Neutral Citation: [2011] IEHC 559

THE HIGH COURT

FAMILY LAW

[2009 No. 32 M]

IN THE MATTER OF THE FAMILY LAW ACT 1995,

AND IN THE MATTER OF THE FAMILY LAW DIVORCE ACT 1996,

AND IN THE MATTER OF THE DOMESTIC VIOLENCE ACT 1996,

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

BETWEEN

J.D.F.

APPLICANT

AND

C.F.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 28th day of October, 2011 with supplemental judgment of 13th December, 2011 annexed.

1. The applicant J.D.F. (the husband) was born on the 30th January, 1953. The respondent C.F. (the wife) was born on the 1st December, 1957. The parties were married in a civil ceremony on the 15th November, 1989, having previously married in a Catholic ceremony on the 19th October, 1988. There are two children of the marriage, both daughters, M. born 13th November, 1992, and E. born 20th January, 1995. The wife had been previously married on the 8th August, 1980. This was a short marriage and a church annulment was granted after some eighteen months. The parties obtained a decree absolute of divorce in England on the 27th March, 1989; this was accepted as being valid in this jurisdiction by the Registrar of Births, Marriages and Deaths.

2. The husband and wife were involved in a relationship from 1985. The husband worked in a business in Dublin. The wife had a business that operated mainly in a provincial city but had two branches in Dublin.

3. At the beginning of the relationship the wife owned a house in the provincial city where she had operated her business. She sold this house in 1985, which, after payment of the mortgage, yielded IR£26,000. She divided the proceeds between investment in her business and a contribution towards the acquisition of the family home in Dublin. The husband also contributed to the acquisition and the refurbishment of this property, in part by means of a bank loan. In 1989 the husband bought a farmhouse from a relation. This farmhouse was closely situated to a sizeable farm owned by the husband's father. The farmhouse was situated on half an acre, but had no other land attached to it. It was held in the husband's sole name. In 1992 the husband and wife moved to reside in this property, and their two children were subsequently born there. The wife's businesses were sold – at some small loss or at least with no profit – between 1992 and 1994. The family home was sold in 1996 for the sum of IR£160,000.

4. In 1998 the husband's employment was terminated and he received a settlement from his employers. He decided to establish a stud farm business at the family home. He invested money in developing stables and other facilities for this business. After the number of years the farm managed to build a good quality of stock and a reputation and the business started to make a profit.

5. Since there was no land attached to the parties' family home, the husband operated the stud farm on 22 acres of land adjacent to the family home which was part of the farm owned by his father, Mr. J.F. senior. Although the husband used this land for the purposes of his stud farm, the land remained in the ownership of his father. The husband sometimes assisted his father on his farm, and the father also sometimes assisted his son. The wife, no longer working, looked after the children and the home, with the aid of a housekeeper.

6. Unhappy differences arose between the parties in 1995. The wife issued proceedings in April 2000, leaving the family home in October, 2000. The wife sought a decree of judicial separation as well as certain ancillary orders. She then lived in rented accommodation, the children residing mainly with her.

7. The judicial separation proceedings were heard before O' Sullivan J., in the High Court. The learned judge delivered a judgment and order on the 16th May, 2002, and made a subsequent order on the 14th November, 2002. The trial lasted some nine days. Much of the evidence turned on the financial resources of the husband, both in this jurisdiction and in the Isle of Man, on the ownership of the farm lands and on the working of the stud farm. It was established that the 22 acres on which the stud farm operated remained in the legal ownership of Mr. J. F. senior. The wife maintained that the 22 acres on which the stud farm operated formed part of the family home or at least part of the matrimonial assets.

8. The learned trial judge gave judgment on the 16th May, 2002. In his order he granted a decree of judicial separation. By way of ancillary relief he further ordered:

> 1. "That the husband do have the right to occupy for life the family home situate at S. Stud, G., [] to the exclusion of the wife;

2. That the said family home do include the 22 acre site immediately adjoining the residence upon which site the husband has developed the stables, yard, lunge ring and enclosed fenced area;

3. That the husband do pay to the wife a lump sum of €489,000 being the sum of €461,000 representing a fair evaluation of the wife's interest in the assets (with the exception of the furniture of the house) of the family home and the sum of €28,000 to balance the notional sum available to the husband in the context of extra costs caused by his lack of co-operation with the requirements of discovery;

4. That the wife do continue to have the benefit of the children's allowances;

5. That the husband do until he has paid the aforesaid lump sum continue the existing maintenance and thereafter that he pay to the wife for maintenance the sum of €2,100 per month being the sum of €500 in respect of the wife and the sum of €800 in respect of the each of their two children;"

9. The order went on to provide for the maintenance of two life policies for the benefit of the wife and the children and for a pension adjustment order. It also provided that the husband should continue to pay V.H.I. premium for the two children and also pay for their medical and dental bills. The learned judge also ordered that the mutual rights of the parties under the Succession Act of 1965, be extinguished. The parties were granted joint custody of the two children and the matter of residence and access was set out in a detailed schedule to the order in accordance with a scheme advised by Dr. Gerard Byrne, Consultant Child Psychiatrist.

10. In September, 2002, the wife decided unilaterally to move her children from the school they were attending near the family home to a school in K., where the wife was residing. The wife did not inform her husband of this and two days before the start of the new school term in September she informed her children of the change. She told her husband on the same day.

11. On 7th October, 2002, the husband brought a motion seeking orders of attachment and committal against his wife for breach of the custody order. This motion was heard by O'Sullivan J. on the 14th November, 2002. The learned judge found the wife to be in contempt and ordered that in lieu of imposing a fine on the wife the lump sum ordered to be paid by the husband to the wife pursuant to the order made on the 16th May, 2002, be reduced by €25,000 to the sum of €464,000. The learned judge also remitted the matter of the schooling of the children and any questions regarding access to the District Court. This order was appealed by the wife by notice of appeal dated the 17th December, 2002.

12. Up to that point the husband had not appealed the order of judicial separation of the 16th May, 2002; however, by a motion dated the 1st July, 2003, he sought from the Supreme Court an enlargement of time within which to serve a notice of appeal. This motion was heard on the 11th July, 2003. An extension of time was granted on the following terms:-

"1. That the husband do pay to the wife the sum of €250,000 within six weeks of the date hereof on account of the lump sum payment of €464,000 due by him to the wife – execution for the balance of the said sum to be stayed pending the determination of the appeal herein or until further order.

2. That the husband shall be at liberty to further mortgage the family home at [] Stud, up to a sum of €250,000.

3. The undertaking to the Court by the husband which the Court doth note that he will not dispose of the said property without the consent of the wife pending the determination of the appeal herein or until further order."

13. The Supreme Court was informed that the said sum of €250,000 had in fact been paid to the wife. The husband filed a notice of appeal dated the 31st July, 2003. The wife made an appeal against the order of O'Sullivan J. on the 14th November, 2002.

14. The Supreme Court gave judgment on these two appeals on the 12th day of July, 2005.

15. In relation to the appeal of the husband, the husband submitted that the learned trial judge erred in law and in fact in holding and in so providing in his order that the family home included the 22 acre site upon which the stud farm had been developed. Secondly, the husband submitted that the judge had erred in law in holding in his judgment that, despite the fact that it was not open to him to make a property adjustment order in relation to the 22 acre site, he should take into account the value of that property adjoining the family home as an asset available to the husband. It was as a result of these two errors of law and fact, the husband submitted, that the learned trial judge had valued the family home at IR£600,000 and ordered an excessive lump sum to be paid by the husband to the wife. Examining the law and the definition of the family home under the precise terms of the Family Home Protection Act 1976, the Supreme Court held that it was clear that in referring to the "family home" as including the 22 acres, the learned trial judge had erred. It was obvious, according to the Supreme Court, that the husband had not acquired a beneficial interest through any contribution – direct or indirect – to its acquisition. The Supreme Court found that the husband operated on the 22 acre plot under a licence from his father. McGuinness J. opined that in order to establish a beneficial interest accruing to the son by means of a proprietary or promissory estoppel there must be at least some clear evidence of an actual promise, inducement or representation by the father to the son that he intended the son to be the owner of the land. Inferences from conduct are not sufficient, particularly if they are not supported by the evidence at the trial, where they were not here, as Mr. F. senior gave evidence which gave the strong impression that he was quite determined to retain the ownership of his land. Mr. F. senior stated that he would not transfer his land to his son during his lifetime nor would he be bequeathing to him anything more than a life interest after his death. There was no evidence that that he had previously made any promise, offered any inducement or given any assurance to his son that he would transfer to him the 22 acres that was in issue. In the Court's view, therefore, the doctrine of promissory or proprietary estoppel could not operate. The husband had not by the operation of an estoppel acquired a beneficial interest in the 22 acres in question. The 22 acres thus could not be held to be an asset of the husband or a part of the matrimonial assets of the couple and the learned trial judge erred in so treating it. The Supreme Court allowed the appeal on that ground and ordered that the matter be returned to the High Court to enable up-to-date financial and valuation evidence to be received and a fresh adjudication made.

