THE HIGH COURT

FAMILY LAW

RECORD NO. 2017/72M

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

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

AND IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN

D.E.

APPLICANT

AND

F.G.

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 18th day of January, 2019

1. By these proceedings, D.E. ("the applicant") seeks decrees of judicial separation and divorce, and related reliefs. The special summons issued on 13th November, 2017 and came on for hearing before this Court on 6th November, 2018.

2. The parties were married on 10th July, 1999 in an overseas country (hereafter "OC") governed by an EU member state (hereafter "EUS"). The applicant is Irish and the respondent is a citizen of EUS. The parties first met in EUS, where the applicant was working, in 1994. He was working there teaching English in a language school and the respondent took a course there at around this time. The parties had a brief relationship, and soon afterwards the respondent departed to the OC to pursue a business proposition put to her by an acquaintance. This business proved to be very successful for a period.

3. There are three children of the marriage. The eldest, a daughter, was born in 1999. The second, also a daughter was born in 2001 and the third, a son, was born in 2003. It is apparent therefore that of the three children, one has already attained the age of majority, the second will attain it in the course of this year, and the third will not do so until 2021.

4. The children live with their parents in rented accommodation in Ireland, and have been doing so since the family came to Ireland from the OC in 2012. Following upon the breakdown of the marriage, in 2016, the respondent has divided her time between Ireland and the EUS. There is no dispute between the parties in relation to custody or access to the children, which is hardly surprising given their respective ages. Accordingly, the only issues to be adjudicated upon in these proceedings relate to the division of the assets of the family, having regard to their requirement to make proper provision for the parties and their children pursuant to s. 20 of the Judicial Separation and Law Reform Act 1989 ("the Act of 1989") and s. 20 of the Family Law (Divorce) Act 1996 ("the Act of 1996").

Background

5. The applicant went to visit the respondent in the OC in May of 1996. He stayed for about two weeks and then returned home to Ireland to resume his studies. However, he returned in September of 1996 and from that point onwards the parties lived together.

6. There is some dispute between the parties as to the status of their relationship at around this time. The respondent had come to visit the applicant in Ireland in 1995, and the applicant contends that it was then he proposed marriage to the respondent. He asserts that from the time they commenced living together in late 1996/early 1997, he considered that they were in a long term relationship together, whereas the respondent considers that they were not engaged to be married and that their relationship remained that of boyfriend/girlfriend, although living together.

7. The respondent became pregnant with the parties' eldest child in 1999, and they decided to get married. Up until this point, according to the respondent (and this was not disputed by the applicant), the respondent had been earning approximately €220,000 per annum from her business, and had been doing so since in or about 1995. When the applicant arrived in the OC, he worked at first as an English teacher. The respondent says that he earned €400 per month doing this, but the applicant contends that he was earning €1,200 per month from 1997 onwards and that all of his salary went into the household of the parties.

8. In April of 1999, before the parties married, the respondent and her business partner decided to buy a second shop from which to conduct their business. The respondent says that the shop was purchased for the sum of €170,000, which was funded in equal amounts by the respondent and her business partner. At the same time, they also put €170,000 worth of stock into the premises, again funding this amount equally, so that at this time the respondent and her business partner each funded their business venture to the tune of €170,000. From the time of the purchase of this shop, the applicant started to work for the respondent and her business partner. For this he was paid the same salary as another shop assistant, although he said in his evidence that he was also paid some commission. However, he said that the respondent's business partner was adamant that she and their family should not benefit any more from the business than he (the respondent's business partner). According to the applicant, he subsequently contributed very significantly to the success of the business, in particular because he was able to establish relationships with tourist guides and tourists to the area by reason of the fact that English was his first language. However, according to the applicant he received no financial recognition for this contribution to the business. The respondent acknowledges the contribution of the applicant to the business, but says that he was appropriately remunerated.

9. There is a significant dispute between the parties as to the terms upon which they entered into the marriage. I will return to this in due course. The year after they got married, the parties purchased a home for the sum of €360,000. According to the respondent, the purchase price was initially funded through cash provided from her funds of €126,000, with the balance being funded by way of a loan secured by a mortgage over their property. Subsequently, the respondent says that she reduced the mortgage from funds that became available to her from a high interest account of her own (from which she could not draw down funds at the time of the purchase of the house), in the amount of €206,000. The mortgage was thereby reduced to €28,000. The applicant does not deny that most of the money required to purchase the family home was provided by the respondent, but he was unsure as to the sums involved.

10. According to the respondent, business started to decline after 2001 which she attributed to the attacks upon the Twin Towers in New York, and subsequent international events. In 2006, the respondent's business partner decided to leave the business, and it was agreed with him that the respondent and the applicant would buy his share. The respondent provided €205,000 (from funds accumulated subsequent to the marriage) to purchase the interest of her business partner in the shop premises, and the applicant bought the shares of the respondent's business partner in the business for €4,190. It is agreed by the parties that the funds to purchase the interest of the respondent's former business partner came from funds belonging to the parties equally.

11. Thereafter, the business went into further decline. The respondent says that in 2007 they each had an income of €78,694 from the business. This reduced further to about €30,000 each per annum, but nonetheless the business remained profitable.

