THE HIGH COURT

[2022] IEHC 340

[2019 No. 58 M]

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

IN THE MATTER OF THE FAMILY LAW ACT, 1995

BETWEEN:

A

APPLICANT

– AND –

A

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 2nd June, 2022.

SUMMARY

These proceedings started out as an application for judicial separation by Ms A. Immediately prior to the hearing of the judicial separation application, divorce proceedings were commenced by Mr A. The parties are satisfied for the court to treat with both applications in this judgment.

I. Background

1. By way of background, the parties to these proceedings have been party to a decades-long marriage and there are several adult children of the marriage. The parties also cohabited for a

couple of years prior to their marriage. One of the children, it now appears (things looked different at the hearing) will commence a postgraduate degree later this year and it seems that some level of support will be sought by that child; however that child is not a legal dependant. Ms A is approaching her sixtieth birthday; Mr A was 61 earlier this year.

2. As with many marriages, the parties worked throughout their marriage as a team. Ms A, at some periods during the course of the parties' marriage, had pensionable employment outside the family home. However, to a very large extent, Mr A has long been the primary earner and he has done strikingly well in his career. Ms A largely (though not entirely) worked as a homemaker. Unfortunately, for whatever reason, the marriage, though it endured across several decades, essentially came to an end in or around May 2019.

3. I accept that between 2013 and 2019 the children of the marriage were of such an age that Ms A could conceivably have sought work outside the family home in that period – assuming that she thought it sensible to do so when her youngest child was then still in secondary school and coming into the period when state examinations were looming. (She may reasonably have thought this not to be sensible). That said, a degree of reality falls to be brought to bear in this regard. Having spent years as a homemaker and being a middle-aged woman who had been gone from the jobs market for some time by the said period, Ms A's prospects of returning to the jobs market and/or securing a position of a level that she would have attained had she not committed years to being a homemaker have been negatively impinged by the said commitment– which commitment, I note, benefitted Mr A in terms of his being 'freed up' to pursue his successful and lucrative career. This homemaker-related impairment of Ms A's future employment prospects continues to present at this time; indeed as the years progress the impairment likely increases: ageism is an insidious reality for older people.

4. I note Ms A's successful efforts in resolving the dispute with a particular mortgage lender, and in dealing with the disputes that arose concerning the property in [EU Member State 1] and [Property 2], as well as the boundary dispute concerning the family home. I do not, with respect, see that management of the couple's rental properties (apart from the disputes that arose) was an especially onerous task, though when coupled with the disputes presenting this management role (discharged by Ms A) it appears to have been more exacting a task than would typically be the case.

5. For the sake of good form, I note that neither party has (on the evidence before me) been guilty of, nor has either party alleged, such gross conduct during the marriage as would make it unjust for me to disregard that conduct in this judgment.

II. Applicable Law

6. In terms of making proper provision for the parties, in *M v. S* [2020] IEHC 562, I considered the applicable authorities in some detail. Since that judgment was delivered, the Court of Appeal gave judgment in *N.O. v. P.Q.* [2021] IECA 177, which undertakes a helpful analysis of previous authorities. The making of financial provision in this case has largely, though not entirely, been decided by reference to those two cases (which themselves refer to a plethora of useful cases). I do not consider it helpful or necessary to detail the applicable law yet again in this judgment when it has been so carefully considered in those judgments and is simply being applied here. As will be seen, I bring the applicable case-law to bear later below and also go through the *ad seriatim* consideration of the various factors to which I am required to have regard under s.20 of the Family Law (Divorce) Act 1996 (which is the equivalent of s.16 of the 1995 Act in the context of judicial separation).

7. Mindful that there was a roughly equal partnership in terms of the out-of-home and in-home work undertaken respectively by the parties my aim in this judgment has been to secure a roughly equal division of assets. That said, two points might be made. First, with the best will in the world, the division of assets in such a way as to secure proper provision to the parties – even in a roughly equal partnership – will not always result in a *precise* 50/50 split of assets down to the very last cent. This practical point seemed to me to be sometimes in danger of being overlooked by both sides at the hearing. Second, with the establishment of two households in place of one from the same pool of assets there will typically be some diminution in the standards of living previously enjoyed: a standard of living commensurate to one's pre-separation/divorce standard of living will not always equate to a standard of living identical to one's pre-separation/divorce standard of living.

8. As mentioned, I turn later below to consider the statutorily prescribed factors to which I must have regard. However, it will shorten my consideration by reference to those factors and be a more comprehensible read if I first set out my general response to the various key issues that were the subject of focus at the hearing.

III. Income

9. The primary source of income of the parties is Mr A's substantial employment income. The parties are also fortunate to enjoy some rental income from certain investment properties. Neither party is entitled to any payment under statute at this time.

10. I accept Ms McShane's evidence that Mr A's monthly income in 2021 was just under [Amount 1].[1] In the same year, he received an annual bonus of [Amount 2], though this bonus was unnaturally diminished because of under-performance at the height of the Covid lockdowns. So, for example, in the three-year period between 2018-2020 (inclusive), Ms McShane's evidence was that the annual bonus averaged at about [Amount 3]. In this wider historical context, that means (again per Ms McShane) that Mr A will, all else being equal, enjoy an income of in or about [Amount 4]. I am mindful of course that Mr A's monthly income at this time includes provision for rent (a rent allowance) that will cease when Mr A retires – a point to which I return to later below in the context of my consideration of Mr A's accommodation needs.

11. Though Mr A was notably uncertain about his plans for his future in the evidence that he gave, it does seem that he will be retiring from his present employment when he turns 64 years of age (in 2025), with some form of alternative contract being put in place in 2023 when his present contract of employment expires. It is conceivable that he may take some form of employment of an unspecified nature post-retirement but Mr A was not sure about this or even whether he wanted this.

12. In addition to Mr A's employment income the parties also have a monthly post-tax rental income deficit of [Amount 13]. The deficit arises when the applicable mortgages are set against the applicable income. It will be necessary to reduce the mortgages on the rental properties to generate a surplus income from same. The mortgages on the rental properties have about 10 years to run to completion.

[1] To protect the privacy of the parties, square bracketed terms are defined in 'Defined Terms' section at the end of this judgment (which is not being made public). All monetary figures used are rounded figures.

