

**THE HIGH COURT
FAMILY LAW**

[2002 No. 38 M]

BETWEEN**S. MCM.****APPLICANT**

**AND
M. McM.**

RESPONDENT**Judgment of Mr. Justice Henry Abbott delivered on the 29th day of November. 2006.**

1. The applicant and the respondent (to whom I shall refer to as the wife and the husband) were married to each other on the 4th day of February, 1967. Three children were born to the marriage, L. on the 24th August, 1967, J. on the 11th April, 1969 and T. born on the 15th April, 1974.
2. The wife had been a secretary and gave up her employment for her marriage. The husband worked in the family firm which shall be referred to as the "Group" which term includes the additional associated or subsidiary firms accumulated since that time. They lived in what was described by the wife in evidence, and I accept, was "cautious comfort".
3. Unhappy differences arose between the husband and wife as a result of which they separated on the 3rd July, 1991. Different reasons were advanced for the cause of the separation. The wife on the one hand stated in evidence that they arose from the lack of attention and intimacy afforded to her by the husband after the birth of their last child in the mid 1970's. The husband on the other hand asserted that they were a number of (3) affairs, the final of which caused the break-up.
4. A deed of separation was executed by the husband and wife on the 3rd July, 1991, which acknowledged that the wife had purchased a house with the proceeds of the sale of the family home and I should say from the outset that the deed of separation does not refer to the conduct of either of the spouses and it has been conceded in evidence by the husband that conduct had nothing to do with the terms of the separation agreement. I can say then that conduct is not a matter to which the court shall have regard in relation to the deliberations which follow.
5. These proceedings were initiated by the wife on the 8th May, 2002, in which she claims divorce and ancillary relief by way of proper provision under the Family Law (Divorce) Act, 1996. The separation agreement is admitted by husband and wife to have been made by them having taken legal advice and on the basis of a full and frank disclosure of the assets of the parties. The husband paid the wife £83,000 which represented approximately 60% of the proceeds of the sale of the family home and payment of £25,000 gross per annum by monthly instalments to be varied annually in accordance with the CPI. In the event of fundamental change in the circumstances of either husband or wife, either party should be at liberty to apply to the other for an increase or decrease in the maintenance. There is a further agreement not to sue for additional lump sums etc under existing legislations on "any amendment" thereof. This is technically unenforceable under the Family Law (Divorce) Act, 1996 see (*R. G. v. C. G.*), [2005] 2 I.R. 418 but nevertheless I will take it as part of the genre which is commonly referred to as a "full and final settlement" clause. In addition the separation agreement provided for valuable pick ups in relation to VHI, provision of second hand motor car, provision of car insurance by the Group, credit facility with the Group for petrol and payment of two sports stops. In addition the husband agreed to procure the continuation of his pension arrangements with his employer insofar as it benefited the wife in the event of the husband's death. There was no extinguishment of succession rights.
6. The separation agreement was clearly made on the assumption that the wife was not and would not be employed. By the date of the separation agreement in 1991 the husband had become joint managing director of the immediate company in the Group and he remains a director of the Group and is also a director of many associated and subsidiary companies within the same. His existing shareholding in the Group was estimated to be worth c. £400,000.00.
7. The husband is 63 and the wife is 62. While the husband has envisaged reducing some of his day to day commitments within the Group, and has done so, he nevertheless intends to continue working in the Group within the foreseeable future, to face the challenges the Group faces in the next few years. This employment up to a reasonably active level will be subject, of course, to his health. He has recently come to realise that he is in a moderate state of health insofar as he will have to take care of himself, with blood pressure and diabetes concerns. The wife's health is excellent.
8. To the credit of the parties and their advisors many issues were resolved in the lead up and course of the hearing of this case which commenced on the 18th July, 2006 and concluded on the 25th July, 2006. There remains a set of three issues outstanding, namely –

- (a) The value of the husband's shareholding in the Group, and value of his assets relative to the assets of the wife.
- (b) The extent to which the court shall have, pursuant to the 1996 Act, regard to the 1991 separation agreement when making provision by way of ancillary relief before granting a decree of divorce.
- (c) The quantum of such provision.