16. The wife had appealed against the order of O'Sullivan J. in the High Court made on the 14th November, 2002, by which he found the wife guilty of contempt of the High Court for failing to comply with the judgment and order of the Court dated the 16th May, 2002. The Supreme Court found that it was clear from her evidence that the wife was well aware that it was most unlikely that the children's father would agree to the moving of his children to a school in K. Nonetheless the wife persevered in making the arrangements. She not only failed to inform the husband of the arrangements she was making, she also, in what was no doubt a further effort at concealment, did not inform the principal of the school in D. that the children were no longer to be pupils there. More seriously still, in the Supreme Court's view, she did not inform the children themselves of the change of school until two days before the beginning of term. The Supreme Court was in complete agreement with the finding of the learned High Court judge in finding that she was in contempt. The Supreme Court also found that the learned trial judge was correct in balancing the contempt of the wife as

against the husband's lack of co-operation with the court – itself a form of contempt. The actual level of the penalties imposed was thus somewhat immaterial, since the conduct of both parties could be virtually off-set against each other. This appeal was dismissed.

17. The case was remitted to the Circuit Court and was heard by the Circuit Court in July, 2006. The Court made the following order:

> 1. An order directing the husband to pay to the wife the sum of €90,000 within 2 months of the date hereof.
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> In default of such payment an order directing the sale of the family home, with the net proceeds of such sale to be apportioned as to 40% thereof to the wife and 60% thereof to the husband.
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> 2. An order directing the husband to pay to the wife the monthly sum of €400.00 for her support, and the monthly sum of €600.00 in respect of each of the two dependent children for such time as each of them remains dependant as defined in the Status of Children Act, 1987, making in all the monthly sum of €1,600.00
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> 3. The Court made no order for the arrears of maintenance
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> 4. An order directing the husband to pay for half the medical, dental and extra curricular activities of the dependent children
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> 5. An order directing the husband to pay the school fees, books, uniforms and back to school expenses. If the children continue to attend school, the husband to be responsible for the school fees. Should the children be allowed to move, the wife is to be responsible for the school fees should she reside in K.
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> 6. An order directing that the passports for the children be made available to the husband on two weeks notice to the wife and to notify wife if taking the children out of the country
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> 7. Access by the husband to the dependant children as follows;-
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> i) Every second weekend.
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> ii) Between the hours of 6 pm and 7pm the children to be delivered to the husband on Friday by the wife.
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> iii) And between the hours of 6pm and 7pm the Children to be returned to the wife on Sunday by the husband.
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> iv) And the husband to have the children for two weeks holidays in the summer.
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> 8. An order that the pension order in the High Court still stands.
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> 9. An order that the insurance policy order made in the High Court still stands, the wife should sign all the necessary forms to revive the policies with insurance on her life.
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> 10. On consent an order as regards the agreed contents of the house.
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> 11. The Court doth make no order as to costs.
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> 12. Liberty to re-enter.

18. On the 28th July, 2006, Ryan J. granted a stay to the husband for 14 days on the part of the order that referred to the lump sum payment.

19. The judgment of the Circuit Court was appealed and heard before McKechnie J. in December, 2006. An order was made by McKechnie J. on the 8th February, 2007. This order provided that the wife was allowed to move to K. with her children and the children to attend school there, with the husband to pay school fees. The husband was to pay the wife the sum of €100,000.00 before the 30th April, 2007, to be used to find the wife and the children suitable living accommodation. In default of this payment the family home was to be sold. The order with regards to maintenance was affirmed subject to the maintenance with regard the wife personally which would cease on the 20th December, 2011. Arrears of maintenance in the amount of €27,177.92 in six monthly instalments were to be paid to the wife. The parties were to be jointly responsible for the discharge of the dependent children's dental and medical fees and for the costs of their respective extra curricular activities. The husband was to be responsible for the cost of V.H.I. for the dependent children. The order with regard the wife's entitlement to the husband's pension fund was affirmed. The parties were to have joint custody of their children with the day to day care and control vesting in the wife. The children were to have custody of their own passports. The order of the Circuit Court with regards access and the contents of the Family home was affirmed. All existing orders for costs were to be discharged and the husband was to pay fifty per cent of the wife's costs in those proceedings, said costs to include all reserved costs.

20. On the 23rd February, 2007, the husband filed a notice of motion in the Circuit Court seeking a stay on the movement of the children to K. He sought interim custody of the children and an order finding the wife in breach of her duties as a parent, guardian and custodian. The husband claimed that the children did not wish to be relocated to K. He claimed that his children were stressed and that the wife was not looking after their well being in general, leaving them unattended at home and allowing them to miss school. He claimed that a section 47 report should have been carried out but that the Court refused to allow this report to occur. The wife, in her replying affidavit, denied this and claimed that the husband was failing to make regular maintenance payments and that the husband had been the author of much of the inordinately long process of litigation. The wife pointed to the order of the Supreme Court in 2003, whereby the husband was given an extension of time to appeal the High Court order. He was required to pay €250,000 on account within six weeks to the wife, the balance of the €464,000 to be stayed pending appeal. He was given liberty to mortgage the family home up to €250,00.00. In April, 2004, the husband applied to vary maintenance. At that stage he had not yet paid over the €250,000 decreed by the Supreme Court and sought to vary the original maintenance of €2,500. He pleaded penury. Peart J., giving judgment on the 27th July, 2004, rejected this claim and the husband appealed this decision.

21. This Court considered the application of the motion of the 23rd February, 2007, in the High Court (Appeals) and declined to make any order as the Court had no jurisdiction to do so. This Court noted at the time that McKechnie J. had been at pains to bring finality to the matter and that he had expressed the view that there should not be further proceedings anywhere. The husband brought a motion to the Circuit Court on the 28th March, 2007, seeking the same reliefs as well as an order directing a section 47 assessment,

under then-extant divorce proceedings. McDonagh J. refused the motion of the husband on the 3rd May, 2007. On the 9th May, 2007, the husband appealed this to the High Court, the appeal being ultimately dismissed.

22. On the 6th June, 2007, the husband filed a notice of motion varying the orders made by McKechnie J. on the 19th February, 2007, seeking mainly a stay on the execution of any adjustment order in relation to the husband's S. pension fund pending the outcome of the divorce proceedings. On the 11th June, 2007, McKechnie J. refused the motion for an order vesting interim custody of the children with the husband and staying the order of the High Court made on the 19th February, 2007. The appeal was dismissed and the order of the Circuit Court affirmed. On the 15th June, 2007, the husband filed a notice of appeal appealing the judgment and orders of the High Court of the 19th December, 2006, and the 19th February, 2007. On the 13th July, 2007, the wife gave a notice of re-entry for attachment and committal for the husband failing to discharge arrears of maintenance. On the 20th July, 2007, the wife applied to the Supreme Court to have the husband's notice of appeal struck out, basically contending that this case had been litigated thoroughly and extensively. This matter was heard first on the 20th July, 2007, whereby the Supreme Court refused the husband's application for a stay on the matter. The Court adjourned the matter and on the 5th October, 2007, the Supreme Court acceded to the wife's motion and the husband's appeal was struck out with no order as to costs. On the 7th April, 2008, the wife applied for an attachment and committal order for the husband's failure to pay €100,000.00 before the 30th April, 2007, and his failure to pay arrears of maintenance. In his replying affidavit, on the 18th April, 2008, the husband averred that due to market turmoil he was in financial debt to Ulster Bank and the value of his property had fallen drastically. On the 2nd May, 2008, he applied for an order to reduce the lump sum payment of €100,000, to reduce the amount of maintenance, reduce the wife's entitlement to his pension, and strike out her claim for arrears of maintenance. On the 21st May, 2008, the husband started divorce proceedings in the Circuit Court (It is important to note that while the parties were granted a decree of judicial separation in 2002, these divorce proceedings, were initially dismissed in their entirety by Flanagan J. on the 30th November, 2007).