IV. Mr A's Tax Arrangements

13. Mr A works in [EU Member State 3] as what the English would refer to as an 'expat' worker. As an 'expat worker', he is told what his net basic salary will be, and his employer 'grosses up' what he is paid so that Mr A gets this agreed net income. Stock option earnings, it was clear from the evidence of Mr Hyland, the accountant for Mr A – and made even clearer in the interactions with the court that followed on its reserving of judgment (concerning recent Court of Justice case-law) – are viewed by Mr A's employer as private income and thus something in respect of which Mr A must sort out his own tax affairs. It was also clear from the evidence of Mr Hyland that Mr A's employer (as one would instinctively expect in a 'grossed up' arrangement of the type just described) takes the benefit of any tax allowances. Mr A seeks to discharge whatever tax obligations fall to him lawfully to meet. His income, from the evidence, comprises his basic salary, various allowances (including an accommodation allowance), annual bonus and pension payments, and certain share options. He also enjoys a significant travel exemption relief under the laws of the jurisdiction in which he is resident. Following the divorce that is to issue, Ms A will no longer be covered under the health insurance scheme of Mr A's employer and will instead need to source her own health cover. (Mr A will, of course, need to do likewise when he retires).

V. Earning Potential

14. Mr A, should he wish it, will likely enjoy income-generating potential past his mandatory retirement age, thanks to his long work experience (achieved in part by virtue of the fact that he was 'freed' to work outside his family home by virtue of Ms A's years-long commitment to her work as a homemaker; I accept of course that it was *his* career). By contrast, Ms A has low or no earning potential by virtue of long years spent as a homemaker. In this regard, I have considered the observations of the Court of Appeal in *N.O. v. P.Q.* [2021] IECA 177 on how to approach the issue of the earning capacity of a dependent spouse (esp. paras.72–76, 90, 95, and 99). Ms A, it seems to me, finds herself broadly positioned in a similar way to the wife in *N.O.* That said, there are differences between that case and this. *N.O.* concerned a farm and farmland (unlike here). Perhaps more significantly *N.O.* was not an ample resources case and (fortunately for both parties) this case *is* an ample resources case, albeit not the most ample of 'ample resources' cases.

VI. State Pension (Contributory)

15. Ms A will be entitled to a contributory state pension when she turns the age of 66 years. There was some dispute between the financial advisors as to how much this will be. The principal dispute was whether one should calculate her likely pension in the manner in which it would fall to be calculated if she turned 66 years of age today or how it seems likely to be calculated when she in fact turns 66 years of age (there being imminent changes in the pension system in this regard). It seemed to me to be inescapably the case that one should proceed on the latter basis (to proceed on the present day method seemed largely an academic exercise). Proceeding by the latter basis suggests that Ms A stands eventually to receive a relatively paltry contributory state pension of [Amount 5]. Additional contributions between now and Ms A's reaching the age of 66 years will yield an increase in the pension (and there will be social insurance contributions payable on any rental income) so that may increase the just-mentioned figure to some extent. However, it appears that the contributory state pension will never be large. In passing, the suggestion that Ms A would find employment in the next few years so as to accrue her full State pension entitlements seemed to me, given Ms A's age and long absence from the workforce, likely to be unrealistic in practice albeit that I accept it is, theoretically, a possibility. The criticism of Ms A for completing a degree at this time seemed to me to be, with all respect, a mite ungracious.

16. The evidence indicated that Mr A will also, as it happens, be entitled to a contributory state pension in the jurisdiction in which he now resides. No complete evidence was placed before me as to the likely amount of same.

VII. Proposed Reduction in Maintenance

17. Mr A currently pays net monthly maintenance of [Amount 15], a sizeable sum but one that represents a drop in Ms A's previous income (though I cannot but respectfully reiterate that there are few divorces that do not see some level of drop in standards as one household divides into two). There was suggestion by Mr A that the current level of maintenance should be reduced still further to [Amount 6], payable by way of four lump sum payments with maintenance ending after the fourth payment. There are a number of problems with this proposal. First, it would see an unjustifiable reduction in Ms A's income when one has regard to the total assets available. Second, it would impede (the figures suggest that it could frustrate)

Ms A's ability to pay off existing debt (including the costs of the proceedings) and end up with unencumbered title to property that has earning potential in the years ahead. Third, it would leave Ms A with net monthly maintenance that would be barely one-quarter of Mr A's present monthly income despite the fact that her efforts as homemaker greatly 'freed' Mr A to pursue the career that has led to his current relative financial wealth. Fourth, there is no evidence before me to suggest that Mr A has encountered any difficulty in making his current maintenance payments to Ms A.

18. I respectfully do not accept that the 'clean break' contended for by Mr A is sustainable when it comes to my making proper provision. If he works post-retirement (and that is a big 'if' – Mr A did not seem entirely enthused by the prospect) he will be making income on the basis of professional experience that he was freed in part to gain by his wife's working as a homemaker. Again I accept, of course, that he worked hard at his career also. Even so, it seems to me that there would be a fundamental unfairness (want of proper provision) at play in the notion that Mr A could continue to 'cash in' fully on the continuing proceeds of a career that he was freed in part to enjoy by Ms A's action, retaining 100% of the profits from a career in which his wife has also invested.

19. Having regard to the foregoing I will order (a) the lump sum maintenance payments in four annual tranches of such amount as would yield 12 x net monthly payments of [Amount 9] in that year *plus* (b) after the payment of the fourth tranche in four years' time I will order the payment of maintenance to Ms A of such gross amount as will yield to her a net monthly payment of [Amount 9], *provided that* the net monthly amount payable under (b) may well need to be revisited at some future time if Mr A elects not to work post-retirement or such work brings in a still much-reduced income.

VIII. Tax and Maintenance

20. There was considerable discussion at the hearing as to whether Mr A will be able to claim tax relief on maintenance payments in the jurisdiction where he resides. Mr A claimed (by reference to a letter from PWC that he had secured in this regard) that he would not be eligible for relief in respect of his monthly salary and bonus payments. This letter was handed into court without objection and offers the soundest basis for a consideration of Mr A's tax position *vis-à-vis* his employer. It seemed to me that the 'work around' proposed by Ms A in this regard

was a sensible means of accommodating the challenges that present where maintenance is paid gross and received net, namely that I order payment of a lump sum which would be payable in instalments.[2]

IX. Assets

21. The evidence indicates the following assets to be available to Mr A and Ms A: (i) the family home; (ii) two apartments in Ireland; (iii) a holiday home in another EU Member State; (iv) certain cash deposits; (v) shares and share options; and (vi) pensions. There remain two principal areas of dispute between the parties in this regard: (a) the value of the family home; and (b) the value of shares and share options.