12. The parties agreed to wind down the business in an orderly manner. The applicant says that by this time he wanted to leave OC, but the respondent says that she never wanted to do so. The applicant maintains that they decided to leave OC so that the children could have some time in an English speaking country *i.e.* Ireland.

13. In any case they sold the shop for €116,000. By this time the stock had effectively been cleared out. They also sold their family home, for €565,000. There is no dispute between the parties as to what was done with the proceeds of sale of the house and the shop premises and I will return to this in due course. In 2009 they set up a language school in OC and the following year, established an art school. The respondent said that each of the parties worked on these ventures.

14. The parties came to live in Ireland (with their three children) in 2012. The respondent says that she did this in response to the applicant's wishes. The applicant maintains that the plan was to stay in Ireland for a period of about two years, and then to go and live in EUS. He said that his original plan was to study and train here with a view to setting up a school (presumably an English language school) in EUS where he felt it would be possible for the parties to earn a good living. However, he changed his mind about this when, after just three months of living in Ireland, the children expressed their happiness, to both the applicant and the respondent about their move to Ireland, and, according to the applicant, said that they wanted to stay in Ireland. This is denied by the respondent. In any case the parties continued living in Ireland and did not move to EUS. The applicant secured employment and has worked here ever since. The respondent has not worked outside the home. Relations between the applicant and respondent deteriorated, although according to the applicant relations had not been good for many years, and they had been living almost separate lives for a long time. Eventually, in September, 2016, the applicant informed the respondent that he wanted to separate. This had a devastating impact on the respondent, who suffers from depression. Other members of her family also suffer from depression, and her brother took his own life a number of years ago.

15. Since their return to Ireland, the family have been living in rented accommodation. The current rent is €1,850 per month. The applicant and respondent have continued to share this accommodation with their children. However, since the breakdown of the marriage, the respondent has travelled to and from EUS a great deal, where she spends time with her parents, who are elderly (and require care) and with friends. She has spent at least half of her time in EUS over the last two years, and it was one of the applicant's complaints that she fails to notify him sufficiently in advance of her movements. The applicant looks after all the needs of the children while the respondent is away as well as continuing his full time employment.

16. The applicant describes the current family home which the parties are renting as a four bedroomed house with a living room and playroom. He says that he cannot share a room with the respondent and as result he sleeps in the playroom, even when the respondent is away.

17. Each of the parties has made proposals for the resolution of these proceedings, and I will set those out in full presently. Suffice to say for now that the respondent's proposal would entail the continued rental of the current family home to the intent that the children would reside there at all times with one or other of their parents. When the respondent is in Ireland she would reside in that home with the children. During such periods, the applicant would have to move out and reside in whatever accommodation he secures for himself. When the respondent is in EUS, the applicant would move back into the family home. The respondent envisages such an arrangement continuing for a few years only, until sometime after the youngest child leaves school. She envisages returning to Ireland to be with her children every other month.

18. The respondent says that such an arrangement is necessary for her wellbeing, in order for her to maintain contact with the children and to be available to them as much as possible, as she wishes to be. However, even though she would like to be with her children all the time, she feels she cannot do so. She spent a year in Ireland (on a full-time basis) after the applicant said that he wanted to separate, but she suffered significant psychological trauma during this time and described herself as being "*on the edge*". She said she could not have stayed in Ireland any longer, and that it would not be good for either her own wellbeing or that of the children if she stayed in Ireland full-time. She said that it is better for the children that she rebuilds herself in the EUS, and she takes strength from her visits to that country. On the other hand, she feels that she is "*dying in Ireland*". The respondent has attended with a psychologist for therapy.

19. While the respondent has a Ph.D. (in marine biology), there is no possibility of her working in that area anymore. She was offered and took some translation work in the EUS, which she was offered through a friend, more as a means of encouragement than for financial gain, and she received a modest payment only for this work which she said was of the order of €2,000. While the respondent says that she is willing to work, she is not able to do so at the moment, but hopes that she will be able to do so in the future.

20. In response to the proposal of the respondent (that they should each share occupancy of the family home, on a month on/month off basis) the applicant says that he could not see this proposal working. He said that the house is not a hotel in which rooms are cleaned to hotel standard. Such an arrangement would, for the applicant, carry reminders of the respondent with which he would have difficulty coping. The applicant says that he would not feel comfortable sleeping in a room that he continues to share with his wife, even though not at the same time. He does not think that this would be healthy and he would feel unable to "move on". It is for this reason that the applicant has chosen to sleep in the playroom in the house, rather than the bedroom, over the last number of years. But the playroom is a very small room unsuited for use as a bedroom indefinitely. The applicant says that it is better for the children that the adults are clearly separated, and he said that the children are flexible and capable of adapting to changed conditions. The applicant does not feel confident that the respondent would adhere to structured arrangements for visiting Ireland, and she would be more likely to come and go as she pleases, letting him know her movements at short notice. In the applicant's view the respondent should acquire a property in Ireland where she can stay when visiting this country. The applicant expressed the view that the family resources are sufficient to enable the parties to buy a permanent home (in Ireland) each, which he said is the best solution for all concerned.

