had Lego in his grandparents' house and it was essentially a home from home, so that was not an environment that was supporting X. to return. To me, one that would support him in returning is where he wouldn't have any toys there. If he wanted to watch television, they would say, well there is a television at your dad's house, you can go and watch it there. But essentially, they would talk to him and show him love but that he wouldn't have any of the luxuries or the toys and that's not how it got played out. So if the father has difficulty trusting that he will be supported, I can understand that because the evidence shows the opposite*. "

231. Dealing with questions about the need for flexibility the Child Psychotherapist said: -

"*... but also I think that flexibility will be there once trust has been established, that they are all actively working towards the same goal*. "

232. The Child Psychotherapist went on to say –

" ... the very first thing that needs to happen is if the mother changes her narrative that Child X is afraid of his father, because the play activities have shown that there isn't fear, if she can do that and see that the level of control that Child X has is very damaging for him, and even in his behaviour towards his siblings, where he can be cruel with them, and if that shifts, and if they are in different homes, I think that it (the transition period) would be six weeks/two months."

233. In relation to the narrative the Child Psychotherapist made the point that all the adults needed to be on the same page and not be engaging in a negative narrative. The Child Psychotherapist articulated grave concerns for the psychological health of the eldest son in particular if the conflict continues and if things do not improve without delay.

234. She said that both parents must let go of the past and that a specific narrative has to be told to Child X regarding his father. She agreed if that was done - if they both let go of the past and if it was made very clear to the children and in particular to Child X - there could be a sea change in the space of four, six, eight weeks. She said that Child X is not being contained which he needs to be by both parents and she agreed that this containment could not occur unless the narrative was changed and made very clear to Child X - and she agreed that this was something at the moment that is entirely within the gift of the mother.

235. In response to further questioning from Mr. Corrigan the Child Psychotherapist said that she could not believe that the mother had always encouraged the access although it might be that she felt she did - but the Child Psychotherapist didn't believe that's what happened.

236. On examination by Mr. McCarthy, the Child Psychotherapist said that the optimum version or the best version, whether the narrative changes, is you get to Friday for five nights, followed by a break, and then Tuesday into Wednesday.

237. Dealing with a question about whether designating one party a primary carer would be an unhelpful badge the Child Psychotherapist said: -

> "*Once again, Judge, I think it has been an unhealthy power struggle, so that if both parents are seen as equal parents, in this case it would be helpful*."

238. The phrase "*power struggle*" is one which had occurred to the court as an apt description of the dynamics at play between both parents before the Child Psychotherapist used it. The adjective unhealthy also fits.

239. The Child Psychotherapist also accepted the dangers of "*flexibility*" and the woolliness that might be introduced into the regime and she acknowledged "*yes, Judge. You know, there is a lack of trust here*." She accepted that things should happen when they are supposed to happen for the consistency of the children's expectations to be met: -

> *"Yes, Judge, you know, I see that and I am hopeful that when the father is in his home, that Child X is going to know that he can't run away to his grandparents and maybe that eliminates that. Or the support that the Play Therapist and I offer shows him a way to hold the boundaries in a way that are child centred and strong and kind."*

240. When pressed further by Mr. Corrigan in additional questioning about the need for flexibility as opposed to the rigidity of an extremely detailed prescription the Child Psychotherapist said that she did understand that point but: -

> *"Then what I also understand is that I would say that because the mother held the belief that Child X was afraid of his father, that he wasn't fully supported by her in meeting with his father. What I say to parents in this case is supposing your child refuses to eat breakfast or refuses to go to school, how do you manage that? So if she actively promotes Child X going to his father, then I can't see there being an issue."*

241. Of note in the report and evidence of the Child Psychotherapist is the fact that she comprehensively rejects the assertion - which has been part of the mother's narrative - that Child X is afraid of his father. She rejects this narrative because of what she saw in the assessments when Child X was interacting with his father and she furthermore states that she is not in agreement that Child X is being terrorised by his father. She points out that the recording of Child X and his father completing their play activities show that Child X's behaviour is incongruent with fear. She again points out that the parents need to learn to co-parent.

242. The Child Psychotherapist has expressed her opinion in a very clear and considered manner. She states that the narrative that the father is the 'bad guy' needs to cease with all the adults. In addition, she points out that the father needs to let go of the narrative that he is being alienated. She says that if both parents can let go of their narrative that the other is the enemy then she and another professional involved can help heal the rupture within the family - they will support the father to have boundaries with Child X where he can be strong and kind rather than strong and mean when Child X's behaviours are challenging. They will also support the mother to be strong and kind and support Child X to develop a sense of autonomy.

243. While the focus above may be on Child X, it ought not to detract from the fact that the other two children are impacted in different ways by the strife and hostility between their parents - and by the separation. In addition to the professional help that is available and ought to be availed of it is necessary that the Court Order in relation to custody and contact is observed. Insofar as both parents are concerned, this means that they have an obligation to make the regime work. As every parent knows children cannot always be allowed to get their own way. Sometimes they must do what their parents want them to do and sometimes they cannot do what their parents oppose. Good parenting sometimes does require strict parenting and clear boundaries.

244. For the avoidance of any doubt the court accepts the opinions and conclusions of the experts, not least because they accord with the conclusions this court has reached on the evidence.

245. It is a cause for optimism that the parents have, albeit late in the day, reached considerable agreement in relation to custody and contact. The Court has been provided with the proposal of the father dated the 10th November, 2020 and the counter proposal of the mother dated the 11th November, 2020 in relation to custody and contact - and an amalgam showing points of agreement and disagreement. In addition, the Court has made Interim Orders

in relation to custody and contact since the evidence concluded - on the 12th November 2020 and on the 9th December, 2020.

246. In these circumstances the court is making an order providing for custody and contact in the terms set out at the end of this judgment. The order is intended to be clear and precise as the court is of the view that flexibility would likely lead to an unravelling of the regime - whether intentionally or otherwise. If trust is established the parents ought to be able to work together with a view to accommodating the needs and wishes of the other on a reciprocal basis. That day appears to be some time off so meanwhile a clear and certain regime is required for the sake of the children and their parents.

The Applicant's Submissions

247. The applicant in the written submissions at para. 5 states that: -

> "*Much of what drove the intensity and bitterness of the litigation, of what caused the hearing and amplification of issues within the hearing, was the sworn evidence of the respondent to this Court and to the District Court (in the affidavit of the 11th of May, 2018, the affidavit of the 25th of October, 2018, and the information sworn on the 17th of April of 2018 respectively):*
>
> *That she was subjected to multiple incidences of rape being a single occurrence in or about Christmas 2009 and several, although un-enumerated or indistinct from one another, alleged occurrences of forced intercourse and forced digital penetration between September 2016 and March 2017.*
>
> *That she was drugged by the applicant.*
>
> *That the applicant was grooming the children.*
>
> *That he was telling them secrets.*
>
> *That she was in fear of her husband and required the protection of the court.*

That he had been abusive of the children and physically abusive of Child X. That he had stolen from her and that he had financially abused her."

248. On behalf of the applicant it was submitted that "*so long as those allegations remain and are not withdrawn, then it is an untenable proposition that he should be expected to rise above such allegations and proceed to make efforts to resolve the other strands of these proceedings on their own terms as though the allegations had not been made against him."*

249. Whatever of the other allegations, this Court is satisfied that the applicant was entitled to challenge fully the allegations of rape and sexual assault and he was entitled to request this Court to address those allegations in a comprehensive manner when giving judgment.

250. In replying to the point made on behalf of the respondent that it was the applicant who introduced the allegations into the case it is stated on behalf of the applicant that repeating an allegation is not the same as making an allegation. It is submitted on behalf of the applicant that *" .... those utterances were clearly and self-evidently made to bolster the premise that the applicant was untrustworthy, dishonest and a danger to the welfare of his children. The conclusion invited was that individually and cumulatively, these matters justified her decision to seek a separation from her husband; justified her decision to then withhold the children from the society of their father for an extended period of time; and justified her premise that the applicant acted out of a propensity to harm both the respondent and the children. "*

251. It was submitted that the affidavits sworn by the applicant on the 6th of April of 2018 contained details of the allegations which he said were made against him in order to give context to an application to be entitled to have the unsupervised society of his children and to alert the court to the scope and range of, as he saw it, untrue and fabricated allegations against him.

252. In this regard, the court is quite satisfied that the applicant had little option but to set out the scope and range of the allegations which had been made against him when swearing the affidavits grounding his claim for relief in this Court.

253. The applicant is also correct to emphasise that the respondent swore the information which was provided to the District Court in her application for a Protection Order on the 17th April 2018. It is quite clear on the evidence that the respondent did pursue the allegations of rape and sexual assault in a determined way in the District Court and after having sight of the affidavits which were sworn by the applicant on the 6th April 2018.

254. The applicant is correct to point out in the submissions made on his behalf that the allegations were in fact escalated by the respondent in the affidavits sworn by her on the 11th May 2018 and on the 25th October 2018.

255. As the Court has already indicated, it does not find credible the allegations of rape and sexual assault made by the respondent against the applicant. Nor indeed does the court find credible other and somewhat lesser allegations made by the respondent against the applicant.

256. In the submissions made on behalf of the applicant it is submitted *"that the actions of the respondent in swearing to matters which she knew were untrue, then declining to pursue or withdraw those allegations, when taken in conjunction with her concerted efforts to establish her husband to be a source of danger to his family and certainly to Child X, is out of the ordinary experience of the court as something that it tends to encounter in the hearing and disposal of family law cases."*

257. It is submitted on behalf of the applicant that this conduct is exceptional and is a gross offence to the applicant and to the children that he and they endured what they had to endure at the hands of the respondent over the course of the last three years.