22. Turning first to the value of the family home, most unhelpfully I have been presented with two competing valuations. It is unfortunate that Mr A departed from the agreement of both parties to abide by the valuation of a single valuer selected by the parties and elected to get his own valuation evidence after a valuation was made that did not meet his approval. Courts are not omniscient; property valuers know property values better than judges; and it places a judge in a difficult position when they are asked to gauge which of two property valuations to accept. I am inclined to accept the lower valuation received for the following reasons:

[2] This paragraph was written before Ms A's counsel returned to court after this judgment was reserved but before it was delivered to flag the recent decision of the Court of Justice in Case C-60/21 *European Commission v. Kingdom of Belgium* [ECLI:EU:C:2022:172]. That case was concerned with the expatriate tax regime applicable in Belgium. Under existing Belgian law non-residents are only entitled to a personal allowance and other personal deductions, such as for maintenance paid if they earn at least 75 per cent of their worldwide professional income in Belgium. In recent years the European Commission has taken the view that Belgium's refusal to allow deduction of alimony payments from the taxable income of non-residents who earn less than 75 percent of their worldwide income in Belgium penalises non-resident taxpayers. Considering the 75 per cent rule to be contrary to A.45 TFEU (freedom of workers) the European Commission brought Belgium before the European Court of Justice. On 10th March last the Court of Justice held that the 75 per cent rule infringes the free movement of workers when the rule denies residents the right to deduct maintenance when they receive less than 75 per cent of their professional income in Belgium *and* they cannot benefit from the same deduction in their state of residence. Mr A ostensibly comes within the class of persons who would meet the criteria identified by the Court of Justice. However, (i) quite how Belgium incorporates the effect of this judgment into its national law remains to be seen, (ii) given that Mr A is remunerated on a net basis he may not in practice receive any tax benefit if there is no taxable private income (stock option income) available in the taxable period concerned to offset the personal tax deduction (in that case Mr A's employer would benefit from the tax deduction for the alimony), (iii) it was repeatedly indicated that Mr A does not intend to claim any (if any) benefit that arises for him in this regard. Even if (iii) did not apply, point (ii) continues to apply so I am being asked to engage in speculation upon speculation as to what may or may not happen in the future when in truth no-one has any idea whether or not there would be taxable private income (stock option income) available in the taxable period concerned to offset the personal tax deduction. My own sense is that because of (iii) the point being raised is moot but that even if (iii) did not apply the whole point is so speculative as to be impossible for me to reach a concluded opinion on – save to note that I consider, even in the wake of the judgment of the Court of Justice, that in making the level and form of provision contemplated in this judgment I am making proper provision for Ms A for all the various reasons stated herein.

– first, the ostensibly parallel recent sale to which the later valuer had regard was not a comparison of like with like as the sale in question was not an open market sale (as any sale of the family home would almost certainly be).
– second, the sale to which the original valuer had regard *did* seem to be a comparison of like with like (it was an open market sale).
– third, it seems notable that the like-for-like sale resulted in a sale price which was less than the asking price which again suggests that the initial valuer's lower valuation is more firmly rooted in the reality of the market.
– fourth, I admit to being instinctively sceptical about a valuation procured by a party who departs from a joint valuation approach when it yields a valuation that that party does not agree with, and then happens to procure a higher valuation which would increase the value of an asset that it was doubtless contemplated would likely be (and it will be) ordered to the other party in proceedings.
– fifth, it seems notable that the initial valuer did not resile in any way from his initial, lower valuation.

23. As to the value of the contents of the family home, my (admittedly instinctive) sense is that even the lower value offered by Ms A is likely too high: second-hand house contents that have no antique value (and the contents here have no antique value) have a very limited value. Subject to the caveat that I am not especially convinced by either valuation offered – even Ms A's for the reason given – I will give the assets the value that Ms A has accorded them.

24. As to the monies credited to the parties' various bank accounts and the compensation monies currently held by Ms A's solicitors, it seems to me that the fairest way to proceed in this regard is that (i) Mr A would be credited with the monies in the two [Bank 1] accounts, (ii) Ms A would be credited with the monies in the Irish bank accounts and also (iii) receive the bank compensation monies currently held by her solicitors, as well as (iv) an 'equalisation payment' from Mr A such that the division of the monies in the accounts is done on a 50/50 basis overall.

25. As to the value of the shares and share options, the issue as to whether the [Stated Name 1] shares were in fact disposed of has never properly been resolved. Mr A has indicated that they were disposed of but there is no evidence to support this. Courts proceed on evidence: if there is no evidence of disposition (and there is none) they must have been retained. I should

note in this regard, for fear of causing offence, that I do not consider that Mr A has been lying in this regard; respectfully, I just cannot but conclude on the evidence that he is mistaken.

26. As to the valuation of the participation shares, while they may have diminished in recent weeks that is the way of shares. The participation shares do not require to be encashed for some time, and historically they have always appreciated in value over a longer window of time. I do not accept that any circumstance presents which would justify their being valued at a discounted price.

X. Future Needs, *etc.*

27. There is no evidence before me that either party intends to remarry at this time. Apart from the mortgages, neither party has major financial liabilities (there are, *e.g.*, normal credit card liabilities, but nothing notable). Historically, the parties have been used to a high level of income and their combined assets are such that they will, happily, continue to have a relatively good standard of living into the future. None of their children are legally dependent on them. The youngest (non-dependent) child looks set to commence a postgraduate career and I have little doubt that both Mr A and Ms A (both of whom are transparently good parents) may wish to assist that child from such income as they enjoy following on this judgment; however, what (if any) assistance they provide in this regard is a matter for them after this judgment issues, not for me to decide herein. The child in question has needed to visit doctors since childhood regarding a particular complaint but will be able to live a fully independent life as an adult.

XI. Litigation

28. The litigation concerning [Property 2] and the apartment in [EU Member State 1] appear largely to have resolved. The boundary dispute at the family home also appears to have resolved. With regard to the damages received in respect of [Property 2], Ms A has indicated that she has no issue with these being divided 50/50. With regard to the possibility of ongoing proceedings in [EU Member State 1], it seems to me that the sum of [Amount 10] (as mooted by Ms A) should be set aside, rather than the smaller sum of [Amount 11] (as mooted by Mr A). It seems better to err on the side of caution and if there is money left over at the end of the day from [Amount 10], this can be divided equally between the parties. As to the rectification of the family home boundary, as I understand the *D v. D* schedule, Mr A has actually offered

[Amount 12] more in this regard than Ms A estimates that it will cost. Subject to correction in this regard, I propose therefore just to order the amount that Ms A has sought.

XII. Standard of Living pre-Separation/Proceedings

29. I do not have a lot to add under this heading that I have not already mentioned. I have sought insofar as possible to make sure that the parties continue to enjoy a standard of living commensurate to their pre-separation/proceedings standard of living. I have also been mindful in this regard that (as Murray J. indicates in *D.T. v. C.T.* [2002] 3 I.R. 334, at p.408) "[p]*roper provision should seek to reflect the equal partnership of the spouses*", and here – as now mentioned several times – there was a relatively equal partnership in terms of the out-of-home and in-home work undertaken respectively by the parties. (That said, I again note that, with the best will in the world, the division of assets in such a way as to secure proper provision to the parties – even in the most equal of partnerships – will not always result in a *precise* 50/50 split of assets, albeit that a court will work to that ideal in such a scenario). All of the assets here are the 'fruits of the marriage'', *i.e.* neither party has brought inherited property to the marriage.

