2005 IEHC 326

THE HIGH COURT

No: 2001/43M

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

BETWEEN

M.P.

APPLICANT

AND

A.P.

RESPONDENT

Judgment of O'Higgins J. delivered on the 2nd day of March 2005.

1. In these proceedings the applicant seeks a decree of divorce pursuant to s. 5 of the Family Law (Divorce) Act, 1996 and the usual ancillary orders. In his replying affidavit dated 23rd day of October, 2001 the respondent denies that the applicants is entitled to any relief other than a decree of divorce. He also counter claims for ancillary relief and also seeks divorce. (He had previously issued divorce proceedings in the Circuit Court, which he subsequently abandoned).

2. The applicant and respondent were married on the 6th September, 1974, in Co. Dublin. They have two adopted children G born in December, 1982 and J born on the 10th May, 1986.

3. The parties have been living separate and apart since May, 1992 although the marriage was encountering serious difficulties for about the previous two years.

4. Prior to, and for some years after the marriage both parties continued to work. The applicant worked in financial institutions and was successful in her career. The respondent practised very successfully as a solicitor and became a partner at a young age in a well known Dublin firm. The parties lived first in Dundrum and after two other moves bought a substantial house in Foxrock in 1987. The house cost a sum of about IR£280,000 of which approximately IR£48,000 came from the proceeds of sale of the previous house. The rest of the finance came from the savings of the respondent. There was no mortgage on the house. An additional sum of about IR£170,000 was spent on repairs and refurbishment. It was sold following the settlement of the matrimonial proceedings in 1992 for a sum of £400,000 after selling costs and the court was told that the present day value of the property is €7,000,000. (The respondent told the court that on the break up of the marriage he urged the applicant to retain the family home. Had that happened her present assets would greatly exceed his.) The respondent's evidence was that the parties intended that the house should be held in trust for any children to the extent of 50% and that the remanding 50% interest was to be held by the parties. However this agreement and understanding between the parties was never incorporated into a legally binding document for reasons given to the Court by the respondent. The applicant does not accept that there was any such arrangement. However, I accept the evidence of the respondent on this matter. In particular, his explanation for the understanding not being incorporated in a legal document is persuasive.

5. Prior to the adoption of the children the applicant changed her work to a part-time basis. Following the arrival of the first child she ceased to work outside of the home and devoted herself to the care of the children. This decision was by mutual consent of the parties. It was envisaged that the applicant would return to work outside the home at some time, but not unnaturally no specific date was contemplated, and no definite decision was made in that regard. Unfortunately, the marriage broke down in circumstances of considerable acrimony and bitterness. Mediation was attempted for a period but eventually proceedings were issued in the High Court seeking judicial separation and other relief (1991 SP 683).

The settlement

6. The judicial separation proceedings were settled on the date of the hearing in May, 1992 and orders were made on the terms agreed between the parties. The agreement is an important document and the background against which the present proceedings must be considered. The court made an order for judicial separation pursuant to the provisions of s. 2(1)(f) of the Act of 1996. The following is a summary of the other main provisions of the settlement.

(a) The wife was to have custody of the two children and access was agreed between the parties.

(b) The family home was to be sold and the proceeds of sale less the costs of the sale were to be divided between the parties.

(c) The husband was to pay the wife the sum of £175,000 in two instalments.

(d) Maintenance was agreed in the sum of £1,800 per month net of income tax, £1,400 of which was in respect of maintenance to the wife and £200 per month in respect of each of the two children. The sums to be adjusted annually in line with the Consumer Price Index.

(e) The husband was to maintain VHI cover in respect of the wife and the children.

(f) The husband was to pay all medical and dental bills in respect of the two children and to pay for their education, to include third level education.

(g) The husband was to provide a sum for the purchase of a car and to replace it every four years on trade-in with a car of similar type or cost.

7. Disputes arose in relation to the settlement and various proceedings ensued. The interpretation of a clause in the settlement was litigated to the Supreme Court and remitted to the High Court for further evidence. There were motions for committal. In addition the respondent instituted proceedings to have the settlement set aside but these proceedings were not pursued.

8. The respondent returned to live with his mother for a period of over a year. His only asset at that time was a holiday home in County Wexford and he had to start again. He had of course, a lucrative career and large earning power and since that time has built up considerable assets. He described the settlement in these proceedings as "appalling deal from my point of view". With regard to the distribution of the assets the respondent's view is understandable. However in terms of maintenance the applicant was getting a very small proportion of the respondents nett income. The applicant essentially got all that she asked for at the time of the settlement.

9. The children have done well; the son, despite having Asperger's Syndrome is pursuing post-graduate studies at university and the daughter is a student nurse.

The background to the settlement
10. In her affidavit furnished 14th June, 2001 in the present proceedings, the applicant avers:-

> "[T]hat the financial assets of the respondent at the time of the resolution of matters in May, 1992 was less than clear. I say and believe that the respondent furnished misleading documentation pursuant to an order of discovery and that the same did not truly reveal his true financial circumstances."

11. Despite these averments, however, the applicant does not make the case that she entered into the settlement in the belief that her husband's assets were less than was actually the case, except insofar as it is contended that the applicant was not aware of the respondents partnership income for the year prior to the settlement, a matter to which I will return.

12. The case being made to this Court is that the respondent tampered with a document that had been discovered and a considerable amount of time was devoted to this issue. The applicant claims that this alleged improper conduct was a factor which was potentially embarrassing to the respondent and enabled her to exert leverage on the respondent and to obtain a favourable settlement.

13. In particular the applicant relies on a document disclosed in discovery by the respondent being his accountant's figures in respect of tax relating to the year 1989/1990. This court heard that on the morning that the case was due to be heard in 1992 a document was produced similar to the document which had been subject of discovery in which figures had been erased with Tippex and new figures inserted. The newly produced document showed an extra sum of £ 10,000 in deposit interest. This document, according to the respondent, showed that the respondent had £300,000 to £400,000 extra on deposit which is the sum necessary in order to generate such deposit interest. It was the applicants contention that the respondent altered the discovered document with a view to concealing the true amount of money held by him on deposit for a particular year.