258. It was submitted on behalf of the applicant that by "*failing to pursue at trial the case she made out an affidavit, and then asserting that although these things happened to her at the hands of the applicant, she now accepts he meant 'no harm', the respondent compounded the wrongdoing and so brought herself within the realm of litigation conduct [sic] (misconduct)*.

259. The Court has considered the conduct of the respondent insofar as the allegations of rape and sexual assault in particular are concerned, and returns to the issue later.

260. The respondent was wrong when she decided to make the allegations of rape and sexual assault, and indeed the other allegations, against the applicant and when she decided to pursue them in the manner and to the extent which she did. The allegations are not credible and do not stand up to scrutiny.

261. The court accepts the submission made on behalf of the applicant that the behaviour/misconduct of the respondent should, at a minimum, sound in costs.

The Respondent's Submissions

262. In the written submissions on behalf of the respondent a point is made that it is not an issue for the court to decide the truth of historic allegations made by the respondent as to the conduct of the applicant to her. The court has expressed its view on the position of the respondent concerning the allegations earlier in the judgment. It is true that this Court is not dealing with a criminal prosecution in relation to allegations amounting to criminal charges. It is also true that this Court is not dealing with a defamation action. However, the court is very much dealing with the dispute inter partes and the unfortunate reality for the respondent is that the serious allegations made by her against the applicant are very much part of the case - because she made those allegations. The court cannot decide the case, the issues (including the child welfare issues) and administer justice inter partes without addressing the allegations of rape and sexual assault, and without expressing a view on the credibility of those allegations.

263. The respondent is correct to point to the fact that her position was set out clearly on the first day of the hearing. The fundamental problem for the respondent is that it is she who made the allegations of these crimes. Once she did so then the applicant was perfectly entitled to defend himself fully against the allegations unless they were unequivocally withdrawn by the respondent - and they have not been.

264. Insofar as the open offers of each party are concerned it is the position that, absent a withdrawal of the allegations of rape and sexual assault or some satisfactory formula agreed to deal with the allegations, the gulf between both parties was too wide to bridge.

265. The Court accepts the submission on behalf of the respondent that it should have regard for the date property was acquired by the parties - "*that the property acquired pre-marriage by both parties must be viewed in that context"*. The Court also accepts that some of the properties acquired by the respondent were acquired by her in the context of her historic cancer and inability to secure life assurance and critical illness cover. Bearing these matters in mind, along with the other circumstances in the case, the considers that it would not be correct to approach the making of proper provision on an equal division of assets basis.

266. The Court has considered the unquantified diminution in pension entitlements of the respondent by reason of the time she took off work as a result of family and child care duties in the early days of the marriage (certain unpaid leave). The court's considerations in this regard are detailed in that section of the judgment dealing with pensions.

267. The evidence concerning the personal injury award is very limited but the sum received by her is in respect of injuries sustained such that it cannot be regarded as some windfall benefit accrued by her. In considering the lump sum payment, the court has had regard to this fact.

268. Insofar as the written submission of the respondent concerning receipt of maintenance for the children from the applicant is concerned, the respondent has not advanced any persuasive reason as to why a maintenance order is necessary.

269. Issue is taken with the failure of the applicant to seek a promotion which would probably increase his salary somewhat. The court accepts the reasons advanced by the applicant for not doing so. It is clear that the applicant's employer (and his manager in particular) did stand by the applicant whilst he was dealing with the difficult family law litigation and it is not unreasonable of him to reciprocate that loyalty. He is entitled to exercise a judgment in that regard in circumstances where he hopes to remain in the employment well into the future.

270. The evidence does not support the description in the respondent's written submissions of "*the slightly perilous state the respondent finds herself in arising from her cancer history*." Although the respondent did refer to the fact that it is a question not of "*if*" but "*when*" the cancer will return it is the position that no independent medical evidence was produced and the prior history does not affect the respondent in her daily life or her work. It is the position that the respondent's cancer history is a matter of concern for her but there is no real evidence to support the *"perilous state* " description.

271. Insofar as the childminder is concerned, this Court does not accept that it is in the interest of the welfare of the children that the respondent be the sole employer or boss of the childminder. The Court considers that the childminder ought to be employed jointly by the applicant and the respondent and this is dealt with elsewhere in this judgment.

272. In the written submissions the respondent argues that some flexibility in the contact regime is desirable. The Court has carefully considered allowing for some flexibility but has concluded, on the evidence, that flexibility would be unwise and is more likely to cause problems with contact than will a prescriptive regime.

273. Insofar as the respondent's submissions concerning the credibility and truthfulness of the applicant is concerned, the following is the position; -

(a) The Court has elsewhere in this judgment expressed its view in relation to the "*bank letter*". The court does not find that the revelation of this letter impacts upon the credibility of the applicant.

(b) The evidence in relation to the bank loan of €60,000 from the applicant's father is almost as unsatisfactory as the evidence in relation to the loan which the respondent says she received from her parents at the time she purchased the apartment in Wicklow many years ago. The court deals with these *"loans"* elsewhere in this judgment.

(c) The court does not find that the production of the newspaper article is suggestive of a deliberate attempt by the applicant to conceal or fail to disclose the *"bank letter"*.

(d) Insofar as the applicant's alternative accommodation in Cork is concerned, the court has dealt with this elsewhere in the judgment.

(e) Not finding or acknowledging or producing the *"bank letter"* until it was produced to him and not giving details of the proposed alternative accommodation are, this Court finds, unimportant matters in the context of the issues to be addressed by this Court. These matters do not impact on the court's view that the evidence of the applicant is credible evidence even if his evidence has been shown to be incorrect in certain respects and even though his approach might have been different. In the latter respect, the applicant might have decided to give comprehensive details of his proposed alternative accommodation to the respondent and/or to the Child Psychotherapist once that accommodation was acquired by his father - or he might have given more detail in his most recent affidavit of welfare. Having said that, the conflict between both sides was such that the court can understand the applicant's decision to limit that information. It is also the position that the applicant could have been asked for full details in relation to the proposed alternative accommodation when giving evidence. He was not.

274. In paragraph 23 when replying to the applicant's written submissions (at paras. 14 to 22 - concerning the reason the applicant says the respondent made the very serious allegations against him) the respondent's submission states that no such allegations were advanced at the trial and that it is speculation advanced on the part of the applicant in relation to the matters recited at paras. 14 to 22 "*to prejudice this Court against the respondent."*

275. Paragraph 24 then goes on to say "further, the contents of these paragraphs of the applicant's submissions are themselves based on the unacknowledged premise that the allegations referred to did not happen. "

276. This expression of the position of the respondent really illustrates why it is necessary for this Court, given all the issues in the case, to express its view on the credibility of the serious allegations which have been made by the respondent.

277. In the written submissions the respondent effectively asserts that it is no business of the Court to be expressing a view or a finding in relation to the serious allegations made by the respondent against the applicant - and in particular in relation to the allegations of rape and sexual assault - and even those allegations are referred to in the affidavits of the respondent filed in these proceedings. In fact, the evidence of the respondent was that she stands over everything in the affidavits which she swore. The respondent's argument appears to be that the allegations are irrelevant to the court's considerations in circumstances where those allegations are not being "*pursued*". These arguments are dealt with elsewhere in this judgment. In summary, this court believes the position of the respondent to be erroneous. The court cannot ignore the evidence in the case and must, insofar as it is relevant, express a view on the credibility of the evidence presented. The sworn averments in the affidavits and the oral evidence in relation to the allegations given during the hearing of the case is evidence which is before the court and which cannot be ignored - because it is relevant.

278. The respondent in the written submissions suggests that the court ought to conclude that the omissions from the respondent's earlier affidavit of means were inadvertent on her part and also submits that the court should conclude that the applicant was (at best) an unreliable witness given "*the lie about*" the bank letter and in light of his assiduous ability to document other matters which in his view were supportive of his stated case and motivation. In this regard, there is an apparent contradiction in this approach which the respondent proposes the court ought to take when drawing conclusions from the evidence of the applicant and that of the respondent.

279. The respondent's assertion in the written submissions that it is likely that the applicant will receive a significant workplace/contractual settlement sum is not supported by the evidence in the case.

Oral Submissions

280. In the oral submissions on behalf of the applicant concerning the offer of maintenance which was made by the applicant in February of 2020 the point was made that this issue of maintenance should be considered by the court in the round and in light of the state of knowledge as it existed in February of 2020, and a state of anticipation. While it was stated in oral submissions that the applicant was not resiling from the offer to pay the modest sum in respect of maintenance he was nonetheless asking that the court look at the need for this in circumstances where the evidence he says has *"now established that the respondent will enjoy an income very considerably in excess of the income enjoyed by B.P., both in terms of her enhanced contractual salary, her rental income, the presumption on her part that she will have the Children's Allowance and the maintenance 'which was offered in the open offer in February 2020' ".* It is submitted in the oral submissions on behalf of the applicant that the court should consider the question of whether or not the maintenance offered, although not withdrawn, might be considered to be a payment which is unnecessary - having regard to the

degree and frequency of contact which it appears that the applicant will have with the children along with the commitment to pay half of the fees, expenses, etc.

281. In dealing with the rape and sexual assault allegations Mr. McCarthy pointed out that the respondent in the written submissions (at para. 25) stated that "*no case has been made at trial by the respondent as to these allegations*". Mr. McCarthy went on to say that "*I suppose, Judge, that's exactly our point*". *So we both say that no case has been made. Mr. Corrigan urges on you one conclusion and set of consequences and . . . . . I urge on you an entirely different set of conclusions and consequences by reference to that, Judge*".