23. On the 22nd May, 2008, the husband sought an order, mainly to seek the primary custody and care of the children but also financial reliefs. On the 28th May, 2008, Sheehan J. refused to vary the orders of McKechnie J. in relation to lump sum, maintenance current and arrears, and fund adjustment. Sheehan J., also refused to alter the custody and access arrangements as ordered by McKechnie J. The wife made an application for attachment and committal on the 4th June, 2008. The husband sought to be allowed to make an entry of appeal of the decision of Sheehan J. on the 16th July, 2008. This was refused.

24. In February, 2009, the husband sought to have the maintenance dealt with under the divorce proceedings in the Circuit Court. Flanagan J. declined to deal with the application as it was outside her jurisdiction due to the presence of ongoing attachment and committal proceedings in this Court. In February 2009, Sheehan J. outlined the situation whereby divorce proceedings (which had been initiated in the Circuit Court) could be adopted into the High Court as if they had commenced there. This was accepted by the parties. The wife's then solicitor was suspended in September, 2009. On the 5th February, 2010, the husband made submissions that the attachment and committal proceedings were not properly put before the court by reference to Order 41 Rule 8. He claimed that the wife should have served a penally endorsed copy of the orders on him prior to the 1st March, 2007. Irvine J. ordered the husband to file affidavits as to his financial status and directed the wife's legal representatives to produce copies of the vouching documentation. On the 16th February, 2010, the husband filed a motion seeking discovery and on the 12th March, 2010, Edwards J. ordered that the wife file an affidavit in respect of the supervision of the children and update her last affidavit of discovery, with motion being adjourned to the 26th March, 2010.

25. On the 9th March, 2010, the wife applied for the following orders:

(i) dismissing the husband's application dated the 16th February, 2010

(ii) striking out the husband's application for divorce for failure to comply with the order of McKechnie J.

(iii) an Isaac Wunder order restraining the husband from any further applications without prior approval of the court

26. Edwards J., on the 12th March, 2010, refused the reliefs sought at (ii) and (iii) with liberty to the wife to apply in the future if further applications made and relief (i) was adjourned to the 26th March, 2010. The wife withdrew the attachment and committal proceedings before Edwards J. on the 12th March, 2010.

27. On the 16th February, 2010, the husband had sought an order directing the wife to ensure that the daughters were not left unsupervised and alone at night for an extended period of time. On the 26th March, 2010, McKechnie J. refused this relief.

Enforcement in District Court

28. On the 7th April, 2010, the husband was arrested and brought before the sitting of the District Court on foot of a warrant issued by the District Court for the non-payment of maintenance. Hartnett J. remanded the husband to appear before him at K. District Court on the 13th April, 2010. The husband made an ex parte application to the High Court on the 8th April, 2010. McCarthy J. refused the husband's application and stated that the proper approach for the husband to take was to apply immediately to have the issue of maintenance dealt with.

29. On the 14th May, 2010, on foot of a notice of motion issued by the husband on the 12th April, 2010, McMenamin J. stated that it would be more practical to consolidate all financial matters related to the proceedings in this Court thereby avoiding parallel proceedings in the District Court. The Judge directed that the proceedings should be taken over by the High Court and brought to a conclusion under the supervision of this Court. He stated that a motion should be brought for directions as to whether this Court should hear all matters, including those matters in the District Court. This motion was brought by the husband. On the 27th April, 2010, McMenamin J. directed that the parties set out affidavits with regard to their aspirations for the children.

30. On the 4th June, 2010, the husband requested that a stay be put on the pension adjustment order of McKechnie J. until the proceedings were dealt with. The Court refused this request. This Court made a number of orders on this date, mainly in relation to the wife and husband providing discovery. On the 29th June, 2010, the husband made an *ex parte* application seeking injunctive relief as the wife had attempted to cash fifty percent of the entitlements under the S. pension scheme. This was granted.

31. On the 6th July, 2010, on foot of the husband's motion of the 12th April, 2010, This Court noted that the parties were each at liberty to draw down fifty percent of the S. pension fund. In summary, This Court ordered that the husband and wife file updated affidavits of discovery and means. The order of McKechnie J. for payment of periodic maintenance by the husband to the wife was stayed on condition that the wife could draw down her portion of the husband's pension, with a further condition that the stay should lapse if arrears of maintenance should grow to a certain level. The purpose of this arrangement was to save the husband from imprisonment by the District Court. On the 23rd July, 2010, The Court made an order, mainly for further discovery to be made by the parties. On the 30th July, 2010, the Supreme Court ordered that the order of the 6th July, 2010, be stayed pending the determination

of the appeal from said order except in respect of twenty-five percent of the pension fund (€74,514.00 being paid to the husband) conditional on the husband taking all the necessary steps to expedite his appeal. This order was amended on the 15th September, 2010, pursuant to O. 28, R. 11 to state that the order of the 6th July, 2010, be stayed pending the determination of the appeal from said order except in respect of twenty-five percent of the wife's fifty percent portion of the husband's pension fund entitlements in the S. pension fund as outlined in the orders of McKechnie J. On the 4th February, 2011, the Supreme Court ordered that the stay on the order of the High Court dated the 6th July, 2010, be lifted and the husband became entitled to be at liberty to draw down (as directed in order of the High Court: O'Sullivan J. dated the 16th May, 2002) fifty percent of the total accrued benefit in S. pension fund. However, the husband has never accepted that the Supreme Court brought clarity to the matter and made extensive submissions on the subject to this Court at the hearing of the divorce proceedings herein.

32. At the end of the day, the wife was left in a position where she was unable to draw down any share of the pension, was left without maintenance and by reason of the fact that the hearing of the divorce application was imminent, this Court continued the stay on the order of McKechnie J. for maintenance so that the husband would not be imprisoned and would be available to be present for the divorce hearing.

Supreme Court Order
33. The order of the Supreme Court dated the 4th February, 2011, is set out for the purpose of the record and for the purpose of showing how complex matters had become.

> "The motion on the part of the respondent pursuant to notice of motion herein dated the 21st day of January, 2011, for an order;-
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> (i) amending the order of this Court dated the 30th day of July, 2010, and the amended order dated the 15th day of September, 2010, in as much as it relates to the respondent's entitlement under the applicant S pension fund where this Court granted a stay pending the determination of the appeal of the applicant from the judgment and order of the High Court (Mr. Justice Abbott) give and made on the 6th day of July, 2010 – which refused a stay on the order of the High Court (Mr. Justice McKechnie) (on a Circuit appeal) given and made on the 19th day of February, 2007, which affirmed the Circuit Court order dated the 27th day of July, 2006, which in turn had affirmed a previous order of the High Court (Mr. Justice O'Sullivan) given and made on the 16th day of May, 2002, in relation to S pension fund which ordered that a pension adjustment order be made in favour of the respondent (in these proceedings) to the extent of fifty percent of the total accrued benefit and,
>
> (ii) compliance with maintenance benefits as outlined in the said order of the High Court (Mr. Justice McKechnie) dated the 19th day of February, 2007, coming on for hearing this day and upon reading said motion the affidavit of C.M. filed on the 21st day of January, 2011, and the affidavit of D.F. filed on the 25th day of January, 2011, and upon hearing the respondent in person and the applicant in person together with the officers from S. Bank and M. respectively present in court for the purpose of assisting the court in relation to such entitlements.
>
> It is ordered that the stay on the order of the High Court herein (Mr. Justice Abbott) dated the 6th day of July, 2010, be lifted and the respondent herein be at liberty to draw down (as directed in order of the High Court Order (Mr. Justice O'Sullivan) dated the 16th day of May, 2002) 50% of the total accrued benefit in S pension fund.
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> And the Court doth make no order as to costs."