21. He was asked by counsel for the respondent how the children would see their mother when she is here, if they are residing with him in a new family home. He said that if the respondent is to be away most of the time, it would be better for the children to reside

with the applicant and he said that the respondent could keep her own apartment in Ireland where she could exercise access to the children. It is implicit from this that he envisages buying a home large enough to accommodate himself and the children, but that it is unlikely resources would stretch so as to enable the respondent to do likewise. So therefore the children would be unlikely to live with the respondent while she is here, and in the event that such an arrangement were to be implemented; they would, of necessity, be restricted to visiting her in whatever accommodation she acquires, or meeting her in public places. The children would however be able to visit and stay with the respondent in the EUS during their holidays.

22. All of that said, the applicant did confirm his willingness to continue renting the existing family home for a period, and to keep the children there. But that really solves nothing if, as he wants, the respondent cannot stay there. In any event, once he buys a house, he will hardly be able to continue paying the rent on the current family home, and it would be extravagant to do so. The applicant also said that, having regard to his age, he is very concerned to buy a house soon, while he may still get loan facilities.

The children's welfare
23. The children were all interviewed by Professor James Sheehan, consultant psychologist. The eldest child, A. will turn 20 years of age this year. Having started one third level course, she changed her mind and now hopes to start a different degree course in college next year. She is very close to her mother and wants her mother to look after herself first, and so she is happy for her mother to spend time in EUS. In her view, however, when the respondent is back in this country the applicant should move out to facilitate the respondent. However, she would have no objection to the applicant staying in the house while the respondent is there, as long as there is no arguing.

24. The second child, a girl, turns 18 years of age this year. She is in her final year in school and hopes to start a degree course next year. She informed Professor Sheehan that she would like her mother to be looking after them when she is Ireland, but wants to be able to spend time with both of her parents. She said that the respondent is always with them when she is home, but this is not so with the applicant (reflecting it must be said that the applicant is at work and the respondent is not working outside the home).

25. Finally, the third child turns 16 years of age this year. He is in transition year. In discussion with Professor Sheehan, he was most concerned about his parents arguing when they are in the same house. He would like to see the applicant acquire an apartment where he would stay when the respondent is in Ireland, and that the respondent should stay in the family home when she is here.

26. Professor Sheehan gave evidence that the children are "*three wonderful young people*" who have clearly had very good parenting. They have good relations with both of their parents, however, they want to be with their mother as much as possible when she is in Ireland, most probably because as a full-time mother she is able to nurture them and meet their day to day needs more readily than the applicant. Unsurprisingly, the most vulnerable of the children is the youngest, C., who is especially close to the respondent. Professor Sheehan thought that the children may not yet be aware that the respondent is intending to spend six months or a little more a year in EUS.

27. Professor Sheehan opined that the children's short and longer term interests are critically bound up in the next few years. It is clear from his evidence that providing a home and stability for them over the next few years is especially important for their longer term development. Professor Sheehan in his report of 12th June, 2018, stated that the focus must be on the education and psychological needs of the children over the next couple of years, and that the younger two children will need a lot of support around their schoolwork if their educational efforts are to bear fruit for them. He was of the view that it would be preferable that the younger two children in particular should be based mainly in the care of their mother over the next couple of years, with their father playing a supportive role in their lives during midweek and weekend periods.

28. On the other hand, Professor Sheehan also opined that the respondent is very vulnerable at the moment. He said that she made sacrifices to come to Ireland and it would not have been her first choice. However, he also said that the respondent, in his opinion, is a "*fighter survivor*".

29. Professor Sheehan said that for the respondent's plan to work, it would need to accommodate the children's schedules and their lives in Ireland. He was doubtful that the plan as put forward by the respondent would provide the children with the stability that they need. He queried what the respondent would gain from coming and going to EUS every second month, especially if she is not taking up employment in EUS. He felt that the respondent might need to show more flexibility in the interests of the children, by which I inferred that she may need to spend more time here than she would otherwise prefer. Professor Sheehan acknowledged that the respondent may feel the need to spend as much time as possible in EUS in order to survive from a psychological perspective, but on the other hand she faces something of a dilemma between doing that and being here for her children as much as they need her to be here. The respondent in her evidence gave an additional reason for spending so much time in EUS- in order to be able to avail of social security benefits there in due course. Professor Sheehan expressed the view that in spite of the ages of the children, an access order would be helpful for the two younger children and especially C. However, he said that there is no obvious or easy way forward. The situation is very difficult for both the parents and the children, and, in his opinion, one of the most challenging questions is whether or not the respondent can spend enough time in Ireland to care for the needs of the children.

The marriage contract
30. One of the more unusual features to this case is that there is disagreement between the parties as to the basis upon which they entered into the marriage. The applicant contends that from the time they started living together, he always assumed that everything was shared. He said that when they got married, he took the view that being in a marriage they were "*part and parcel of the same adventure*". He noted that they bought their family home in OC in their joint names and that when the opportunity came to acquire the interest of the respondent's business partner, that share was put into the name of the applicant.