282. Mr. McCarthy disagreed with the contention that the applicant should be penalised and that the decision of this Court in *BR v. PT* [2020] IEHC 205 ought to be applied: -

> *"Judge, the last thing is the urging on the court that, in fact, for B.P. to have insisted that the case be heard in the absence of a withdrawal, for not disclosing the letters to the bank regarding €10,000 of the advance of €60,000 and for not telling the court about the availability of accommodation in* Cork *before November, that, cumulatively, the court should express the court's dissatisfaction with the conduct in costs".*

283. Mr. McCarthy expressed the view that the circumstances in *BR v. PT* and the appellant's behaviour in that case were in no way comparable to the behaviour of the applicant which the respondent suggests is in some way analogous. On this point, this court recollects the behaviour of the appellant in *BR v. PT* . It was quite extreme and is no way comparable to the assertions made in respect of the applicant's character and evidence in this case.

284. In the oral submissions the point was made on behalf of the applicant that the serious allegations infected every part of the case and that it is very difficult to separate out the days from one another and to suggest, for example, that two of six days or three of six days, or whatever were caused by this issue. This is a valid point but the court must nonetheless assess

the position and decide as a matter of probability if the allegations did lengthen the case. On this, they obviously did. Thereafter, the court must endeavour to decide on and measure the additional dimension and time which the allegations added to the case. This is dealt with elsewhere in the judgment.

285. In oral submissions on behalf of the respondent Mr. Corrigan posed the rhetorical submission: -

> "*Would this litigation have consumed so much time, would the issues have been narrowed had the applicant 's proposal on the .. of February not been a conditional proposal, part of which my client could not achieve, because it required her to withdraw allegations made by others, and secondly, as she said in her own evidence, she couldn't withdraw on affidavit matters, because that would be to acknowledge that her previous affidavit was untrue?"*

286. Similar rhetorical questions are raised in relation to the bank letter and in relation to the fact that the alternative accommodation was not made known to the Child Psychotherapist. The court is not concerned about any additional time added by the latter two issues.

287. Mr. Corrigan is entitled to point to the fact that the demand for the withdrawal of the allegations by the respondent and the withdrawal of allegations by her which allegations were made by others created something of an impasse for his client. However, the impasse or the obstacle arose because the respondent made the allegations in the first place and failed to withdraw them. The court accepts that the applicant really had no sensible alternative but to defend himself against the allegations and seek to have them dealt with. He was entitled to protect and defend his reputation and character when accused of acts of the utmost gravity.

288. On behalf of the respondent it was submitted that it was not suggested in any manner or means that the applicant's conduct was comparable with the conduct of the appellant in *BR v.PT.* Instead, it was urged that the principle should remain the same - in the context of the

way he approached the litigation (for instance, the conditional open offer, the alleged lie about the bank letter, the concealing of details of the house in Cork, the newspaper article being produced). It was submitted that on matters which suited him, the applicant presented his evidence in detail and did not present evidence on matters which were unsuited to him.

289. The argument that the 'principle' in *BR v PT* applies to the facts here is erroneous. This Court has already indicated its view on these matters and it is satisfied that the applicant approached the issues in the case reasonably and that his evidence was credible even if he was incorrect on some matters (and on the bank letter in particular).

290. In the oral submissions some time was spent by counsel for the respondent taking issue with what was described as the first mention that the court should alter a proper provision in some fashion or other for gross and obvious misconduct occurring in the written submissions. The first point to make in this regard is that it is for the court to decide on the evidence whether the conduct of either party amounts to such gross and obvious misconduct, or suchlike. The second point to make is that it was pointed out by counsel for the applicant on the first day of the hearing before evidence was called that a really significant issue in the case was that there were allegations and that those allegations were of quite a heightened severity and that they were allegations that had to be solved and constituted a real issue in the case.

291. In the course of the oral submissions on behalf of the respondent it was asserted that, speaking of the rape and sexual assault allegations in particular, "*that issue, the truth or accuracy of whether those offences occurred or did not occur is not before the court."* It was further submitted that contrary to the submissions of Mr. McCarthy and the written submissions on behalf of the applicant "*it was not suggested to the respondent that she made these allegations falsely and with an intent as outlined in the written submissions*" and therefore that question was not in issue.

292. This position of the applicant is dealt with earlier. These submissions and this argument of the respondent is something of a circular argument. These matters are an issue before the court because they are part and parcel, and indeed a predominant part, of the dispute between the parties. The credibility of the serious allegations made is a matter the court must consider and express it's view on. Quite apart from anything else the child welfare concerns compel the court to consider whether the serious allegations are credible. This is a basic and obvious point.

Proper Provision - Family Law Act, 1995

293. It is necessary to consider the issue of proper provision in accordance with s. 16.

'16.-(1) In deciding whether to make an order under section 7, 8, 9, 10(1) (a), 11, 12, 13, 14, 15A, 18 or 25 and in determining the provisions of such an order, the court shall endeavour to ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case.

(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.*

The Court's finding: - each party is financially independent and in secure highly paid employment.

(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 of the spouse or otherwise).*

The Court's finding- their respective situations are and are likely to remain comfortable and secure by virtue of their qualifications and employment. The tangible assets of the husband are modest and those of the wife are not insignificant. Both are members of good pension schemes.

(c) *the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be.*

The Court's finding- their respective situations are adequately provided for by their salaries and income. They enjoyed a comfortable lifestyle during the marriage.

(d) *the age of each of the spouses and the length of time during which the spouses lived together.*

The Court's finding - both are relatively young and their marriage was of relatively short duration. In addition their work kept them apart for significant periods during the marriage as the husband worked away from home.

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

The Court's finding - the wife's medical history involving treatment for cancer as a young adult requires to be recognised and is in this judgment. She does need the comfort provided by the safety net of at least some of the asset base which she has built up and worked hard for, even if she has to re-arrange her finances. Were it not for her health concerns the court would award a greater lump sum than what it has decided on.

(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.*

The Court's finding - although the wife earned more than the husband the evidence is that they endeavoured to contribute equally to family outgoings and expenses. It seems likely that the wife did contribute more as her earnings were much higher than the husbands. But this is not a "contribution" case as such. The court must also bear in mind that the wife was a working mother who had the obligations of her career and as a mother as each of the children were born and after. She coped with all these obligations throughout although the father was working away for significant periods of time. The mother did not enjoy the down time from the pressures of family life which the father did enjoy through working away - although it may well be that he would have preferred to be home after work each day. The mother was generally a 24/7 mother, albeit with a child minder to help. It must also be acknowledged that the husband did forego significant earnings when he agreed with his wife to alter his plans and stay in Cork when Child X was an infant and pursue studies there.

(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 together 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.*

The Court's finding - there is no real evidence that the career of either has been impeded in any substantial respect. There has been an unquantified impact on the pension of the wife because of time she had to take off due to having a family. No evidence was called concerning the pension or the diminution and the wife does not appear to be making a significant issue of it. On the evidence this impact is not shown to be of significance in the overall financial context. As stated above, altering his plans and staying in Cork did cost the husband a significant loss of earnings.

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

The Court's finding- both parties will be entitled to public pensions by reason of their employment and it seems clear that the wife's scheme is better than the husbands. It is an older and better scheme.

(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.

This is dealt with separately in this judgment.

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

The Court's finding - the Court accepts that the husband is entitled to have a comfortable home if the wife is to have the family home as she hopes. He is entitled to acquire his own home. It is in the interests of the children for this to happen in view of the court's decision on custody and contact. This does involve the husband receiving a lump sum - due in part in consideration of his share in the family home. If the wife cannot retain the family home and if it has to be sold she will have sufficient resources to acquire another less expensive home, after payment of the lump sum fixed to the husband.

(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 judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring.*

The Court's finding - both parties will be entitled to public pensions by reason of their employment and neither will be so prejudiced as to require some extra provision.

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

This does not arise.

The Effect of Misconduct

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

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

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

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

296. For present purposes, it is worthwhile considering the *S v. S* decision referred to by Irvine J. Burton J. there observed:-

> *'Conduct.*
>
> *37. It is common ground that for conduct to be taken into account in the assessment of financial provision/property adjustment, either by way of enhancement of the position of the 'innocent' party, or reduction or elimination of the entitlement of the 'guilty' party, such conduct must be exceptional. The statutory provision in s25(2) I have already set out in paragraph 22 above, namely by reference to subsection (g)*

that the court shall have regard to conduct " if that conduct is such that it would in the opinion of the court be inequitable to disregard it". The exceptional nature of this course is referred to by Lord Nicholls in Miller at para 65, and again by Baroness Hale at para 145:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

298. The obvious and gross misconduct is at a very high level in the above examples. The cases are noteworthy also because they can perhaps be better characterised as cases of misconduct during the marriage as opposed to what is at issue here. The wrong committed by the wife here is essentially the making of allegations of a serious nature against her husband

as to things allegedly done by him before the split during the marriage - and before the marriage.

299. The Court finds that the father did not abuse any of the children and in particular did not abuse Child X. Those allegations are serious but fall into a lesser category than the other allegations of rape and sexual assault.

300. The court has carefully considered the evidence in respect of the allegations by the wife that the husband raped and sexually assaulted her. It finds that the allegations lack any credibility or cogency. The court finds that the allegations are not the truth. Making the allegations and pursuing them in the course of the disputes in the district court proceedings and repeating them in affidavits filed in these proceedings was wrong. The approach adopted at this hearing of not withdrawing but not relying on or pursuing those allegations is against the backdrop of what happened in the district court hearings and against the backdrop of the experts reports referred to above. It was clearly a strategic approach adopted as a damage limitation exercise on the part of the wife. The making of these very serious and untrue allegations and pursuing them to the extent they were pursued does in all of the circumstances amount to gross misconduct on the part of the wife. She put her husband through a truly awful chain of events and experiences which he did not deserve. It is inexcusable conduct.

