Neutral Citation: [2016] IEHC 330

THE HIGH COURT

FAMILY LAW

[2011 54 M]

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

BETWEEN

H.N.

APPLICANT

AND

B.N. (née B.Y)

RESPONDENT

AND

J.Y.

NOTICE PARTY

JUDGMENT of Mr. Justice Keane delivered on the 27th April 2016

Introduction
1. In these proceedings, the applicant husband ("the husband") and the respondent wife ("the wife") both seek a decree of judicial separation and each seeks various ancillary reliefs pursuant to the terms of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act") and the Family Law Act 1995 ("the 1995 Act").

Background
2. The parties were married to each other according to the laws of the State on the 12th of December 2004. There are no children of the marriage. The parties separated in November 2010 and have not lived together since that date.

3. Throughout their marriage the husband and wife jointly managed a farm consisting of some 90 hectares of land ("the farm"), which is the principal asset of the parties. The farm has been in the wife's family for several generations. It is located on the outskirts of a medium sized town. For much of their marriage, the husband and the wife resided in a house in that town, in which the husband continues to reside.

4. The notice party is the wife's mother. She has lived in a period home located on the farm ("the farmhouse") since she got married to the wife's father in 1967; the wife has also resided in the farmhouse since the breakdown of the parties' marriage in or about November 2010.

5. The family farm represents the principal matrimonial asset in dispute in the proceedings.

6. The wife's father, sadly since deceased, had transferred the farm to her on the 11th of May 2005 ("the 2005 conveyance"), shortly after the parties married on the 12th December 2004. On the same day, the wife made a further agreement with her father that, in consideration of that transfer, the wife, her successors in title and assigns, covenanted to provide the wife's brother with accommodation, alternative to the farmhouse but on the farm lands, within five years of the date of death of the wife's mother, who is, happy to say, still living. The wife's brother was to have the right of exclusive occupation of that alternative dwelling house for life, pending construction of which he was to have a right of residence in the farmhouse, and was to be provided with certain livestock and associated grazing rights. The wife also agreed to a right of residence in the farmhouse and a right to maintenance out of the farm income for each of her parents for their natural lives (to include the provision of a taxed and insured vehicle for their own use).

7. In 2009, the wife transferred the farm into the joint names of herself and her husband ("the 2009 conveyance"). In consideration of this transfer, the husband also covenanted to support the wife's parents in the manner already outlined and is, presumably, bound by his wife's covenant with her brother. A small portion of the farm, essentially comprising a particular field, was contained in a separate folio and, by oversight it would appear, was not transferred from the wife's name into joint names at that time.

Procedural history
8. The proceedings commenced by way of special summons issued on the 4th of October 2011. In that summons, the husband seeks a decree of judicial separation pursuant to the provisions of s. 2(1)(b) and (f) and s. 3 of the Judicial Separation and Family Law Reform Act 1989, together with various ancillary reliefs pursuant to the provisions of the Family Law Act 1995 ("the 1995 Act"). Those ancillary reliefs include: the transfer to him of the family farm, pursuant to s. 9 of the 1995 Act; the sale of the family farm and the disposal of the proceeds between the parties, pursuant to s. 10(1)(a)(ii) of the 1995 Act; the partition of the lands comprising the family farm between the parties, pursuant to s. 10(1)(e) of the 1995 Act; and the determination of any issue between the parties as to the title or possession of, inter alia, the family farm, pursuant to s. 36 of the 1995 Act.

9. In an affidavit sworn on the 12th December 2011, the wife contests the husband's entitlement to the reliefs that he seeks and, in turn, claims reliefs including: the transfer to her of the family farm, pursuant to s. 9 of the 1995 Act; the transfer to her of the house

in town, pursuant to the same provision; an order for sale of the house in town and the disposal of the proceeds between the parties, pursuant to s. 10(1)(a)(ii) of the 1995 Act; and an order for the partition of the property (presumably, the farm), pursuant to s. 10(1)(e) of the 1995 Act.

10. In circumstances that remain unclear, on the 26th April 2013, the court directed that the wife's mother be given notice of these proceedings, pursuant to the provisions of s. 40(b) of the 1995 Act. Section 40(b) provides, in relevant part, that:

> "Notice of any proceedings under this Act shall be given by the person bringing the proceedings to … any other person specified by the court."

11. Order 70A of the Rules of the Superior Courts ("RSC"), as amended, deals with the appropriate procedure in respect of "family law proceedings" as therein defined. Such family law proceedings include those for ancillary relief in an application for a decree of judicial separation and proceedings pursuant to s. 36 of the 1995 Act, such as the Court is concerned with here.

12. Order 70A, rule 11(1) provides that an applicant or respondent may, at any stage, bring a motion for directions to the Court, *inter alia,* where an order is sought concerning the sale of any property in respect of which any other party has or may have an interest. Order 70A, rule 11(2) provides that the Court may, upon such motion or of its own motion, make such order or give such direction pursuant to s. 40 of the 1995 Act as appears appropriate. Order 70A, rule 11(3) provides that, save where the Court shall otherwise direct, a notice party who wishes to make representations to the Court shall make such representations by affidavit which shall be filed and served on all parties to the proceedings within 28 days of service upon them of the notice of application for relief or within such further time as the Court may direct.

13. Order 70A, rule 12 provides that the Court may, at any stage, direct that the parties to any proceeding exchange pleadings, in relation to all or any of the issues arising in the proceedings between the parties or between the parties or any of them and any third party on such terms as appear appropriate and may give such directions in relation to the matter as appear necessary.

14. Section 15(5) of the 1995 Act states:

> "Where a spouse has a beneficial interest in any property, or in the proceeds of the sale of any property, and a person (not being the other spouse) also has a beneficial interest in that property or those proceeds, then, in considering whether to make an order under this section or section 9 or 10(1)(a) in relation to that property or those proceeds, the courts shall give to that person an opportunity to make representations with respect to the making of the order and the contents thereof, and any representations made by such a person shall be deemed to be included among the matters to which the court is required to have regard under section 16 in any relevant proceedings under a provision referred to in that section after the making of those representations."