Valuation of the Husband's Shareholding in the Group

9. The contest on this issue involved wide ranging debate and evidence on the method evaluation. It was necessary in evidence to examine the complex corporate arrangements in relation to the holding and control within the Group. It is not necessary or appropriate for me to set out in full complexity the detail of these arrangements but it is necessary for me to find the following facts, as I do –

1. The husband has a minority non-voting shareholding in S. company, which is the main equity holding vehicle in the Group.
2. The husband has voting shares and directorship positions in relation to the Group but does not have controlling voting rights, neither is he in a position of king maker in relation to his shareholding of any of his shareholdings, such as to give them a special value.

3. The Group was founded by the husband's grandfather and the ownership thereof has expanded and continues to expand pyramid fashion down the generations to various members of the family in diverse holdings of various companies throughout the Group.

10. The Group has shown profit over the last few years from its distribution business, mainly, although recent challenges within the trade have had the effect of reducing this profit, but the husband and his fellow family shareholders are committed to continue the business of the Group in the distribution trade and do not intend to sell their shareholding, or to float the Group on any stock market, notwithstanding similar events occurring in relation to some of their competitors in the recent past. While there was an internal market evidenced by one transaction between members of the family for shares within the Group, I find that that is not sufficient to establish any meaningful internal market within the company and there are no constitutional means within the Group to facilitate arbitrage or exchange of value within the family. The Group was clearly set up by its founding fathers as one which was suitable for keeping the business within the family. It is likely that the family pyramid will continue to expand and that increasingly professional management will take over as the family numbers expand. Perhaps as the pyramid of ownership expands there might be developments tending towards a sale of the Group or major cash realisation of its assets, but I consider that that event is, while possible, is far too far off on the horizon for the practical purposes of this case.

11. The Group is likely to pay a modest dividend based generally on 1% of profits to its shareholders into the foreseeable future. While the dividend is modest, none of the shareholders appear to be agitating to have same increased, and it is the policy of the Group to maintain the business by reinvestment of profits to secure the future of the company. In current competitive conditions such profits may well be jeopardised in the short term and reinvestment of profits may be more to maintain market position than to expand it, but nevertheless such a reinvestment of profits preserves the opportunity for the company to capitalise on changes and vacancies within the market arising from recent turbulence in that area. The evidence adduced to show that the fixed assets of the Group are valued at a sum in excess of €300 million is not conclusive, by reason of the fact that the sampling method of valuation applied to a mark up of the book value of properties and the accounts, fell down when applied to a number of properties which were actually sold, and also by reason of the unsatisfactory nature, not so much the valuers called on behalf of the wife, but the evidence of a witness called as an expert in relation to properties in the distribution business of the type carried on by the Group. Notwithstanding that the attempts to put such a high value on the assets of the company of the Group were a forensic disaster, the evidence does indicate the wide scope and potential of the value of the Group in the event of a disposal or of the value becoming unlocked in some way in the future.

12. On the basis of the foregoing I find that the valuation of Mr. Peelo, backed up by the further expert evidence in the case, that the dividend was the chief guide to value the shares in a closely held Group such as the Group in this case, without an exit mechanism, and that the net value of same after allowance for capital gains tax is in the region of €3 million.

Extent of Regard to 1991 Settlement

13. I find that the facts of this case are closer to the cases *K. v. K.* [2003] 1 I.R. 326 and *R. G. v. C. G.* decided by O'Neill J. and Finlay Geoghegan J. respectively than to the case *W. A. v. M. A.*, [2004] 1 I.R. 1 decided by Hardiman J. insofar as the settlement is of long years standing and does not represent a sharing of assets and business opportunities between husband and wife such as occurred in *W. A. v. M. A.*