34. The reason the Court dwells in some detail on the proceedings relating to the stay on the order of maintenance of McKechnie J. on condition that the wife could draw down her fifty percent share under the pension adjustment order of McKechnie J., is that the pension fund of the husband, however defined, became central to discussion and consideration for provision for the spouses in this case for the following two reasons:-

> 1. It was agreed by the parties that the pension adjustment order whether originating from the order of O'Sullivan J., the Circuit Court order of Ryan J. or the High Court order on appeal of McKechnie J. may be reviewed in this divorce hearing as no order was made in any of the foregoing orders blocking such action in a manner as is enabled by the Acts of 1995 and 1996.
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> 2. After extensive discovery, the evidence and cross examination and submissions of both counsel for the wife and the husband, it was agreed that at the present time the only asset available to the parties that is either liquid, in the sense of being capable of being distributed by order and not encumbered by debt, is the pension fund.

Consideration of Provision
35. In accordance with usual practice the Court considers proper provision having regard to the circumstances in accordance with s. 20(1) of the Act of 1996 and without prejudice to the generality of subs (1), the Court considers the following paragraphs of subs (2) as they may affect the position seriatim as follows:-

> (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:-
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> (i) The wife's latest affidavit of means and counsel estimates show the wife's assets as follows: maintenance payment arrears of approximately €27,000.00 (on the basis of €1,600.00 per month), motor car value €2,000.00, ponies, jewellery and personal effects value €1,000.00. Her income consisted of the following:-
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> Single parent allowance €269.00 per week
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> Child Benefit €32.30 per week
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> HSE Rent Supplement €134.00 per week
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> (ii) Her liabilities consisted of the follows:-
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> i) Loans from members of the wife's family and financial institutions amount to sum in the region of €240,000.00 when a

sum of almost €42,000.00 of bank, credit union loans is included.

ii) Arrears of household bills come to almost €3,000.00.

iii) Her weekly personal outgoings are somewhat over her income but by no means are they extravagant. Notably it includes V.H.I. insurance of €123.33.

On the basis of the existing pension adjustment order or on the basis of any improvement thereof, and the buying of an annuity bond by the wife, the income from that source would vary on the husband's calculations from at most €500.00 to €750.00 per month (depending on the eventual improvement of her share in the pension through a new pension adjustment order or equivalent). On either prognosis, the wife will be dependent on either maintenance or lone parents allowance to make up the shortfall. This Court considers that for the foreseeable future maintenance from the husband is not likely to be a significant feature in the case and may only be confined to the wife and one child. The Court notes also that in the order of McKechnie J., that maintenance was only to be payable by the husband until the end of 2011, after which time the wife was to depend on social welfare payments. Against this background the importance of securing some dependable source of income such as the pension annuity becomes even more crucial.

(iii) The husband's assets consist centrally of the family home and such whimsical interests as he may have in the stud, in addition to a life interest in his father's farm which he inherited subject to the provision of sites for members of his family on the death of his father in 2009 (after the order of McKechnie J.). The newly inherited life interest in the farm relates to a holding of upwards of 110 acres with some farm buildings such as two four bay haysheds, old slated lofted buildings and two newer looking buildings at the rear – presumably cattle – straw sheds. The schedule of assets of the father's estate valued the property at €1,000,000.00 and there was an agreed lower valuation of €750,000.00 on a fee simple absolute basis. However, that was not valuing the life interest of the fifty-eight year old husband.

(iv) The actual valuation of the life interest of the husband in his farm could be approached on a rule of thumb basis as follows. Until the recent upturn in agricultural product prices the generally held view was that profit from extensively run farms such as the husband's would consist of the E.U. farm support payments (which in this case amount to approximately €8,500.00) with whatever income from actual agricultural activities covering costs of production. Even with the renewed vigour in the agricultural sector over the last year or so, the Court would be stretching things to conclude that an additional €100.00 per acre profit could be made. On that basis, an optimistic €20,000.00 per annum could be posited. With investment properties now regularly advertised at ten percent return per annum and achieving annual returns of more than that at certain fire sales, it is difficult to see how a valuation of more than five to six times purchase could be obtained for the life interest of a sickly fifty-eight year old man. That places a valuation on the life interest on fairly optimistic assumptions at €120,000.00. However, this valuation is based on zero cost of realization and sale. This assumption cannot be met in this case as even if the Settled Land Acts (and now the Land and Conveyancing Law Reform Act 2009) permitted the sale, the legal costs of likely opposition by the husband, based on the track record of this case, would outweigh the benefit of any potential sale. Notwithstanding that a sale of the farm at a net of €750,000.00 would provide a current rate of return for permitted investment of €35,000.00 annually for the husband for life, The Court considers that this is an unlikely event. I, therefore, put no present value in terms of capital on the farm, but it may be recognized as an income producing asset.

(v) As pointed out by the husband in evidence, he is undercapitalized and handicapped by his bad health in developing his farm. It is doubtful if he can capitalize on the recent farming boom, especially having regard to the fact that gearing up production will be all the more expensive by reason of the increased livestock prices. He seems to be condemned to a rather slow build up from extensive farming rather than leasing the farm for the medium term under possibly favourable tax terms (if the next budget does not remove favourable tax treatment for leases of farmland of five years and over). The reason he is so condemned is that with changeover in E.U. farm supports 2013 or 2014, the conventional wisdom seems to be that it is unwise for a person with E.U. entitlements to part with possession of the land by letting or otherwise, lest they prejudice future E.U. entitlements under the new regime. The only possible relevance of consideration of the implications of a sale of the land with cooperation all round under the Settled Lands Acts, or otherwise, and use of the husband of the capital for income for his life would be to consider it as a pension substitute in days when he is unable to farm. However, having regard to the obvious attachment which the husband has shown to his land, this option would be highly unrealistic.

(vi) The husband's stud company is a company which the parties agreed had no positive value. It is structured on the basis that third parties have the apparent beneficial interest therein as shareholders and the husband is a mere employee. On balance, this Court considers that the company is effectively a sham distraction by which the possible benefits of the husband may have been hidden/obfuscated in the past. However, the Court accepts the evidence of the husband that in recent years, due to the economic downturn, the bloodstock industry has taken a battering. The husband himself claimed that, at best, the company provided him with income as its manager/employee, but he has not taken any income in past years. Counsel for the wife, cross-examined him vigorously in relation to appearances and equestrian events for which he received some publicity, and also records from sales of bloodstock. He stated that he did not have any beneficial interest in these sales, and that they were effected as agent for outside buyers or sellers. The stud company does have considerable reality in the case from the point of view of providing employment and income generation. The most significant aspect of the stud company is that it has survived a very harsh downturn in its business and is likely to continue its existence to provide remunerated employment whenever the industry picks up. This Court considers that it is likely to provide remunerated employment for the husband in the future, especially in the event of these proceedings being finalised as much as possible within the law so that the wife no longer is permitted to maraud around this company, thereby inhibiting its attainment of any economic reality and ability to provide at least remunerated employment for the husband. The husband expressed some interest in seeking employment, either by way of setting up his own business or becoming an employee or partner in a firm in the financial services area. This Courts considers this to be a long shot, but if he could make this move, given that he is numerate, literate and intelligent, it would probably be in his best interests and leave the farm on "autopilot" without having precious capital and time resources spent on it. This latter outcome the Court considers only to be a wild aspiration and highly unlikely. The most likely scenario as regards the husband developing income is by continuing the stud business until the upturn comes and slowly turning around his farm business without overuse of capital.