XIII. Age of Spouses and Duration of Marriage

30. Both parties are within a few years of the state retirement age. For whatever reason, their marriage, though it has endured across several decades, essentially came to an end in or around May 2019. Theirs is a classic case in which each party to the marriage in their own way, over the course of many years, strove to make the marriage and their family life a success, dividing financial/parental tasks between them in the manner already described. When it comes to the role of Ms A as a homemaker, I am mindful of the observation of Denham J. (as she then was) in *DT v. CT* at p.382, that "*A long-lasting marriage, especially in the primary childbearing and rearing years of a woman's life*" – as here – "*carries significant weight, especially if*" – as here – "*the wife has been the major home and family carer*".

XIV. Disability

31. Neither Mr A nor Ms A suffers from any disability.

XV. Contributions Made or To Be Made to Family Welfare

32. I have repeatedly mentioned and do not propose to re-consider the respective contributions made by the parties to the marriage (Mr A, largely through out-of-home work and as a good father; and Ms A largely as homemaker and as a good mother). I have also considered Ms A's presently diminished earning potential by virtue of her long-time primary commitment as homemaker.

XVI. Accommodation

33. Ms A lives in the family home in Ireland and I will order that the family home be transferred to her. I will also order one of the Irish apartments ([Property 1]) to her (it will be a good source of income when the mortgage is cleared) and also the property that sits in [EU Member State 1]. Ms A also sought that she be given the second Irish apartment ([Property 2]) so that she could use it as a *possible* tax shelter in the future *if* she disposes of another property. Although Mr A lives abroad, he is from this country and, understandably, wants a toehold here when he retires. He owns no property in Ireland or in his jurisdiction of residence; he rents a property in the latter jurisdiction using a generous accommodation allowance which of course will come to an end when he retires from his current employer. I am not entirely persuaded by the argument that Mr A is getting a large portfolio of shares and will have future earnings therefrom: experience shows that shares can rise and fall significantly in value. As to the 'he will continue to work and make money argument', Mr A has only a few years of employment left with his present employer and, as already mentioned, it did not seem to me that he was entirely enthusiastic about the prospect of his doing post-retirement work. Also, to use a colloquialism, 'a bird in the hand is worth two in the bush': the parties already own four properties; Ms A will be awarded three; and Mr A will get (by comparison) a relatively modest one. It seemed to me, with all respect, that I would not be making proper provision for Mr A were Ms A to get all the properties, leaving Mr A with nowhere to live in Ireland unless he raises the funds to do so, when he is advanced in years and when rising property prices seem again to be the norm in this jurisdiction. So I will order that he be given [Property 2].

XVII. Pension Schemes

34. There are two pension funds available to Mr A. The assets of one pension scheme sit in Ireland and are susceptible to an Irish court order. The assets of the second pension scheme sit

in the Isle of Man and are not so susceptible. Consistent with my general approach of making roughly equal provision for the parties, I consider that the only way open to me in this regard is to order the (smaller) Ireland pension fund to Ms A, leaving the (larger) Isle of Man pension fund to Mr A, and also to require Mr A to make an equalising payment of [Amount 14] to Ms A so that, in effect, they both get an equal division of the total present pension funds.

35. I note the contentions made for Ms A by reference to *Russell v. HSE* [2015] IECA 236 as regards the likely future value of her pension. However, that was a case involving the investment of damages for a child who had suffered catastrophic injuries at birth so of course a conservative outlook was taken. Here, in any event, the investment outlook was addressed in the actuarial evidence, with Mr Marsh (the actuary for Mr A) taking a more positive outlook which seemed thoroughly justified and to be preferred.

XVIII. Death-in-Service Benefit

36. There is a substantial death-in-service benefit payable to Mr A's estate in the unfortunate event that he should die while in employment. Although I can see the logic of ordering that Ms A should receive some of this benefit – it is a benefit derived from the arrangement whereby Mr A was free to pursue a lucrative career and Ms A largely worked as a homemaker – I understand that the fund in question is outside the jurisdiction of the court and hence the proposed order would be futile. There is nothing to suggest at this time that Mr A is at any higher risk of dying than anyone else of his age and his intention is that any payment of the benefit, in the event that he should die before his employment ends, will go to his children. So the dispute arising in this regard seems more illusory than real but be that as it may, if – as I understand – the fund in question is outside the court's jurisdiction then the proposed order would be futile, and courts do not deliberately make futile orders. All that said, if before I come to making my orders in this matter the parties can agree some alternative form of order regarding the death-in-service benefit that would not be futile for me to make, I will consider including same in my final orders (and almost certainly will include it if it has been agreed).

XIX. Rights of Other Persons

37. There are no other persons whose rights have to be taken into account by me.

XX. The Gift to the Parties' Daughter

38. At one point during the marriage, Mr A advanced a sum of money to a daughter who had encountered financial difficulty. He should have consulted with Ms A before doing so and did not. Ms A takes some umbrage that this advance was made, possibly – it was not quite clear to me what precisely her cause of umbrage was – but possibly because she considers that all of the couple's children should be treated equally. However, it seems to me that if Ms A continues to take this view she can simply arrange matters in her will to ensure that, after she dies, provision in a suitably lower amount is made by her for that child than is made by her for her other children. But the fact remains that the child who so benefitted is a child of the marriage, and Mr A (beyond not consulting Ms A and, with respect, he *should* have consulted her) did nothing that no right-thinking parent would not do if a similar situation presented and they had the resources to assist. So one half-of that sum should come from Mr A and another one-half from Ms A, not the full sum from Mr A. (Indeed as the heat of these proceedings recedes into history, I suspect that Ms A may well find herself ultimately more contented that the said sum was clearly gifted to the daughter by both parents, with any corrective measure – should Ms A desire to make same – being taken by her in her will so as to ensure that none of her children is shown greater favour than any other).

XXI. Case-Law

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

The Constitutional/Statutory Scheme

(1) In terms of applicable law, the starting point in a divorce case is Art. 41.3.2° of the *Bunreacht,* as amended by the 15th Amendment (and now the 38th Amendment also),

the statutory machinery for the implementation of which is the Family Law (Divorce) Act 1996 (*D.T. v. C.T.*, Keane C.J., at p. 381).

Noted.

(2) The duty of the courts to ensure that proper provision is made for a spouse before a decree of divorce is granted flows directly from the provisions of Article 41 of the Constitution and it is in the context of that Article as a whole that the nature and extent of the duty set out in the Act of 1996, must be interpreted (*D.T. v. C.T.*, Murray J., at p. 424).

Noted.