15. In directing that the husband was to give notice of the proceedings to the wife's mother pursuant to s. 40(b) of the 1995 Act, and that, according to the said notice, she was to be informed of her right to make representations in relation to her rights of residence at, and support and maintenance from, the family farm, it is not clear whether the court was invoking the provisions of s. 15(5) of the 1995 Act or the terms of Order 70A, rule 11 of the RSC, or both. More importantly, it is not clear whether the Court was directing that the default procedure under Order 70A, rule 11(3) should apply, i.e. that the wife's mother was to put any representations that she might wish to make in that regard on affidavit, or that, pursuant instead to the terms of Order 70A, rule 12, the Court was directing that she plead her case against the applicant and respondent as a fully fledged third party.

16. In any event, the wife's mother swore an affidavit on the 15th May 2013 in which she put forward representations on her own behalf and also on behalf of her son (the wife's brother). On the same date, the wife's mother also swore an affidavit of means. While the delivery of such an affidavit on the part of a person on notice under s. 40(b) of the 1995 Act, who is making representations pursuant to either s. 15(5) of the 1995 Act or a direction under Order 70A, rule 11 of the Rules, does not seem to be contemplated under Order 70A, rule 11(3), it might, I suppose, be considered as a further part of the representations by affidavit that a notice party is entitled to make under that rule.

17. What is more difficult to understand is the fact that the wife's mother had already purported to deliver "Points of Claim" on the 9th May 2013. If this was done pursuant to the power of the Court under Order 70A, rule 12 to direct the exchange of pleadings between the parties or any of them and the wife's mother, as a third party, I have not been apprised of any such direction. Of course, if there was no such direction then no "Points of Claim" should have been delivered and it would have been unnecessary to have separate legal representation for the wife's mother both prior to, and to date during, the trial of the action. In the course of argument it was suggested that the Court was, rightly or wrongly, understood to have given, albeit informally, a direction under Order 70A, rule 12 at a hearing on the 10th May 2013 and that the Points of Claim dated the 9th May 2013 were, therefore, until then in the nature of a draft.

18. Whatever their status may have been, it seems that those Points of Claim were subsequently delivered to both of the parties. In them, the wife's mother goes beyond making the representations that she is entitled to make - either under s. 15(5) of the 1995 Act or pursuant to a direction of the Court under Order 70A, rule 11 of the Rules - and to which the Court is required to have regard under s. 16 of the 1995 Act in considering the appropriate orders to be made by way of proper provision for each of the parties, by asserting her own claim to certain reliefs in the proceedings between her daughter and son-in-law.

19. Those reliefs include: a claim to the residence and maintenance rights the subject of the covenant between the wife and husband, of the one part, and the wife's mother and father, of the other part; and a claim on behalf of the wife's brother in respect of the accommodation agreed to be provided for him by the wife and husband. Both of these claims are expressed to be claims for "proper provision" although, as that term is applied under the 1995 Act, it is plainly limited in its application to the spouses and any dependent member of the family concerned, with "dependent member of the family" being defined under the 1995 Act as limited to a child of the spouses, or one adopted by the spouses, or one in respect of whom the spouses are *in loco parentis.*

20. Perhaps understandably, the wife did not deliver any response to her mother's Points of Claim. The husband delivered "Points of Defence" in response to it on the 20th November 2013. Again, the Court is unaware of the extent to which this was, or was not, done in accordance with any direction of the Court. At pain of repetition, I am unaware of the contents of any such direction as might have been made. The husband swore an affidavit on the 20th November 2013 in reply to the wife's mother's affidavit sworn on the 15th May 2013.

21. I have set out my, no doubt, imperfect understanding of the procedural history just described because it explains the background to a process that culminated in the delivery of the Points of Defence just mentioned. That pleading sought to raise a further

controversy, by asserting for the first time a plea on behalf of the husband that the wife's mother and brother are disentitled to the relief claimed by the wife's mother on behalf of both of them because of their own alleged misconduct and, in the alternative, a plea that the husband is entitled to some form of set off or counterclaim against them in respect of any such relief to which they might otherwise be entitled by reference to the loss and expense which their alleged misconduct has caused to him.

22. That is how those issues entered this case for the first time, in what I can only describe as procedurally questionable circumstances, on the 20th November 2013, in respect of a trial that was due to commence, and subsequently did commence, on the 2nd December 2014, just 12 days later.

23. Meanwhile, the wife's brother, who had also been put on notice of the proceedings under s. 40(b) of the 1995 Act, elected to make representations on affidavit, in accordance with Order 70A, rule 11(3) of the Rules, in respect of his asserted beneficial interest in the relevant property as contemplated by s. 15(5) of the 1995 Act. The wife's brother swore that affidavit on the 29th November 2014.

24. The trial itself ran for the four days allotted from the 2nd and 5th December 2014 but did not finish within that time. Ultimately, it lasted for twenty-one days. Indeed, on the eleventh day of the trial, the Court was informed (entirely correctly, as it turned out) that the expert evidence would occupy the next eight days. I cannot here refrain from observing that, in my limited experience of trials in the Family Law division of the High Court, the initial estimates provided to the court by counsel of the likely duration of trials have proved significantly inaccurate in at least 90% of the cases that I have dealt with, and have been wildly inaccurate in approximately half of those cases.

25. It is apposite to note that in *M.D. v. N.D.* [2015] IESC 16 (at para. 4.13) the Supreme Court explained that the appropriate pre-trial management procedures should attempt:

> "to detail with some reasonable precision the length of time which each element of the case is expected to take. In the absence of unexpected developments it is reasonable for a trial judge to keep the parties to such estimates or to reflect any failure to do so in costs or an adjournment. It is important to emphasise that significant overruns in the length of matrimonial cases eat into the available resources."

26. In *P.D. v. R.D.* [2015] IEHC 174, I added my own view that that it is not just the effect on the pool of resources available to the parties that is at stake. Unnecessarily or unreasonably protracted litigation has resource implications for the courts system and access to justice implications for other litigants. In the present case (as in that one), there were no significant unexpected developments in the course of trial.

