**THE COURT OF APPEAL**

Neutral Citation Number: [2016] IECA 410

**Birmingham J.**
**Irvine J.**
**Hogan J.**

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

**2014 Nos. 619 and 622**

**[Article 64 transfer]**

**BETWEEN /**

**C.C.**

**APPELLANT /**

**RESPONDENT**

**- AND –**

**N.C.**

**RESPONDENT /**

**APPELLANT**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of October 2016**

1. The parties to this appeal in family law proceedings were married in October 1987 and there are four children of the marriage, all of whom have now attained their majority. The parties separated in December 2003 and it is plain that the marriage has irretrievably broken down. I shall for convenience refer to the parties as the "husband" and the "wife" respectively.

2. This is an appeal taken by the wife against the decision of the High Court (Abbott J.) delivered on 2nd March 2012 in divorce proceedings: see *CC v. NC* [2012] IEHC 615. She maintains that the High Court erred in the manner in which proper provision for her was assessed. There is also a cross-appeal taken by the husband against aspects of the High Court order, specifically, the making of any divorce decree conditional on the payment of certain legal costs incurred by the wife.

3. There are essentially three issues for consideration by this Court on this appeal. First, has adequate provision already been made for the wife by reason of the capital payment made by the husband following an order to this effect by the High Court in the judicial separation proceedings in 2005? Second, what is the appropriate amount of maintenance for the wife? Third, was the High Court entitled to make an order for divorce subject to the husband discharging an earlier order for costs? All other grounds of appeal were abandoned and the issue before this Court essentially reduced itself to questions of proper provision for the wife and whether the husband was entitled to a decree of divorce.

4. While I will presently address these issues in turn, it is first necessary to set out the background facts.

**The background facts**

5. The couple were at one stage enormously wealthy. Unfortunately, a good deal of that wealth has been dissipated by the massive costs generated by two sets of family law proceedings of staggering complexity; the erosion of property values following the 2008 - 2009 crash and, it must be said, improvident spending on certain capital assets by the wife. Despite all of this erosion of wealth, the husband nonetheless remains a person of very considerable means.

6. The length and complexity of both sets of these proceedings bring the adversarial system of family law litigation little credit. Huge amounts of judicial time and resources have been devoted to this family law litigation and this litigation – with its heavy financial and emotional costs – has dominated the lives of this couple and their children for well over a decade. Indeed, when this appeal first came before the Court in May 2016, the Court was prompted to urge the parties to consider mediation as a possible solution with a view to bring this protracted litigation to an end. The parties agreed to this suggestion and the appeal was adjourned to facilitate this. In the end, a mediated solution did not, unfortunately, prove possible and the appeal resumed on 31st July 2016.

7. The husband's principal asset is a large estate which has been in the possession of his family for several hundred years. The estate is a major tourist attraction which generates a significant income for the husband (and, by extension, the wife). Prior to the separation, this was treated by the parties as being in the nature of the family business and the wife helped out to some limited extent by, for example, assisting with the running of the souvenir shop and the farm. In the course of his very detailed judgment in the judicial separation proceedings in 2005 O'Higgins J. stated that while he did not wish to take from her efforts as a devoted wife, mother and homemaker, he was not satisfied that the wife had made any appreciable financial contribution to the husband's financial situation. Nothing has emerged in the course of the subsequent divorce proceedings to gainsay that conclusion.

8. Following the breakdown of the marriage in December 2003 the husband lived at a farm (which was the former family home of the parties) until December 2005. In that month the husband moved into a manor house on the estate and the wife then rented accommodation until she purchased a property in April 2006.

9. Lengthy judicial separation proceedings ensued in the aftermath of the marriage break-up. After some fifteen days of hearing in a judgment delivered in July 2005 O'Higgins J. made an order of judicial separation pursuant to the Judicial Separation and Family Law Reform Act 1989. The Court also made ancillary orders providing for a sizeable capital payment from the husband to the wife and providing for maintenance for the wife and the children. The order declared that the husband had sole title to the estate and the

associated companies.