14. The respondent agrees that there was potential to embarrass him which led to his settling the proceedings on terms so disadvantageous to himself. However, this potential embarrassment was not in any way connected with the tampering of a document. Still less was it concerned with any attempt to interfere with his income tax returns – a suggestion wrongly put in correspondence prior to this hearing, but subsequently admitted to be made in error. (It is clear that the applicant intended to use the same document to apply pressure in these proceedings also.) The real potential for embarrassment was that the money, included in the figures for monies on deposit in the respondent's firm for the years 1989/1990, may have consisted in part of monies of a client/friend who had availed of the firms account because of the favourable rates available to it. It is not surprising that this information was not disclosed to the applicant during negotiation. This was potentially a source of huge professional embarrassment to the respondent, particularly in the light of the fact that his professional activities had suffered - to the knowledge of his partners - because of his marriage break-up and the subsequent litigation. The applicant submits that the commencement of proceedings by the respondent to have the settlement set aside undermines his contention that he settled the case to avoid potential embarrassment, as the reopening of the matter on his initiative would expose him again to risk of such embarrassment. I do not accept the applicant's submission.

15. The fact that the respondent commenced proceedings - which he did not pursue -to have the settlement set aside – does not in my view undermine the explanation given by the respondent for settling the proceedings; it merely shows that he was unhappy with the settlement. I have no hesitation in accepting the version of events given by the respondent concerning the document. There is an innocent and credible explanation for the alterations in the document which is alleged to be the wrongly tampered with version of the discovered document. I am satisfied that the applicant copied the discovered document and used it, not with any purpose to deceive but as a template for producing estimated figures for an entirely different tax period. It is written on the document itself that it is an estimate. That fact in itself distinguishes it from the document which was disclosed on discovery.

16. Moreover, the document disclosed on discovery appears to have related to 1989/90 where the estimate is stated to be for liability to income tax for 1990/91. The disclosed document included a line under personal allowances reading 'business expansion scheme'. In the year covered by that document i.e. 1989/1990 a figure is entered under 'business expansion scheme' as that scheme was availed of during that tax year. However, in the document in dispute, while the words 'business expansion scheme' still occur, the entry for such scheme is left blank because the scheme was not availed of by the respondent in the year for which he was providing an estimate i.e. 1990/1991.

17. This supports the contention of the respondent that he copied the document with the intention to use it as a template for a different year to the year covered by the document furnished in discovery and that he then filled in the appropriate figures. A comparison of the documents in question supports the explanation given by the respondent. He had knowledge of a document which showed a lot of deposit interest for the year 1989/90. He was able to explain some of that money by reference to the sum of approximately IR£170,000 spent on refurbishment of the family home, and by reference to money on deposit in his firm for the purpose of discharging income tax. However, he was also aware that some of the money which produced the deposit interest may have been client's money lodged in the respondent's name – a source of potential embarrassment.

18. I reject the applicant's allegations that the respondent deliberately altered a statement of his income to deceive the applicant and her advisors and I reject the contention that he settled the case because his attempt to deceive had been exposed. The document was copied, and altered by the use of Tippex, but not for the purpose of deception, or for any illegitimate reason, but simply for the convenience of using it as a template for estimating tax liability for a particular year. It borders on the comical that the applicants legal advisors were able to exercise leverage on the respondent to secure a favourable settlement for their client on a basis quite unknown to the respondent, and that the respondent made a settlement disadvantageous to himself and very favourable to the applicant on the basis of a potential exposure to an embarrassing disclosure of facts quite unknown to the applicants.

19. The applicant persisted in her attitude concerning the disputed document in these proceedings but I am quite satisfied that the applicant had no sum secreted away and on deposit at the time of the settlement which he attempted to conceal from the applicant. The applicants contentions in that regard are not well founded.

20. The knowledge of the respondent at the time of the settlement may be relevant in that a settlement entered into in ignorance of the financial realities of a case might merit less consideration in these proceedings that are entered into with the benefit of true knowledge of the financial situation. The applicant settled the case on the basis of a mistaken belief that the respondent had IR£300,000 – IR£400,000 more than was actually the case. To that extent the settlement was more favourable than she realised. The applicant complained that she made the settlement in ignorance of the partnership income of the respondent for the year ending 31st March 1992, the year of the settlement. That income was IR£440,833 a considerable increase on the previous year. Such information

was clearly ascertainable by her as the partnership profits for the year were in the possession of the managing partner of the respondents firm in respect of whom a subpoena to attend court had been served. In any event any complaint that the applicant may have in this regard is more than counter balanced by the fact that the applicant settled the case in the belief that the respondent had IR£300,000 – IR£400,000 more that he actually had.

Non payment of bills
21. The applicant has testified that one of reasons for the present applications is that the respondent failed to abide by his agreement to pay medical bills incurred by the children. The applicant has demonstrated that in the year 1997 she unsuccessfully asked for payment of a relatively modest sum of money from the respondent in respect of medical bills which she had discharged upwards of a year prior to that time. It is true that the respondent wrongly maintained in correspondence that the discharge of medical bills by him would not be unconditional but would be dependent on his being consulted in relation to bills (other than routine medical bills and emergency medical expenses which would be covered by the VHI policy). His explanation for this was he felt frustrated at being excluded from involvement in the life of his daughter. Likewise there is evidence that a psychiatrist asked for a more substantial sum to be discharged by the applicant in the year 1993, indicating to her that the bill had been sent to the respondent but no response had been forthcoming. He has no recollection of receiving this bill but admits he was in financial difficulty at the time. In any event, I do not consider either of these episodes to be of any real importance. It would appear that despite voluminous correspondence from the solicitors to the applicant on matters outstanding between the parties, no request appears to have been made for the discharge of these particular bills. In particular, I accept that if the respondent had been asked specifically by the applicant to discharge the psychiatrist's bill in question he would have done so. Although, the respondent was in default in specific instances, I am satisfied that in general terms he was not remiss in abiding by the agreement and providing for the educational, health and welfare of his children. I am not satisfied that the failure to pay the bills in question is of any significance in relation to the applicant bringing the current proceedings. It is clear from the very generous financial provisions made by the respondent for his children that lack of concern for their welfare is not a complaint that could be reasonably levelled against him.