14. Both *R. G. v. C. G.* and *K. v. K.* are authorities for the proposition that should the financial circumstances of the provider alter substantially and dramatically for the better, then less regard is to be paid to the previous settlement. Counsel for the husband has argued that if the court considers the fact that the 1991 settlement was reasonable in all the circumstances, is a factor to which considerable weight should be given in deciding to make provision. I have seen the disclosure made by the husband in his statement of affairs of 1991 and the disclosure is of a high standard. Apart from her disappointment about the after tax outturn of the maintenance, the wife was satisfied initially with the settlement. It is clear that the husband and wife took a reduction in their living standard insofar as the family home was sold to be roughly divided between them for the purpose of buying residences of a lesser standard while the husband's shares were valued at over £400,000.00 the couple had not received dividend up to then and had for a considerable period of time not known that the husband's father had placed the shares in the husband's name. The £25,000.00 gross maintenance together with valuable pick ups compared to a salary of £81,000.00 (including dividends) which was represented as being the equivalent of net income after tax on s. 34 loan payments as £43,120.00 per annum. On the current rough valuation of pick ups – approximately €20,000.00 per annum the maintenance of the wife would have been somewhat over one third of the husband's salary. The family had led a comfortable but cautious lifestyle and the provision made in the settlement for the wife seems to have accommodated this lifestyle within the parameters of the reduced resources arising from the separation. The wife continued to have the responsibility at least in part for the youngest child who was then aged 17. Her responsibilities therefore seemed to be less than the wife in the *R. G. v. C. G.* and *K. v. K.* cases. Unlike the *W. A. v. M. A.* case, the wife in this case did not have any resources given to her from which she could earn a livelihood or develop a business: she was solely dependent on the husband for her maintenance in the future. She had the comfort of knowing that succession rights were not barred and that the husband's pension would be maintained and available for her on his death. These latter two elements represented accrued security which must at least be replicated by the equivalent in any provisions to be made in this case. There is no attempt made to provide any sum to represent the esteem in which the plaintiff had been held in relation to her efforts as a mother and housewife which had been described by her in her evidence. The husband had stated that he too contributed to the home by gardening and cooking. The husband admitted in cross-examination that the wife did not suffer in the settlement by reason of any alleged conduct on her part. Having regard to the foregoing I find that the settlement was a reasonable one and subject to the reservations giving rise to additional provision in divorce proceedings the same would represent a very solid centre of gravity restraining the court from going too far beyond the parameters thereof. The question arises whether the further test in the *K v. K.* and *R. G. v. C. G.* cases in relation to additional provision is met. This test is whether the circumstances of the provider (the husband) have altered substantially and dramatically for the better since the making of the settlement a relatively long time ago in 1991. The possible dramatic increase in the value of the shares in the Group owned by the husband is largely illusory in relation to answering this question given the locked-in nature. Of more tangible importance is the comparison between the increase in the husband's annual income of around £80,000.00 to €420,000.00, which is approximately a four-fold increase, allowing for currency conversion with the maintenance and pick up value of the wife which is estimated now to be the equivalent of €72,000.00 – only slightly over double the initial maintenance in monetary terms. As the husband stated in evidence, that his salary was based on national wage agreements or understandings over the years, the only explanation for the discrepancy between the rate of growth of the husband's income with the income of the wife in monetary terms, is that where as the wife was protected against price increases she did not share in the dramatic economic growth experienced in this country over the last few years. The case must surely illustrate that whereas the CPI adjustment may be suitable for protection against short term cyclical inflations it ultimately does not protect against longer term or secular alterations such as has been evidenced by the dramatic and unusual growth in the economy in the 15 years since the settlement. In my opinion, it would be unfair to allow the terms of the settlement to prevent the wife from enjoying the better standard of living experienced throughout the country in real terms especially when they have been enjoyed (albeit on a prudent or measured scale), by the husband in regard to his income. Additionally the husband has been in a position to accumulate a substantial pension and to increase dramatically and successfully his shares portfolio. While the wife has commendably been in a position to save something to establish a portfolio this falls into insignificance when

compared to that of the husband. The evidence of the wife as conceded by the husband is that she has led a cautious life. She has to borrow or rely on friends for holidays, her house has become dated. She has become aware of vast increases in the cost of nursing home care in the event of her requiring same. On that basis that the settlement should not act as a restraint in relation to providing reasonable resources to enable the plaintiff to catch up with modern prosperity and to receive an adequate and proper amount of resources to provide security which she will lose by foregoing succession rights in the post divorce situation. The settlement should be of influence in ensuring that the shares in the Group in the hands of the husband should not be exploited to disrupt the family and inherited nature of the business or to provide resources by aggressive provisions in the divorce order for realisation or use as security.