10. A key feature of the 2005 judgment was that the husband's assets were then valued as being in the order of €30m., with a net (after tax and disposal costs) valuation of almost €24m. It is important to repeat that these properties were the principal source of revenue for the husband and, by extension, the wife. If, for example, the husband's principal asset (namely, the estate) were to be sold, it would significantly diminish his revenue earning capacity which in turn would have implications for the level of any maintenance payments to be made to the wife.

11. At all events, the effect of the orders made by the High Court in 2005 was that a capital sum of €3.3m. was to be paid by the husband to the wife. The husband was also ordered to provide for maintenance of €240,000 net per annum to the wife; payment of €20,000 per annum per child; the discharge of annual school fees (totalling €125,000 per annum) and the payment of some €628,000 in respect of the wife's legal fees. An appeal was taken to the Supreme Court against this decision, but it was struck out by agreement in March 2009.

12. In the course of his judgment O'Higgins J. expressly rejected the argument that a one-third capital payment should generally be made in those cases where the spouses were wealthy and had ample assets. Drawing on the comments of Denham J. in *D.T v. CT*. [2002] 3 I.R. 334, 384-395 to this effect, O'Higgins J. stated:

> "In the present case the property assets of the parties were inherited and brought to the marriage by the applicant. The concept of one third as a check on fairness is not, in my view, useful in the present case. In the present case the decision that has been reached on the basis that proper provision for the respondent requires the purchase of a suitable home and a suitable and proper level of maintenance, having regard to what is proper provision for the applicant as well. In default of an accurate calculation of the real value in capital terms of the maintenance figure awarded by the court it is not possible to give an accurate figure in percentage terms of the total assets which is represented by the order of the court. If that figure approximates to one third of the assets it is not the basis on which this decision is made. In the circumstances of this case it is my view that the provision of appropriate maintenance together with provision of a lump sum to purchase suitable accommodation is the best way to ensure proper provision for both of the spouses and the children. It appears to me that such an approach is the best way to ensure the future of the business - which is the parties main source of income - while at the same time being fair to both the applicant and the respondent. It also takes into account the fact that the properties were inherited by the applicant and bought into the marriage by him.

The respondent told the court that she thought that a sum of €240,000 for herself and €120,000 a year for the children would enable her to have the same standard of living as heretofore. That sum would not only include travel for the children's education it 'would cover everything for the five of us, including travelling, holidays, clothes, groceries, dogs, cats, ponies and everything.' It would, however, exclude school fees. The court has not been told how the respondent arrived at these figures. The sum of €240,000 is almost exactly one third of the income of the applicant. Mr. Peelo told the court that such an annual sum would be more valuable than a lump sum of €4.5 million. However the value of €240,000 per annum in lump sum terms was not provided although Mr. Peelo stated that the actuarial valuation would be in the order of 16 to 20 times the annual sum. In all the circumstances of the case the sum of €240,000 per annum after tax seems to me to be fair and appropriate to make proper provision for the respondent in the present case. The figure in respect of the children is more problematic. I have no doubt there are many extra expenses incurred. In my view a sum of €20,000 per annum is appropriate for maintenance in respect of the children. This sum is to cover all expenses including extra curricular school costs, but not the school fees."

13. As I have already indicated, in the wake of the capital payment of some €3.3.m., the wife purchased a country house in the south-east for over €5.1m. in April 2006. She also spent a further sum of €1m. on repair work which was not ultimately completed. In the course of this refurbishment process the wife incurred borrowing costs of some €2.5m. from the Bank of Ireland which her accountant - who gave evidence to this effect in the High Court - had advised were not sustainable.

14. In the course of this refurbishment work the oldest child left school and began to attend university in Dublin. The wife left the country house (which she had lived in for only two years) and moved with the children to Dublin. She and her children stayed in a fashionable Dublin hotel for an extended period and in doing so she incurred a bill of some €90,000. In the meantime the country house fell into a state of disrepair. It was ultimately sold for some €670,000 following the appointment of a receiver by the Bank of Ireland in 2012.