27. The trial having been adjourned on a part-heard basis to the next suitable date for its resumption, the wife's solicitors wrote to the husband's solicitors on the 28th January 2014, stating that - in their view - it was incumbent on the husband to provide written legal submissions in respect of the following two questions:-

> (i) Whether the husband can maintain the claim he makes against the wife's brother in the context of the litigation between the husband and the wife, and;
>
> (ii) Whether, even if the husband can litigate this issue in these proceedings, there is any legal basis for the husband's contention that the wife's brother's rights can be extinguished as against the husband.

28. Thus, the Court thus found itself dealing with, if not a preliminary issue, something very close to it in the midst of a part heard trial.

29. The basis upon which the husband purported to deliver Points of Defence on the 20th November 2013, more than six months after receipt of Points of Claim on behalf of the wife's mother and just twelve days prior to the commencement of the trial of the present action, was never properly explained. Even assuming that the husband had an entitlement in principle to advance a claim in those Points of Defence against the wife's brother (who is not a party to these proceedings), he was unable to explain why did he not apply to have the wife's brother made a party to the proceedings for that purpose in good time prior to the trial of the action. Nor did he explain why, had he done so, he could not then have sought directions concerning the exchange of pleadings between himself and the wife's brother in order that the issues between those persons could be clearly defined, and the procedural entitlements of each in respect of those issues properly considered, in good time prior to the trial of this action. After all, as already note above, Order 70A, rule 12 of the RSC seems to exist for precisely that purpose.

30. For the foregoing reasons, I came to the conclusion that the first question raised on behalf of the wife as just described must be further divided into two questions, only one of which was addressed in the arguments advanced by the parties. The question that was addressed is whether the husband could maintain the claim he makes against the wife's brother in these proceedings as a matter of legal principle. The question that was not addressed is whether the husband could maintain that claim in these proceedings as a matter of fundamental procedural fairness.

31. The wife's brother, while he is a person who was given notice of the proceedings pursuant to s. 40(b) of the 1995 Act, is not a party to the proceedings and, in consequence, is not represented in them. The husband is perfectly entitled to pursue any claim he may wish against his wife's brother (alleging the extinguishment of any lawful claim the wife's brother might otherwise be entitled to assert against him) in separate proceedings properly constituted for that purpose. Such proceedings would allow the issue of those rights to be properly determined between those parties and, significantly, would allow the issue of who should bear the legal costs of asserting and defending the relevant claim(s) to be appropriately and discretely determined as between those parties. The husband is a party to these judicial separation proceedings and has the same entitlement as any other litigant in such proceedings to return to court at any time in the future to invoke the court's obligation to make proper provision between the parties should the position in that regard change, whether by reference to the extinguishment of the rights of any other person claiming a beneficial interest in property that forms part of the pool of matrimonial assets or otherwise.

32. In all of those circumstances, I decided that it would be neither procedurally fair nor conducive to the efficient administration of justice to permit the husband to advance the claim against the wife's mother and brother set out at paragraph 7 of his Points of Defence within the rubric of these proceedings.

33. In light of that conclusion, I did not address the question of whether, in principle, a claim of the sort the husband seeks to make in these proceedings against the wife's mother and brother can properly be considered in the context of judicial separation proceedings between a husband and wife in which appropriate ancillary relief is sought pursuant to the relevant provisions of the 1995

Act. Nor did I address the question of the legal validity or factual merit of any such claim.

Basis for the decree
34. While each party seeks a decree of judicial separation pursuant to the provisions of s. 2 (1) (b) of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act"), on the ground that the other party has behaved in such a way that they cannot be expected to continue living together, it is unnecessary and, perhaps, unhelpful to approach the matter in that way. Both parties seek the same decree, pursuant to s. 2 (1) (f) of the 1989 Act, on the alternative basis that the marriage has broken down to the extent that the court is satisfied in all of the circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application. As, sadly, on consideration of the evidence before me I am so satisfied, I will grant each of the parties a decree of judicial separation on that ground.

Positions of the parties
35. It is, of course, the task of the court to make proper provision for the husband and the wife, with due regard to the rights and interests of the wife's mother and brother.

(i) the husband's open offer

36. The husband made an open offer at the commencement of the trial. That proposal envisages the equal division of the assets of the parties, after deduction of debts and liabilities and any sums that the court considers are lawfully due to the wife's mother, as notice party, and the wife's brother, as party on notice.

37. As part of that proposal, the husband submitted that the farmhouse should be transferred into the wife's name, subject to the rights of residence of the wife's mother and brother, and that an appropriate adjustment might then be made to the division of the remaining assets to reflect the receipt by the wife of the value of that property subject to those rights. The surrounding farmlands would be sold to facilitate the appropriate division of assets.

38. I think it is fair to say that the husband's proposal has been worked out in considerable detail. It includes, for example, costings in relation to the carrying out of the works necessary to establish the farmhouse as a viable property separate from the surrounding farmlands, involving the construction of a separate connection to the mains water supply and of the appropriate waste water treatment unit. The husband proposes that these costs, together with the legal costs associated with the division of the property into farmlands and separate dwelling house, are to be borne out of the sale proceeds of the farmlands, the farm stock and machinery, applicable farm payments, and miscellaneous other farm property, after the discharge of the various debts and loans associated with the operation of the farm. The husband further proposes that the maintenance rights of the wife's mother, as an encumbrance on the land, and the herd maintenance rights of the wife's brother, should be capitalised and discharged from those sale proceeds.

(ii) the position of the wife

39. The wife has not put her position in writing on what constitutes proper provision for each of the parties, whether by way of open offer or otherwise. The written submissions furnished on her behalf at the conclusion of the trial refer only obliquely to the issue.

40. In the recent case of *M.D. v. N.D.* [2015] IESC 16, in which judgment was delivered shortly prior to the conclusion of the trial in this case, the Supreme Court set out several points of suggested good practice in matrimonial proceedings where there are any issues of significant controversy or complexity. Having pointed to the desirability, in any but the most straightforward of resources cases, of presenting before the Court, in the simplest way, the competing positions of the parties on the available resources issue, together with, on each side, a single simple schedule of assets, Clarke and MacMenamin JJ. went on to set out that, at the commencement of the trial, "each party should specify what it says would be proper provision in the overall picture of the assets and other resources which emerges from the relevant schedule or schedules."