31. The applicant was asked if he recalled any discussions about the terms of the marriage before or at the time that the parties married. He said that on the day that they were married, the parties worked until about 12.30 p.m. and at 2.30 p.m. they went to the registry office. There was a discussion with a public official or registrar just before the marriage ceremony itself. The applicant was not aware that this would be necessary and he thought it was just a formality. At the time, according to the applicant, his standard of fluency in the language of OC (which is also the language of EUS) was intermediate. He said that he would have understood day to day matters, but not matters of complexity, especially legal matters.

32. The applicant said he remembers being surprised at the idea of a prenuptial agreement. He said that he had always understood marriage to involve equal ownership of all assets. He said that on the day, he understood the official/registrar to explain that it was possible to choose between two forms of marriage contract:-

> 1. A contract whereby assets belonging to the parties at the time of the marriage remain in the separate ownership of the parties to the marriage, and revert to those parties in the event of divorce; and

2. A contract involving equal ownership of both parties of all assets, regardless as to when the assets were acquired.

33. He understood that in rejecting the first option, the parties in effect agreed to enter into a marriage contract involving equal ownership of all assets, *i.e.* the second form of contract. The applicant said that he later discovered that there is in fact a third option available to parties getting married in OC (which it should be stated is subject to the laws of EUS) and that is that the parties, in the event of divorce, retain those assets that they had before the marriage, but anything acquired during the marriage would be shared equally. He said that he understood this to be the default position in the event that the parties, at the time of marriage, failed to accept either of the other options referred to above. The applicant said that he was shocked to discover that this was the position being adopted by the respondent in these proceedings, as he only discovered that it was the respondent's view that they entered into the marriage on this basis about two years ago. In short, it is the applicant's contention that the parties expressly rejected the idea of electing for any form of marriage contract and proceeded to get married without so electing, on the understanding that they were getting married, on the same basis that they would if they were getting married in this jurisdiction. He said that he understood the parties were accepting equal ownership of all assets from the date that they got married. The applicant acknowledged that he understood that OC was governed by the law of the EUS but he understood this not to be of any consequence because, as he understood the situation, the law of the EUS, insofar as it applied to marriage, and assets belonging to the parties at the time of the marriage, related to assets in the EUS itself, and/or Ireland (by reason of the fact that the applicant was Irish), but not assets located in the OC.

34. The respondent gave evidence that the meeting with the registrar or public official concerning the form of marriage contract and the marriage ceremony took place about 10 days before the marriage, and not on the date of the marriage. She said that the official explained the options available to the parties and that her understanding was and is that it is obligatory to elect for a particular matrimonial regime. She went so far as to say that if you do not do so you are not (legally) married.

35. She said that when a person in the OC or the EUS marries a person of a different nationality, the official must make certain that that person understands the nature of the marriage contract. In the case of the applicant, the respondent points out that by this time the applicant had been living in the OC for three years, and prior to that he had spent time in the EUS. She said that he spoke the language of the EUS/OC fluently and in fact that a year later he did an exam for residency of the OC in which he was required to prove his proficiency in the language, and he scored 19/20, indicating full fluency.

36. The respondent said that the official satisfied himself that the applicant was able to speak the local language fluently and explained the three options available to parties getting married:-

1. Full separation of all assets;

2. full sharing of all assets; or

3. parties maintaining assets owned by them at the date of the marriage, but sharing all assets acquired thereafter.

37. The respondent explained that if parties failed to elect for a particular type of contract, then the default position is number three above. She went on to say that 86% of parties getting married elect for number three. She said that in the case of the parties, they discussed the matter and they specifically chose option number three.

38. The respondent was adamant that the meeting with the public official was at least 10 days in advance of the marriage as this is a legal requirement. Following upon that meeting, notice of intention to get married must then be advertised. The respondent is also adamant that the applicant would have fully understood, without any difficulty, what was explained to him about the different types of marriage contract.

39. A marriage certificate in the local language of OC/EUS was handed into Court as well as a translation of the same. There is nothing in either document to indicate the availability of any particular marriage contract, or any choice made by the parties, or any default position. The certificate is simply that; recording that the parties married on 10th July, 1999, the names of their parents and witnesses etc.

40. The applicant does not dispute that there are different forms of marriage contract in the OC/EUS. What he does dispute is that he was fully aware of the different types of contract at the time that he got married and in particular that he was aware of option three or that that would be the default position in the event that parties failed to elect for a particular type of contract.

The means of the parties

The means of the applicant
41. In his affidavit of means sworn on 24th October, 2018, the applicant states that he has outgoings of €6,135.50 per month. Of this, €805 relates to school fees which he states are currently paid by the respondent from rental income received from one of the investment properties in Las Vegas, to which I refer below.

42. The applicant receives a gross annual income of €85,300 per annum from his employment, resulting in a net monthly income of €4,499.78. He is currently receiving payment of the child benefit for the two younger children in the sum of €280 per month.

43. His outgoings include the sum of €1,800 per month for rent in respect of the family home. The applicant's principal liability arises from these proceedings which at the outset of this hearing was estimated to be €20,000 plus VAT, but by the conclusion of the same will amount to somewhat more. The applicant also owes his employer €5,000 in respect of money borrowed to purchase a car.