15. The wife now lives in rented accommodation in London. The order made by Abbott J. in 2012 subsequently provides for the payment of that rent by the husband, along with annual maintenance of €50,000. This latter figure was intended to be a net figure.

16. In addition, the wife had reached the conclusion that the income which she received as maintenance creditor of her husband was not taxable from 2005 onwards, albeit that O'Higgins J. had very clearly stated to the contrary in his judgment. As a result of this decision the wife failed to make the appropriate tax returns or to make any provision in respect of these tax liabilities. The wife's financial position is now precarious in that there is now a significant tax debt due to Revenue Commissioners and the Bank of Ireland have subsequently obtained judgment for a significant sum against her. The Bank of Ireland subsequently obtained an order for the appointment of a receiver by way of equitable execution from the High Court (Peart J.) on 16th November 2011. In January 2015 the High Court (Kearns P.) ordered that some €40,000 of the €50,000 maintenance figure was to be applied in satisfaction of the debt to the Bank. The husband has, however, voluntarily paid the wife the balance of the moneys that were otherwise due to her following the making of that order in favour of the Bank of Ireland.

17. The parties had separated in December 2003 and, upon the expiration of the four year period stipulated by Article 41.3.2.i of the Constitution, both parties separately commenced divorce proceedings in December 2007. These proceedings were heard over thirty one days of evidence and legal argument throughout 2010 and 2011 and culminated in the judgment of the High Court on 2nd March 2012. The High Court order was perfected on 31st July 2012. The wife filed a notice of appeal on 3rd October 2012 and the husband filed what was termed a notice of variation (in effect, a cross-appeal) on 9th October 2012. These appeals were originally made to the Supreme Court, but were then transferred to this Court pursuant to Article 64 of the Constitution following the establishment of this Court on 28th October 2014.

**The judgment of the High Court of March 2012**

18. In his judgment Abbott J. reviewed the entire history of the affair. Much of the judgment is devoted to a consideration of whether the estate was subject to a trust and also whether there was marriage settlement upon the marriage of the parties in 1987. These issues were not pursued on this appeal and I need not concern myself with these questions.

19. The latter part of the judgment of Abbott J. is, however, concerned with proper provision and maintenance. He concluded that it

would be inappropriate to award the wife any further capital sums, because he was not confident that he could so without "totally destroying the income generation capacity of the husband." He sought to address the needs of the wife by providing for generous maintenance payments.

**The husband's capital assets and income**

20. The value of the husband's capital assets and his income are, of course, critical considerations. At the hearing of the judicial separation proceedings in 2005 the net valuation given to the husband's various properties was some €24m., with liabilities of just over €1.25m. In the aftermath of the financial crash in 2008 - 2009 it is not perhaps surprising that these assets had been valued by Abbott J. in the High Court at just under €20m.. In addition, the husband's liabilities had increased to some €7.3m, leaving net assets of some €11.35m.

21. At the date of the judicial separation in 2005 the husband's after tax income was found by O'Higgins J. to be €725,000. If allowance is made for maintenance payments to the wife, then the value of that income fell to €280,000. By 2012 his net *after tax* income was approximately €628,000.

22. At an earlier stage in the appeal proceedings the wife indicated that she proposed to challenge the findings of fact made by Abbott J. in respect of these valuations. This matter was not ultimately pressed before this Court. This judgment proceeds accordingly on the basis that these findings of fact are correct.

**The jurisdiction of the Court and the obligation to make proper provision**

23. The jurisdiction of the Court is ultimately derived from Article 41.3.2 of the Constitution. This constitutional provision requires the Court to be satisfied in respect of four particular pre-conditions before a decree of divorce can be granted. The first two pre-conditions – namely, that the spouses have lived apart for at least four years and there is no prospect of reconciliation – are plainly satisfied. The dispute in the present case concerns the third and fourth pre-conditions prescribed by Article 41.3.2:

> "(iii) such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them, and any other person prescribed by law, and
>
> (iv) any further conditions prescribed by law are complied with."