(3) The Constitution and the Act of 1996 circumscribe the power conferred on the designated court, by obliging it, before it may grant a decree of divorce, to be satisfied of certain matters. The court must, if it is to act constitutionally, satisfy itself that the evidence proves these matters. The consent of the marriage partners cannot confer upon the court the power to dissolve their marriage so as to absolve it from this duty (*D.T. v. C.T.*, Fennelly J., at p. 433).

Noted.

(4) Section 20(2) sets out a long list of criteria to which a court must have regard in the making of financial orders. Furthermore, the list is not exhaustive and does not confine the discretion of the court. Section 20(5) perhaps complicates the matter further by requiring that, in the final analysis, the court should not proceed to make an order unless it would be in the interest of justice to do so (*M.K. v. J.K. (No 2)*, O'Neill J., at p. 346).

Noted.

Clean Break?

(5) When, following the 15th Amendment, the Oireachtas came to introduce divorce legislation, it was modelled to some extent on modern English divorce law. There is,

however, an important difference. English legislation embodies the 'clean break' principle laid down by the House of Lords in *Minton v. Minton* [1979] A.C. 593 (*D.T. v. C.T.*, Keane C.J., at p. 384).

Noted.

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

Noted.

(7) The absence of specific statutory machinery for the making of 'clean break' provision should not preclude the court from seeking to do so in appropriate cases. In the case where the amplitude of resources makes it possible, the desire of the parties for financial finality should not be frustrated (*D.T. v. C.T.*, Fennelly J., at p. 440; see also *Y.G. v. N.G.*, Denham C.J., at p. 729).

Mr A desires a clean break. Ms A requires ongoing maintenance. As stated previously above, I respectfully do not accept that the 'clean break' contended for by Mr A is sustainable when it comes to my making proper provision. If he works post-retirement (and that is a big 'if' – Mr A did not seem entirely enthused by the prospect) he will be making income on the basis of professional experience that he was freed, in part, to gain by his wife's working as a homemaker. I accept of course that he worked hard at his career also. Even so, it seems to me that there would be a fundamental unfairness at play in the notion that Mr A could continue to 'cash in' 100% on a career (work experience) that he was freed, in part, to enjoy by Ms A's action; and that earning potential albeit that it may only be recognised in the future is a present asset. I do not see that the 'clean break' arrangement canvassed for by Mr A would see me making fair provision for Ms A were I so to proceed.

Certainty and Finality

(8) Keane C.J. did not believe that the Oireachtas, in declining to adopt the 'clean break' approach to the extent favoured in England, intended that the courts should be obliged

to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties (*D.T. v. C.T.*, Keane C.J., at p. 385).

Noted. See my comments at (7).

(9) The principles of certainty apply to family law as to other areas of the law. Certainty is important in all litigation. Certainty and consistency are at the core of the legal system. However, the concepts of certainty and consistency are subject to the necessity of fairness. Consequently, each case must be considered on its own facts, in light of the principles set out in the law, so as to achieve a just result. Thus while the underlying constitutional principle is one of making proper provision for the spouses and children, this is to be administered with justice to achieve fairness (*D.T. v. C.T.*, Denham J. (as she then was), at p. 403).

I have proceeded so in my deliberations and conclusions.

(10) A court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s.22 of the Act of 1996, where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit (*D.T. v. C.T.*, Murray J., at p. 432).

Noted.

Broad Discretion

(11) While s.20(2) of the Act of 1996 lists in detail the factors to which the court is required to have regard in making the various financial orders provided for in Part III of the said Act, it is obvious that the circumstances of individual cases will vary so widely that, ultimately, where the parties are unable to agree, the trial judge must be regarded as

having a relatively broad discretion in reaching what she or he considers a just resolution in all the circumstances (*D.T. v. C.T.*, Keane C.J., at p. 386; see also Murray J., at p. 422).

Noted.

(12) Normally, even in cases where the parties might be considered to enjoy a substantial decree of financial comfort, the finite resources of the parties will be an underlying prescriptive factor in the exercise of a discretion as to how those resources can be applied in making proper or fair provision for both spouses (*D.T. v. C.T.*, Murray J., at p. 423).

Noted.

(13) The Oireachtas, in choosing the approach it enshrined in s.20, made a considered decision to confer upon the court a duty of a particularly broad discretionary character. This requires the court to pass judgment on the presence and, where they are present, the weight it attributes to an extremely wide range of specified considerations (*D.T. v. C.T.*, Fennelly J., at p. 435).

Noted.

(14) The matters listed in s.20(2) of the Act of 1996, are designed to ensure that the court will have regard to all the wide variety of circumstances which should, in the interests of justice, be weighed in the balance when considering what is proper provision. The starting point in that regard must be, on the one hand, to the resources and on the other to the needs, obligations and responsibilities of the parties. There is no stated limitation on the financial resources or on the " *financial needs, obligations and responsibilities* …" to be considered by the court and which may be available for the purpose of making provision. They may extend to resources or to needs, obligations or responsibilities which either spouse " *is likely to have in the future* " (*D.T. v. C.T.*, Fennelly J., at p. 437).

The income that Mr A may earn post-retirement is obviously a resource that Mr A is likely to have in the future (should he elect to work post-retirement).

Financial Needs

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

I have sought to achieve such a commensurate standard of living in the orders that I intend to make. However, I would respectfully refer the parties to my observations in para.7 above. Making proper provision is not always a matter of giving exactly 50% to each side down to the last cent – and again it seemed to me that sight was lost of this fact by both sides during the hearing.

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

No such need presents here.

(17) Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances (*Y.G. v. N.G.*, Denham C.J., at p. 732).

There are no inherited assets in play here.

(18) Where one or both parties are in receipt of income, but their joint assets are not of such significant value as is the case here, the first task of the court will almost certainly be to consider what the financial needs of the spouses and the dependent children are. At one end of the spectrum, there will be cases in which, at best, no more than basic subsistence requirements at the most can be met. At the other, there will be both substantial assets and income available and the court will be concerned with the proper distribution, in terms of the section, of the available assets so as to ensure that proper provision is made for the spouses and any dependent children (*D.T. v. C.T.*, Keane C.J., at p. 386).

This is an ample resources cases albeit not the amplest of ample resources cases. So by making a roughly equal split of the available assets, fair provision can be made for each side.

(19) The Act of 1996 does not require the assets of the spouses to be divided between them and the dependent children in every case. There will be cases in which it would be solely concerned with the appropriate level of the maintenance to be paid by one spouse to the other and as to what is to happen to the family home. But in cases where there are substantial assets brought into being in circumstances where it would be unjust not to effect some form of division, the court will inevitably find itself having to determine, where the parties are unable to agree, how the assets should be divided and whether that division should take the form of a lump sum order or a property adjustment order (*D.T. v. C.T.*, Keane C.J., at pp. 386-87).