22. The applicant complained about the lateness of payments. She also pointed to the fact that the payments were made by cheque marked "without prejudice." I accept that those concerns were genuine and that the respondent was occasionally late with his payments; however I do not think that the applicant had any doubts but that payment would be made. Had the applicant such real concerns she would undoubtedly have complained through her solicitors. The occasional difficulties in relation to the payment of bills by the respondent and the petty attitude being displayed by paying the maintenance other than by standing order, and on a without prejudice basis, are, in my view attributable to frustration and rancour in the face of ongoing difficulties between the parties, and the strained relationship between father and daughter rather than any intention on the part of the respondent not to honour his commitments.

23. The motivation for the bringing of these proceedings was not to secure a payment of medical bills; neither was it to ensure that the respondent would continue to pay the maintenance to which he had agreed under the settlement. The applicant told the court that one of the reasons she brought these proceedings was that she found that the sum provided was inadequate in view of the expense of raising the children. However, the uncontradicted evidence of the applicant was that at no time since the making of the settlement did she complain in correspondence that the maintenance provisions were inadequate. It is clear that there was a difference in understanding between the parties as to who was liable to pay tax on the maintenance. I accept that the applicant expected that she would not be liable to pay tax on the maintenance which she received. The main reason for these proceedings is the applicant's legitimate aspiration to have her future security definitely established should the respondent pre-decease her, and her legitimate hope of securing a pension adjustment order as well as having her settlement reviewed in the light of the developments in the law.

The Legislation
24. Pursuant to the provisions of s. 5.1 of the Family Law (Divorce) Act, 1996 it is a prerequisite to the granting of a decree of divorce that:-

> "(a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years," and
>
> "(b) there is no reasonable prospect of a reconciliation between the spouses. . ."

25. I have ample evidence of the requisite period of separation and the irreconcilable nature of the breakdown of the marriage such as to satisfy the constitutional and statutory terms for the granting of a decree of divorce. I am also satisfied that proper provision has been made for the children of the marriage. The respondent has made generous provision for his children and this is not an issue in these proceedings. Those necessary conditions for the granting of a decree having been satisfied, I now move on to other statutory considerations.

26. Section 5(1) of the Act of 1996 requires that the court has, in addition to being satisfied of the matters being set out in s. 5(1)(a) and 5(1)(b) to consider whether :-

> "(c) such provision as the court consider proper having regard to the circumstances exists or will be made for the spouses and any dependant members of the family"
>
> the court may, in exercise of the jurisdiction conferred by Article 41.3.20. of the Constitution, grant a decree of divorce in respect of the marriage concerned."

27. Section 20 of the Family Law (Divorce) Act, 1996 provides that:-

> "(1) In deciding whether to make an order under section 12, 13, 14, 15 (1)(a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.

28. Section 20 (2) obliges the court to have regard to a number of specific matters in deciding whether the making of the orders aforesaid and in determining the provisions of such orders. I will deal with these matters *seriatim*.

> "20 (2) (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.*"

Income
29. The respondent has a substantial income; in the year 2003 his income after payment of taxes was €591,254. Full figures are not available for the year 2004 but his professional income before tax for that year was €683,541.

30. The applicant had not worked outside the home until 2004 when she earned a very modest income of approximately €6,000 as an assistant part-time Montessori teacher. Her income on which she was liable for tax in 2003 was €28, 248. In addition she had a sum of €7,148 in respect of maintenance of the two children. That sum was tax free. Her income after tax for the year was €31,717.

Earning capacity
31. The respondent is a partner in a firm of solicitors. The probability is that he will retire in the at the age of 58 in the year 2008, although there is a possibility that these plans will change and that the applicant will continue working for a year or two longer. It needs to be noted that in the years until his retirement the percentage share of profits of the partnership are gradually diminishing from 4.7% in 2000/2003 to 3.54% in 2008. However these percentage figures are somewhat misleading. The percentages were agreed by the partners at a specific time on the basis of the number of partners at that time. The diminishing share of profits to which the respondent is entitled is likely to be further diminished on the admittance of new equity partners to the firm.

(1) On his retirement the respondent is entitled to monies under

(i) the partnership agreement, and

(ii) the consultancy agreement, and

(iii) the purchase agreement.

(i) Under the partnership agreement:

On his retirement he is entitled to one quarter of his profit share in the year prior to retirement. Thus, if his share of the profits for that year were €600,000 he would be entitled to a lump sum of €150,000 taxable as income. In addition he will be entitled at that time to withdraw whatever sum is in his capital account with the firm. As of the time of hearing this case there was a sum of over €399,000 on which tax has been paid in that account. The sum of €399,000 is a sum earned by the applicant and on which tax has been paid as of the particular date, it is not money on deposit. The sum available and the time of his retirement could be quite different. A figure of €600,000 for earnings from the partnership seems to be reasonably likely to be obtained. The respondent makes the point that his percentage of the profits is diminishing and is subject to further diminution in the event of other equity partners being admitted to the practice. However his earnings were €762,883 in the year ending 30th April 2003 and €683,541 in the following year. €600,000 in 2008 would be a considerably lesser sum than the same sum in 2003. In any event the sum does not purport to be an exact one but merely an general indication of the resources likely to be available to him on retirement for the purpose of estimating the lump sum to which the respondent will be entitled on his retirement.