While McKechnie J. considered that there might be some prospect of raising €100,000.00 to assist the wife in purchasing a house, the Court is of the view that with the passing of time and fall in the property market, coupled with increasing indebtedness on the family home, that same is in negative equity by this stage and cannot be considered as a positive

asset any longer.

(vii) While the wife has had many jobs in her life time, her current employment prospects seem to be hampered by her health (suffering from some depression). Given the uncertainty of these proceedings, it is very much in her interest to seek to get back to the employment scene. Realistically, no matter how well she succeeds in establishing a pension annuity within the framework of this judgment, it will hardly exceed her lone parent's allowance. In the short term, she should endeavour to attend a suitable retraining course with social welfare assistance-type payments which might exceed any reduced lone parent's allowance so as to enable her to re-focus on new employment situations. This Courts proceeds on the basis that it is unlikely that she will attain much employment in the future, but equally, The Court would not wish the structure of this judgment to act as anything but an incentive to her to seek employment and independence. This approach is with a view to halting (as much as is possible) these proceedings for good.

(viii) Under consideration at this paragraph (a), the Court notes that the husband made a rather bizarre attempt to fix his wife with ownership of property arising from the following circumstances. The wife's family were wealthy and her mother now holds what remains of that wealth, (albeit much devalued by the fall in the property market). Nevertheless, it is probably reasonably substantial. The husband claimed, and the fact is, that the wife's mother now suffers from an incurable mental incapacity such that she is unlikely to be capable of making or revoking a will. The husband somehow obtained production of a purported will of the mother, under which, if probated on the demise of the mother, the wife could stand to inherit property which would be of significance in this case. From the wife's last affidavit of means, it appears that her mother is now ward of court and the wife gave evidence that her mother is in long-term care and does suffer mental incapacity, but is otherwise in good health and could survive for many years. It is quite surprising that the husband, through this outrageous submission, would seek to persuade the court that it should hold that whatever vague hope the wife may have to succeed from her mother should be categorised as a concrete asset to be taken into consideration in ascertaining the property of the wife under s. 20 of the Act of 1996. This is especially true having regard to the fact that he established in no uncertain terms against the wife, through the Supreme Court appeal in 2002, that the old proverb "he goes long barefoot that waits for dead man's shoes", has very strong application in calculation of family assets in these cases.

The point fails for the following reasons:-

1. A draft will has no force of law until it is probated. If the paper writing, a copy of which has been produced by the husband, is to have any force it must be probated. Taking a strict probating point of view there is no evidence in any event that this is in fact the last paper writing purporting to be the will of the person concerned, and of course there are many evidential bridges to be crossed (not least proof of death) before such a document could be admitted to probate.

2. It would be entirely a breach of trust of the heinous kind for either wife or husband to seek to gain any benefit from the property of a person who is now disabled and a ward of court, and from the degree of knowledge the Court has of the practice of the Office of the Wards of Court under successive Presidents of the High Court, it is a policy and practice to seek recovery of any assets obtained from incapacitated persons in such circumstances and any benefit or monetary interest gained therefrom. Apart from the foregoing, any meddling by the husband in this area would be an outrageous intrusion on the constitutional rights of the mother-in-law and her right to defend the proposed rights.

3. If the husband attempted to pursue this folly, the ward of court would have to be informed and ultimately if the husband persisted the President of the High Court would dismiss the claim in limine.

(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);

(i) Until recently, the two children, now 19 and 16 respectively, resided with the mother except for some disputed sojourns with the father. Last week the father informed the Court that the youngest daughter has decided to reside with him and the Court understands that she has commenced schooling in the locality. This Court considers that the children are old enough now to vote with their feet, and the Court relys on comments made as far back as the hearing before the Circuit Court by Ryan J., that the children were a good credit to both parents.

(ii) During the interlocutory preparations for this case the father obtained an order for a s. 47 report to be prepared on the eldest girl on the basis that she had become unsettled in relation to school, but on further hearing of the matter the Court has found that there was nothing more than the normal growing pains for a young woman coupled with concerns of the husband setting a very high bar in relation to attainment of high points in the leaving certificate for her which would be best left to naturally sort themselves out with the interaction of the parents and daughter rather than have the intervention of an expert. Accordingly, this Court discharged the order and is glad it has done so, as the evidence is that both girls are settling in and pursuing their objectives and seem to cope reasonably well with the tragically non-mediating behaviour of their parents.

(iii) Therefore, the financial needs, obligations and responsibility of the mother will centre around providing a home for herself and eldest daughter (who may now be going on to third level education with the benefit of state grants). Likewise, the father's financial needs and obligations will centre around providing a home for himself and the younger daughter, who this Court would expect will either go on to third level college or might, in fact, make a career for herself in equestrian/farming activities without such necessity. Any provision made by this Court will find it difficult to meet all the financial needs, obligations and responsibilities of the wife so that she may be weaned off social payments entirely, although they may be reduced on a means tested basis in the future. She will continue to require rented accommodation as it is unlikely that any lump sum coming from the pension will assist her even in this depressed market to acquire ownership of a dwelling house. The father has the same financial needs and obligations in relation to this own personal welfare and that of his second daughter residing mostly with him, in addition to paying some maintenance (albeit on a reduced scale from that of the order of McKechnie J.) to wife and daughter. While the Court has accepted that the husband has had great difficulty in meeting his maintenance obligations and keeping his head above water financially, This Court is satisfied that much of his difficulty as he stated himself was due to these proceedings and that rigorous requirements for disclosure and discovery have distracted him from coping with his businesses in very hard times. If the proceedings were over for good, financial resources would increase marginally and eventually significantly with the progress of time, thereby allowing him to eke out financial survival on the basis of his needs and obligations in the medium term.

(iv) In addition to the foregoing needs and obligations, the Court is very mindful that both parties have family and bank debt, (more bank than family in the case of the husband). The approach of both parties to their banking and family creditors at this stage which is nearest approaching rationality may well be to say to the creditors "live horse and you will get grass". This may not be entirely different fro the approach of many unfortunate Irish borrowers who find it difficult to make realistic and credible proposals to their creditors for repayment in these uncertain times. However, this factor should make it abundantly clear to the parties, (as it appears to this Court) that one very substantial way of creating a more certain atmosphere in which the parties in this case may approach their creditors with more credible proposals regarding their serious debt, would be for these proceedings and all family law proceedings between the parties to be disposed of for good, subject to any adjustments in relation to pension provision and housekeeping matters following this judgment.

(v) While the recent judgment of the Supreme Court in the case G. v. G. [2011] 3 IR 717., was delivered after the hearing, the Court consider s that it has adequately addressed any implications therefrom in this judgment. The parties during the course of the preparation of pension adjustment orders and other housekeeping matters may, however, in fairness, have an opportunity to address me and make submissions to the court in relation to any manner in which G. v. G. affects the manner in which the case should be decided which has not been taken into account by me.

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be;-

(i) Apart from times when the wife had intermittent employment or had funding from her family, she has had to eke out with a low standard of living. Apart from some showy appearances at equestrian events, the husband also has had difficulty in surviving. On the evidence of the wife it appears that it was not always so. The husband was in employment in the city in the early years of the marriage and had a commensurate lifestyle, with the wife living at home taking care of the children and having considerably more comforts than she has enjoyed in recent years (albeit not with the same flamboyance of the husband who was in well remunerated employment). It should be the objective of this judgment to at least ensure her survival in the short term with the current standard of living of the parties and to facilitate some improvement thereof, and above all to establish a structure whereby the parties will call a halt to mutual hostilities and give each other a chance to conserve and develop their resources.

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

(i) Both spouses are approaching their late middle age. They were married in 1989, having been previously involved in a relationship with each other from 1985, and the wife left the family home in October, 2000. However, family ties remain to the present day by reason of their link through the children. The Court considers that the length of the relationship as envisaged by this paragraph is such as not to disentitle either party from a fair share of need based provision in the short term, but at the same time it must be realized that the parties have been separated for eleven years, and despite the fact that they share the concern about their children, they should be expected to have at this stage worked out means whereby they establish separate sustainable existences for themselves without the torment of pointless court applications. This conclusion is all the more obvious when it is considered that the wife moved unilaterally with the children to K. in early course, and insisted on setting up home there even when the €250,000.00 award by the Supreme Court to buy a family home was inexplicably appropriated by her original solicitors for costs. The latter expectation reinforces the court's intervention to seek, insofar as it is possible within the law, to curb further court involvement of these parties even if the law does not allow full and final settlement in this type of case.