See my response to (18).

Non-Discrimination

(20) The work of a spouse in the home cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or the breadwinner during the course of the marriage (*D.T. v. C.T.*, Murray J., at p. 427).

Noted.

(21) Lord Nicholls, in *White v. White* [2001] 1 A.C. 596 emphasised that the whole tenor of English divorce legislation was the avoidance of a discriminatory approach: the fact that, as often happened, the wife had devoted the greater part of her time to looking after the children and caring for the home generally, was no ground for confining her share of the family assets, in the event of a breakdown of the marriage, to so much of the assets as met her 'reasonable requirements'. That is also the law in Ireland (*D.T. v. C.T.*, Keane C.J., at p. 389).

Noted.

(22) In *Cowan v. Cowan* [2002] Fam. 97, a so-called 'ample resources' case, Thorpe LJ, at pp. 118-19, summarised his understanding of *White v. White* [2001] 1 A.C. 596 as follows, " *Disapproved is any discriminatory appraisal of the traditional role of the woman as home maker and of the man as breadwinner and arbiter of the destination of family assets amongst the next generation. A calculation of what would be the result of equal division is a necessary cross check against such discrimination….Disapproved is any evaluation of outcome solely or even largely by reference to reasonable requirements* ." Provided that it is always borne in mind that in 'ample resources' cases an equal division of the assets is emphatically not mandated by the legislation, Keane C.J. considered that there should be no difficulty in adopting a broadly similar approach in this jurisdiction. (D.T. *v.* C.T., Keane C.J., at pp. 389-90).

This is an ample resources cases, albeit not the amplest of ample resources cases. By making a roughly equal split of the available assets, fair provision can be made for each side. Again, I would respectfully refer the parties to my observations in para.7 above. Making proper provision is not always a matter of giving exactly 50% to each side down to the last cent – and again it seemed to me that sight was lost of this fact by both sides during the hearing.

(23) When a court is exercising its discretion in making provision for spouses on an application for divorce, the following should be considered: (i) in making such provision a spouse who has worked principally in the home during the course of the marriage should not be disadvantaged in the making of such provision by reason of that fact; (ii) both spouses are entitled, in principle, to seek that the provision made for them provides them with a measure of independence and security in their lives and there is no reason why, in principle, a non-earning spouse should be confined to periodic payments. The extent to which this can be achieved in practice will depend on the circumstances of the case, the resources available and the exercise of judicial discretion in taking into account all the factors referred to in s.20; (iii) a court has power to direct the payment of lump sum payments where this is considered an appropriate means of making proper provision for one or other of the spouses; (iv) all the resources, assets and income of the applicant and the respondent) should be taken into account (*D.T. v. C.T.*, Murray J., at pp. 431-32).

See my observations at (22).

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

Noted.

(25) In Irish society today, it can no longer be assumed that the husband and wife [in mixed-sex marriages] will occupy their traditional roles in which the husband has been the breadwinner and the wife the home builder and carer. The roles may on occasions even be reversed and, in many instances, both husband and wife will be in receipt of income from work. In those cases where one spouse alone is working and, in the result, a significantly greater responsibility for looking after the home has devolved on the other, it is clear that under s.20(2)(f) of the Act of 1996, the court must have regard to that as a relevant factor (*D.T. v. C.T.*, Keane C.J., at p. 387).

Noted.

(26) A court is obliged by virtue of s.20(2)(g) to have regard to the financial consequences for either spouse of his or her having relinquished the opportunity of remunerative activity in order to look after the home or care for the family (*D.T. v. C.T.*, Keane C.J., at p. 387).

Noted.

(27) In assessing the " *proper provision* " under Article 41.3.2°, the court must look at both aspects of a spouse's role in the family, *i.e.* the two sides of the coin. Thus the court must have regard to the role of the spouses in relation to the welfare of the family, to their contribution in looking after the home or caring for the family: s.20(2)(f). On the other side of the coin, the court must have regard to the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each, and the degree to which the future earning capacity of a spouse was impaired by reason of the spouse having relinquished or foregone the opportunity of remunerative activity in order to look after

the home or care for the family: s.20(2)(g). By this total approach to the family role of a spouse and its effect, formal recognition is given to the role of caring for the family (*D.T. v. C.T.*, Denham J. (as she then was), at p. 402).

Noted.

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

I consider that I would be acting in breach of this requirement if I acceded to the 'clean break' proposition canvassed by Mr A.

(29) In ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the courts should, in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner. The value to be attached to their respective contributions in those circumstances is, perhaps, underscored by Article 42.1 of the Constitution which refers, *inter alia*, to the " *duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children"* (*D.T. v. C.T.,* Murray J., at p. 428).

Noted.

(30) Where substantial assets and income have accrued to one spouse in the course of the marriage, the court should take them into account in determining the proper provision to be made for the other spouse. They are available in order to make a proper provision for the other spouse. In the case of a wife who has worked primarily in the home, she is just as entitled as her husband to have the 'fruits of the marriage', taken into account by the court in determining what provision should be made for each of them (*D.T. v. C.T.,* Murray J., at p. 430).

Noted.

(31) Section 20(2)(f) obliges the court to give due weight and consideration to the respective roles of the breadwinner and the homemaker, *i.e.* such weight as is appropriate in all the circumstances. It does not erect any automatic or mechanical rule of equality. Nor does it institute any notion of family resources or property to be subjected to division. Several considerations militate against the adoption of such rules of thumb. The children of the marriage have to be considered and their provision by one spouse may mean that property should not be equally divided. One or both of the parties may have entered into new relationships, possibly involving children. The supposed 'breadwinner' or 'homemaker', as the case may be, may not, depending on the circumstances deserve to be placed on an equal footing. It is only with the greatest care, therefore, that one should formulate any general propositions (*D.T.* v. *C.T.*, Fennelly J., at pp. 438-39).

See my observations at (22). There are no dependent children. One non-dependent child intends to return to college this autumn but it is a matter for the parties as to whether and how they fund this from their respective assets. They are both good parents and I expect that some funding will be forthcoming from them; however, that seems to me to be a matter for them.

(32) In *White v. White* [2001] 1 A.C. 596, Lord Nicholls observes, at p. 605, that *"If, in their different spheres, each* [spouse] *contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer".* Fennelly J. adopted this language to the extent that he argues for equal recognition of the value of the contributions that may have been made during the marriage, in their respective roles, by the money-earning spouse and the home-making spouse (*D.T. v. C.T.*, Fennelly J., at p. 439).

Noted.

Other Relevant Factors

(33) Other factors to which the court is obliged to have regard is the standard of living enjoyed by both parties before the breakdown of the marriage, their respective ages and the duration of the marriage (*D.T.* v. *C.T.*, Keane C.J., at p. 387).