24. The Family Law (Divorce) Act 1996 ("the 1996 Act") may be said to give effect to the fourth pre-condition prescribed by Article 41.3.2 Section 20 of the 1996 Act provides:-

> "(1) In deciding whether to make an order under section 12, 13, 14, 15(1)(a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that *such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned*.
>
> (2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:-
>
> (a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,
>
> (b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise),
>
> (c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be,
>
> (d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another,
>
> (e) any physical or mental disability of either of the spouses,
>
> (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,
>
> (g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,
>
> (h) any income or benefits to which either of the spouses is entitled by or under statute,
>
> (i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it,
>
> (j) the accommodation needs of either of the spouses,
>
> (k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring,
>
> (l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.
>
> (3) In deciding whether to make an order under a provision referred to in subsection (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.

(4) Without prejudice to the generality of subsection (1), in deciding whether to make an order referred to in that subsection in favour of a dependent member of the family concerned and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:

(a) the financial needs of the member,

(b) the income, earning capacity (if any), property and other financial resources of the member,

(c) any physical or mental disability of the member,

(d) any income or benefits to which the member is entitled by or under statute,

(e) the manner in which the member was being and in which the spouses concerned anticipated that the member would be educated or trained,

(f) the matters specified in paragraphs (a), (b) and (c) of subsection (2) and in subsection (3),

(g) the accommodation needs of the member.

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

25. The approach of the Court in cases such as the present one where there are ample resources was most recently examined by the Supreme Court in *YG v. NG* [2011] 3 I.R. 717. In that case the parties had entered into a separation agreement, but the wife later sought further provision in the course of the divorce proceedings by way of capital payments following divorce. The importance of *YG* is that in her judgment Denham J. laid down general principles which are of considerable assistance so far as the resolution of the present case is concerned, even if not all of them are applicable:

(i) A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight. This is so especially if the separation agreement, as here, provides that it was agreed between the parties that the agreement was intended to be a full and final settlement of all matters arising between the parties; and, in the event of either party being granted a court decree, the terms of the agreement should be incorporated into the court order.

(ii) Irish law does not establish a right to a "clean break". However, it is a legitimate aspiration. As Keane C.J. said in *D.T. v. C.T.* [2003] 2 I.R. 334, 364:-

> "It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the "clean break" approach which are clearly beneficial. As Denham J. observed in F. v. F. [1995] 2 I.R. 354, certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and of the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the "clean break" approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties."

In that case, Murray J. stated at p.411:-

> "I also agree that when making proper provision for the spouses, a court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s. 22 of the Act of 1996, where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit."

(iii) The constitutional and legislative scheme gives to the Court a specific jurisdiction and duty under the Act of 1996.

(iv) Under s. 20(1) of the Act of 1996 "the court shall ensure that such provision as the court considers proper having regard to the circumstances exists" will be made for the spouses and any dependant children. Thus this duty requires the Court to make proper provision, having regard to all the circumstances. A deed of separation stated to be in full and final settlement is a significant factor.

(v) If the circumstances are the same as when the separation agreement was signed then prima facie the provision made by the Court would be the same, as long as it was considered to be proper provision.

(vi) If the circumstances of the spouses, one or both, have changed significantly then the Court is required to consider all the circumstances carefully. However, the requirement is to make proper provision and it is not a requirement for the redistribution of wealth.

(vii) Relevant changed circumstances may include the changed needs of a spouse. If there is a new or different need, that may be a relevant factor. Such a need may be an illness.

(viii) The changed circumstances which may be relevant include the bursting of a property bubble which has altered the value of the assets so as to render an earlier provision unjust. These are two example illustrations and are not intended to be a conclusive list of relevant changed circumstances.

(ix) If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project by spouses during their married life, then that is not a factor of itself to vest in the other spouse a right to further monies or assets.

(x) If, in the period subsequent to the conclusion of a separation agreement, one spouse becomes very wealthy, there is no right to an automatic increase in money or other assets for the other spouse.

(xi) If a party seeks additional funds, the Court has to look at all the circumstances and its duty is to make proper provision, not to enter into a redistribution of wealth.