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

(i) The wife has some depression but she appears sprightly and capable. The husband has, on his own account, many of the ailments (some of which are life threatening) which in most people have a later onset, but he says that he is in treatment and will probably survive. As already stated, he is sickly, and his condition would be greatly improved if the great burden of litigation, associated with concealment games were lifted from him.

(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;

(i) In the early years of the marriage the wife played a significant part in the home. It is difficult to say that she gave up much of a career as earlier proceeding did not show that she was particularly successful. In later years due to this litigation saga both parties were more of a hindrance than a help to each other.

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

(i) Unless the wife assiduously attended to keeping up credits, it is unlikely that she will qualify for contributory old age pension at sixty-eight. Equally, the husband's contribution record is uncertain but he should target to have it rectified by voluntary contributions as much in the past as possible and into the future, even at times of no taxable income so that he ensures his entitlement at sixty-eight. It may well be possible that in the next budget rent allowance may be reduced, but the general policy expectation is that the reduction of rent allowances will cause a corresponding reduction in the level of rents charged by landlords. To make this prognostication a reality, the wife should have available to her and take unto herself the responsibility of keeping a certain sum of money which will leave her free to threaten her landlord with movement by being in the position to put a deposit on another rental property so that her existing landlord may negotiate down to some level of rent commensurate with the reduction (of allowance).

(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

(i) The Court does not consider that over litigating is conduct which is so "obvious and gross" to qualify under para.(i). However, the Court always has regard to the "make up" and "form" of the parties which is typified by an excessive willingness to litigate. The working out of such tendencies during the history of this marriage is reminiscent of the Cold War acronym "mutually assured destruction" (M.A.D.) and as previously indicated, notwithstanding the financial rapaciousness and double dealing of the parties to have happily continued to have the capacity to talk to each other, and even exchange pleasantries, in the midst of their hot personal disputations. This residual ability to communicate (the basic feature which regrettably is absent in most of the worst children's cases) in no small measure takes both parties out of the category of conduct envisaged by this paragraph as well as being most beneficial for the children who seem, notwithstanding severe buffeting, to have survived the ordeals presented by their parents litigation.

(ii) The wife had many opportunities to take up employment and retain same but she has been fickle and changeable and has very often distracted herself with this needless litigation. When she was not distracting herself in this way, her husband's litigation antics also distracted her.

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

(i) Each party is housed in its own location. Similar needs will continue, and arrangements could be significantly helped by provision in this area – although in each case there is an imminent financial need.

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

(i) In evidence and finally on the submissions on the 10th May, 2010, the husband went into detail about his claims in the S. pension fund, discussed in detail above. This is the last chance for the parties to settle the pension issue for once and for all. Stated simply, the husband's arguments are as follows:-

1. The pension adjustment order made which purports to follow the judgment of O'Sullivan J. as affirmed by the Supreme Court, was not validly made. There may be some validity to this argument insofar as the documentation from M. and the pension authorities indicate that there was a "manuscript" pension order. However, no order which would be identifiably a pension order in any accepted sense of the word has been produced to the court. This lack of form is of no particular relevance at his stage given that the parties have agreed that this Court is in a position to make a new pension adjustment order as part of the provision for divorce, and discharge what was made before.

2. The pension fund of €541,000.00 approximately (on Mr. Ó Síothcháin's figures) consists of not one but two pension funds. This, the husband argues, is because he invested IR£80,000 odd into a cash fund after his employment had terminated. This Court considers that he may have some merit in this argument, as some of the reporting documentation from the pension authorities indicates that there is a separate fund, now referred to as a cash fund, in value of €134,000.00. It would seem that the methodology here was that of additional voluntary contribution. The practice seems to be that separate pension adjustment orders should be made in respect of A.V.C. pensions.

3. The husband raised discussions about whether the pension fund apart from the cash fund (so called A.V.C. fund) was, in fact, a hybrid fund with D.C. and D.B. elements combined. If this is so, (and he can obtain confirmation from the pension authorities on this) then the reckonable earnings or relevant period should be calculated separately, although my understanding of the matter is that a separate pension adjustment order is not required for each element of the hybrid "cross". If the understanding of the pension providers is that the hybrid nature arises from a combination of the general S. pension fund and the A.V.C. element, then the Court would have serious misgivings about that conclusion but the husband should endeavour to have that aspect finalised when coming back to the finalisation of the pension adjustment order hearing on reckonable earnings. This Court intend to hold onto this view unless the pension authorities and the husband are in a position to persuade me otherwise.

As the husband was given to understand during discussions in the hearing of the case that the court would have to take some steps to compensate the wife for loss of maintenance through the build up of arrears by the husband and also to ensure that some incentive would be given to her to abandon future most likely vexatious litigation against the husband in the courts some improvement on 50:50 should be made in favour of the wife. The husband is not to be taken as consenting to a change on the 50:50 arrangement, but has acknowledged the jurisdiction of the court to change it. He does emphasise, however, that the proposed arrangement of the wife prior to interlocutory injunction proceedings about the pension to purchase a life annuity was a very wasteful exercise, and that he himself would take whatever pensions funds were adjusted to him and invest them less expensively and for a greater return and with as much input of self management was available through the pensions legislation. In answer to these propositions this Court would say that the issue should be resolved in the terms of "horses for courses" and what is most suitable for the wife is an annuity insofar as it gives her certainty and also may prevent her from going on a splurge in an imprudent way with her pension funds so that she falls back even more on social welfare or court action to recover her losses. On the other hand, the husband would claim some degree of financial expertise and puts considerable weight on having a chance to be allowed to use same. While he should remember the old adage that shares and other risky securities may go "up as well as down" he should be given a chance to indulge his minor passion in the hope that it would yield better returns.

(ii) On the basis of an assumption that a separate pension adjustment order may be made in respect of the cash fund A.V.C. element, on the basis of approaching one hundred percent for husband and nominal order for wife, it would seem to me to be fair and just in the circumstances and to meet the requirements of this judgment as set out to have a pension adjustment order made in relation to the balance of the fund of ninety-five percent in favour of the wife and five percent in favour of the husband.

The husband accordingly should prepare appropriate notices to the trustees furnishing them with all the information appropriate as would be indicated by the Pensions Board website and prepare pension adjustment orders as outlined above having clarified the issues with the pension authorities beforehand.

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

(i) No rights arise herein.

Separation Agreement
36. Pursuant to s. 23 the Court is required to consider any separation agreement which has been entered into by the spouses and is still in force. The practice has arisen in the family law courts for the court to consider a separation order as coming into the consideration of this section. This Court has had regard to the order of McKechnie J. The Court has also considered the comments of McGuinness J. in her Supreme Court judgment in 2002, referring to the futility of various aspects of the litigation at that stage and the overuse of the Superior Courts to resolve the differences. The Court has also had regard to the conclusions reached by McKechnie J. in relation to the reliability of the husband as financial historian. However, the order this Court makes has changed in quantum while following the template of the order of McKechnie J. with appropriate adjustments by reason of the fact that economic circumstances have left the parties in a much worse position and by reason of the fact that the time has now been reached in relation to this and many other proceedings whereby the court must take decisive action to protect its own process, primarily in the interest of the parties, but also in the interest of the taxpayer and general public policy. In this context this Court had previously considered the money allocated by the Supreme Court for a home which vanished into costs.

37. This Court has further considered pursuant to s. 20(4) the interests of the dependent members of the family (i.e. the two children) under the various categories specified and, the Court is satisfied that if the parties can be restrained in some way from pursuing their obsession with litigation, that they will as responsible parents look after their children physically, emotionally and spiritually to the very best of their ability.