41. Nevertheless, from certain references in the wife's submissions and from the evidence called on her behalf, by implication a position does emerge. It is that the husband should retain the house in town, which has an agreed value for the purpose of these proceedings of €200,000, and that a property adjustment order should be made transferring the farm into the wife's sole name. Thereafter, the wife should be afforded an, as yet, undefined period of time in which to raise an, as yet, unspecified lump sum, by selling an, as yet, unidentified 50 acre portion of the farmlands. The lump sum would comprise the net proceeds of that sale. It appears to follow that the wife would retain the livestock, machinery and associated (though reduced) farm payments, while also taking over the debts and liabilities of the farm and the obligations of the parties towards the wife's mother and brother.

42. It is impossible to assess the extent to which any such proposal is, or is not, capable of amounting to proper provision for each of the parties, unless and until a view can be taken, not only on the total value of the pool of assets available to the parties, but also on the value of that portion of the assets which each party is to receive on foot of that proposal.

43. The failure by the wife to adduce any evidence of the value of the 50 acre portion of the farmlands that it is intended to sell leaves both the husband and the court in a difficult position in attempting to address the fairness of the wife's proposal.

44. The husband has sought to meet that difficulty by extrapolating, purely for the purpose of argument, from certain evidence given by the wife's expert forensic accountant. That expert valued the farmland, apart from the house and adjacent outbuildings, at €2 million. This, the husband asserts, gives a value per acre of €9,478 and, in consequence, an average value for a 50 acre portion of that land of €473,933.

45. It follows that, under this proposal, the husband would receive a lump sum of something under €673,933 by way of proper provision, being the value of the house in town together with the net sale proceeds of the relevant parcel of land. The husband points out that this would leave the wife, on her own case, with assets valued at approximately €2,392,927, according to the parties' net asset position as described in the report of the wife's expert accountant. On the assumption that each side will have to meet his or her own costs, by estimating his own costs at €333,000, the husband asserts that he would then receive the net sum of €340,933.

46. The husband points out that the figure just mentioned would represent the allocation to him of fractionally over 14% of the net assets available to the parties. It seems to me that this is not entirely correct. In the first place, the 14% figure fails to take account of the wife's net (rather than gross) asset position of €2,059,927 (being €2,392,927 less the same estimate of the wife's legal costs at €333,000). In the second place, it fails to take account of the fact that the wife's net asset position would be further reduced by the value of the rights of the wife's mother and brother, which presumably would continue to exist solely against the wife in the context of the relevant proposal. Based on the figures provided by the actuary called on behalf of the wife's mother and the expert valuer called on behalf of the husband, the aggregate value of the rights of the wife's mother to maintenance, support and the

provision of a vehicle; the right of the wife's brother to maintain livestock on the land; and the right of residence of each in the farmhouse and, in the case of the brother, at some point in the future in a house to be constructed on the lands, is €623,750. Further subtracting the value of those rights from the wife's net asset position would leave a figure of €1,436,177. Accordingly, the net asset position of the husband (€340,933) would represent just over 19% of the total net assets available to the parties (€1,777,110), leaving the wife with 81% of those net assets.

47. The wife argues that such an apportionment represents proper provision for herself and for her husband on a number of grounds. She points to the relatively short duration of the marriage; she takes issue with the nature and extent of her husband's contribution to the farm business (whether directly or through his parents); she criticises her husband's role in the management of the farm; she criticises her husband's conduct during the marriage; and she submits that particular regard should be had to the fact that by far the greater part of the pool of matrimonial assets comprises the inherited farm that she brought into the marriage

Some further background
48. It is appropriate to preface this part of the judgment by recording the clear impression that I formed in the course of their evidence that each of the parties was an honest, sincere and truthful witness.

49. The parties are now both in, or approaching, their mid-forties. They first met in 2003 while attending a farming course, the completion of which was necessary to enable qualified farmers to avail of a stamp duty exemption on the inheritance of farm land. The wife had gone to work on the farm when she left school at 16 years of age and has known no other occupation or employment. The husband attended a third level institution in Ireland before completing his third level education in a business discipline abroad. He then worked outside the country in various management positions before returning to Ireland in 2003. He was attending the farming course because it was at that time envisaged that he would be gifted, or inherit, a farm owned by his father in another part of the country. The husband's father had already gifted to the husband's brother another farm owned by the family, which - as luck would have it - is located not too many miles distant from the wife's family farm.

50. In the event, the parties became engaged in June 2004 and were married in December 2004. It was agreed between the parties and the wife's parents that the parties would take over the running of the farm. The wife's father transferred the farm into the wife's sole name in May 2005. Each of the wife's two sisters and her brother was given a site on the farmlands to build a house. The farm stock was also transferred to the wife, together with the farm debts in the sum of between €50,000 and €55,000. While it is submitted on behalf of the wife that these debts were not significant compared to the value of the farm, they do seem to have had some significance in the context of the limited profitability of the farm in general and in light of the requirement for working capital that any such farm would have, as well as whatever capital investment might be necessary to sustain and, ideally, improve that profitability.

51. Indeed, the need to provide an income from the farm not only for the parties themselves but also for the wife's parents (and, to a much lesser extent, the wife's brother) appears to me from the evidence I have heard to have been a huge source of strain on the parties' marriage from the outset.

52. While there is some controversy about the precise extent of the financial contribution that the husband made to the farming enterprise over the course of the marriage, there is no doubt that it was significant. The husband's evidence was that, in light of his marriage, he agreed with his father that there was no longer any purpose in his taking over his own family farm in another part of the country and that instead his parents would provide financial support in respect of the operation of the farm by the husband and wife.

53. The wife accepts that, when it became necessary to discharge the stamp duty on the transfer of the farm from the wife's father to the wife because of an error in timing whereby that transfer was completed before she qualified as a farmer, the husband's father provided the necessary bridging finance until a rebate of that stamp duty could be obtained. As it was necessary to take out a bank loan to discharge the existing farm debts and to provide working capital for the farm after its transfer to the wife, the husband's father acted as guarantor of that bank loan and, ultimately, directly discharged it when the balance stood at €120,000.