(xii) The facts and circumstances to be considered will include the length of time since the separation agreement was entered into. The greater the length of time which has passed, barring catastrophic circumstances, the less likely a court will be to alter arrangements.

(xiii) The standard of living of a dependent spouse should be commensurate with that enjoyed when the marriage ended. The Act of 1996 specifically refers to matters to which the Court shall have regard and these include the standard of living enjoyed by the family before the proceedings were instituted or before the spouses commenced to live apart, as the case may be.

(xiv) However, if a party has new needs, for example a debilitating illness, that will be a factor to be considered by a court in all the circumstances of the case.

(xv) 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.

(xvi) A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party.

(xvii) If there has been an exceptional change in the value of assets, which was unforeseen at the time of the judicial separation or High Court hearing, it is a relevant factor, as not to take account of such a factor would result in an injustice. See *M.D. v. N.D.* [2011] IESC 18."

26. As I have indicated, some of these general principles have lesser application to the facts of the present case than others. There was, for example, no separation agreement which was expressed to be in full and final settlement between the parties. While it is true that Ms. C. is said to have suffered some ill-health in recent times, it cannot be said that her state of health has changed dramatically as to constitute a significant alteration in circumstances since the judicial separation judgment in 2005.

27. The blunt reality is that the husband had the good fortune to inherit a vast landed fortune and it is essentially this capital and income which has enabled the family to live in the style to which they have become accustomed. As YG makes clear, this is a relevant factor because Denham J. expressly stated that inherited assets are not to be treated in the same way as the joint assets of the parties acquired in the course of marriage. There are two reasons why that principle is especially relevant here. First, as both O'Higgins J. and Abbott J. recognised in their separate judgments, much of this inherited land is essentially illiquid and difficult to sell. Second, even if it could be sold, this would destroy the income generating abilities of the husband.

28. Two other factors enumerated in *YG* are also important to note. First, the task of the Court is to make proper provision and not to ordain some kind of wealth distribution between the parties. Second, the fact that one spouse makes poor investment decisions after an initial capital transfer as part of proper provision is not in itself a reason to justify a further such transfer.

29. While as both *DT* and *YG* illustrate, Irish law does not recognise the existence of a formal clean break, the starting point nonetheless is that in the 2005 judgment O'Higgins J. sought to make proper provision – in the manner required by the Judicial Separation and Family Law Reform Act 1989 – for the wife and children. This is a very similar – if not, indeed, identical - exercise to that which the High Court was and this Court is called upon to perform in the present divorce proceedings. Furthermore, by analogy with the underlying reasoning in *YG*, the very existence of the proper provision order in 2005 is itself a factor which has to be accorded significant weight.

30. What, then, was the proper provision to which the wife was entitled in the light of these *YG* principles? In my view, the task facing the High Court was to ensure that the wife had sufficient capital monies as would enable her to purchase a large comfortable property as would befit the social standing and standard of living which she had enjoyed immediately prior to the separation. Of course, in making this assessment it is necessary to have regard to the totality of the orders made. If the sum of €3.3m. could be considered to be somewhat on the low side in view of the husband's significant assets, this is tempered by the fact that the order for maintenance made by O'Higgins J. was a generous one.

31. It must also be recalled that the effect of the marriage break-up and the judicial separation decree was that the wife found herself obliged to leave the estate which had been her family home.

32. Given the inherited nature of the husband's wealth and the fact that proper provision is not intended to operate as a form of wealth distribution, I find it difficult, however, to say that the sum of €3.3m. directed by O'Higgins J. – approximately 15% of the estimated net value of the husband's assets – was inadequate for this purpose when regard is had to the size of the maintenance award. Even with the enhanced land valuations which obtained in 2005 - 2006 immediately prior to the financial crash, the sum of €3.3m. ought nevertheless to have been sufficient to enable the wife to purchase a fine country house with some land in the period from 2005 - 2006.