301. The question remaining is should this court penalize the wife for this wrong to her husband. Would it be unjust to disregard this conduct in all of the circumstances of the case. At first glance one would think that there could be only one answer - i.e. that disregarding such conduct would be unjust.

302. However, it would be wrong to jump to such a conclusion and the court considers that the justice of the case signals otherwise. The court does not consider that the provision should be influenced by the gross misconduct. Because the circumstances here are not such as

would make it unjust to disregard the conduct when considering the provision to be made. For the following reasons ; -

(a) Throughout the hearing the applicant was clear in his view that the allegations had to be dealt with and put to bed so that the family could move on. He was not seeking some financial package to compensate him for the egregious wrong. The court is satisfied that its findings will address his legitimate concerns.

(b) The applicant impressed the court as a person who appreciated that a really important concern is the children and their future. The court is of the view that he is likely to appreciate that a measured approach to the issue of provision is likely to prove beneficial in this regard - whereas the imposition of a penalty would likely do the opposite. The parents have three young children to co-parent and penalising the mother for her behaviour is not going to assist either the parents or the children going forward - particularly when the alternative exists of this court giving its decision and thereby hopefully making the process of the parties moving on and putting the wrongdoing of the past behind them easier.

(c) Both the applicant and the respondent are young professional people with responsible and respected positions which they have many years to enjoy and progress in. The respondent committed a great wrong against her husband in making the allegations and pursuing them to the extent she did. But she is not to be defined by the decision to do so - which occurred in the tumult of the realisation that she was looking at the failure of her marriage. The respondent is someone who has achieved much through ability, hard work and determination. Making these untrue allegations and pursuing them to the extent she did appears to be an aberration. As to the failure of the marriage the court should add that it sees no reason, or basis on which, to attribute blame to either side even if it was so minded - and it is not. This court is poorly placed to

evaluate the relationship and the cause for the failure. Two fundamentally good people were unfortunate in that they could not make things work. And that happens to people and not infrequently without any real blame attaching to either.

(d) Both parties are financially independent and secure.

(e) The court must and will consider the behaviour of both parties when considering the issue of costs.

(f) When marriages and relationships end it rarely helps to focus on the fault of either one or both parties as doing so is likely to pour oil on troubled waters. There are cases as here where the court must address allegations made in order to decide the issues in the case and in order to administer justice. A court should generally be slow to impose a penalty on a party found to have seriously mis-behaved when considering the provision to be made in the unravelling of the affairs of a marriage. What occurs in relationships and the dynamics at play throughout will frequently be difficult if not impossible to articulate or illustrate. Even though serious misbehaviour on the part of one spouse may be found, any attempt by the court to apportion or to isolate blame may well be a flawed process because the court cannot live the relationship. Furthermore, finding fault and imposing some penalty, in addition to possibly exacerbating the situation following a failed relationship, might also encourage a re-focussing by litigants on behaviour and alleged behaviour in the hope of achieving some advantage in litigation. In general, it will not be difficult to identify gross misconduct which may warrant sanction. And the circumstances in one case might warrant sanction for specific misconduct while the circumstances of another might not even though the misconduct be similar. For example, if the allegations here had resulted in the applicant losing the permanent position in Waterford and/or his career being tarnished and adversely affected this Court might well feel compelled to

address that wrong when considering the making of provision. Apart from the issue of the garda vetting, there is however no evidence that this happened. Rather the evidence is to the contrary. It seems quite clear that the serious allegations did not attract any traction or any credence of note.

Findings.

303. Both the applicant and the respondent are highly qualified and well-regarded professionals whose respective careers have consumed, and continue to demand very significant time and energy.

304. Difficulties began to emerge in the marriage at an early stage. The difficulties were exacerbated by the significant demands on them of their respective professional positions**.** The applicant was working away from home much of the time while the respondent was endeavouring to look after one, two and then three young children while at the same time working full-time. The stresses and difficulties on the marriage were further exacerbated because Child X began to exhibit behaviour problems with *"temper tantrums"* which were extremely difficult for either parent to manage or control or cope with.

305. The relationship between the spouses deteriorated. The couple grew apart and the marriage ruptured.

306. The applicant and the respondent spent a considerable time in the witness box and both presented as able, independent, strong and articulate individuals. The court did find the applicant more spontaneous and his testimony more persuasive. In contrast, the respondent was at times evasive, non-committal, vague and lacking in spontaneity of response. Of the two, the applicant was the more credible.

307. It is clear from the evidence that it was the respondent who ultimately decided that the marriage was over. She made a decision to extricate herself from the marriage on the best

terms which she could achieve. It is obvious from the evidence that she has been extremely determined, and somewhat ruthless, in pursuing that objective.

308. The evidence shows that both the applicant and the respondent are loving parents and that there is no reason to doubt their willingness or ability or suitability to care for and parent the children. Both do require supports particularly because Child X is very challenging and the split has been very bitter. Both are now aware of the need for professional support and are availing of it.

309. The allegations which the respondent has made against the applicant concerning his treatment (ill-treatment) of the children and of Child X in particular do not stand up to scrutiny. The court has no child welfare concerns insofar as the father's custody and care of the three children is concerned.

310. The successful implementation and adherence to the court order concerning custody and contact is largely dependent on the willingness of the parties to abide by the court order and to behave in a mature fashion when the implementation and adherence to the court order requires contact between them both. In this regard, the court is satisfied on the evidence that the respondent has frustrated contact between the children and the applicant at various stages since she left the family home with the children and went to her parents' home in December of 2017. The court is satisfied that her actions in this regard have at times been deliberate - and at other times probably subconscious. Lying in bed with the eldest son on a school morning while his father is trying to get him out to school is clearly not helping the father - and indeed it is somewhat generous to the mother to describe this as the Child Psychologist did as *" .. unconscious sabotage".* Nor can it be that the maternal grandparents' house - a short distance from the family home- just happens to be well equipped with the eldest child's favourite toy (Lego). It is abundantly clear from the evidence that the maternal grandparents' home is deliberately made so comfortable for the eldest son that it is at times impossible to wrench him

from that environment in order that contact between he and the applicant can take place in accordance with the court order. No criticism could be levelled at the respondent or the maternal grandparents for providing a comfortable grandparents' house and a warm welcome to the eldest grandchild or any of the grandchildren. Criticism is however justified if the regime in place is constructed in such a way as to help frustrate contact with the father - and the court considers that this is the situation which has prevailed in this case and especially insofar as the eldest son is concerned.

311. The applicant and the respondent are both high income earners in secure pensionable employment. Individually they are well placed to provide for themselves and for the three children.

312. The financial picture presented to the court by the applicant and by the respondent is something of an enigma. Each of them has enjoyed high salaries for several years - more so the respondent. There is no real evidence of a lavish lifestyle although the weekly outgoings detailed in the affidavits of means of both parties do suggest an abnormally high cost of living for a family with three children. Apart from the weekly outgoings, the family home was the significant expense but is mortgaged. The cash input was not huge and is detailed above. The combined value of the two cars and of the collection of paintings is modest. The properties, other than the family home and the holiday home are effectively self-financing - and taken together appear to be generating profits. Yet, the evidence presented to the court concerning debts and borrowings is suggestive of two individuals in straightened financial circumstances. No accountants were called by either party. Ultimately, insofar as the state of the evidence concerning the respective financial positions of both parties is concerned, this Court is of the view that the evidence is quite unsatisfactory. Leaving aside the "parental loans" and other alleged "debts" already commented on, the court might well ponder whether it has been presented with a full and accurate picture besides of the parties respective financial positions.

The court must nonetheless decide the case on the evidence presented. What is clear is that the applicant and the respondent are both earning substantial salaries and have some rental income and property assets of value. This Court is satisfied that they are individually financially secure.

313. The Court does accept that the respondent has some health concerns. On a day to day basis her evidence is that her medical history does not impact on her but she is concerned about a recurrence of the cancer which she was treated for in her 20's. No medical evidence was called in relation to the future prognosis but the court does nonetheless accept that the past medical history is something which it ought to take into account. It is a legitimate worry for the respondent even if she does not dwell on it. Fortunately, the position of the children going forward is secure in that the applicant has his secure and well-paid employment. If the respondent falls ill at some future stage while the children, or any of them, are dependent then the applicant will be there to provide financial and other support for the children. It should be said that the court is without any satisfactory evidence, such as evidence from a medical expert, concerning future prognosis.

314. A central issue, if not the central issue, throughout the hearing of this case over the seven-day period was the credibility of the allegations of rape and sexual assault made by the respondent against the applicant - and which issue the court must consider using the civil standard of proof - on the balance of probabilities.

315. On this issue, there is the respondent's assertion that it was the applicant who brought these allegations into the case. Firstly, the truth is that the allegations are in the case because the respondent made them and repeated them to her parents - and repeated them during the dispute and on affidavit. Secondly, the respondent's apparent efforts to neutralise the court's ability to address these allegations is misconceived. The court must look at the credibility of such allegations in the overall context given the child welfare concerns involved in the decision

concerning custody and contact - and even if the position be that the respondent no longer wishes in these proceedings to "pursue" those allegations. Even if the court was prepared to allow the respondent to somehow park the allegations, and it is not, it would be wrong to do so when the court is addressing the issues of custody and contact and the suggestion of a co - parenting regime. The court would not be addressing the child welfare issues in the case if it ignored allegations of rape and sexual assault made by one party against the other and which allegations have not been withdrawn. Those allegations must be considered as well as the allegations of physical abuse of the eldest child made by the respondent against the applicant. Thirdly, the court could not do justice inter partes by leaving such allegations unaddressed and hanging in the ether.