54. Although the entire farm, to include the farmhouse, had been transferred into the wife's name after the parties' marriage, subject to the reservation of a right of residence in favour of the wife's parents comprising the general use of the farmhouse and the exclusive use of their own bedroom within it, it appears to have been suggested to the parties shortly after they took up residence there, that the wife's parents, in fact, expected them to live elsewhere. The husband's evidence was that this came as a surprise. The wife testified that this was always her understanding. The terms of the deed of transfer associated with the 2005 conveyance appear to favour the husband's view, but not a great deal turns on the resolution of that controversy.

55. After leaving the farmhouse, the parties lived for a short period in another farmhouse on the farm of the husband's brother some miles distant. In order for the parties to have accommodation more convenient to the farm itself, the house in town was acquired for them by the husband's parents in 2006. Initially, that house was held in the name of the husband's mother before later being transferred into the husband's name. The husband gave evidence that the only reason it was not transferred into joint names was to avoid incurring a tax liability. The cost of purchasing and furnishing that house was between €320,000 and €325,000. It now has an agreed value of €200,000.

56. The wife in her evidence and on affidavit explained that it was her father's view that the farm continued to be their "family farm", even after he transferred it into her name and she and the husband took over its management and its debts. Indeed, the wife said that she shared that view. The father, then a septuagenarian, continued to breed animals on the farm lands, putting the expenses of that activity through the farm accounts. The husband says that this was a drain on the overall farm finances. The wife believes that the activity broke even or was marginally profitable. The wife and her expert accountant pointed to certain specific sale transactions as evidence of that profitability but I do not think that the matter can be approached in that way, without reference both to the sales figures as a whole and to the countervailing costs and overheads associated with that activity. Nevertheless this is an illustration of the competing views held by the parties concerning the proper ownership of the farm enterprise; how it should be run; with what resources; and for whose benefit. It is this conflict that appears to be the single greatest cause of the rupture in, and ultimately the disintegration of, the parties' relationship.

57. It would seem that, at all material times, the parties were reliant to a very significant degree on the husband's parents to provide the resources necessary to enable them to discharge the obligations to the wife's parents that the wife had taken on when the farm was transferred into her sole name in 2005. In particular, the husband's father made available two jeeps at various times as the vehicles that the wife, and later the husband and wife, were obliged to provide for the use of the wife's parents. More generally the husband's parents regularly provided funds to the husband which he applied to cover the debts and other expenses associated with the operation of the farm during the currency of the marriage.

58. In June 2007, the husband took up employment in a business in a city some distance from the farm. He gave evidence that his reasons for doing so were broadly twofold: first, he was becoming frustrated by the continuing conflict over the management of the farm; and second, he felt that the additional income was important.

59. The husband worked in that off-farm employment for two years, until June 2009. During that period, he returned to the farm to work for two days each weekend and contributed approximately €115,000 from his off-farm income into the farm accounts, which facilitated the parties in providing work placements for agricultural students from Germany and France to assist on the farm. The wife argues that the husband's contribution to the farm in that amount should be ignored, since no value has been attributed to her work on the farm during that period. In my view, the correct approach is to give proper credit to the wife for her full time work on the farm and to the husband for both his part-time work on the farm and his financial contribution to its operations during the relevant period.

60. During the period leading up to 2007, a plan was conceived to construct a new farm yard with a large modern farm building to enhance and upgrade the farm infrastructure. The wife in her evidence, and through that of the expert agricultural consultant who gave evidence on her behalf, characterised the plan as excessive in scale and "a vanity project" on the part of the husband. The husband and his expert agricultural consultant took fundamental issue with that characterisation. In any event, plans were drawn up, planning permission was obtained and, in March 2007, the steel structure was purchased in the United Kingdom. However, construction did not start until 2010 due, at least in part, according to the husband, to objections from the wife's family. The construction cost of the farm building was, it is agreed, somewhere between €560,000 and €575,000

61. In the Spring of 2009, the wife agreed to transfer the farm into the joint names of herself and her husband. The husband says that he did indeed want this to be done in order that the parties could make a fresh start in a spirit of true partnership. The wife says that she felt under pressure to agree to this request as otherwise the husband would not return to work on the farm full time; would not proceed with the construction of the new farm building; and would not continue to make substantial capital investments in the farm. There is no doubt that the wife was faced with a difficult decision. On the one hand, the husband wanted his contribution to their marital and farming partnership recognised as an interest in the farm property. On the other hand, the wife's parents continued to view the property as their "family farm", a view with which the wife agreed.

62. The turbulent nature of the relationship between the parties during the course of their marriage is illustrated by the fact that, in 2008 the wife gave instructions for the preparation of a will leaving the farm property to her sister rather than the husband. The wife stated that she felt under pressure to transfer the farm into joint names. However, she was fully and independently legally advised in respect of that transaction. The wife's solicitor gave evidence that she advised the wife that it was "unwise" to transfer the farm into joint names and that, instead, the wife should "go for a legal separation", but accepted that, once the appropriate legal advice had been proffered and considered, the decision was that of the wife to make. The wife conceded through Counsel that she has no grounds in equity, whether under the doctrine of duress or that of undue influence or otherwise, to seek the rescission of that transaction.

63. Insofar as it is suggested on behalf of the wife that the Court should use the requirement under s. 16 of the 1995 Act that it must have regard to "all the circumstances of the case" to apply some broader conception of duress or undue influence in the application of that section than that which applies under the general law of equity, I accept the submission of the husband that there is no basis in law for any such approach.

64. Even it were appropriate to apply a wider conception of undue influence or duress to the question of proper provision (and I reiterate my view that, as a matter of law, it is not), it seems to me that it would still be inappropriate to characterise any difficult decision a person may make to favour the interests or demands of a spouse over the conflicting interests or demands of other close family members as one, *per se*, invalidly made under the undue influence of, or duress applied by, the spouse concerned. If the position were otherwise, few transactions between spouses would not be amenable to rescission at will in the context of family law proceedings.

65. The wife left the house in town and returned to reside in the farmhouse in November 2010 to assist in the care of her terminally ill father. This effectively marked the end of the marriage between the parties.