38. Finally, it is abundantly clear to me that the order proposed to be made in the interests of justice in relation to the financial provisions, maintenance for the children and restrictions on further litigation.

39. The Court accordingly makes the following order subject to the parties addressing the court in relation to formalising of same.

(1) Upon being satisfied about the following matters:-

(a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period, or periods amounting to, at least four years during the previous five years;

(b) there is no reasonable prospect of a reconciliation between the spouses; and,

(c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family.

This Court, in exercise of the jurisdiction conferred by Article 41.3.2 of the Constitution grants a decree of divorce in respect of the marriage of the applicant and the respondent.

(2) The respondent shall be entitled to exclusive right of residence in such home as she rents or leases in the city in which she now resides and the applicant shall be responsible for the school fees for school years beginning September, 2011, and ending at the completion of secondary schooling by both children respectively. The order of McKechnie J. in the judicial separation proceedings record number [2006 No. 228 CA] for the payment of maintenance to be stayed upon the following conditions. The applicant pay to the respondent the sum of €200.00 monthly for her support and the monthly sum of €600.00 in respect of the daughter E., born on the 28th January, 1995, now residing with her, for such time as the said second daughter remains dependent as defined in the Status of Children Act 1987, making in all the monthly sum is paid punctually on and from the 1st day of November, 2011, the said maintenance payments to be lodged henceforth to the credit of the applicant and the dependent child in the office of K. District Court and the respondent shall be entitled to retain the State child allowance payments in respect of the said second child, and that the applicant take all steps to have a pension adjustment order made in accordance with the terms of the order within six months from the date hereof or within such extended period as shall be allowed by the court.

(3) The parties shall be jointly responsible for the discharge of the dependent children's dental and medical fees and of the costs of the respective extra curricular activities (including the cost of relevant gear, clothing, equipment and effects). In the event of the applicant's default the respondent (wife) shall have liberty to recover same by way of application to the District Court or Circuit Court as a simple contract debt. The applicant shall be responsible for the cost of V.H.I. for the dependent children.

(4) The order of the Circuit Court and High Court on Appeal in respect of the respondent's entitlement to the applicant's S. pension fund is hereby set aside and in place thereof the following pension adjustment orders shall be made subject to the directions contained in the above judgment.

(a) A pension adjustment order shall be made in respect of the A.V.C. cash fund as to 99.9% thereof for the applicant and 0.01% for the respondent.

(b) In the event of the S. pension fund being a separate pension Fund as found provisionally by the court being a separate fund shall be subject to a pension adjustment order as to 5% thereof for the applicant and 95% thereof for the respondent.

(c) In the event of the fund not consisting of two separate pension funds then the combined pension fund in that instance shall be apportioned by way of one single pension adjustment order so as to reflect the proportions in (a) and (b) above as they apply to the total fund, so as to leave the overall financial result which would otherwise arise for (a) and (b) the same.

(d) The applicant shall have responsibility to take steps for the formalization of pension adjustment orders as directed by judgment herein, and finalise same at the latest within six months from the date hereof.

(5) The parties hereto shall have joint custody of the dependent children with day to day care of the eldest "child" vested in the wife and day to day care and control of the second child vested in the husband. (This order recognizing that in the case of eldest "child" it is only recognizing a de facto position).

(5) The children shall have custody of their own passports.

(6) An order continuing the order of the Circuit Court in respect of the contents of the family home.

(7) The parties hereto shall not be entitled to apply for a review of the maintenance of the other by reason only of either or both parties taking up employment within a period of two years from the date of this order for the purpose of giving provision under the Constitution by way of incentive to the parties to obtain employment without harassment of proceedings arising from that period.

(8) Subject to the foregoing order, an Isaac Wunder order prohibiting both parties from pursuing any further proceedings pursuant to the Family Law Acts unless relating to the urgent necessities of the children (the interests of the children being paramount at all times) without the leave of the President of the High Court and the court recognising that it may not on its own motion make a blocking order pursuant to s. 18(10) of the Act of 1996 for the purpose of augmenting the Isaac Wunder order invites one or both of the parties to make application to it in that behalf for such an order.

(9) The husband shall be solely entitled to reside in the family home at S. freed and discharged of any claims by the respondent therein.

(10) The parties hereto shall be obliged to sign all deeds, documents and other instruments necessary to effect and execute this judgment in default whereof the Counties Registrar for the County of [] shall have the power to execute same.

(11) No order as to costs.

(12) Liberty to apply, only in relation to housekeeping matters arising from this order.

THE HIGH COURT

FAMILY LAW

[2009 No. 32 M]

BETWEEN

J.D.F.

APPLICANT

AND

C.F.

RESPONDENT

SUPPLEMENTAL JUDGMENT of Mr. Justice Abbott delivered on the 13th day of December, 2011.

40. As was indicated in the judgment of this Court delivered herein on the 28th October, 2011, the parties were invited to make further submissions to the Court on the effect of the decision of the Supreme Court in G. v. G., [2011] 3 IR 717, as they had no opportunity to do so prior to the finalisation of the judgment of the 28th October, 2011. The parties took this opportunity of addressing the Court on the 15th November, 2011. The applicant appeared in person and the respondent was represented by counsel.

Submissions of the Applicant

1. The applicant submitted that the Court in its judgment did not set out a list of the applicant's debts which amounted to a sum in the region of €600,000.00 including a six figure sum of debt claimed to be in respect of the mortgage on the family home where in lived, in respect of which the bank had sent a letter of demand on the 4th November, 2011, indicating that if he did not make proposals in relation to repayment, that the matter would be put in the hands of solicitors. He submitted that the judgment in G. v. G. indicated that the needs of the parties should be considered within the statutory framework and that the initial judgment would have the effect of "bankrupting him".

2. The applicant also referred to the judgment in G. v. G. indicating that in certain cases bad stewardship on the part of a person provided for in a prior settlement should be taken into account subject to the requirements of need in the case, and laid particular emphasis on the fact that the respondent was guilty of such bad stewardship with not providing herself with a house from the money paid by him to her on the direction of the Supreme Court. Further, by failing to agree to the sale of the house again to avoid bank debt and provide in accordance with McKechnie J.'s order a capital sum for to assist her in purchasing a house for herself and also her insistence in following up the proceeds of clients horses and her intrusion into his business affairs to the extent that he had to set up the present company structure for the stud. In discussion with the Court he conceded that in the face of his indebtedness that a s. 117 application might possibly have been appropriate in respect of his father's estate, but he said that initially on reading the legislation he thought that he had two years in which to make the application, but on a re-reading of the legislation found that this period had been reduced to six months and that he was out of time.

3. He stated that since the hearing both daughters had moved to live with him, the eldest now having university accommodation in respect of her chosen course at third level and, therefore, there should be no allowance for maintenance in the judgment in respect of the children for the respondent. It is noteworthy to record that some discussion followed in relation to the circumstances of the eldest daughter in relation to third level grants. It emerged that she would have qualified for a grant from her resident in K. with the respondent, but that now since the judgment was delivered, the respondent has unilaterally moved from K. to reside in a position within the disqualification radius for residential grants in the particular university. Counsel for the respondent, advanced the reason for this as being twofold. Firstly, she had better job prospects in the area and second, without any income she had found it impossible to get rented accommodation in K., and would fare better in her present circumstances. There was also the consideration that

she would be closer to her children.

4. While the applicant had no objection to a 99% adjustment order in respect of the A.V.C., he submitted that he should get at least 50% of the defined benefit.

5. He repeated that if arguments were made against him for not making a s. 117 application in respect of the estate of his father, similarly some account should be taken in respect of any prospective inheritance including that from the respondent's mother which might occur in the future.

Submissions on Behalf of the Respondent

41. Counsel submitted as follows on behalf of the respondent:-

1. The children had left the respondent by reason of the fact that the applicant had left her in a position where she could not maintain them as maintenance had ceased.

2. Her move from K. to a position within the university radius, so as to disqualify the eldest daughter from a grant and leaving her dependent on a new address with the applicant (which he said was 25 miles distant from the university according to his car clock), was due to the fact of rent free accommodation being made available to her through a friend. Additionally she submitted that she could not rent again or obtain employment in K., by reason of her unfortunate record there through the penury suffered through lack of maintenance and lump sum to be paid under court judgments by the applicant, was a reason for her reloacation.