33. The unpalatable fact, however, is that all of that money paid over on foot of the order of O'Higgins J. has now disappeared. The wife certainly did purchase a noted country house, but she ran into considerable financial difficulties because the initial purchase price of €5.1m. significantly exceeded the capital sum she had received from her husband. She further was required to expend considerable sums in respect of the repair of the property, which sums were – apparently – inadequate for this purpose and exposed the house to frost and water damage. One way or another, the property was sold in 2012 by the Bank of Ireland for a fraction of the initial purchase costs.

34. This aspect of the appeal certainly presents an unhappy and unfortunate tale. It is impossible not to have very considerable sympathy for the wife who, in many respects, appears to be yet another victim of the property crash. It is nonetheless clear from *YG* that the other spouse should not be visited with the consequences of poor and improvident investment decisions made by the other spouse in the aftermath of the marriage break-up. Looking at this another way, if the capital provision made by the High Court in 2005 was, viewed objectively, proper capital provision for the wife and children, the fact that the wife has subsequently misspent this capital sum is not in itself a reason why further provision should now be made in the course of the divorce proceedings. As Hardiman J. said in *W.A. v. M.A.* (divorce) [2004] IEHC 387, [2005] 1 I.R. 1, 19:

> "….the conduct of a party in himself (or, of course, herself) bringing about the circumstances giving rise to the alleged need for (further) provision is itself of relevance to considering whether such provision should be made, and in what amount."

35. As, however, I have already indicated, I cannot say that - measured by reference to the *YG* principles - the initial capital provision made by O'Higgins J. was inadequate in view of the totality of the orders for capital sums and maintenance made by him. If that is so, the fact that the wife needs a further capital injection of cash to compensate her for the improvident investment decisions which she took after the initial High Court order took effect is not *in itself* a reason why the High Court in 2012 (or this Court in 2016) should now make an order for further provision.

36. For these reasons, therefore, I would dismiss the wife's appeal against this part of the order of Abbott J. as made no further capital provision for her.

**The maintenance order in favour of the wife**

37. I turn now to the issue of the maintenance order. Irrespective of her other financial woes, I consider that, where it is financially possible to do so, the wife is entitled to receive maintenance as will endeavour to match the standard of living which she previously enjoyed prior to the separation. At the same time, the maintenance order should reflect the level of the husband's current and future income. While it is true that both the husband and wife are professional persons, the wife has not worked for a long time and it would be unrealistic to expect her to do so now. I propose, therefore, to proceed on the basis that the wife's income remains totally dependent on that of her husband.

38. In effect, therefore, this exercise first requires an assessment of the gross value of the husband's income. The evidence is that the husband's gross pre-tax income was in the region of €1m. to €1.1.m.. In the judicial separation proceedings in 2005 O'Higgins J. had ordered that the wife receive a gross figure equivalent to €433,000, together with a sum of €80,000 in respect of the up-keep and maintenance of the four children. (As the children have all subsequently attained their majority, there is now no need for this Court to address their particular circumstances.)

39. In the divorce proceedings Abbott J. set aside the maintenance order made by O'Higgins J. He directed instead that the husband pay the rent of €36,000 a year along with a sum of €50,000 free from all deductions for the wife's necessaries. This objective was not, however, entirely achieved in that, as I have already recounted, the Bank of Ireland subsequently succeeded in obtaining a High Court order effectively attaching €40,000 of that sum. The husband has subsequently agreed on a voluntary basis to make supplementary payments to ensure that the wife received the full level of maintenance payments.

40. In these unusual circumstances there is much to be said on pragmatic grounds for leaving the status quo as directed by Abbott J., assuming of course that the wife continues to receive the full net maintenance payment of €50,000 (*i.e.*, after tax) from the husband, the High Court order in favour of Bank of Ireland notwithstanding. One could, of course, make a cogent case for increasing the maintenance amount, but as the likely effect of this simply would be that more funds would be diverted from the wife to the benefit of the Bank of Ireland and (perhaps) the Revenue Commissioners, this in turn is likely to result in a situation where both husband and wife are simply worse off.