Proper Provision
66. Under s. 16 (1) of the 1995 Act, I must endeavour to ensure that proper provision is made for each spouse concerned having regard to all of the circumstances of the case. In doing so, I am required under s. 16 (2) of the Act to have regard to a number of identified matters. I will address each of those matters in turn.

Financial resources
67. The first is "*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) Assets and liabilities

68. The farm is, by some margin, the most valuable asset of the parties. They disagree about the value of both the farmlands and the farmhouse and they each called expert evidence in relation to those issues. The expert valuer called on behalf of the husband attributed a value of €3,725,000 to the land and the farmyard buildings situated thereon, excluding the farmhouse. He attributed a value of €475,000 to the farmhouse.

69. The wife also called an expert valuer. He gave evidence that the value of the usable acreage on the farm (excluding the value of the original farm buildings and the farmhouse) was €2,500,000. He attributed a total value of €400,000 to the farmhouse and adjacent outbuildings.

70. Having carefully considered the evidence of those experts, and the comparators which each commended to the Court, I would attribute a value of €425,000 to the farmhouse and adjacent outbuildings. In being asked to resolve the disagreement between the parties' respective experts in relation to the valuation of the farmlands, it is perhaps appropriate to note that the husband's expert drew on his long experience in the profession and a range of comparable properties throughout the country, while the wife's expert, in acknowledging his shorter period of experience, laid emphasis on his particular store of local knowledge concerning comparable properties in the general vicinity. The only way in which I am able to resolve so significant a disagreement between those two experts is to select a valuation in partial recognition of the views of each. Accordingly, I propose to value the farmlands in the sum of €3,250,000.

71. The house in town has an agreed valuation of €200,000.

72. The parties have a range of assets and liabilities associated with the farm. The assets include state payment entitlements, livestock, farm machinery, farm materials and bank accounts. The debts include bank loans, overdraft facilities and monies owed to various agricultural providers and contractors. The expert accountant who gave evidence on behalf of the husband estimated the net value of those assets over liabilities at the material time to be €236,946. The expert accountant called on behalf of the wife estimated the the relevant figure as €292,437.

73. The difference between the two estimates just described arises from a disagreement between the parties concerning a liability in the farm accounts of €72,000 to an agricultural contracting company ("the company"). The husband has a minority shareholding in that company and the husband's father is its principal shareholder. The services provided to the farm by the company included the provision of certain modern agricultural machinery that, the husband contends, enabled necessary work on the farm to be carried out more efficiently. There was some evidence that the father in fact discharged the farm's debt to the company by permitting the debt to be offset against certain director's loans that he had advanced to the company. Accordingly, the sum concerned might be characterised as a contribution made to the farm enterprise by the husband's father on the husband's behalf or as a debt due by the farm to the husband's father. For present purposes, I believe it is fairest to all parties to characterise the value of those services as a debt owed by the farm.

74. The wife does not deny that the farm had the benefit of the machinery provided by the company. However, she asserted that the number and type of machines used and the charges incurred exceeded the needs of the farm; that the cost of certain repairs to those machines was wrongly attributed to the farm; and that the newly constructed farm building was used to house the company's machines free of charge, all of which should greatly reduce, if not eliminate, the relevant debt. The husband denied each of these assertions.

75. There was also some dispute about the valuation of the husband's 14% shareholding in the agricultural contracting company just described. The wife's expert accountant attributed a value to that shareholding (net of CGT) of €15,656. The husband's expert accountant attributed a nil value to it. While I accept that the valuation of such a shareholding necessitates some discount in recognition of the fact that it is a minority interest, I do not accept that it is rendered entirely valueless as such.

76. The legal costs incurred by the parties in the conduct of the present litigation constitute a very significant liability for each. As already noted above, the husband estimated his costs in the sum of €333,000 and it seems reasonable to attribute an equivalent liability to the wife.

77. Taking all of the assets and liabilities just described in the round, I am satisfied that the net value of the assets of the parties is in the region of €3,480,000.

(ii) Income and earning capacity

78. The wife has worked full-time on the farm since she left school at the age of sixteen to assist her father in the management of the farming enterprise.

79. The husband has a third level business qualification and, prior to his marriage, worked in a number of management positions in various companies in another EU Member State. As already described, for a two year period during the currency of the marriage, he worked for a commercial enterprise in a city some distance away, while working only part-time on the farm. The husband, in common with the wife, has indicated his desire to continue in some form of farming activity.

80. It is necessary at this point to refer to certain evidence adduced in the context of the wife's proposal for the appropriate orders by way of proper provision. The expert agricultural consultant who gave evidence on behalf of the wife expressed the view that the farm could continue as a viable economic unit after the proposed sale of 50 acres. This view was based in part on his belief that the preponderance of the state payment entitlements currently attaching to the land could be retained after such a disposal. He also gave evidence that the potential annual income of the reduced holding could be as high as €54,400, whereas the potential annual income of the farm in its current intact form is approximately €59,600. Thus, on the evidence of the wife's agricultural consultant, the income earning potential of the farm in the event of the sale of 50 acres of land would be reduced by a mere 10%.

81. However, the expert agricultural consultants on both sides acknowledged that the potential profit figures for the reduced holding that the wife's expert suggested were feasible had never been achieved on the intact holding during the entire period of the parties' marriage and would, if achieved, be on a par with the top performing farmers in the country. It is difficult to accept that potential annual income figure as a remotely realistic aspiration and certainly not as an immediately practical income stream.

82. Returning to the general income earning capacity of the parties, I am satisfied, that the husband has the capacity to earn a significant income by virtue of his business qualifications and experience, although in considering this factor I must also take into account his stated desire not to return to employment in the business sector but to remain a self-employed farmer, in which capacity his income earning capacity is likely to be more modest. For the reasons I have already set out, I believe that the wife's income earning capacity will almost certainly be modest at best.

Financial needs, obligations and responsibilities

83. The second matter to which I am obliged to have regard is "*the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future.'*

84. I have already acknowledged above that the parties have certain obligations to the wife's mother and brother and this is a factor that will have to fully and properly taken into account in seeking to make proper provision for both parties.