(ii) The consultancy agreement: Under this agreement the respondent will be entitled for a period of 15 years following his retirement to a sum of €6,200 per month or alternatively a lump sum of €400,000 subject to tax as income and a further €3,100 for twelve years following his retirement. All these sums are index linked from April 2002. However it is possible for the applicant to defer the commencement of these payments until he is sixty years old.

(iii) The purchase agreement: Under this agreement the partnership will buy out the respondent's share as of the year 2008 for a sum of €400,000 (as of April 2002 index linked) which is taxable.

The cumulative effect of these arrangement is that it is not unreasonable to calculate that the respondent on retirement will have a sum likely to be in the regions of the following:-

. €150,000 being an estimate quarter of his profit share for his last year subject to tax.

. €4000,000 index linked from 2002 subject to tax under the consultancy agreement.

. €400,000 under purchase agreement index linked and subject to tax.

. Whatever sum is in his capital account at his retirement. Tax will already have been paid on that sum.

32. He will also have the sum of €3100 index linked from April 2002 for a period of 12 years. In addition he will have the benefit of whatever is in his pension funds at that time.

33. Following his retirement if it occurs at the age of 58 it is unlikely the respondent will be involved in any employment remotely as lucrative as his present occupation and I accept his evidence on that point. Other than some not very lucrative directorships and perhaps some small involvement in property management the respondent is unlikely to be generating any significant income. The applicant has not challenged his entitlement to retire at the time he proposed and similarly it is not unreasonable to expect that the applicant will be entitled to retire from the workplace at some where in or around the age of 58 - 60.

Applicant's earning capacity:
34. The applicant qualified as a barrister and worked in financial institutions both prior to and for a number of years after the marriage. Sometime before the family arrived she started to work part-time and when the couple decided to adopt children it was mutually agreed that the wife would forego employment outside the home to devote herself to the rearing of the family. While there was no specific arrangements as to the number of years this was to last it was contemplated that she would return to the work force at some stage. Although it might have been expected that the applicant would resume employment outside the home – perhaps when the children were in their early teens she had not done so. The applicant explained that the elder child - who has Asperger's Syndrome required particular care from his mother. The applicant also told the Court that the second child had difficulties and sickness over the years. In my view, it would be reasonable to expect the applicant to return to the workplace in or around the time when her daughter commenced secondary school, at which time her absence from the workforce would have been around fifteen years. However, the applicant did not return to the work place until 2004 when she commenced part-time teaching a Montessori school. The respondent maintains that it is open to the applicant because of her experience and expertise to earn considerable

income. Although the applicant is anxious to resume employment she would be prefer to be engaged in teaching or work other than with financial institutions. She is also sceptical about her ability to resume employment of the type in which she was previously engaged.

35. Ms. Higgins a recruitment consultant and Mr. Murphy a director of a recruitment firm both gave evidence as to the future work prospects of the applicant. Ms. Higgins told the court that the only type of position for which she could put the applicant forward would be for a receptionist type job which would not command more than €23,000 or €24,000 per annum. The applicant's absence from the work force for such a long period would render irrelevant her previous eight years experience in the banking sector. Ms. Higgins considered the applicants law degree irrelevant and told the court that information technology skills would be required for the type of banking position formerly held by the applicant. Mr. Murphy agreed with Ms. Higgins thought that the age of the applicant was not a barrier to her reemployment. However, he felt that her starting level on re-entering the workforce would be not less than €30,000. He felt his opinion was that she could recommence a job and what he described, albeit rather inelegantly as "somewhat like a semi professional or entry level so that they could climb the classic learning curve again fairly quickly". He considered the lack of information technology skills of the applicant to be less important at a professional level than it would be at a clerical or at receptionist level. Mr. Murphy also pointed out to the court that there was available courses in the Law Society of one years duration by which the applicant could bring her knowledge up to date. Having re-established herself in the workforce the prospects were very good for an increase of income. He agreed however that the motivation of the person was an extremely important factor in re-entry to the workforce.

36. The evidence in this case is that the applicant while anxious to resume employment would prefer to be engaged in work such as teaching rather than resuming work in the financial sector. It is not unfair to her to say that she is not highly motivated in terms of a return to the banking sector. Having considered the evidence of both Ms. Higgins and Mr. Murphy I think that it would be reasonable to expect the applicant to return to work on a full time basis and earn a sum in the region of €25,000 to €30,000 for the next five years or so. Such salary would enable her to contribute to a larger pension although the amount produced over the next four years by pension contributions would still be very modest.

37. It is not reasonable to expect that the applicant would be able to resume her career in financial institution and work there until the age of 65. Although she is only 53 years old she has been away from the paid work place for over 20 years and in my view would have considerable difficulty resuming employment similar to that in which she was engaged prior to the arrival of her children. However if the applicant had returned to work when her daughter commenced secondary school it would be more realistic to expect that she could have returned to work in the financial services sector in a legal capacity. However she did not do so.

Property:

Applicant:
38. The applicant has her home valued at €1.1m. It is not subject to a mortgage. She has no other significant financial assets.

Respondent:
39. The respondent has the following:

(1) His home valued at €1.75m. It is not subject to a mortgage. The evidence is that the disposal of this property would give rise to a potential capital gains liability in respect of half an acre of the property; the remaining acre would be exempt from such tax as the respondent's principal private residence. The respondent contended for a sum of €100,000 in respect of that liability but I accept the evidence of Mr. Murtagh the applicant's accountant that a more realistic sum would be €20,000 - €30,000.

(2) The respondent has a house in Dundrum producing rental income of €1,650 per month and valued at a sum of €750,000. It is subject to a mortgage of €191,000. On disposal of this house the liability for capital gains tax would be in the sum of €110,000. On disposal of the property therefore the respondents would be left with approximately €450,000.

(3) Timeshare: The applicant has a time share property valued at €6,000.

(4) The respondent has a property in Spain valued at €367,000 LHM report with a mortgage thereon of €141,879 giving the respondent equity of approximately of €225,000 in that property.