The assets and income of the parties.

15. I find that the net assets of the husband are as follows:-

1. House	€1,234,000.00
2. Pension Fund	€2,156,000.00
3. Investments	€1,500,000.00
4. Boat	€180,000.00
5. Bank Accounts	€41,000.00
Total	€5,111,000.00
6. Husband's share in Group	€3,000,000.00
Total	€8,111,000.00

16. The net assets of the wife are as follows:-

1. House	€800,000.00
2. Shares	€80,000.00
Total	€880,000.00

17. On the basis of the best figures worked out by Mr. Peelo and Mr. Grant, the two accountants in the case, the gross income of the husband from all sources is €450,000.00 and the net disposable income after tax is €282,000.00. The existing maintenance of the wife is €52,000.00 gross or €35,000.00 net. The maintenance plus pick up items is valued at €72,000.00 gross. It has been estimated by the accountants that the net disposable income of the husband after maintenance, tax and pick up items is in the region of €230,000.00. I consider the calculation to be done on this basis €280,000.00 - €72,000.00 = €210,000.00 plus €17,000.00 = €227,000.00. (Tax not paid by the husband in hands of wife) investment of 50% of pensions fund in an Approved Retirement Fund will result in an income/pension for wife of €52,000.

Consideration in relation to provisions pursuant to s. 20 of the 1996 Act.

18. Having regard to the criteria set out in s. 20(2) paragraphs (a) – (l), deal with same consecutively as follows.

19. In relation to paragraph (a) the husband will continue to have a high earning capacity in the immediate future which will reduce when he eases his workload and/or retires. Even in retirement and allowing for reallocation of resources by and in provision of this case between husband and wife, the husband will continue to have ample income, from pension and dividend income, from his shares in the Group and his investment portfolio. The wife will continue to have a dependency on the husband. Her shares can barely provide an income of €1,000.00 a year in net dividends. She has not the capital resources to upgrade her house or provide modest holiday accommodation elsewhere.

20. In relation to paragraph (b) the figure of €90,000.00 per annum gross maintenance has been suggested by counsel for the plaintiff as being adequate maintenance to enable the wife to catch up in her estimation on her requirements for day to day expenditure and basic outlets such as holidays. This compares with the current value of maintenance and pick ups of €72,000.00 gross. This figure requires to be augmented with capital sums to provide catch up expenditure such as up-grading or changing house and holiday accommodation together with pension provision in the future. An increase in the pool of capital available for the wife is necessary to ensure that she may plan for a fund to ensure security in relation to nursing care in her old age. The husband's financial needs and obligations are essentially the same as those of the wife and he should have ample resources left after provision is made to the wife in these proceedings.

21. In relation to paragraph (c) it is clear that the husband has caught up with any possible surpass the standard of living enjoyed by the family before the spouses commenced to live apart from one another but that the wife's standard of living has deteriorated as I have already described.

22. In relation to (d) both parties are in their sixties and both have a concern about security for their older years in relation to pensions and nursing home accommodation. While the duration of their marriage was long, the length of time in which they have lived apart is 15 years. I have dealt with the significance of the length of time of 15 years in relation to the consideration of the settlement. I also find it of significance that during all of the 15 years the wife has been solely dependent on the husband and remains so into the future. While the husband has concerns about blood pressure and diabetes and must take care of himself to control these, the health of the wife is excellent. I take into account the health of the husband from the point of view of endeavouring to ensure that the crafting and architecture of the eventual order in this case will not involve disruptive liquidation type procedures and that if an absolutely clean break cannot be ensured that the provisions are such that they will not be intrusive in relation to the family and inherited nature of the Group. To do otherwise would in my view place unnecessary strain on the parties by reason of the continuation of litigation would not be conducive to good health.