44. The applicant claims to be the joint beneficial owner of four investment properties in Las Vegas which, at the time that he swore his affidavit, he claimed to have a value of between €600,000 and €650,000 (in total). He also claims to be the joint beneficial owner of savings held in the name of the respondent in New Zealand having a total value of €200,000.

45. The applicant also has €53,000 in a bank account in this jurisdiction. He has a pension fund with Friends First valued at €19,207.50.

The means of the respondent
46. In her affidavit of means sworn on 1st November, 2018, the respondent claimed to have outgoings of €4,501.50 per month in respect of the children and €1,267 in respect of her personal outgoings. The outgoings that she identifies in respect of the children overlap significantly with those of the applicant. So, for example, she includes the house rent as one of her outgoings, in the sum of

€1,800 per month, but it appears that is paid by the applicant. She also includes school fees for the two younger children in the sum of €512 per month, which the applicant had included in his affidavit of means in the sum of €805, but which he said were discharged by the respondent. In any case, the respondent says that the outgoings for the children which she discharges directly come to €1,180 per month. Even at that however, there seems to be some overlap between the monthly expenditure claimed by both parties, although neither took issue with this during the course of the proceedings.

47. The respondent says that she receives rental income (net) from the Las Vegas properties in the sum of €1,423 monthly, or €17,079 per annum. This is after payment of taxes and agent's fees. She says that she also receives €236 monthly in respect of interest on the New Zealand bank accounts.

48. The respondent claims to be owner of the Las Vegas properties which she valued as at 9th April, 2018, in the sum of €484,000. She also claims full ownership of the savings account in New Zealand in the sum of €200,000.

49. She refers in her affidavit of means to a bank account held with Bank of America in the USA as having a balance of €106,000. It appears however from a notation on the affidavit that this may be an error and should instead be €10,600. In an earlier affidavit of means sworn on 27th February, 2018, the respondent says that there is €8,000 in this account. She also refers to a bank account in the Bank of Wells Fargo, in the USA, having a balance of €11,000 on 1st November, 2018. The respondent also identified a number of other bank accounts with smaller balances.

50. The most significant area of dispute between the parties in these proceedings relates to the entitlement to ownership of the Las Vegas properties and the New Zealand bank account. This dispute largely revolves around the understanding of the parties regarding the nature of the relationship that they entered into when they got married.

51. Before dealing with that I should mention that there is also a measure of disagreement regarding the value of the Las Vegas properties. Somewhat surprisingly, neither party had procured a valuation prior to the hearing of these proceedings, notwithstanding that a significant disparity in their respective valuations of these properties was apparent from their affidavits of means, with the applicant contending the four properties taken together had a gross value of between €600,000 and €650,000, and the respondent contending that they had a value of €484,000.

52. In any case, valuations were procured during the course of the proceedings. It must be observed however that they were procured in some haste and that the valuer provided the valuations without having had the opportunity to view the properties. The valuations were prepared by reference to comparisons with other properties. In any case, the combined estimated value of the four properties is now €838,000. However, any disposal of these properties would be subject to capital gains tax payable in the United States at the rate of 15%, and also a sales commission which I was informed could be at the rate of between 6 and 8%. The parties are agreed on the source of the funding for the acquisition of the Las Vegas properties, as well as the funds in the New Zealand account. The funds came from the proceeds of sale of the dwelling house in the sum of €565,000, and the proceeds of sale of the jewellery shop in the sum of €117,000. The Las Vegas properties were acquired for a total sum of €337,000. The balance of the funds then available, amounting to €345,000, were lodged in four different deposit accounts in New Zealand. These funds have since reduced to €200,000 as a result of living expenses and also an investment in an unsuccessful business enterprise, by the parties, in the intervening years.

53. The Las Vegas properties were bought on the advice and with the assistance of the son of a good friend of the respondent who was working in real estate in that part of the United States. Three of these properties were bought, in the first instance, in the joint names of the parties, and the fourth was bought in the sole name of the respondent. Subsequently, but within quite a short period (according to the applicant, a number of months) it was decided that the three properties acquired in joint names should be transferred in the sole name of the respondent. The reason for this transfer is another area of dispute between the parties.

54. The applicant contends that they were transferred into the sole name of the respondent for tax reasons. He said they did not take tax advice on the issue and the applicant, having researched the matter himself, came to the conclusion that if the properties were in the sole name of the respondent, it would be more tax efficient because she would not be liable to tax in Ireland on that income, whereas he, the applicant, would be so liable. The respondent, however denies this version of events. She says that the properties should all have been bought in her name in the first place, and that the first three properties were bought in joint names in error. The transfer of the same into her sole name was to correct this error. The respondent says that the parties decided before they moved to Ireland that the houses in Las Vegas should be held in her name because their value at the time represented only half of the value of the funds brought by the respondent into the marriage. Accordingly, she says the parties agreed that the Las Vegas properties should belong to her solely. She said it was to be her source of revenue upon leaving the OC, and also her pension. She says the parties specifically spoke about this issue and were agreed upon the treatment of the Las Vegas properties.