(5) A holiday home in Co. Wexford owned by a company controlled by the respondent. The house is valued at about £320,000 but should it be sold after the payment of mortgage and capital gains tax there would be £180,000 approximately which would accrue to the respondent.

(6) The respondent has other properties but these are held in trust. They are

(a) an apartment in the vicinity of Harcourt Street area valued at €475,000 held in trust for his three children.

(b) a house in Rathgar valued at €850,000 held in trust for

(c) a property in Portugal unlikely to worth less than €700,000 held in trust 25% each for his 3 children and 12½% each for two of his siblings.

40. The respondent currently manages those properties and draws rental income from them but this income is more than counter balanced by the costs incurred in refurbishing and upgrading the properties for the benefit of his children.

(a) Other financial resources:

Life Policies:
41. The respondent had two life policies. One has been encashed and the proceeds used to pay income tax. Another policy with the value of €600,000 has been assigned to the benefit of the children of the respondent.

42. The applicant had two life insurance policies. Both have been encashed.

Bank:

43. As of December 2004 the respondent had a sum of €332,659 in a bank account but it is accepted this money was earmarked for the payment of income tax due. Apart from that sum, there are no monies in the bank accounts of either of the parties of significance in the context of this case.

Investments:
44. The applicant had an investment which was entered into for tax purpose in the Avro Longline Partnership. However, it is clear from the evidence that this sum is unlikely to be available for some years to come if at all. In addition the respondent has a theoretical exposure of a 100% liability on a sum which is difficult to calculate but is probably in the region of €3m in respect of this investment. This is because the partners in the venture are liable jointly and severally for any debts incurred. More realistically however, he has a potential liability of 4% of the total if he incurs any liability. I do not consider this matter should be regarded as an asset. but it is clear that there is a possible liability which should it become a reality is more likely to be in the region of €120,000 - €130,000 representing his share of the total liability rather than the 100% liability to which he is notionally exposed.

Lime partnership:
45. This was another tax led investment to which the applicant attributes a value of almost €14,000. However the scheme was challenged successfully in the courts by the Revenue Commissioners and the position is that the investment leaves the respondent with a potential liability of about €29,000.

The Mary Street Investment:
46. In the 2002 tax year Mr. P. contributed a sum of €263,000 into a tax lead investment scheme. He got tax benefits from the investment and sometime between 2008 and 2019 he will recoup the sum of approximately €140,000 from this. This is more likely to be towards the end rather than at the beginning of that period.

Equities:
47. It appears that the respondent has shares that were valued at the hearing at €66,642 and the applicant has shares to the value of €6,675.

Pension Funds:
48. The applicant participated in pension funds the total value of which was given at the hearing as €2,175,069 which is the subject matter of submissions by the parties and to which I will return.

Other assets:
49. The applicant is entitled to receive a pension commencing in 2012 and the current value of the anticipated benefits is €1372 per annum. She had two life policies which she encashed. She is likely to receive a share in her mother's house. The mother of the applicant is an elderly lady who lives in a house in Co. Kildare. Counsel for the respondent put it to the applicant that on the basis of what he called "a drive-by valuation" the property was worth more than €1m. However, the applicant disagreed with that figure. I cannot accept a valuation without evidence in support thereof. The applicant told the court that she was likely to get one quarter share of her mother's house "maybe less than €100,000". In those circumstances it is reasonable to act on the basis that she is likely to benefit from her mother's estate, but that the value of her share is unascertained but is likely to be in the region of €100,000.

> "s.20 (2) (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*),

The applicant:
50. The applicant has a substantial dwelling house and an earning capacity already discussed. The younger child who will be 19 in May is likely to be dependant for another 4 or 5 years. The son, although he is a post-graduate student and spends a lot of time with his father, will still be dependent to some extent on his mother for the next few years. In a few years time the applicant will have no financial obligations or responsibilities to anybody other than herself.

The Respondent:
51. The respondent has a child from another relationship who is now aged eight and he has obligations and responsibilities for the education and maintenance of that child which are likely to be ongoing until that child, is in her early to mid twenties. He is currently in another long-term relationship and it is clear that he has to make provision for his own retirement and old age.

Financial Obligations:
52. The outgoings of the parties are set out in their respective affidavits of means. In the case of the applicant the expenditure therein is twice the income although some of the outgoings cannot be expected to be ongoing, in particular the provision for holidays to include the children. The figure for Christmas presents for the children seems inordinate. However, the applicant is entitled to an appropriate lifestyle and there is no evidence of her being overspending on holidays. The respondent's outgoings are very large indeed. This is attributable in so small measure to the building up of pension funds. The accumulation of resources for his retirement is of vital importance for both parties if the maintenance is to be sustained at the present level or increased.

> "s. 20(2)(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*,"

53. Prior, during and after the marriage both of the parties enjoyed a comfortable middle class standard of existence and it would appear continue to do so. There is evidence of quite a number of foreign trips by the respondent, but I accept his evidence that many of these were of short duration or the purpose of looking after his property or for business. The respondent lives a comfortable lifestyle of a successful and hardworking solicitor but in no way could his lifestyle be described as extravagant or lavish. The applicant appears to live in relative comfort also and it is clear that there are sufficient resources to ensure that that continues to be the case.

> "s.20 (2) (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,*"

54. The husband is aged 54, the wife is aged 53, the parties were married in September, 1974 and ceased to live together in May, 1992. They lived together for a period of about 18 years although it appears that the marriage had broken down some two years prior to the separation. At the time they ceased to live together were both relatively young.