Standard of living, age of spouses, duration of marriage, disability

85. In the particular circumstances of the present case, it is convenient to deal with the next three factors together. They are: the prior standard of living of the parties; the age of the parties and the duration of the marriage between them; and any physical or mental disability of either party.

86. Both parties are in their mid-forties. The marriage of the parties lasted between December 2004 and November 2010, a period of almost six years. Because of the very poor performance of the farming business during that time, despite the consistent dedication and self-denial of both parties, their standard of living wavered between modest and poor.

87. Neither party has a significant disability. The husband slipped a disc in 2000 and had a back operation in 2006. It was this problem that prompted the decision to convert the farming enterprise into one involving a different type of livestock, the care of which

involves a different and more limited form of physical exertion.

Contributions
88. A factor of particular significance in this case is that of "the contributions which each of the spouses has made or is likely to make in the immediate future 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 to looking after the home or care for the family."

89. There are several aspects of the case which fall within the rubric of this consideration.

(i) the farm as an inherited asset

90. The first is that the farm is, by some margin, the principal marital asset, and was brought into the marriage by the wife, having been transferred to her by her father in 2005. The wife lays great emphasis on her uncontroverted evidence that the farm has been in her family for a number of generations, going back to the time of her great grandfather. Thus, she argues that the farm should be treated as an inherited asset. In that context, the wife relies on the following *dictum* of Denham J. in *YG v. NG* [2011] 3 I.R. 717, at p. 732:

> *"Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances. In one case, where a couple had worked a farm together, which the husband had inherited, the wife on separation sought 50%, however, the order given by a court was 75% to the husband and 25% to the wife. This is a precedent to illustrate an approach, but the circumstances of each case should be considered specifically."*

91. While the wife acknowledges, on the authority of *T v. T.* [2002] 3 I.R. 334, that property acquired by inheritance does not thereby "*escape the net*" of proper provision (per Fennelly J. at p. 416), she points out that the availability of all property whenever acquired by either spouse for the purpose of proper provision is not an unqualified principle and does not apply to cases where such a result would be unjust, such as that of a short-lived marriage by a fortune hunter to a wealthy heiress. Correctly, in my view, the wife stops short of suggesting that any such situation arises here.

92. The wife further relies on the following statement by Murray J. in the same case, albeit in the slightly different context of assets acquired after separation but before divorce, at p. 409:

> *"That is not to say that the resources of one spouse which could be said to have been acquired completely independently of the marriage should be excluded from consideration by the court. 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 circumstances. 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."*

93. I pause here to comment that the wealth that the wife brought into the marriage now at issue was almost entirely illiquid in that it was tied up in land and carried with it little or no affluence in terms of income. This, in turn, gives rise to a fine point as to whether the wife's position in this case should be more properly characterised as one of limited resources or of independent wealth. Equally, while a marriage of six years duration is certainly not a long one, it is not clear to me the extent to which it might be properly characterised as one of a very short duration.

94. The wife then takes her argument concerning inherited property further by invoking three decisions of the High Court: those of O'Higgins J. in *B v. B* (Unreported, High Court, ex tempore, 11th April, 2005) and *C v. C* (Unreported, High Court, O'Higgins J., 25th July 2005); and that of Abbott J. in *N v. N* (Unreported, High Court, 18th December, 2003). The wife, in effect, points out that in each of those cases the court permitted the relevant party to retain the full benefit of an inherited farm or estate, as authority, for the proposition that neither an equal division of assets, nor indeed a one third allocation of assets to the husband, is an appropriate yardstick in this case. While there is much force in this argument concerning the appropriate yardstick, it does seem to me relevant to observe that in each of those case the Court was able to make significant alternative provision for the non-inheriting spouse out of the other assets and income available to the parties.

95. In *T v. T ,* Denham J. explained (at p. 384):

> "The concept of one third as a check on fairness may well be useful in some cases, however, it might have no application in many cases. It may not be applicable to a family with inadequate assets. It may not be relevant to a family of adequate means, if, for example, such a sum could only be achieved by a sale of assets which would destroy a business, or the future income of a party or parties, or if it related to property brought solely by one party to the marriage, or any other relevant circumstance."

96. Again, I pause here to note that, while the sale of the farmlands would, of course, terminate the farming business currently operated by the husband and wife and, formerly, conducted by the wife's family on the farm, this is not a case in which, if the business were allowed to continue under the wife's sole ownership and control, there would be any prospect of alternative provision for the husband beyond the unspecified lump sum offered, whether by way of viable periodical payment order or otherwise.

(ii) contribution to financial resources

97. The husband in this case has made, both directly and with the assistance of his parents, a significant contribution to the financial resources of the parties during the marriage. That contribution includes: a loan balance of €120,000 that was discharged by the husband's father; the contribution by the husband of €115,000 of his off-farm earnings to the farm during the period between 2007 and 2009; the funding by the husband's parents of the construction of a large modern farm building at a cost of somewhere between €560,000 and €575,000; the supply by the husband's father of vehicles to enable the parties to honour their obligation to the wife's parents for much of the duration of the marriage; and the provision through the husband's parents of a house in town in which the parties lived for the greater part of that period, the amenity of which for both parties derived largely, if not entirely, from its proximity to the farm that they jointly managed.

98. The husband's evidence was that the value of his contributions, whether directly or through his parents, in direct payments and in

the value of goods and services provided amounted to €1.28 million. The wife's evidence, through the independent expert financial accountant retained on her behalf, was that the value of those contributions was €815,161, subject to reservations about the appropriate vouching of that amount. I suspect that the true figure is probably somewhere in between but, however calculated, those contributions were significant.

99. Each of the parties made a significant contribution to their joint financial resources during the currency of the marriage by the provision of the labour of each on the farm.

Effect on earning capacity and statutory entitlements

100. The next two factors are the effect on the earning capacity of each of the spouses of their marital responsibilities and the income or benefits to which either is statutorily entitled. These are not factors of any particular relevance in the present case.

Misconduct

101. The ninth factor that must be considered is "*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.*" For the avoidance of doubt, on the evidence that I have heard I am satisfied that there has been no misconduct by either party, much less any misconduct of a gross and obvious kind.