55. As to the value of the assets that she brought to the marriage, the respondent claims that prior to getting married she had:-

1. Half the value of the first shop the respondent shared with her business partner, which was sold for €67,000 - €33,500;

2. half the value of the stock in the business at the time she married, having a value of €148,000;

3. half of the value of the second shop she shared with her business partner, later sold for €116,000:- €58,000.

4. Half the value of her business account:- €210,000; and

5. Savings up to the time of the marriage:- €210,000.

56. All of this comes to a total of €660,000, which the respondent says belonged to her solely at the time of the marriage, whereas the applicant had no more than a few thousand euro at that time. The respondent estimates that, of their current assets, €340,000 has been generated since the parties married.

57. In the course of her evidence, the respondent said that in her estimation, in their twelve years together in the OC, she was responsible for 78% of the income generated, and the applicant was responsible for the balance of 22%. For the six years following upon their return to Ireland, the respondent estimates that she was responsible for 47% of the funds expended by the family i.e. while the applicant was not earning during this period, her savings in the New Zealand accounts were used and applied towards family expenditure. The balance of 53% during this period was accounted for through the salary of the applicant. So the respondent has calculated that, over an 18-year period, she contributed 68% of the running costs of the family, and the applicant contributed the

balance.

The proposals of the parties
58. The parties each made open offers to the other during the course of the hearing. On the second day of the hearing, the respondent offered to resolve the proceedings on the following basis:-

1. That there should be joint custody of the children between the parties. The respondent proposed that the parties share custody on a month on/month off arrangement in the family home now rented by the parties;

2. that the sum of €100,000 should be transferred from the New Zealand deposit account and placed into a joint account in the names of both parties to discharge all of the following (as they arise):-

(a) the rental of the family home now occupied by the parties

(b) all outgoings of the children, except for food (to be funded by the applicant).

3. The balance in the New Zealand bank account amounting to approximately €110,000 to be divided equally between the parties;

4. The Las Vegas properties to remain in the sole name and for the sole benefit of the respondent;

5. No orders as to maintenance or pensions.

59. In the respondent's estimation, the transfer of the €100,000 from the New Zealand account into an account held in joint names, applied in the manner suggested by the respondent, would, together with the income of the applicant, meet the needs of the family for the next two years. The respondent's proposals do not go any further than this period. At that juncture, if this proposal were implemented, there would be no family home available to the children at that point in time unless the parties had managed to make other arrangements in the meantime. While all three children would be over the age of 18 by that time, the third will only turn 18 in the course of 2021, and all three are likely to be in third level education.

60. The applicant made the following proposal to the respondent to resolve these proceedings on the fourth day of the trial:-

1. The respondent to retain three of the Las Vegas properties having a value of approximately €403,000;

2. the respondent to retain €90,000 from the New Zealand account, and €15,000 of cash currently held in her name;

3. The applicant to receive one of the Las Vegas properties valued at €326,000;

4. the applicant to receive €125,000 in cash from the New Zealand account.

Based on current value the above proposals would mean that the respondent receives assets having a value of approximately €508,000, and the applicant receives assets having a value of €451,000.

5. The children to reside with the applicant in the current rented family home or in any accommodation acquired by the applicant in the future.

6. The respondent to leave the family home within a fixed period.

7. Each party to discharge their own rent/accommodation costs. The applicant will discharge the day to day costs of maintaining the children as they arise as long as they live with him.

8. The children will be free to reside with the respondent in whatever accommodation she may acquire for herself, by rent or by purchase, when she is in Dublin. The respondent will be responsible for the costs of maintaining the children during such periods, as well as any holiday expenses of the children.

9. the applicant to provide a fund not less than €36,000 to be maintained and applied towards the educational expenses of the children and to fully indemnify the respondent against any liability in respect of future education costs.

10. Each party to retain their own pensions, such as they are.

Conclusion
61. The first observation to make is that while this is a family with significant resources at its disposal, and while those resources would be more than adequate to meet the needs of the family living as a single unit in one property in Dublin, they are not adequate to support the acquisition of two family sized properties in the Dublin area. The second significant problem presented by these proceedings arises out of the positions adopted by the parties, for perfectly understandable reasons of their own. First, there is the fact that the applicant finds himself unable to tolerate sharing accommodation with the respondent in any way, i.e. even on the basis proposed by the respondent whereby they would not actually be sharing the house at the same time, as has been the case in recent times. However, aside altogether from the particular difficulty that the applicant would have in tolerating sharing the same house as the respondent, it is not difficult to understand why he would be reluctant to accept the respondent's proposal to move in and move out of his own house on a month on/ month off basis.

62. Secondly, the respondent, from a psychological perspective, is unable to live in Ireland on a full-time basis and is, in effect, in the process of disengaging herself from this country and taking up residence in EUS. This is not her personal preference in the sense that she would much prefer to be living with her children, and that would also be the preference of her children, but the respondent feels unable to cope psychologically with remaining in Ireland on a full-time basis.

63. Leaving money to one side, in order to solve the personal problems of the parties it would be necessary to acquire either two or

three family sized properties in Dublin. Even if it two properties could be acquired, this would necessitate the children moving from one house to another every second month, which would be highly disruptive to them and their efforts to progress at the important stages that they are at in their respective lives. But as I have said already, the resources of the family do not extend to acquiring two family sized properties in the Dublin area.