I have addressed these issues previously above.

(34) A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party (*Y.G. v. N.G.*, Denham C.J., at p. 732).

Noted but of no practical consequence in this case.

Conduct of Parties

(35) The conduct of the parties will be relevant where, in the opinion of the court, it would be unjust to disregard it (*D.T. v. C.T.*, Keane C.J., at p. 387).

Noted but of no practical consequence in this case.

(36) Ultimately, when all these factors have been assessed by the trial judge, he or she must be satisfied that any financial orders made constitute proper provision for each of the spouses, and the dependent children, within the meaning of the Constitution and the Act of 1996 (*D.T. v. C.T.*, Keane C.J., at p. 387).

I am so satisfied. There are no dependent children.

(37) As to when it would be " *unjust* " within the meaning of s.20(2)(i) to disregard the conduct of each of the spouses, in *Wachtel v. Wachtel* [1973] Fam. 72, Denning MR said, at p. 90, that:

> ***"There will no doubt be a residue of cases where the conduct of one of the parties is…'both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the***

> ***support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life … in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place."***

Keane C.J., in *D.T.*, agreed with the view expressed by Lord Denning in *Wachtel* that the court should not reduce the financial provision which it would otherwise make to one of the parties save in cases where misconduct has been " *obvious and gross* ". (*D.T. v. C.T.,* Keane C.J., at p. 391; see also Denham J. (as she then was), at pp. 408-09).

Noted but of no practical consequence in this case.

Date of Valuation of Assets

(38) As to the time at which the assets should be valued, the language of s.20(2)(a), and, in particular, the reference to " *property … which each of the spouses concerned has or is likely to have in the foreseeable future* " is more consistent with an assessment by the court of the value of those assets as of the date of the hearing. Any other construction would seem to give rise to the possibility of injustice to either party. That was also the view taken by the Court of Appeal in *Cowan v. Cowan* [2002] Fam. 97, at p. 122 (*D.T. v. C.T.*, Keane C.J., at pp. 390-91).

Noted.

(39) The assessment of assets must be as of the date of trial or appeal. This is consistent with the wording of the statute which refers to " *circumstances exist", "the income…which each of the spouses concerned has or is likely to have", "the financial needs which each of the spouses has or is likely to have* ". However, while the assessment of assets is at the date of the trial or the appeal, there may be important factors relevant to that sum to be taken into consideration in determining the proper provision for the spouses. *E.g.*, the fact that

a considerable sum of money was acquired by a spouse after their separation, the basis for such a new acquired sum, or the existence of a deed of separation, may be very relevant (*D.T. v. C.T.,* Denham J. (as she then was), at p. 404).

Noted. I do not see that there are any important factors to be considered other than those considered in this judgment.

(40) Assets should be assessed as at the date of trial. However, there may well be circumstances as to their relevance as an asset base in providing proper provision. Thus, if the parties had no joint enterprise (such as a farm or business or professional practice) and one party after separation commenced and achieved success in a wholly new area, that may be a circumstance applicable to the determination of the asset base relevant to proper provision. While the factors set out in s.20(2)(a)-(1) must be applied, it may affect the benchmarking of fairness (*D.T. v. C.T.*, Denham J. (as she then was), at p. 405).

Noted.

Ad Seriatim *Consideration*

(41) In determining proper provision, it is mandatory for the court to have regard, in particular, to the factors set out in s.20(2) of the Act of 1996. The relevance and weight of each factor will depend on the circumstances of each case. Best practice is to consider all the circumstances and each particular factor *ad seriatim* and give reasons for their relative weight in the case (*D.T. v. C.T.*, Denham J. (as she then was), at p. 402).

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

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

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

I have so proceeded. I consider that it is in the interests of justice to make the orders that I intend to make.

Lump Sum

(43) There is nothing in the Constitution or legislation which prohibits a lump sum as part of a financial ancillary order. In considering whether such an order is applicable, the provisions of the Act of 1996 must be applied (*D.T. v. C.T.*, Denham J. (as she then was), at p. 403).

Noted.

(44) The Constitution would require that the making of lump sum payments be ordered if, in the particular circumstances of the case, the court considered in its discretion that that was the appropriate manner by which proper provision should be made for the spouse in question (*D.T. v. C.T.*, Murray J., at pp. 429-30).

Noted. There is a lump sum dimension to what is being ordered in this case, which I consider to be appropriate.

Proper Provision (not Division)

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

Noted. I have sought to make such provision as I consider proper having regard to the circumstances that exist.

(46) The Act of 1996 enables the court to make a variety of financial and property orders; the purpose of the making of these orders upon the granting of a divorce decree is to ensure that proper provision is being made for a dependent spouse and children (*M.K. v. J.K. (No 2)*, O'Neill J., at p. 332).

Noted. I have sought to make such provision as I consider proper having regard to the circumstances that exist. There are no dependent children.

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

Noted. I have sought to make such provision as I consider proper having regard to the circumstances that exist.

(48) The scheme established under the Act of 1996 is not a division of property. The scheme provides for proper provision. It is not a question of dividing the assets at the trial on a percentage or equal basis. All the circumstances of the family, including the particular factors referred to in s.20(2) are relevant in assessing the matter of provision from the assets (*D.T. v. C.T.*, Denham J. (as she then was), at p. 404).

Noted.

(49) It is not the case that in making financial provision for spouses their assets should be divided between them. Neither the Constitution nor the Act of 1996 requires that, expressly or implicitly. It is rather that a spouse should not be disadvantaged by reason of the fact that all, or nearly all, of the assets and income in the marriage are those of the other spouse. It also means that in cases where there are very substantial assets belonging to one spouse which greatly exceed any conceivable day-to-day needs of either spouse, whatever their standard of living, those assets should not as a matter of course remain with the spouse who owns them, with the other spouse being confined to depending on periodic payments (*D.T. v. C.T.*, Murray J., at p. 428).

Noted.

(50) Proper provision should seek to reflect the equal partnership of the spouses. Proper provision for a spouse who falls into the category of a financially dependent spouse should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet his/her financial liabilities and obligations, continue with a standard of living commensurate with his/her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that he/she can live an independent life and have security in the control of his/her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependant on receiving periodic payments for the rest of her life from his/her former wife/husband. 'In principle' because in many cases the resources or circumstances of the parties will dictate that the only means of making future provision for the spouse in question will be by periodic payments from the other spouse (*D.T. v. C.T.*, Murray J., at p. 429).

Noted.

(51) The court must do what is "*proper*" in the sense of 'appropriate'. This is synonymous with what is "*fair*" or "*just*". In the moral sense, this is a clearly stated objective. In practice, it requires the court to weigh in the balance the infinite variety and complexity of the elements of human affairs and relationships and to arrive at a just result (*D.T. v. C.T.*, Fennelly J., at p. 434).