23. In relation to paragraph (f) the contribution of the wife as a mother and home maker for the duration of the childhood of her three children is to be taken into consideration with the vast bulk of the contribution made financially by the husband as described above. The contribution of the wife should be met by some adjustment in relation to the shareholding of the husband in the Group as hereinafter described and also allocations of some capital and pension, (part of which may be regarded as being part of a catch up on falling relative value of maintenance payments and in part recognition of past contributions). These capital adjustments will not go anywhere near the type of parity of treatment one might have if the marriage had continued to the date of the divorce and assets were being distributed on the basis of an application of the *T. v. T.*, [2002] 3 I.R. 334 principles and in the event of there being no prior reasonable settlement has occurred in this case. The husband too made a contribution to the family by being the father and participating in the home, participating in holidays and making special contributions in relation to attending the garden and large lawn and doing some cooking. The children have succeeded well and both parents can take credit for ensuring their nurturing and upbringing.

24. As regards paragraph (g) the earning capacity of the husband was not inhibited by his marital responsibilities. As was the pattern in the 1960's and 1970's the wife gave up her employment and to that extent gave up the opportunity of earning outside the home. In the beginning of the settlement period she is unlikely to have earned more than the maintenance under the settlement and she is not particularly making a case that she would have ascended up the ladder to some other career arising from her former employment as a secretary and this paragraph does not really affect the outcome of the case in financial terms as the wife has not pressed it.

25. Paragraph (h) does not arise in so far as neither of the spouses entitled by or under statute to any income or benefits.

26. Paragraph (i), I do not propose to deal with the conduct as the parties would not wish me to do so and it is fair and just that I take that course.

27. Paragraph (j), the husband's house is of somewhat higher standard than the wife's house. She said that her house is cramped, and that she would like more room for her visiting children and their friends and possibly grandchildren. She would also like to have the opportunity of requiring a modest holiday home elsewhere in the country. I consider that the capital allocation provision in this case immediately realisable will enable the wife to seek to improve this accommodation.

28. In paragraph (k) the wife will lose her legal right under the Succession Act, 1965, to a share in the husband's estate on death in the event of a divorce. She may also lose part of the pension arrangement but this will be amply compensated by new pension arrangements and these losses as they may arise may be catered for by securing maintenance and pension payments in the manner proposed by me.

29. Paragraph (l) does not arise as there is no dependency nor does the evidence disclosed that either party intends to remarry.

Provision

30. I propose to increase the annual maintenance of the wife to €90,000, increasing with the cost of living but obviously reviewable if the husband ceases employment. I accept suggestion of husband's counsel that this should be secured in the event of death of husband on the husband's ARF, but also on €500,000 of his portfolio. The suggestion of securing same on the husband's share in the group is too illusory for the wife and too distressing for the husband.

31. I propose to order payment of lump sum of €400,000 by the husband to the wife.

32. I propose to order the division of the pension fund by providing the sum of €1,250,000 for the provision of an ARF for the wife, having regard to the fact that the same might augment the lump sum in the further residential and holding of property which in turn will be security for the future pension or nursing home needs of the wife.

33. I direct that the husband, his successors and personal representatives do hold from henceforth ten per cent of his current non-voting shares in the S. company in trust for the wife to the intent that the wife may hold the same and dispose of same by deed or will (such disposed to take effect not less than 15 years from date of order) and for her own benefit as she shall decide, provided however that the wife shall not be entitled to call for the vesting of such shares in her but shall be entitled to such dividends and cash proceeds as they fall down on the basis that the husband shall be liable for funding any corporate action associated with such shares. For the purpose of avoidance of doubts I invite the parties to make suggestions as to how the order incorporates this principal in the event of a disposal by will and death within the 15 year period – obvious with Mr. McMin a trustee position.

34. I find that at the date of the institution of the proceedings the husband and wife have lived apart from one another for a period amounting to at least four years during the previous five years and that there is no reasonable prospect of a reconciliation between the spouses and that the court has made proper provision having regard to the circumstances existing for the spouses, being the husband and wife in this case, and that there are no dependent members of this family within the meaning of the 1996 Act and accordingly I am prepared to grant a decree of divorce in respect of the marriage of the husband and wife in this case. I leave to the submissions of counsel to address me in relation to the fine tuning of the formalities of the order having regard to the foregoing judgment.