316. In this regard, the Court is satisfied that the allegations of rape and sexual assault are not the truth. Unfortunately, these allegations appear to the court to be an ill-considered attempt by the respondent to construct a particular narrative in the hope that doing so would gain traction and leverage and assist in negotiating or achieving the best terms of dissolution of the partnership. The respondent was wrong to make these allegations against the applicant and could not but have been aware of the gravity of the allegations she made and repeated.

317. The Court considers it appropriate to be as direct as this in this appraisal of the situation as any ambiguity surrounding the court's finding in this regard would, in the view of the court, leave unresolved an issue that needs to be addressed by this Court and decided so that the applicant and the respondent can put the past behind them and move on.

The property and assets and income of the parties.

318. The applicant and the respondent both have substantial salaries and income. In his affidavit of means sworn on the 29th October, 2020 the applicant gives a total gross income anticipated for 2020 of circa €226,242.88 [after deducting €5,439.12 in respect of unpaid leave]. His annual income is likely to rise somewhat in the near future.

319. In her affidavit of means sworn on the 27th October 2020, the respondent details income (including expenses and child benefit) totalling €294,328.00 per annum (and based on the rent received for 2019). Her actual annual income is dealt with above and is higher.

320. Thus the applicant has a gross annual income in the region of €230,000.00 and the respondent's gross annual income is in the region of €300,000.00.

321. The applicant and the respondent are well regarded and successful professionals. The respondent has progressed in her career at a faster rate than the applicant whose career has advanced at a slower if steady pace.

322. The respondent did have cancer when she was younger. Although no medical evidence was called, she did herself express a concern about the future prognosis. She did explain, and it was accepted, that obtaining life insurance is a particular difficulty for her and that this is the reason why she has invested in some rental properties - i.e. to provide some security in the event that she suffers ill-health by reason of a recurrence of the cancer in the future.

323. The Court accepts the motivation and objective of the respondent in acquiring investment properties. However, it is also the position that the breakdown of the marriage between the applicant and the respondent does inevitably mean that they must both reorganise their finances in circumstances where they both need a home to live in and to co-parent their children separately. They are both entitled to have comfortable homes in nice surroundings

324. It is also worth noting at this stage that the respondent is a member of her work Pension Scheme. The statement of benefits as at the 23rd September, 2020 recites a pensionable salary of €250,704.00 with a total pensionable service of 16.7124 years. The respondent's accrued pension benefits as at the 23rd September, 2020 and payable at age 65 years are as follows; -

(1) a pension of €46,960.05 per annum and;

(2) a lump sum of €157,119.96.

325. The applicant is a member of his work Pension Scheme under the 2013 rules since January 2000 (minus a two-year absence from July 2011 to July 2013). The actual value of the pension on retirement is not clear but it does appear from the evidence that the respondent's scheme is likely to provide a better pension than the scheme which the applicant is a member of. The position is nonetheless that both the applicant and the respondent are fortunate to be members of schemes which provide good pensions on retirement. They are both very high earners in secure pensionable employment. Having regard to this fact and to their resources, the court is of the view that no interference with their respective pensions is necessary or warranted e.g. - by giving one spouse a percentage share in the pension on retirement of the other, and by way of the making of a pension adjustment order to achieve that. There is however likely to be some wisdom in the parties reaching agreement on reciprocal pension adjustment orders. The evidence concerning the pensions was incomplete.

326. The D v. D schedule was agreed between both parties and submitted in evidence.

327. The figures in relation to the real property assets are in effect agreed between the parties.

328. The family home in Cork is valued at €950,000.00 with a mortgage redemption figure of €674,578.00.

329. After an estimated allowance in respect of sale costs of 3% the jointly owned property has an equity of €246,922.00 leaving each party entitled to €123,461.00 in the event of a sale at the valuation referred to. The court is not persuaded that the family home is likely to be sold. It is a home which suits the respondent as it is near to her parents and she and the children are accustomed to it. It is a house with a substantial mortgage debt but a debt which the respondent is well placed to service. The respondent is to have this house with the mortgages secured on it and subject to the payment of the lump sum referred to below.

330. The respondent is to pay a reasonable lump sum to the applicant. This is in recognition of his equity in the house and having regard also to the total value of the combined assets of the parties and all the relevant circumstances. This sum will be available to assist him in paying for alternative accommodation.

331. There is another jointly owned property the holiday home. It has a valuation of €150,000.00 and a mortgage of €138,048.00. Thus, a sale at the valuation would leave very little for division after sale costs. This house is to be sold and the net gain or loss is to be divided equally between the parties. The Respondent is to nominate the Solicitors to have carriage of sale. Both parties are to agree on an Auctioneer and are to be guided by him/her in relation to the price, manner of sale and all related matters.

332. The respondent owns an investment property in Wicklow which is mortgage free and valued at €322,500.00 with an estimated sale value of €312,825.00 after sale costs at 3%. She also owns an investment property in Cork. It is valued at €165,000.00 and it has a mortgage of €74,106.00. The equity in the property is estimated to be €85,944.00 after estimated sale costs at 3%. The court is not directing a sale of either of these properties. It is a matter for the respondent to arrange her own finances in order to reduce her debts to a level which she is comfortable with.

333. The applicant owns a property in Mayo which is valued at €292,500.00 with a mortgage of €169,932.00. After estimated sale costs at 3% the equity in this property is €113,793.00. Again, it is a matter for the applicant to arrange his own finances and borrowings.

334. The value of the husband's assets is approximately €241,000.00 and the value of the wife's assets are approximately €526,000.00 - but that assumes sales of the properties and sale costs of 3%.

335. The liquid assets of the parties are detailed in the schedule. The applicants liquid assets are small - say €10,000.00. The respondents liquid assets have been reduced as she paid

her parents €40,000.00 to reduce the loan she obtained from them for legal costs. Her liquid assets including her €52K personal injury settlement are in the region of €90,000.00.

336. The third section of the D v. D schedule details unsecured debts. The evidence of both sides in relation to a number of the unsecured debts is unsatisfactory.

337. The following are the court's findings in relation to the *"debts (Not secured on Properties)"* listed: -

(1) Credit card debts of the respondent €18,025.68 - proved.

(2) Debt re: legal fees incurred by the applicant €148,362.00 - proved.

(3) Debt re: legal fees incurred by the respondent €118,000.00 - proved. (was €158,000.00 but now reduced by the payment of €40,000.00 from the salary arrears payment).

(4) Debt due by the applicant to his parents of €60,000.00- not proved. The Court is not satisfied on the evidence that this advancement by the father of the applicant to him was an advancement which was required to be repaid. If litigants wish to establish parental advances as debts then it is for the party asserting the debt to prove it by satisfactory evidence. There are two competing versions of events concerning this alleged loan and no hard evidence to support either version. The position may be as contended for by the applicant that his father is owed this money - but he has not proved that to be so.

(5) Debt due to the respondent's parents of €62,500.00 - not proved. The same can be said of this alleged debt. It was omitted completely in the affidavit of means sworn by the respondent on the 9th July, 2018 and in one other affidavit of means sworn on 25th September, 2019. It does appear in the affidavit of means sworn on 25th October, 2018 and it is scheduled as a debt allegedly due to the

parents in respect of the purchase of the Dublin investment property in the affidavit which was sworn by the respondent on the 25th October, 2020. The respondent has not proved that this is an advancement which was to be repaid.

(6) The debt due in respect of legal fees arising out of litigation concerning the holiday home. This debt is alleged to be €3,665.00. The debt has not been proved. The court finds that the legal bill in respect of the litigation was probably negotiated downwards and satisfied by a payment of €7,000.00 sometime ago. This was the applicant's evidence in relation to that legal bill and there is no convincing evidence to the contrary.

(7) Accountancy fees which the respondent says are due. This is not proved. The evidence in relation to this alleged debt is wholly unconvincing. It may well be that the respondent's father assisted her and the applicant with their tax affairs and assisted her in preparing for this case and particularly in relation to the finances at issue. However, the respondent's evidence that she is indebted to her father in the sum of €30,000.00 which she says is due to him and was made part of his severance package on his retirement from the firm is simply not credible. The alleged debt is unsupported by any clear evidence.

(8) The household expenses totalling €11,550.00 are not proved. Both parties have had household expenses since January of 2018. Both are high earners and it is artificial to seek to introduce such expenses as debts.

(9) The tax liability of the respondent in the sum of €1,014.00 for 2019 is proved.

(10) The personal loan of the applicant in the sum of €22,215.00 is proved.

(11) The miscellaneous items claim listed by the respondent in the sum of €2,000 are simple items of expense and are not proved as debts.

(12) The sums actually due to the Builder, Architect and Engineer are jointly owed by the applicant and the respondent and are in respect of work done on the family home. They are to be paid without delay - and are to be shared equally between the applicant and the respondent. The bills should have been paid before now.

(13) The applicant's revenue debt in the sum of €6,151.00 is proved.

(14) The figure in respect of the utility room in the sum of €4,500.00 is not proved as a debt. Whether or not this expense is incurred remains a matter of choice.

338. After adjusting the figures in light of the Court's findings in respect of what is and is not proved as a debt, the figures indicate that the debts of the applicant are in the region of €180,000.00 - made up largely of the legal costs as a result of the family law litigation. The unsecured debts of the respondent following adjustment are in the region of €140,000.00.

339. If one subtracts €180,000.000 from the husband's total asset value based on the figures above, 241K + l0K = €251K, one is left with a figure of €71,000.00.

340. If one subtracts an approximate figure for unsecured debts of €140,000.00 from the total asset value of the respondent, say €526K + €90K = €616K - € 140K, then one is left with a figure of approximately €476,000.00.

341. Even allowing for some latitude in relation to the calculations or the validity of some of the smaller debts claimed by the respondent to exist one is still left in the position that the respondent's net worth is substantially in excess of the applicants.

342. The respondent's net worth is tempered by the fact that she has some health concerns which the applicant does not have.