> "s.20 (2) (e) *any physical or mental disability of either of the spouses.*"

55. Neither of the spouses has any physical or mental disability.

> ".20.(2).(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*"

56. During the course of the marriage both spouses contributed to the welfare of the family. Some short time prior to the arrival of the children the wife devoted herself to working in the home. She left her career in 1981 approximately eight years into the marriage. She continued to care for the children on a full time basis for the duration of the marriage and after the settlement. In my view it would be reasonable to have expected her to return to the workforce at about the time her daughter commenced secondary school. Although the respondent acquired almost all his present resources after the settlement, and without the help or support of the respondent also it is a fact that the continuing day to day care of the children was a factor in enabling the respondent to pursue his career after the settlement of the case. Clearly, this contribution by the wife was significant since she opted to forgo her earning capacity in order to stay at home and thus enable the other party to accrue financial resources. This important contribution was in existence at the time of the settlement.

57. The applicant is likely to have the day to day care of the children for the next few years although, the evidence is that the elder child spends considerable time in his father's house. After a few years the dependency will cease to exist.

> "s.20 (2) (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.*"

58. The caring for the children by the applicant was something which made it easier for the respondent to continue his successful career and was known to the parties at the time of the settlement. The settlement itself envisaged that such care would be ongoing.

59. Some eight and a half years into the marriage the applicant abandoned her career shortly before the arrival of the first child. She did not work for the remaining 10 years of the marriage and indeed did not return to the workforce until 2004. She had an absence of 20 years from the workplace which has the effect that she has a diminished future earning capacity to which I have already referred. However, in my view had she returned to the workplace at the time her daughter commenced secondary school as she was capable of doing, it is reasonable to expect that she could have resumed a career in a legal capacity. She could have earned money as a professional for about 12 years or so and made pension provisions during this period. Despite that finding it is clear that for a period of about fifteen years she was out of the workplace in order to look after her children and even if she had returned to work when it was reasonable to do so, that length of absence would have had some adverse financial affect on her career.

60. It was clearly contemplated by the custody arrangements that the applicant would be the primary carer for the children who were aged 9 and 6 respectively at the time of the settlement. The diminution in earning capacity of the applicant was a factor before the court in 1992.

> "s.20 (2) (h) *any income or benefits to which either of the spouses is entitled by or under statute*,"

61. No evidence was adduced concerning any income or benefit entitlement under statute.

> "s.20.(2).(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,"*

62. No reliance is being placed on this subsection by either party.

> "s.20.(2) (j) *the accommodation needs of either of the spouses*,

63. The accommodation needs of both parties are being adequately met at present and neither party has addressed any argument to the court on this topic. The applicant has to have accommodation for the children for the immediate future. It is not suggested that the present houses are unsuitable or will be unsuitable for either party.

> "s.20.(2) (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*,"

64. No evidence has been adduced concerning pension benefits or any other benefits affected by this sub section. Each spouse will forfeit their rights under the Succession Act, 1965

> s.20(2) (l) *The rights of any person other than the spouses but including a person to whom either spouse is remarried.*

65. Apart from the children of the marriage who have been generously provided for by the respondent, he also has an eight year old non-marital child to whom he will have financial and other responsibilities into the future until perhaps she attains her mid-twenties.

66. Section 20(3) of the Family Law (Divorce) Act, 1996 provides that

> *"In deciding whether to make an order under a provision referred to in subsection (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force".*

67. The weight to be attached to a prior settlement will vary from case to case depending on many factors including the length of time since it was reached, the financial background against which such settlement was reached, when compared with the present circumstances, and the reasonable expectations of the parties at the time of the settlement. The relative importance of these factors themselves will vary according to the circumstances of a case.

68. The terms of the separation order are of very great importance in this case and have already been referred to. In deciding what constitutes proper provision I must have regard to the following:-

(a) The fact that except for rights under the Succession Act, 1965 the settlement was intended to be long term and lasting. There is nothing to suggest that the transfer of IR£175,000 was intended to be merely an interim payment or that another payment was contemplated at that time. The applicant's solicitor acknowledged in evidence that the insertion of the increase of maintenance in accordance with the Consumer Price Index was to avoid the necessity of going back to court unless there was a fundamental change in circumstances.

The evidence of the respondent on that point is contradictory. At one point he referred to the fact that his wife was to get a continuing income into the future; at another point he expressed the view that she might see sense and come to have the agreement set aside by consent and on another time he referred to the possibility of the situation with regard to maintenance being changed if the applicant were to secure employment or win the lottery. I am satisfied, however, that the respondent was aware that he was obliged to pay the maintenance and expected to have to continue so doing indefinitely into the future and that he intended to abide by the term of the agreement. The fact that the maintenance was expressed to the indexed linked with the Consumer Price Index is a support of the interpretation that it was contemplated that it would be paid on an ongoing basis. Of course the respondent realised that the order would cease in the event of his pre-deceasing the applicant but he considered that in that event the applicant's position would be protected by the provisions of the Succession Act, 1965. The legislation itself does not allow for absolute finality and in the agreement of 1992, Succession Act rights were retained by each party.

(b) The fact that the vast bulk of the family assets were transferred to the applicant at the time of the settlement and the respondent was left with a holiday house and his earning capacity

(c) The fact that the sum transferred to the applicant could have been expected to have been husbanded in such a way as to have increased and not diminished.

(d) The fact that the settlement was entered into in the knowledge that the applicant would have day to day care of the children and that she would continue to do so.

(e) The fact that there was, and would continue to be a diminution of the earning capacity of the applicant was a factual reality against which the settlement was reached. It was a matter to which the court had to have regard pursuant to the provisions of s.20 (2) (g) of the Judicial Separation and Family Law Reform Act, 1989.

(f) The fact that the circumstances have not changed in that the settlement was entered into in the knowledge of the earning capacity of the applicant. The respondent was a partner in his firm at the time of the settlement and the general nature of his earnings and earning capacity was known to the applicant. He also had made some pension provisions at the time of the settlement which were disclosed to the applicant. It was reasonable to expect that the respondent would continue to build up a pension fund.

(g) The fact that the maintenance provided is only a very small percentage of the respondent's earnings.

69. Following the settlement the applicant was left with a sum of IR£120,000 after the purchase and furnishing of her house. In addition she subsequently received a sum of IR£60,000 from her mother. All of that money has been spent. The applicant explains this by:

(a) The extra expenditure occasioned by the greater than anticipated costs of looking after the children.