It seems to me, if I might respectfully note, that this is an especially useful observation by Fennelly J. Often in divorce cases, to use a metaphor, the parties in truth need two 'cakes' on which properly to survive as they go their separate ways but, in terms of assets, have only one 'cake' between them. A divorce court cannot make two full cakes out of one full 'cake', it can only give some of the one full 'cake' to each party; in doing so, as Fennelly J. observes, it must (and can only) do what is "*proper*" in the sense of '*appropriate', i.e.* fair or just in all the circumstances presenting. I have sought to do this.

(52) Any property, whenever acquired, of either spouse and whenever and no matter how acquired, is, *in principle*, available for the purposes of the provision. Thus, property

acquired by inheritance, by chance, or the exclusive labours of one spouse does not necessarily escape the net. On the other hand, not all such property is automatically available either (*D.T. v. C.T.*, Fennelly J., at p. 437).

Noted.

Continuing Obligation

(53) Each spouse has a continuing obligation to make proper provision for the other and the resources which are available to each of them may be taken into account, so far as is necessary, to achieve that objective. Each case will necessarily depend on its own particular circumstances (*D.T. v. C.T.*, Murray J., at p. 430).

Noted.

Limited Resources

(54) Where there are quite limited resources available it may only be possible to provide for the basic needs of each spouse. On the other hand, different considerations would also arise where one spouse was independently wealthy before the marriage and the marriage was of a very short duration (*D.T. v. C.T.*, Murray J., at p. 430).

None of these scenarios presents here. This is an 'ample resources' cases albeit not the amplest of 'ample resources' cases.

Agreement Between Spouses

(55) It is evident that parties may well be able to compose their material and financial differences by agreement. Agreement is, in its nature, to be encouraged, a matter which is recognised in the legislation, in particular, by requiring the court to have regard to the terms of any existing separation agreement (*D.T. v. C.T.*, Fennelly J., at pp. 433-34).

There is no agreement.

XXII. Section 20

40. Turning next to s.20 of the Act of 1996, which provides as follows:

> "***20.— (1) In deciding whether to make an order under section 12, 13, 14, 15 (1) (a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.***
>
> Here, my only concern is with the spouses. There are no dependents.
>
> ***(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,***
> >
> > I have done this previously above.
> >
> > ***(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage or registration in a civil partnership of the spouse or otherwise),***
> >
> > I have had regard to same previously above.
> >
> > ***(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be,***

I have considered same previously above.

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

I have had regard to same previously above.

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

Neither spouse suffers from any disability.

(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,

I have considered this previously above.

(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,

I have had regard to same previously above.

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

No such income/benefits have been identified. The future availability of old age pensions has been considered previously above.

(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,

No such conduct presents.

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

I have had regard to same previously above.

(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring,

I have considered the pension funds previously above.

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

No other such rights have been raised as an issue.

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

There is no such agreement.

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

There are no dependants.

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

For the various reasons outlined in this judgment I consider this necessary predicate to present.

XXIII. Conclusion

41. There is a lot to the foregoing. So I request of the parties that they agree between them a form of order that reflects my judgment (obviously without constraining in any way their later ability to appeal any or all aspects of that order should they so desire). That order should reflect what I have indicated in the preceding paragraphs and should, at the least, include the following orders:

(1) an order for (a) the payment by Mr A of an annual lump sum payment of such grossed-up sum as pays Ms A the amount of [Amount 9] net per month payable for each full year to Mr A's retirement date, with (b) 'grossed up' monthly maintenance payable thereafter in such an amount as will enable Ms A to receive a monthly net payment of [Amount 9] *provided that* the net monthly amount payable under (b) may well need to be revisited at some future time if Mr A elects not to work post-retirement or such work brings in a much-reduced income.

(2) an order that the damages received in respect of [Property 2] be divided 50/50.

(3) with regard to the possibility of ongoing proceedings in [EU Member State 1], an order that the higher sum of [Amount 10] (as argued for by Ms A) be set aside. It seems better to err on the side of caution and if there is money left over at the end of the day this can be divided equally.

(4) as to the rectification of the family home boundary, as I understand matters, Mr A has actually offered more than Ms A has sought; hence, subject to counsel correcting me in this regard, an order for the amount that Ms A has sought.

(5) an order that the family home, [Property 1], and the property in [EU Member State 1] all be transferred to Ms A; and an order that [Property 2] be transferred to Mr A. (Mr A and Ms A might note that effecting these transfers will take time, not least in terms of sorting out the mortgage arrangements and I will make certain related orders in this regard).

(6) an order that the (smaller) Ireland pension fund go to Ms A and the (larger) Isle of Man pension fund go to Mr A, coupled however with an order that Mr A make an equalising payment of [Amount 14] to Ms A so that, in effect, both parties get an equal division of the total pension funds.

(7) an order that the [Bank 1] bank monies go to Mr A and the Irish bank account monies and the [Bank 2] compensation monies go to Ms A, coupled however with an 'equalisation payment' by Mr A to Ms A so that all of these monies are in effect divided equally.

42. Mr A will retain his shares portfolio.

43. Although I can see the logic of ordering that Ms A should receive some of the death-in-service benefit should it ever arise to be paid, as I understand matters the fund in question is outside this jurisdiction and so any order by me concerning the fund would be futile. If before

I come to making my written order, the parties can agree some alternative form of order regarding the death-in-service benefit I would consider including that agreed order in my final order (and almost certainly will include it if it has been agreed).

44. As regards the sum of money that Mr A advanced to one of the children of the marriage without consulting Ms A (and there should have been consultation) my sense is that this should be a liability of [Amount 11] for each party. The child who benefitted is a child of the marriage, Mr A (beyond not consulting Ms A and he *should* have consulted her) did nothing that no right-thinking parent would not do if a similar situation presented and there were the resources to assist. If Ms A does not wish to see one child favoured over her other children, I have respectfully suggested above that this can be addressed in her will.

45. As to the petition for a decree of divorce, the parties meet the criteria for granting same, are desirous of same, and I will make the decree sought. The post-divorce 'proper provision' will be as indicated above.

46. Finally, I note that that thanks to the delay caused by Ms A in bringing the decision of the Court of Justice to my attention after I reserved judgment (and when I was on the verge of issuing my judgment) – and I make no criticism but there <u>*was*</u> a delay – the markets-related figures at play in these proceedings may have moved on considerably, thanks to the battering that the stock and commodities markets have taken in recent weeks. It may therefore be that exceptional circumstances call for an exceptional re-visitation of the share/pension values at play in these proceedings. If Mr A wishes to make this contention, I will hear the parties on whether I can/should proceed in this exceptional manner before I make my final orders.

47. I will hear the parties as to costs.