64. In exercising its statutory powers, whether pursuant to the Act of 1989 or the Act of 1996, the Court is obliged to ensure that such provision is made for either spouse and any dependent children of the family as is adequate and reasonable having regard to all of the circumstances of the case. These are statutory obligations imposed upon the courts and it seems to me that it is incumbent upon the court to discharge its statutory obligations in the first instance, before any question can arise as to the enforcement of a prenuptial agreement. In cases where there are ample resources, in excess of the needs of the parties (as determined by the court) such agreements may well be enforced or at a minimum are likely to influence the court as regards assets and resources that are in excess of the needs of the family as determined by the court, but we are not dealing with such a case here.

65. In arriving at this conclusion I have had regard to a number of authorities to which I was referred, but in particular the decision of Irvine J in the Court of Appeal in the case of *Q.R. v. S.T*. [2016] IECA 421 in which she said, at para 70:-

> "As to the assets to which the court must have regard when determining proper provision, the authorities make clear that all property and income, no matter how it was acquired is available for proper provision. This is so regardless of whether any particular asset was required by one of the parties throigh inheritance or as a result of their own endeavours prior to the marriage."

66. Counsel for the respondent argued persuasively that, as an alternative to enforcing the agreement which the respondent contends was the basis upon which the parties were married, the Court should, at a minimum, have regard to that agreement in determining these proceedings. But I think the reality in which the parties find themselves in these proceedings is such that, once account is taken of their needs, and assets applied accordingly, the argument becomes somewhat academic.

67. For that reason, I do not believe that it is necessary to resolve the controversy as between the parties in relation to whether or not they were married on the terms argued on behalf of the respondent or on the terms argued on behalf of the applicant. I would, however, make two observations in relation to that issue. The first is that the marriage certificate introduced into evidence gives no indication as to the choice of contract made by the parties. This is somewhat surprising. One would imagine that there would be some documentary evidence available to demonstrate the choice of marriage contract made by the parties, if matters are indeed as argued by the respondent. Additionally, no evidence was placed before the Court at to the applicable law in either the OC or EUS as regards the basis upon which parties enter into the marriage contract.

68. Secondly, insofar as the applicant contends that he simply assumed that he was getting married on the same basis that he would do as in this jurisdiction, and that as part of that assumption he assumed that the parties would own all assets of the marriage equally, he is obviously mistaken, as there is no such presumption in Irish law.

69. I turn now to decide what I consider to be the fairest and most appropriate distribution of resources having regard to the needs of the parties and their children. Firstly, and most obviously, the children of the marriage, who are still dependent children, require a stable base, and that is likely to be required until the youngest has finished his education. Based on the family circumstances as outlined to me, it is likely therefore that his needs will continue up until the time he is 23 years of age *i.e.* 2026. Since the older children have expressed an interest in third level education, it is likely that they too will remain dependent until that age, or thereabouts.

70. The applicant is in gainful employment and is optimistic about his future in this regard. However, he will be 49 years of age this year, and his time for obtaining a mortgage is undoubtedly running out. His salary is €85,300 per annum and leaves him a net income of just under €4,500 per month. It is clear that this salary will not enable the applicant to obtain a mortgage to acquire a family home, and he will require a significant lump sum in order to do so.

71. I have heard no evidence at all as to how much might be required for this purpose. But the price of accommodation in the Dublin area has again acquired an undesirable notoriety and in my view funds of the kind put forward in the proposals of the applicant to resolve these proceedings (as outlined at para. 60 hereof), taken together with the applicant's income, would almost certainly be required to enable the applicant to acquire a reasonable standard of family home for himself and the children.

72. Depending on the values of the properties concerned, as I observed in para. 60 these proposals will leave the respondent having a value of approximately €508,000.

73. While it is an entirely matter for the respondent, she could choose to liquidate all of the assets in her name and acquire an apartment in Dublin with that amount, from which the children could come and go whenever she is here, which she has indicated will be every other month. She could also use such a property to generate additional income by way of Airbnb during those months when she is not here.

74. As to responsibility for the maintenance of the dependent children, the applicant proposes that he shall be responsible for their maintenance while they live with him, and the respondent should be responsible for maintenance of the children during any period they are residing with her. As I have said, the applicant is in gainful employment, and he is optimistic about his future. The respondent, on the other hand, is unable to pursue gainful employment at the moment by reason of her mental state. She did say that she hopes to secure employment in the future, and that would clearly be desirable from both a financial and psychological perspective. Having regard to the uncertainty as to her future income earning capacity, and to the existing earnings of the applicant, I think it is appropriate that the responsibility for the ongoing maintenance of the dependent children should rest fully with the applicant. I will discuss with the parties how this should be implemented during any period when any of the children are residing with the respondent.