(b) The alleged failure of the respondent to honour the agreement and in particular his failure to pay dental, medical and educational bills.

(c) The fact that contrary to her expectation the sum for maintenance was subject to tax and she was obliged to dip into her capital to make up the short-fall.

(d) What she terms "some lifestyle choices".

70. In the year 2001 the sum of IR£56,000 was in her bank account a post office saving certificate IR£34,000. I can accept that the expenses caused in looking after the children were more than anticipated by the applicant. However, I do not think that this is a sufficient explanation for the exhaustion of the capital sum. In my view, although the respondent was in default on occasion in the payment of medical bills, in the overall context of the case these failures are not significant. Likewise, while he may have failed to pay the school bill on occasion, I am not satisfied that his failure was significant or regular. I do however accept that from the applicant's prospective the settlement was based on her receiving the maintenance after tax.

71. It is unclear what the applicant means by life style choices – if the applicant decided to dissipate the settlement monies rather than manage the them prudently it would be wrong should the consequences of such decision be visited on the respondent on the other hand the applicant was and is entitled to an appropriate lifestyle.

72. In recent years the respondent expended €16,000 in the refurbishment of her house and she also bought a car for her daughter which together with ancillary expenses cost about €13,000. She also expended some €15,000 on a shares investment which was unsuccessful. It would be wrong to criticise the applicant for the unfortunate investment. In my view she was perfectly entitled to expend the sum of money on her house just as the respondent was entitled to expend considerably amounts of money on his dwelling house over the years. The provision of the car for the seventeen year old daughter may not have been prudent or necessary but I do not regard it as deliberate dissipation of her assets in the context of the upcoming divorce hearing. Any suggestion that the applicant deliberately ran down her assets in the context of the pending litigation is not sustained. It is true however, to say that she failed to properly husband the not inconsiderable cash resources available to her after the settlement. It is reasonable to expect that had they been properly husbanded the applicant's financial position would be stronger than it is today. That failure to husband resources is a factor which the court must take into account even though the court must act on the basis of the assets as they exist at the time of the hearing.

Actuarial evidence

73. The court has power to make a pension adjustment orders under s. 17(2) of the Family Law (Divorce) Act, 1996. Such orders would require to have a specified percentage of the retirement benefits which accrued over a specified period of time be earmarked for the benefit of the applicant in this case. The relevant period specified in the adjustment order cannot extend beyond the date of the decree of divorce. It follows therefore, that the court can only deal with the benefits which have accrued in the past, and not

with benefits which may or may not accrue in the future by virtue of a retirement benefit contributions yet to be made by the respondent.

74. Section 17 (23)(b) of the Family Law Divorce Act, 1996 provides as follows:-

> "The court may make a pension adjustment order in addition to or in substitution in whole or in part for an order or orders under section 13, 14, 15 or 16 and, in deciding whether or not to make a pension adjustment order, the court shall have regard to the question whether proper provision, having regard to the circumstances, exists or can be made for the spouse concerned or the dependent member of the family concerned by on an order or orders under any of those sections."

75. The guidance notes issued by the Pensions Board in relation to the section 17 (23)(b) of the Family Law Divorce Act, 1996 reads as follows:

> "The legislation requires the court to consider the question of whether adequate and reasonable financial provision exists or can be made by means of any other orders that are available under the Act, prior to the making of a pension adjustment order."

76. That appears to me to be a correct statement of the law. The court must consider whether provision can be made by recourse to other orders available, but it is not precluded from making an order under section 17 (23) (b) even if provision can be made under other orders, if there is good reason to do so.

The consequences of a 50% adjustment order
77. The present amount of retirement funds from all three sources available to the respondent is €2,162,962. A fifty percent of a reduction would amount to €1,081,481. On the assumptions that (a) the fund can earn a rate of 2% per annum in excess of inflation and (b) the costs of securing a pension when the applicant reaches the age of sixty would be the same as the cost of securing a pension for a person who is currently aged sixty Mr. McCarthy the actuary for the applicant calculated that the pension adjustment order in 50% would generate a fixed income for the applicant from the age of sixty of €69,400 per annum or €45,500 per annum which increases each year at the rate of 3% per annum. The projected incomes are illustrated in today's terms that is by reference to current purchasing power.

78. On the same basis he calculated the sum which would be available to the respondent arising from the remaining 50% of the current fund and on continuation until October, 2008 of his current contributions of €6,000 per month. He estimated that the funds could generate an income for the respondent from the age of fifty eight of €94,650 per annum or an income of €65,000 per annum with yearly increases at a rate of 3% per annum.

79. A number of possibilities were advanced to the court which might provide for the applicant into the future. They were:-

> (1) The making of a pension adjustment order to enable an annuity to be purchased for the applicant in four years time. This was the applicant's preferred option.
>
> (2) The provision of a capital sum sufficient to secure the maintenance into the future based on actuarial calculation.
>
> (3) The respondent's proposal involving the continued payments by him to be secured in various ways until the respondent is 72 and thereafter
>
> (a) the provision of a capital sum to achieve the continuation of the maintenance from that time onward
>
> or
>
> (b) the provision of an annuity to achieve the same effect.

1. Adjustment order to purchase annuity
78. Both actuaries agreed that a pension order allocating funds with a current value of €915,000, or a pension adjustment order of 42.3% would be required to secure the current level maintenance payment index linked to the consumer price index payable from four years hence. Mr. McCarthy stressed that this was the price of fully securing income for the applicant commencing in four years time. It was his view that the purchase of an annuity was the only means by which the current income index linked could be guaranteed to the applicant. However, the opinion of Mr. Marsh was that a similar result could be achieved on a far more cost effective basis.

2. Capital value of maintenance payment
79. Mr. Marsh assessed that is the amount of money that would produce the current income, index linked into the future from today.