343. There is however an air of unreality about the discussion concerning the net asset value, small debts and financial pressures - when one considers the gross and net income of the parties. Over a five year period into the future the applicant can look forward to a gross

income in excess of one million euro at current figures and the respondent at a gross income in excess of one and a half million euro. Even allowing for taxes at the top rate there is no reason for either spouse to be under financial pressure.

344. The applicant is seeking a lump sum payment of €300K-put earlier by him at €350K. To award this sum would completely disregard the fact that some of the assets of the respondent were acquired before the relationship began. It would ignore genuine health concerns which she has. It would disregard the fact that €52K of her assets are compensation for injuries she sustained. While the evidence in respect of the injuries is very limited the court accepts that the money is largely in respect of pain and discomfort and probably includes damages for future pain and discomfort. And it would give the applicant an unequal share of the combined value of the assets.

345. Equally it would be wrong to base the lump sum payment solely on the value of the equity in the family home. The family home does have a value to the parties over and above its monetary value. The spouse not getting it (encumbered as it is) now must provide for accommodation elsewhere and the applicant has explained the arrangements made. He is now in the alternative accommodation which he intends to buy from his father in due course.

346. The suggested payment of €100K by the respondent is too little in all the circumstances. It does not even represent his share in the equity of the family home. It does not recognize that the respondent is in a much stronger financial position than the applicant. It fails to have regard to the combined value of the assets which is somewhere in the region of €550,000.00. This last figure ignores the recent and not insignificant earnings of both parties since the evidence concluded in November 2020.

347. The Court considers that a fair lump sum payment is €185,000.00 to be paid by the respondent to the applicant and on the basis that she gets the family home and takes over responsibility for the borrowings on it. The payment is to be made prior to 1/9/2021. In default

of payment the house is to be sold and the proceeds are to be applied in such a manner as will otherwise give effect to this judgment and as the court shall direct - and the parties will have liberty to apply in that regard.

348. The Court will grant a Decree of Judicial Separation pursuant to s.2(1)(f) of the Judicial Separation and Family Law Reform Act, 1989.

349. It will make an order granting joint custody of the three children of the marriage to the applicant and the respondent and an order fixing the contact regime and regulating ancillary matters in relation to the children in the manner set out below.

Custody Schedule.

350. The following is the Court order in relation to Custody and parental contact.

1. The applicant and the respondent are to have joint custody of the three children with equal rights in relation to the care and welfare of the children, in a co-parenting regime.
2. This Court Order is to create a clear and definite regime in terms of contact between both parents and the three children. The contact regime provided for by this Court Order can only be altered by the court or by express agreement evidenced by text or by email or by hard copy passing between the parents in advance of the scheduled contact.
3. The current contact regime agreed between the parties is to continue until Monday the 8th day of March of 2021 and thereafter the regular term custody and contact schedule will commence and proceed as follows: -

<u>Week 1:</u>

Maternal custody from 9am on Monday until 1.30pm on Tuesday. Paternal custody from 1.30pm on Tuesday until 9.00am on Wednesday. Maternal custody from 9am on Wednesday

until 1.30pm on Friday. Paternal custody from 1.30pm on Friday until 9.00am the following Wednesday.

Week 2:

Maternal custody from 9am on Wednesday until 1.30pm the following Tuesday.

4. The handovers are to take place at the school drop-off or collection. Where handovers are away from the school the children are to be brought by the parent (or a responsible nominee of the parent) whose custody time is ending to the Cork residence of the parent whose custody time is to begin.

Custody during school breaks

5. Summer school break

(1) The regular term custody schedule will continue over the summer break with the alteration that handovers usually scheduled for 9 a.m will occur at 10 a.m instead.

(2) The school summer break custody schedule begins once the children's classes have ended for the academic year and will continue until the first child returns to class for the new academic year.

(3) Once Child X starts secondary school the school summer break custody schedule will apply for June, July and August.

(4) Over the summer school break the respondent can choose three weeks where paternal custody will not occur between 10 a.m on Monday morning until 1.30 p.m the following Friday afternoon; these periods may not include August 3rd ; if one of these periods includes August 10th then paternal custody will occur on that date in Cork from 4 p.m until 7 p.m.

(5) Over the school summer break the applicant can choose three weeks where maternal custody will not occur between 10 a.m. on Monday morning and 1.30 p.m

the following Friday afternoon; these periods may not include August 10th if one of these periods includes August 10th then maternal custody will occur on that date in Cork from 4pm until 7pm.

(6) On even numbered years the respondent can choose her three weeks first and must communicate her choices to the applicant by text no later than the 31st March of that year. The applicant will then choose his three weeks and will communicate his choices to the respondent by text no later than the 30th April of that year.

(7) On odd numbered years the applicant can choose his three weeks first and must communicate his choices to the respondent by text no later than the 31st March of that year. The respondent will then choose her three weeks and must communicate her choices to the applicant by text no later than the 30th of April of that year.

(8) The three weeks need not necessarily run consecutively and may be broken into a two-week and a one-week period (with the longer period being first or last).

Christmas Holidays

(1) The Christmas custody schedule will supersede the regular term custody schedule.

(2) The Christmas custody schedule will commence at 1.30pm on December 23rd and will continue until 6pm on 5th January. Before and after this period the regular term custody schedule will apply.

(3) Christmas custody and contact is to follow the regime agreed between the parties and reflected in the Court Order "dated" the 16th of December of 2020 - but alternating each year. At Christmas 2021 the respondent will enjoy the custody and contact which the applicant enjoyed at Christmas 2020 - and vice versa.

Easter Holidays

(1) The Easter custody schedule will change from the normal and commence annually from 9am on Monday morning of Holy Week until 9am on the Monday morning following the Easter Public Holiday Monday. In 2021 the applicant is to have custody of the children from 4pm on Palm Sunday until 4pm on Easter Sunday.

(2) In 2021 the respondent is to have custody of the children from 4pm on Easter Sunday until 9 am on the Monday morning following the Easter Public Holiday Monday.

(3) This regime is to alternate in subsequent years.

School mid-term breaks.

The regular term custody schedule will continue to apply during all school midterm breaks.

Bank Holidays other than Christmas Day. St. Stephen's Day. New Year's Day Easter Monday.

The regular term custody schedule will apply.

The children's birthdays.

On each of the children's birthdays, the parent who does not have custody of the children overnight on the night of the birthday will have exclusive access to the 3 children together in Cork for three hours on that day from 4pm until 7pm.

Parent's birthdays.

On each of their birthdays the applicant and the respondent shall have custody of their three children from 9am to 6pm superseding the regular arrangements.

Mother's Day and Father's Day.

Whatever the regular term custody arrangements are maternal custody will occur on the weekend of Ireland's Mother's Day from 1.30pm on Friday until 9am on the Monday. Similarly, paternal custody will occur on the weekend of Ireland's Father's Day from 1.30pm on the Friday until 9am on the Monday.

First day back to school of the academic year.

Both parents will together bring each of the children to school on their first day of each new school year and the regular term custody schedule will otherwise apply.

Roman Catholic Sacraments.

(a) Child Z will be baptised in the Roman Catholic Church on or before the 1st October of 2021. He will have two godparents and each parent will choose one. The applicant and the respondent are to co-operate in selecting a date suitable to both sides.

(b) Child X will make his Confirmation with his classmates. Child Y and Child Z will make their First Confession, First Holy Communion and Confirmation with their classmates.

(c) Whichever parent does not have custody of the children overnight following baptism, First Holy Communion or Confirmation will be entitled to exclusive access to the three children for three hours that day immediately after the ceremony and school reception has ended. If any of these events has tickets or restricted attendance, then such tickets and/or rights of attendance will be allocated evenly between the parents.

Passports

(a) Neither party is to remove any of the children from the jurisdiction without the consent of the other party. Both parties will sign the passport renewal documents as and when required to do so. Ordinary passport replacement costs will be paid jointly. A parent who loses a child's passport will reimburse any costs of express replacement to the other parent. In the event that the loss of a child's passport results

in the cancellation of travel plans, the parent who lost the passport will reimburse any unrecoverable costs of cancellation to the other parent.

(b) Passports will remain with the last party who left the jurisdiction and are to be handed over to the other party at least 60 days prior to any notified travel. In circumstances where one parent is taking the children abroad within 60 days of notified travel with the other parent, the passports will be given to the other parent at the handover following the children's return to the jurisdiction.

Children's social activities and engagements.

Each party is to make their own arrangements during their own scheduled access time to deal with the children's activities.

Childminder

(1) The applicant and the respondent will jointly choose and employ a childminder. The childminder will not be a member of either family.

(2) The terms and conditions of the childminder's employment are to be agreed between the parties and the childminder and are to provide, inter alia, that:

- During the school term the childminder will collect the children from school and will be available to mind them until 6pm on Mondays Tuesdays, Wednesdays and Thursdays and until 3pm on Fridays.
- Outside of the school term, when neither parent is on annual leave it may be necessary for the childminder to work from 9am until 6pm on Mondays, Tuesdays, Wednesdays and Thursdays and from 9am until 3pm on Fridays.
- The childminder will not be required to work six weeks in the summer or during the Christmas and Easter school holidays.
- The childminder may be required for the mid-term breaks.

- The applicant and the respondent will contribute equally to the costs of employing the childminder.

Children's education. related fees and costs.

(1) All fees and costs relating to the children's education will be paid in equal shares. Clothes (e.g. school uniforms, shoes etc.) and equipment related to the children's school will be purchased in duplicate with a full set held by each parent. All information regarding the children's education is to be shared between the parents without delay and both parents are to be placed on all relevant mailing lists. All decisions regarding the children's education are to be made jointly.