41. In these unusual and difficult circumstances, I would propose for these essentially pragmatic reasons that the order for maintenance made by the High Court should continue. This, however, is predicated on the assumption that the husband will undertake to this Court to continue the existing payments so that the wife continues to receive the net €46,000 annual maintenance figure, the attachment order made in favour of the Bank of Ireland notwithstanding. If such an undertaking were not forthcoming or there was otherwise a material change in circumstances, this might well justify the wife making a fresh application to the High Court to vary any earlier maintenance order.

**The husband's cross-appeal: Did the High Court have a jurisdiction to grant a decree of divorce subject to compliance with certain pre-conditions?**

42. Although the High Court made an order providing for a divorce decree, this was made conditional on the payment by the husband of a figure of some €629,000 (a sum which represents the wife's taxed costs in the original judicial separation proceedings) and lodging the further sum of €1m. on account in respect of the legal costs incurred by the wife in the divorce proceedings. As the husband has not yet paid this sum, the decree of divorce has yet to take effect. A key part of the husband's submissions is that the High Court had no jurisdiction to make the divorce decree conditional in this way.

43. In this part of his judgment Abbott J. concluded that the husband had been guilty of contempt of court and abuse of process during the course of the proceedings by reason of the following facts. First, he had concealed from the High Court in 2005 the existence of a marriage settlement. Second, he had unilaterally reduced the amount of maintenance for the wife without a court order. Third, he understated his income to the Court. Fourth, he had misrepresented the situation regarding his entitlement to a tax claw-back in respect of the estate. Fifth, he had reduced the maintenance for his two elder children. Sixth, he had refused to pay the sum of some €629,000 which were certified as being the taxed costs arising from the 2005 proceedings.

44. Abbott J. then concluded:

> "Having regard to the foregoing, I conclude that the court is coercively bound to protect the administration of justice in this and other cases and to take some steps against the applicant husband. I am satisfied that the most practical reaction to the situation may be met by an order that the husband pay into a joint account of his solicitors and the respondent's solicitors the costs taxed and owing (and in respect of which an order under the Solicitors Ireland Act has been obtained) and that such monies shall be paid out on the basis that they are monies owed by the husband to the respondent's solicitors directly on the basis that the said costs arose by reason of the implied pledge of the husband's credit for such necessaries, and that similarly, pending agreement what taxation of the level of same that the costs of these proceedings estimated provisionally at €1m to include VAT should be paid into a similar account on the same basis, and that the order for divorce in these proceedings would not issue or be granted until the said sums have been paid as directed."

45. The curial part of the High Court order dated 14th September 2012 provided for the grant of a divorce subject to the husband "complying with the following orders on or before 31st January 2013 and the said order shall take effect from the date of compliance." The husband was then directed to pay the wife's solicitors the sum of almost €629,000 in respect of the taxed costs arising from the first set of judicial separation proceedings, the wife's solicitors having obtained an order of taxation to this effect. The High Court order further recites that these costs were incurred by reason "of the implied pledge of the [husband's] credit for such necessities."

46. The High Court also made an order requiring the husband to make a payment of €1m. (including VAT) on account of his wife's legal costs in the divorce proceedings. The order positively prohibited the husband from re-marrying pending compliance with these requirements.

47. In his appeal to this Court counsel for the husband argued forcefully that the High Court had no jurisdiction to make a conditional order of divorce of this kind. It was submitted that an order for costs did not fall within the scope of the proper provision requirements and that even if it did, the High Court had been given no power by either the Constitution or the relevant statute law (*i.e.*, the Family Law (Divorce) Act 1996) to make this kind of conditional order.

48. I agree that the High Court did not have jurisdiction to make a conditional form of divorce in this fashion. To that extent, therefore, I consider that the form of the order was wrong. But, for the reasons I propose now to explain, I consider that Abbott J. was in substance correct inasmuch as no proper provision could be made in the circumstances for the wife unless these significant costs orders were addressed and dealt with.