Accommodation needs

102. The tenth factor is "the accommodation needs of either of the spouses." I have already described the present accommodation arrangements of the parties. The manner in which their needs in that regard will have to be met in future is discussed further below.

Benefit forfeited

103. While working abroad prior to his marriage, the husband made contributions to a state contributory pension scheme in the EU member state in which he was resident, the value of which is unknown.

Third party rights

104. The relevant third party (or, in the case of the mother, notice party) rights of the mother and brother have already been described above. I propose to make provision for those rights on the basis of the figures provided by the actuary called on behalf of the wife's mother and the expert valuer called on behalf of the husband, in respect of the aggregate value of the rights of the wife's mother to maintenance, support and the provision of a vehicle and the right of the wife's brother to maintain livestock on the land. Provision will also have to be made for the right of residence of each in the farmhouse and, in the case of the brother, at some point in the future in a house to be constructed on the lands.

105. Insofar as the husband took issue on various discrete grounds with the basis for the calculation on behalf of the wife's mother of the crystallised value of her right to support and maintenance, it seems to me in justice and fairness that this is not a dispute that I can entertain in circumstances where the relevant rights were conceded to the wife's mother and brother in exchange for the transfer into the husband's joint name of a farm property worth several million euro.

Conclusion

106. In deference to the wife's proposal, I now propose to reconsider it in light of the conclusions I have reached on the evidence presented concerning the value to be attributed to the assets of the parties.

107. I have concluded that the gross value of those assets is €4,146,000. I have placed a value of €3,250,000 on the farmlands which, as noted above, comprise approximately 211 acres of land, which suggests that the sale of the farm should realise a price per acre of approximately €15,402. It follows that the sale of a 50 acre portion of the farm would accordingly realise a price of approximately €770,142.

108. If the husband received a lump sum in that amount and retained the house in town, which has an agreed value of €200,000, his gross asset position would stand at €970,142. Making the appropriate deduction of an estimated €333,000 for legal costs, the husband would emerge with net assets of €637,142.

109. That apportionment would leave the wife with the balance of the assets in the sum of €3,175,857. Assuming it is appropriate to make a deduction of €333,000 for her legal costs equivalent to those of the husband; taking account of the value of the rights of the wife's mother and brother, which I have already valued at €623,750; and allowing for the legal costs of the wife's mother, which are estimated in the sum of €75,000, the wife should emerge with assets in the net value of €2,144,107.

110. The net joint assets of the parties by reference to the preceding calculations would stand at €2,781,250. Of that amount, on the wife's proposal, the husband is to receive €637,142, which amounts to approximately 23% of the total net value of the matrimonial assets.

111. There are a number of more fundamental difficulties with the viability of the wife's proposal on the facts that I have found. First, I cannot accept that the projected income from the reduced holding of €54,400 per annum is a realistic prospect for the reasons I have already set out.

112. Second, I do not believe that, even if the wife were able to realise such an income, she would be in a position to discharge the various financial obligations that her proposal entails. As I understand the position, those obligations include: the maintenance or provision of working capital for the reduced farm holding; the provision of any necessary investment capital; the payment of her legal fees (should she be required to pay her own costs); the discharge of the support and maintenance obligations that the farm owes to her mother and brother; and the provision of an adequate income for the wife herself.

113. Third, the wife's proposal requires the court to reject or ignore the evidence of the husband's expert agricultural consultant (albeit evidence contested by the equivalent expert on behalf of the wife) that the sale of the farmlands as a whole will realise a greater sum pro rata for the benefit of both parties than the sale of any smaller parcel or parcels and that the farm land that the wife proposes to retain will not constitute a viable farming enterprise.

114. For these reasons, I have come to the conclusion that it would not do justice between the parties to assign so small a

proportion of the parties' assets to the husband, in the absence of any other provision for him, while at the same time burdening the wife with obligations on her much larger portion of the assets so great as to render her financial position untenable.

115. Equally, I do not accept that it would do justice between the parties to effect an equal division between them of their joint pool of assets. That would be to ignore, or have insufficient regard to, the fact that, by a significant margin, the wife contributed the greater portion of that pool of assets, by bringing into the marriage her family farm. It does not seem unreasonable to view the transfer of that farm to the wife by her father as akin to the receipt by her of an inheritance. As the Supreme Court pointed out in YG v. NG (per Denham J. at p. 732), inherited assets should not be treated as assets obtained by both parties.

116. For those reasons, it seems to me that I should adopt the husband's proposal subject to a different division of the proceeds of sale of the farmlands than the equal division of those proceeds for which he contends.

117. That is to say, I propose to make orders in broadly the following terms. First, I will direct that the farmhouse be transferred into the wife's sole name, subject to the rights of residence held by the wife's mother and brother. The boundaries of the farmhouse, yard and curtilage to be retained are to be those suggested in the report of the husband's expert agricultural consultant.

118. Second, I will order the sale of the farmlands.

119. Third, from the proceeds of that sale, I will direct that, after the deduction of the costs of sale and separate holding conversion costs, the wife's mother and brother are to be paid a sum equivalent to the capital value of the mother's right to maintenance and support and the brother's right to maintain livestock on the land and to have the exclusive use of a house constructed on the lands during his lifetime.

120. Fourth, I will direct that the mother's reasonable legal costs in these proceedings be discharged from those proceeds of sale.

121. Fifth, I will direct that a lump sum payment of €1,000,000 be made to the husband out of the proceeds of sale and that he retain ownership of the house in town by way of proper provision for him.

122. Sixth, I will order that the wife retain the remaining proceeds of sale of the farmlands, together with the remaining farm assets and liabilities, in addition to assuming sole ownership of the farmhouse, subject to the relevant third party rights, by way of proper provision for her.

123. As no more than a useful check on fairness, the orders that I propose to make should leave the husband, after the deduction of his legal costs (estimated at €333,000) with assets valued at €867,000 out of a total pool of matrimonial assets with a net value of €2,646,250, meaning that the husband will emerge with approximately 32.7% of the net assets of the parties.

124. I will hear the parties concerning the appropriate form of order to reflect the terms of the present judgment.