(2) Choice of secondary school for each of the three children is to be discussed in a timely manner and agreed between the applicant and the respondent in sufficient time to secure a place in the school.

(3) Both the applicant and the respondent shall make the necessary amendments to their on-call roster or in default shall make childminding arrangements if either is on call and the weekend access does therefore not suit them. The reason for this is to ensure that the children know well in advance in whose house they will be residing and who is responsible for them on any given weekend. The applicant and the respondent are to provide a wall calendar with the schedule clearly set out to provide certainty for the children.

Health Care

(1) The applicant and the respondent will take out their own health insurance policies. The applicant is to retain the respondent on his health insurance policy until 1st September, 2021 if she is currently on it.

(2) The applicant and the respondent are to endeavour to take out a standalone health insurance policy to cover the three children and they are to share equally the

cost of same. If it is not possible to obtain such a policy, then the applicant shall retain them on cover on his own policy and in that event the respondent is to re-imburse him 50% of the cost of the children's cover.

(3) The parents are to share equally any medical, dental, orthodontic or like costs for the children's health care if same is not covered by health insurance.

351. Turning now to the issue of costs in the case.

General principles applicable to the issue of costs.

352. As Dr. Biehler and Mr. McGrath point out in *Delany and McGrath on Civil Procedure* (4th ed., Roundhall, 2018), at p. 915, para. 24-02:-

'The starting point of any consideration of the power to award costs and the principles to be applied in that regard has traditionally been the provisions of Order 99 of the Rules of the Superior Courts, which contains a comprehensive code regarding the award of legal costs that applies in the absence of any other applicable statutory provision or rule dealing with costs. However, the provisions of Order 99 will, to a significant extent, be superseded by Part 11 of the Legal Services Regulation Act 2015. Although, at first glance, it might seem that Part 11 is intended primarily as a codification of the principles developed by the courts in relation to the power to award costs, as discussed below, it may provide a further impetus to the development by the courts of an increasingly sophisticated approach to the issue of costs.'

353. Clarke J., on the issue of costs, in *Cunningham v The President of the Circuit Court* [2012] 3 IR 222, at para. 18, p. 228, stated:-

'There can be little doubt but that the normal rule is that costs follow the event. This stems from 0. 99, r. 4 of the Rules of the Superior Courts 1986 (S.I. No. 15 of 1986) and has been the subject of many judicial comments such as that of Denham J. in

Grimes v. Punchestown Developments Co. Ltd. [2002] 4 LR. 515. It also appears clear that the rule is equally applicable to the costs of appeals: see for example SP.UC. v. Coogan (No. 2) [1990] 1 LR. 273.'

354. He went on to point out, at para. 19, p. 229 that:

'It is, of course, the case that there are exceptions to that general rule. A somewhat different approach is sometimes taken in cases involving points of law of exceptional public importance or test cases or the like. There also may be difficult cases where the question of who has won the "event" may not be as clear cut as might arise in more straightforward proceedings.'

355. Order 99 of the Rules of the Superior Courts (hereafter 'the RSC') was substituted in full by SI 584 of 2019, which came into effect on the 3rd December, 2019. Order 99, rule 2 (1) now states as follows:-

'*The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.'*

356. Order 99, rule 13 (2) states:-

' The costs and expenses of an adjudication shall, unless the Legal Costs Adjudicator, for special reason to be stated in his determination otherwise directs, follow the event.'

357. Order 99, rule 3(1) of the RSC provides as follows:

'*The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act where applicable*.'

358. In this regard, s. 169(1) & (2) of the Legal Services Regulation Act, 2015, provide as follows:-

'(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including-

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.'

359. Simons J. in *J (A Person Subject to an Allegation of Abuse) v. The Child and Family Agency* [2020] IEHC 671, para. 21, points out that:-

'Part 11 of the LSRA 2015 draws a distinction between a party who is "entirely successful" in proceedings, and a party who has only been "partially successful". The

default position is that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings unless the court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. A non-exhaustive list of the factors to be taken into account by a court in exercising its discretion are enumerated under section 169(1).'

360. Submissions on behalf of the applicant draw the Court's attention to the decision of Cooke J. in *Goode Concrete v CRH plc and Others* [2011] IEHC 310, where at para. 12 of his judgment, he states:-

'*For the purpose of O. 40, r. 12 of the Rules of the Superior Courts, allegations made on affidavit may be "scandalous" when they are not only irrelevant in relation to the issue to be determined by the Court but so gratuitous and vexatious in relation to the subject matter of the cause as to amount to an abuse by a party of the privilege that attaches to evidence given in the course of litigation. That is not the case here. It is accordingly sufficient in these circumstances to rule the objected averments inadmissible at this point as irrelevant to the issue arising on the motions for security for costs and to proceed to hear those applications accordingly*' . [Emphasis added]

361. Additionally, counsel for the applicant has drawn the Court's attention to the decision of Laffoy J. in *Dublin City Council v Marble & Granite Tiles Ltd* [2009] IEHC 455 wherein she refers to a passage from Delany & McGrath, *Civil Procedure in the Superior Courts* (2nd ed., Roundhall, 2005), at para. 18-61 :-

"*The contents of an affidavit will be considered to be scandalous where it attempts to introduce into the proceedings extraneous matters for purposes and motives unconnected with the subject matter of the dispute between the parties. This will*

particularly be the case where the material is calculated to and has the effect of embarrassing or causing distress or offence to the opposing party."

362. Clarke J., in *Veolia Water UK plc v. Fingal County Council* (No. 2) [2006] IEHC 240, [2007] 2 IR 81 gave rise to what are commonly referred to in practice as '*the Veolia principles*'. While they arose out of very complex commercial type litigation, their fundamental raison d'etre seem to be of relevance in this case.

363. At the outset of his judgment, Clarke J. acknowledges, at p. 85, that:-

' ..... *it is worth noting that there are certain cases where even a determination as to what the "event" is, may be a matter of some complexity. For reasons which I will address in due course, this case is one of them*.'

364. At p. 86, Clarke J. continued:-

'Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful.'

365. Clarke J. identified two fundamental principles in this area, they being that the awarding of costs is discretionary and the starting position is that costs should follow the event. The question of 'successful' parties and the 'event' giving rise to such 'success' is a complex and delicate matter in family law litigation, particularly in light of the fact the findings in this type of litigation can have profound effects on the parties themselves, their children and the wider family unit of which they are part. In family law proceedings one is rarely dealing with successful parties in the sense in which one encounters such litigants in other types of litigation.

366. Trite and all as it may sound there are rarely any winners or losers in family law cases. There are two parties whose intimate relationship failed and who required the assistance of the court to sort out their affairs and frequently disputes concerning children.

367. In considering the approach to be taken in light of the finding that costs were increased in the case by way of the pursuance of particular issues, Clarke J. observed, at para. 13, p. 86, that

> *'Where the court is so satisfied, then the court should attempt, as best it can, to reflect that fact in its order for costs. Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue. A similar approach should apply to any discrete item of expenditure incurred solely in respect of an issue upon which the otherwise successful party failed*.'

368. In short the position is that :-

1. In the normal course, costs should follow the event;
2. The starting position is that the party who wins the event should get their full costs;
3. Departure from the foregoing should be considered by a court where the winning party added materially to the costs of proceedings by raising additional grounds or arguments that the court considered to be 'unmeritorious' - by way of a view to be taken which is not narrowly measuring time, but looking at the proceedings in their entirety being materially increased.

369. The Legal Services Regulation Act, 2015 sets out the current legislative provisions. Applicable principles in respect of costs in family law proceedings.

Applicable principles in respect of costs in family law proceedings

370. Traditionally courts have approached costs in family law proceedings differently to the approach adopted in most other areas of law. There has been a view that costs ought not to be awarded ordinarily in family law proceedings and that view has prevailed for good reason. Apart from the relationship dynamic at play courts are frequently dealing with a struggle to see proper provision made where resources are limited. Courts need to be and have been mindful of the reality that any award of costs against a party may impact on and alter what the court has just earlier determined constitutes proper provision. So there is a balance to be struck in this regard, as an added dimension, when considering awarding costs against a party to family law proceedings. That is not to say that proper provision and costs are not separate and distinct considerations but rather that the decisions on both do involve some overlap in so far as the factors to be considered are concerned.

371. In this case the court is keenly aware of the need for this exercise and has measured its decision on costs in light of the lump sum award, the financial resources of the parties and all of the circumstances.

372. The Supreme Court took the opportunity in *MD. v. ND.* [2015] IESC 66, [2016] 2 IR 438 to sound a warning in relation to costs in family law litigation. McMenamin J. stated, at p. 453, para. 33:-

> *'The cost and length of litigation in certain categories of family law cases is a matter of concern, not only to litigants, but to the public. Consequently, one recurring question which arises in family law, as in all other areas of law, is guaranteeing access to justice. Parties, and those affected by family or relationship break-up, are entitled, as a last resort, to have their rights determined by the courts. This is a right,*

not a privilege. It is understandable that certain cases will give rise to substantial costs. On the other hand, the time is long past when parties can be permitted to engage in litigation without time limitations, and without cost consequences. In the truest sense, time spent and lost in court impacts not only on the parties and family members indirectly affected by such cases, but also on other waiting litigants and the public who resource the courts". *None of these observations are new. As long ago as 2007, Carol Coulter, writing in "Family Law Matters", indicated that the prevalence, even then, of personal litigants constrained for financial reasons to present their cases without lawyers was, in itself, an indicator of prohibitive costs. This problem has magnified in the intervening years. Family members, who have a real stake in the outcome, must bear the consequences of unreasonable conduct by either or both of the parties. Costs of litigation, and time spent in court, are clearly interlinked. In law, as elsewhere, time is money.'*

373. He goes on, at p. 456, para. 42 and para 43, to state :-

'Of course, portraying litigation as a "project", capable of advance costing, suffers one vital deficiency. A project, such as the construction of a building, does not involve the possibility it will be met by some other contesting party seeking to knock it down. This is one of the aspects of adversarial litigation. But there is a vital distinction between what is reasonable and what is unreasonable conduct by an opposing party. [43] A trial judge is in a particularly strong position to determine whether a particular party has engaged in conduct which goes beyond the reasonable parameters in the conduct of litigation. In such circumstances, if there is unreasonable conduct, for example, by setting sights too high, or by non-cooperation in disclosure, or by non-compliance with court orders, a court will be entitled to address this in costs applications. These observations apply, a fortiori, in the last

category, that is, misconduct by one party involving obstructing or failing to comply with court orders. This last is a significant element in the factual background to this case.'