75. Finally, in order to comply with the terms of this judgment, the respondent will have to sell a property or properties in the United States that are solely in her name, and to transfer monies from the bank account in New Zealand. In relation to the latter, the simplest order to make is to direct payment by the respondent of the equivalent of €125,000 from that account to the applicant. In relation to the former, I will not direct the sale of any specific property in Las Vegas, but will instead direct simply that the respondent pays the applicant €265,000 not later than nine months from the date hereof. This sum takes account at the valuation of the most valuable of the four properties in Las Vegas, and of the estimated deductions applicable to such a sale. Alternatively, to comply with this order, the respondent may in lieu transfer into the sole name of the applicant the property located at 152 Cliff Valley Drive, Las Vegas, valued in the sum of $375,000 as at 11th July, 2018.

76. In arriving at the conclusions that I have above, I have had regard to the matters referred to in s. 20(2) of the Act of 1989, and s. 20(2) of the Act of 1996, which are substantially the same in content. In the interests of completeness, I set out below, each of those matters, and a brief comment on the manner in which I have taken the same into account:-

(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."

At the moment, and for the foreseeable future, and aside from income on investments, it is only the applicant has an income of any consequence, although the respondent will have an earning capacity in the future. The earning capacity of the applicant is not sufficient, however, to acquire a dwelling house and he, therefore, needs sufficient funds to supplement his income to enable him to acquire a dwelling house to accommodate both himself and the dependent children of the family. In arriving at the division of assets that I have, I have tried to strike a balance, as best possible, between the needs of the applicant and the dependent children to a home, and the needs of the respondent to both a home and an income. Since, investment income aside, the respondent does not have an income at the moment, and also having regard to her greater contribution to the accumulation of assets, I considered it appropriate that she should have the greater proportion of the accumulated assets referred to above. I should add that her investment income, currently about €17,079 per annum will be diminished by the sale of the apartment in Las Vegas and any investment she may make to provide herself with accommodation, and so I have disregarded it, other than to take the view that she is likely to need whatever investment income her assets produce.

(b) The financial needs, obligations and responsibilities of the parties now and in the foreseeable future.

The same rationale applies to this heading as to the matters referred to in para. (a) above. It is to be hoped that the standard of living of the parties may be preserved at current levels and not negatively impacted by the orders now made, although running two households inevitably costs more than one. I have already described above the financial requirements of the parties as they are currently, as disclosed in the affidavits of means of the parties. The most significant areas of change into the future are likely to be the costs incurred by the parties in acquiring a permanent home or homes, and the educational costs of the children as the second and third children in the family enter third level education. I have taken account of all of these factors as best possible in making the orders that I have, insofar as it is to be hoped that the applicant will have sufficient funds at his disposal (between the funds now to be transferred to him and borrowings) to acquire a home and still have a sufficient reserve to meet the educational costs of the children, while at the same time leaving the respondent with sufficient to provide for her own needs.

(c) The standard of living enjoyed by the family before the proceedings were instituted.

The same rationale applies to this matter as to the matters referred to in paras. (a) and (b) above.

(d) The age of the spouses and the duration of the marriage.

The age of the spouses, and in particular the respondent, is especially relevant to their ability to borrow funds to purchase a dwelling house and I have taken it into account accordingly. The duration of the marriage is not of itself an especially significant factor in this decision, although it may be observed that the applicant would have assisted the respondent in the accumulation of assets in the work that he did in their business both before and after they were married.

(e) "Any physical or mental disability of either of the spouses."

The respondent is clearly very vulnerable mentally at the moment and her mental health is of concern. I have already described above her need to reside in EUS at least half of the year, and the difficulties that this presented in deciding the most appropriate orders in these proceedings. If the respondent was free to live with the dependent children full time in this country then different orders would have been made. This is no criticism of the respondent who must look after her own mental health as best she sees fit.

(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."

While it was the entrepreneurial skills and efforts of the respondent that generated most of the wealth now held in the name of the respondent, as I mentioned above, the applicant contributed to the accumulation of assets by the respondent in working in her business both before and after the marriage. In more recent years, it is the applicant who has earned the income upon which the family relies, although they also have had to have recourse to the assets accumulated by the respondent. This factor was neutral in the decisions that I have had to make in this case which were largely made upon my assessment as to the needs of the applicant, the respondent and the dependent children going forward.

(g) "The effects on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period and 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."

Both parties were working in the business they owned before returning from the OC to this country. Following upon that, the respondent has taken up responsibility for caring for the dependent children, while the applicant has taken up employment. In any case, the decisions that I have made as regards the allocation of resources in the family were made for the reasons set out above.

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

The applicant is entitled to no such benefits at the moment. The respondent is establishing herself in EUS with the intent in the future of being entitled to receive benefits in that country. For the moment, however, she is not entitled to any such benefits.

(i) The conduct of each of the spouses.

This is not a factor in these proceedings.

(j) "The accommodation needs of either of the spouses."

I have already addressed this above.

(k) "The value to each of the spouses of any benefit … which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring."

This does not arise.

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

This does not arise.

77. In relation to the needs of the dependent children, and s. 20(4) of each of the Acts of 1989 and 1996, I have already described how each of the children is dependent upon their parents and are still in education. None of the children have any mental or physical disabilities. The Court was not informed that any of the children had any income, and it is presumed that insofar as they have, it is typical of students in second and third level. The orders that I have made take into account that the children or each of them are likely to remain dependent until the age of 23.