3. The respondent's needs would be better met by no direction by the Court to have the pension proceeds under the pension adjustment order to be invested so as to provide an annuity for the respondent, as the respondent might be in a position to purchase accommodation for herself from the 25% tax free lump sum available from such funds and, in any event, would have some cash from which she could provide a deposit for rental accommodation and set up house. (It should be noted that both the applicant and the respondent expressed dissatisfaction with the cost of purchasing annuity compared with investment in A.R.F. funds which would provide greater discretion at less cost and allow for the possibility of succession of children to unexpended funds in the event of early/unexpected death of the parent).

Conclusions

42. The respondent's complaint that the judgment did not set out in full detail his debts are well founded but not decisive as the Court noted in the judgment that both parties have creditors who could only be dealt with on the basis of "live horse and you will get grass". The reality is that, having regard to the fact that there may be more creditors arising from solicitors costs on the wife's side and that the husband's creditors may well amount to his figure of €600,000.00, that both parties in this case are hopelessly insolvent and the Court has no option but to continue to take the approach in the judgment of the 28th October, to make provision in accordance with their need within the statutory framework referred to under the cloud of oppressive debt. The indebtedness in respect of the respondent's house, formerly the family home, has assumed greater urgency by reason of the letter of the 4th November, 2011, referred to above. However, it must be remembered that the mortgagee/lender in this case does not have a mortgage instrument executed charging the house, but rather relies on a solicitors undertaking in that regard. It may be assumed that it would be a considerable comfort to such mortgagee if the applicant takes steps to execute a mortgage document at least giving them security and priority in relation to the sum claimed by them. The applicant will have some cash from which he might be in a position to pay off some of his creditors, to gain some breathing space and this may give the mortgagee on his home some comfort so that they do not press for possession in the foreseeable future, especially if further proposals are made. There is no doubt that if either party were to get an inheritance of a substantial nature in the next ten years making them worthwhile to pursue for debts owing the creditors, then the question would arise should one party have the right to pursue the other to share out such windfall with the creditors of both parties. This Court has no doubt that this is the type of eventuality which would trigger further litigation and to avoid that eventuality some provision ought to be made consistent with my view that, any hope of succession of the respondent to the mother's estate should not be taken as part of the assets available for distribution as provision under the judgment. To have a mechanism in substitution of the Isaac Wunder order proposed (which neither party enthused about in their later submissions) to allow such comfort for the parties to apply, on a rule of thumb basis, for a minor percentage of such inheritance after appropriate deductions they might receive is a more just end realistic option to an Isaac Wunder order.

43. Maintenance should be continued for the children and paid to the wife on the basis that the children would stay with the respondent wife, if accommodation were suitable and available to them with the respondent. This Court is satisfied that this is no longer a practical solution, although equally satisfied that the children will maintain contact with the mother but by reason of the requirements of third level grants the base of the eldest daughter will, if necessity, be with the father for the period of time when she is not residing in college i.e. weekends and the summer vacation months. The pension adjustment order should be, as originally proposed in the judgment herewith 28th October, 2011, in respect of the defined benefit, a defined contribution pension, but the husband should no longer be liable for maintenance of the wife for herself or for any of the children, as they will be living with him for the foreseeable future. There is now likely to be an increased return on the pension investment over and above the restrictive annuity regime proposed in the original judgment leaving the respondent in possession of a lump sum and income out of which she may be able to buy a dwelling at the very bottom of the current cash market. The Court does not alter costs provisions notwithstanding the applicant's submission that he was promised (by Sheehan J.) the Court would consider his own personal costs in preparing affidavits and disclosure matters, and notwithstanding that an application for committal for non-payment of maintenance was dismissed against the respondent on technical grounds by reason of the fact that, to grant him such costs as personal litigant would provide a dangerous incentive for him to over litigate in the future. As neither party invited the Court to make a blocking order pursuant to s. 18(1) of the 1996 Act as invited by the judgment and order proposed on the 28th October, 2011, the Court decides not to make a blocking order in view of such lack of invitation and also in view of the fact that the applicant allowed life insurance policies to lapse.

Order

44. The order directed in the judgment of the 28th October shall in accordance with this supplemental judgment be amended as follows:-

1. Delete para. 2 and insert substitution therefore of the following paragraph:-

(1) The respondent shall be entitled to exclusive right of resident in such dwelling as she purchases, rents or leases within

the jurisdiction of this Court and the applicant shall have the like right in respect of the former family home in which he now resides. The applicant shall be responsible for the school fees for the youngest child beginning September, 2011, and ending at the completion of secondary schooling of the youngest child. The applicant shall take such steps as to ensure the continuity of third level education grants in accordance with the residential entitlement of the eldest child at university now enjoyed by her insofar as such errant entitlement are consistent with whatever changes shall be made in such schemes.

(2) Arrears of maintenance arising as of the first stay thereof by this Court under the order of McKechnie J. in the judicial separation proceedings record number [2006 No. 228 CA], shall be stayed upon the condition that the applicant complies with this judgment within a period of three months (calendar) from the date of order, and in the event of such stay lapsing the respondent shall be entitled to apply for judgment in respect thereof.

(a) The applicant shall be responsible for the discharge of the dependent children's dental and medical fees and the costs of their respective extra-curricular activities (including the cost of relative gear, clothing, equipment and effects). In the event of the applicant's default in relation to the payment of maintenance in respect of the respondent or the children or any of the payments set out in this paragraph, the respondent shall have liberty to recover same by way of application to the District Court or Circuit Court as a simple contract. The applicant shall be responsible for the cost of V.H.I. for the dependent children.

(b) The order of the Circuit Court and the High Court at appeal in respect of the respondent's entitlement to the applicant's S. pension fund are hereby set aside and any pension adjustment orders purported to have been made thereunder are hereby set aside and in place thereof the following pension adjustment order shall be made subject to the directions contained in the above judgments as follows:-

(i) A pension adjustment order shall be made in respect of the A.V.C. cash fund as to 99% thereof for the applicant and 1% for the respondent.

(ii) In the event of the S. pension fund being a separate pension fund as found provisionally by the above judgment, the same shall be subject to a pension adjustment order as to 5% thereof for the applicant and 95% thereof for the respondent.

(iii) In the event of the S. fund not consisting of two separate pension funds then the combined pension fund in that instance shall be apportioned by way of one single pension adjustment order so as to reflect the proportions of (a) and (b) above as they apply to the total fund, so as to leave the overall financial result which would otherwise arise for (a) and (b) treatments the same.

(iv) the respondent shall have the responsibility to take steps for the formalisation of pension adjustment orders as directed by the judgments herein and finalise the same at the latest within three months from the date of order.

(3) The parties shall have joint custody of the dependent children with the day to day care of the eldest child vested in the husband and the day to day care control of the second child vested in the husband applicant (this order recognises that in the case of the eldest child it is only recognising a de facto position), providing however that the second child may make such arrangements at weekends and other times as are consistent with her school work to stay with the respondent as a matter of her personal choice and consultation with the applicant and the respondent, and this order recognises that the movements of the eldest child are entirely her own choice.

(4) The children shall have custody of their own passports.

(5) An order continuing the order of the Circuit Court in respect of the contents of the family home (if any remaining).

(6) The parties hereto shall not be entitled to apply for maintenance from the other by reason only of either or both parties taking up employment within a period of two years from the date of this order for the purpose of giving provision under the Constitution by way of incentive to the parties to obtain employment without harassment of court applications in that regard arising from that period.

(7) Either party shall be entitled to an order directing the other party to pay a lump sum amounting to 20% of the value of any inheritance net of any enforceable debts, taxes and expenses to which they may be entitled on a death within ten years of the date of the order herein.

(8) The parties shall be obliged to sign all deeds, documents and other instruments necessary to effect and execute this judgment and in default hereof the County Registrar for the County of Dublin shall have power to execute same.

(9) No order as to costs.