374. The Supreme Court in *WYYP. v P.C.* [2013] IESC 12 declined to interfere with an order for costs by Sheehan J. in family law proceedings in the High Court. Denham CJ, on appeal to the Supreme Court held, from para. 37 to para. 41:-

'37. These matters were before the High Court and the learned High Court judge retained a discretion to exercise on the matter of costs.

38. It is an important factor that the High Court found that the respondent's allegations of duress and undue influence were prima facie supported by the evidence.

39. The award of costs is an exercise of discretion of the trial judge, who has considered all the circumstances of the proceedings before her or him and decided the issues. This Court is very reluctant to interfere with the exercise of such discretion.

40. In this case, the learned High Court judge had regard to the general rule and the discretion afforded to him not to follow the general rule when the interests of justice required it, especially in the context of matrimonial proceedings. The High Court exercised its discretion within jurisdiction.'

375. This Court, in *B.R. v. P.T.* [2020] IEHC 205, appended a decision on the issue of costs to the judgment - in the context of a Circuit Appeal which came before it. In it, the Court stated, at p. 39:-

'It is true that there is still a tendency to consider family law proceedings to be separate and apart from other types of litigation insofar as costs are concerned. Of course, that must be the situation in the initial stages of family law proceedings where

the parties are endeavouring, with the assistance of the court, to untangle themselves from a failed relationship. But there comes a point in time when the situation changes; it changes when the litigation becomes unreasonably protracted and bitter and in particular when that has arisen by reason of the conduct of one of the parties ....'

376. In *B.R. v. P. T.,* this Court adopted what McKechnie J. said in *B.D. v. JD.* [2005] IEHC 154, at para. 21 :-

'In this branch of the law there is of course no tendering process similar to that which exists elsewhere and the availability and use of the Calderbank procedure (see Calderbank v. Calderbank [1975] 3 All E.R. 333 C.A.) is undeveloped. Whilst it is true that "open offers" can be made by either party this facility is not commonly availed of. There is therefore no method by which the unreasonableness of one or other of the parties can be dealt with by the court, save for demonstrable conduct during the currency of a trial which rarely is that evident. Given the obligation to make proper provision under the 1995 and 1996 Acts, many parties believe that as a result of this requirement they are in effect financially immune from participating in litigation no matter how lengthy the process may be or how unreasonably they may act. For this to be the situation or even perceived to be the situation, is not in my view in the public interest or in the interest of the administration of justice.'

377. This Court has considered authorities in our neighbouring jurisdiction and the efforts of the courts there to manage the significant court resources invested in vindicating the rights of persons to have access to the courts in family law matters. These efforts are in part because there has been a notable presence of allegations of personal and financial misconduct in cases which has added substantially to the time required to adequately deal with them. In *Sandra Seagrove v. Lawrence Sullivan (Practice Directions Re: Bundles and Citation of Authorities)*

[2014] EWHC 4110 (Fam), Holman J. sitting in the Family Division of the High Court noted, at para. 48:-

> *'The courts have to exert discipline in relation to this. I stress, as Mostyn J did in J v J at paragraph 53, that if parties wish, at their own expense, to litigate to their hearts' content, with thousands and thousands of pages of documents, there is a mechanism available to them known as private arbitration. But litigation within the courts has to be the subject of much more rigorous discipline and structure, precisely because the courts have a duty to ensure that an appropriate, but only an appropriate, share of the court's resources are allocated to any one case. The same judges have to deal also with an enormous number of very difficult cases involving the future of vulnerable children, and the care and treatment of sick people, including mentally incapacitated people. It is simply not tolerable that we go on and on affording to people like Sandra and Larry an estimated eight days of court time on a dispute that ultimately is measured in something not exceeding about £500,000'.*

378. He continued, at para. 49:-

> *'The cost of running these courts is not inconsiderable. I cannot specify what the daily cost is, for I do not know, but the state has to provide and pay for the judge, the court staff, the "back office" staff, the provision of the courtroom, the maintenance of the courtroom and all the other associated costs. It is obvious that the daily running costs of a court and courtroom such as this run into several thousands of pounds. Multiply that by eight and one can see at once that there is an expectation that this state, which as we all know is struggling still to rein in the deficit following the recession, should expend completely disproportionate amounts on resolving issues and disputes of this kind.'*

379. The foregoing case concerned complex family law litigation and what appears, from the judgment, to have been a breath-taking level of documentation, some of which was furnished shortly prior to the commencement of the case. This was in breach of a practice direction, in fact ten times more documentation than was permitted was furnished. However, it is not for that reason that this Court is citing the comments of Holman J. Rather it is to illustrate the difficulties the courts are faced with in terms of the running of such cases. There is a necessity for issues to be properly presented and managed by the parties - and that wrong and false allegations of a serious nature be avoided - to effect savings in respect of time and costs. If this is not done the court must consider the making of a costs order against the litigant who has caused the litigation to become protracted and high-conflict, if one is more to blame than the other.

380. The policy considerations are just one consideration. Doing justice in a case will frequently require the awarding of costs to a party to litigation and this applies equally in family law cases.

381. This Court, in *P.M v. E.M* [2020] IEHC 700 had to again deal with a case with a long and embittered history following the breakdown of the marriage of the parties. In the context of a motion by the mother for the attachment and committal of the father, the Court stated, at para. 12 of the *'Appendix in relation to costs':-*

> *'Ultimately, insofar as the application for costs before the Court is concerned, it is the position that the Court does have a discretion, it is the position that there is a complicated picture, a complicated dynamic at play insofar as this litigation is concerned and insofar as this particular application before the court is concerned. It is the position that the conduct of the father in breaching the court orders in the manner identified by the Court in the judgment is deplorable and deliberate and the Court has to look at the justice of the situation in deciding whether or not to exercise*

its discretion in favour of one party or the other, in this instance in favour of the mother because it is she who is seeking costs, and where the father is saying there should be no orders as to costs. The Court has to look at the justice of the situation and it seems that it would be an affront to justice if it did anything other than award the mother her costs of the motion for attachment and committal of the father. He brought all of this on himself and it was not by an error or by an accident, this was an orchestrated position adopted by him, particularly as the Court has said in its judgment during lockdown, problems emerging in January and then he decides during lockdown to disregard and disobey the court orders. So the Court has to say and it is unfortunate that it has come to this because the preference of the Court in family law proceedings is to avoid making an award of costs in favour of one party against another but a time comes when it is necessary to do justice inter partes ... .. '

382. This Court is quite satisfied that the case was elongated and particularly bitter because the respondent made untrue allegations of rape and sexual assault against the applicant. The untrue allegations of physical abuse of the eldest son would probably not on their own have added significantly to the length of the hearing or the bitterness. Those allegations are in a completely different category and arise in circumstances where both parents have been shown by the evidence to have been unable to deal properly with the behaviour of the eldest son.

383. The open offer or offers of the respondent to deal with the applicants concerns about being wrongly accused of rape and sexual assault were wholly inadequate. The applicant's requests or demands in this regard were understandable as he did need, and was entitled, to protect his reputation and his character. The additional time taken up by these allegations was entirely the fault of the respondent because she made those very serious allegations of a criminal nature against the applicant. If the untrue allegations of rape and sexual assault did

not exist the case would have been considerably more straightforward. Indeed one might well contend that it probably would not have troubled the Court at all.

384. The Court must consider the issue of costs in the context of the breakdown of a marriage where the parties must remain in contact with one another while their children are dependents. The Court must also consider the issue of costs and any award of costs against the backdrop of the assets and resources of both parties.

385. It is agreed between the parties than any award of costs is to be on the basis of Circuit Court costs.

386. Having considered the issue and all of the circumstances the Court will direct that the costs - including all reserved costs - be adjudicated in default of agreement on the basis agreed between the parties (Circuit Court Costs). It is for the Costs Adjudicator to decide on the costs. In the old regime this court would have granted a Certificate for Senior Counsel but that issue is now one for the Adjudicator.

387. Although the Court considers that the untrue allegations of rape and sexual assault added at least 66% to the costs of this case it will award to the applicant 60% of the costs agreed by the parties or determined by adjudication. The Court will grant a stay of execution in respect of costs until the 1st March 2022 but no stay in respect of the adjudication on costs. The court is granting this stay of execution to allow the respondent a reasonable period to arrange her finances and to add to her resources with her income. The court has considered the pre-trial applications/motions and did consider dealing separately with each in terms of costs but has decided to deal with costs as above in circumstances where it considers such an approach fair and straightforward.

388. The Court will deliver this judgment electronically and list the matter for remote hearing at 2.30p.m. on Thursday 25th February, 2021 to hear any application in respect of a stay and to hear the parties in relation to the form of the order.

389. Meanwhile, the Court will request the parties to consider and prepare a draft Order to reflect this judgment and submit it by 2p.m. on Wednesday 24th February, 2021 in soft copy. The issue of Pension adjustment orders and mutual blocking and extinguishing orders should be addressed by the parties - as should any other ancillary orders arising.