49. Article 41.3.2.iii of the Constitution provides that a decree of divorce may be granted where the Court is satisfied that proper provision "exists or will be made". The words "proper provision" must, of course, be construed autonomously in the light of the constitutional objectives of Article 41.3.2 and the proper interpretation of these words cannot be foreclosed by the manner in which they have been understood by the Oireachtas. At the same time, it is nevertheless significant that the Oireachtas in enacting the Family Law (Divorce) Act 1996 has provided in Part III of that Act for a range of ancillary orders designed to give effect to the proper provision requirements of Article 41.3.2. It is accordingly clear from that an order for costs does not fall within the scheme of ancillary relief as prescribed by Part III of the 1996 Act for the purpose of making proper provision.

50. I agree, therefore, that once Abbott J. was satisfied that the four constitutional pre-requisites had been satisfied, he was obliged to grant the order of divorce under Article 41.3.2.iii. It has been clear from the earliest days of this divorce jurisdiction that the party seeking a divorce had, in effect, a constitutional right to such an order provided that the four conditions were fulfilled: see, *e.g.*, the comments of Barron J. to this effect in *R.C. v. CC* [1997] IEHC 4, [1997] 1 I.R. 334. To that extent, therefore, the High Court did not have jurisdiction to make the order for divorce *conditional on the subsequent discharge* - and I stress these words - of the costs order by the husband.

51. Yet, so far as the substance of the order is concerned, Abbott J. was correct. In effect, his view was that given the size of the costs order in 2005 and the anticipated costs of the divorce proceedings, proper provision would not be made for the wife unless these costs orders were discharged by the husband which, to date, he has not done. Put another way, in the unusual circumstances of this case given the size of the costs liability the High Court could not have been satisfied in the manner required by Article 41.3.2 that proper provision would be made for the wife unless the 2005 costs order was discharged and the sum of €1m. was paid in respect of the costs which were incurred by the wife in the divorce proceedings.

52. I would thus vary the order of the High Court by providing that the Court would only be satisfied that proper provision was made for the wife within the meaning of Article 41.3.2 once the 2005 costs order was discharged by the husband and when he had paid the sum of €1m. in respect of the wife's costs for the divorce proceedings. Once these costs have been discharged by the husband, then – and only then – will the four conditions specified in Article 41.3.2 be satisfied and the divorce decree can issue.

53. There will, of course, be liberty to apply to the High Court in respect of this matter once the sums in question have been discharged in the event that it should prove necessary to do so.

**Conclusions**

54. Summing up, therefore, I would conclude as follows:

55. First, I cannot say that the original capital sum of €3.3m. which O'Higgins J. directed the husband should pay to the wife was inadequate as proper provision in the circumstances, particularly when it is viewed in light of the generous maintenance order which was then made. The fact that all of that money has been effectively lost by reason of the improvident business dealings of the wife is not in itself a reason as to why that capital payment should be adjusted or revised.

56. Second, in the unusual and almost unique circumstances of this case, I have concluded that the maintenance payments directed by Abbott J. should be upheld. This is, however, conditional on the husband undertaking to this Court that the existing arrangements whereby he ensured that the wife continued to receive €50,000 net of all other payments continued, the attachment order made in favour of the Bank of Ireland notwithstanding.

57. Third, once the High Court concluded that the four constitutional requirements (including proper provision) set out in Article 41.3.2.iii were fulfilled, the husband had in effect a constitutional right to a divorce decree. In those circumstances the High Court had no jurisdiction to impose a further pre-condition prior to the taking effect of any such divorce decree, namely, that the husband discharge his wife's taxed costs from the 2005 judicial separation proceedings and pay a figure of some €1m. on account in respect of the costs of the divorce proceedings.

58. Fourth, nevertheless even if the order of the High Court was wrong in form for the reasons I have just suggested, it was nonetheless correct in substance. Given the huge legal costs which this litigation had generated, proper provision for the wife within the meaning of Article 41.3.2 required that the 2005 costs order would be discharged by the husband and that he pay €1m. in respect of the wife's costs for the divorce proceedings. Once these costs have been discharged by the husband, then – and only then – will the four conditions specified in Article 41.3.2 be satisfied and the divorce decree can issue.