80. Based on the current gross payment of €28,800 per annum Mr. Marsh calculated the payment after tax and PRSI to the respondent to be in fact €24,044 per annum. That figure is incorrect. The actual sum is likely to be approaching €25,000. He applied a multiplier into this figure to obtain the capital value of future payments. Based on the assumption that the appropriate actuarial rate of interest to be 3% per annum above the rate of inflation and using Irish Life table No. 14 for females as the mortality table, that the marginal rate of income tax would be 9.5%, he calculated the multiplier to be applied to the annual rate of maintenance to be 19.646 and estimated the capital value of maintenance payments to be €472,368 which would require a property adjustment order of approximately 22%.

81. Mr. McCarthy however calculated that if the trustees of a pension scheme had to pay €28,800 per annum to the applicant commencing when the respondent was 68, a pension scheme regulated by the Pensions Board under the Pensions Act, 1990 the statutory minimum reserve that those trustees would have to keep in that pension scheme is €531,000 and that there would also be a covenant by the employer to top up the fund if it proved inadequate. €531,000 would be approximately 25% of the pension fund. Mr. McCarthy was of the view that even that sum would "most likely" not produce the current level of income for the applicant's life. (Mr. Marsh's figure would purchase an annuity of only €14,900 and Mr. McCarthy's figure would provide an annuity of about €16,000).

82. Mr. McCarthy also questioned the use of the mortality statistics used by Mr. March, on the basis that members of pension schemes are a particular subset of the population and that the mortality rate of the population in general is heavier that the subset which consists of people entitled to pensions for the rest of their lives. His evidence was that those people had a greater life

expectancy in the order of four to five years.

83. In my view the payment of a capital sum at present poses unnecessary risks, in particular in the event of the applicant living a long life. Therefore, it does not appear to the court to be the best solution.

84. A debate arose concerning whether it was appropriate or not to adopt the 3% actuarial figure in use in personal injuries compensation cases into family law. Mr. McCarthy argued that it was not mentioned in the pension legislation and had never been adopted in pension law and thought it was inappropriate to do so. However, it seems to me that there is no valid reason for not following the figure of 3% mentioned in the decision of Finnegan P. in *Boyne v. Dublin Bus* [2003] 4 I.R. 47. Mr. Marsh told the court that in a personal injury case, were he was asked to access the value of a loss of pension payable at the age of sixty eight and three quarters for person now aged fifty three he would answer at the same figure. It is unnecessary for me to adjudicate on this matter as I do not intend to provide for the applicant by way of a capital sum.

(3) Respondent's proposal
85. An alternative way to secure the present level of maintenance put forward to the court. It was as follows:

86. The respondent is to continue to pay the maintenance indefinitely. The payments could be secured as follows:

> (a) To secure the payments up until the time when the respondent is 60 payment could be secured by an insurance policy in the sum of €200,000 for the period prior to the respondent's 60th birthday. In the event of his death before that time the payment would be secured by such a policy.
>
> (b) From the age of 60 – 72 the respondent would continue to make the payments but the payments would be secured in the event of his death by assigning the consultancy payments of €3,120 per month index linked from April, 2000. The adoption of that proposal would give security for the payments until the consultancy payments stopped at which time the respondent would be 72 and the applicant 70¾.
>
> (c) From 70 onwards it was proposed that at that stage that in the event of the respondent pre-deceasing his wife such sum could be secured either by a capital payment or the purchase of an annuity.

87. Mr. Marsh the actuary for the respondent considers that a sum of €177,757 a pension adjustment order of the percentage that would provide that sum would generate a sufficient income to provide security for the applicant at the present level of payments from the age of 70 onwards. These calculations are made on the same basis as Mr. Marsh used in his other calculations – and are subject to the same criticisms by Mr. McCarthy. Mr. McCarthy calculated that €177,757 invested now would, assuming an inflation of 2½% and allowing for a 2% yield above inflation (which is available in government stock) would grow to a sum of €359,490 when the applicant is 68. The current maintenance he calculated will have increased to €359,490.

88. That sum he calculated would run out in about 8½ years - or about the time when the respondent was 76 years old. Even if one assumed that the money were invested at that time (a factor not taken into account by Mr. McCarthy), he thought that the money would be gone if the applicant lived "much beyond 80". Even on the basis of Mr. March's calculations this proposal is unsatisfactory because the money would run out in the event of the applicant surviving beyond the age of 85 if it commenced at age 68, or 87 if it commenced at 70. This must be a real possibility.

89. Mr. McCarthy's opinion was that a sum of €503,000 was the capital sum which if invested in government stock would be necessary to provide an income from 68 for the rest of her life at the present levels of income index linked by the purchase of annuity. Mr. March's figure for the same provision was €431,000 (the difference being explained by their differing views as to whether 2% or 3% above the rate of inflation was an appropriate figure to use in their calculations) and he also gave a figure of €360,000 as a sum which invested now until the applicant becomes 68 and three quarters would be further invested and last until the applicant reached the age of 100.

90. An annuity to secure maintenance at current levels index linked would cost €1.13m on the calculations of Mr. Marsh. Mr. McCarthy gave a figure of €1,017,000 to provide annuity for the age of 68. That sum could be secured on the Churchtown property. Mr. Marsh's calculations were on the assumption of a 7% increase above the cost of inflation. The Churchtown property would be worth €2.1m after capital gains tax. The 7% increase is 4% above the cost of inflation where in historical terms over a period of 17 years the actual rate over inflation was 9%. In my view provision should be made to enable the purchase of an annuity if necessary.

91. It is submitted that this proposal is cumbersome and unwieldy. However, the proposal seems to me to be an efficient and uncomplicated method of securing payment of maintenance. It has the advantage of being risk free save only for the calculation that the Churchtown property will be sufficient to purchase an annuity if necessary when the applicant is seventy. Mr. Marsh's assumptions are quite reasonable, and even were they not to prove correct, there is room for a very wide margin of error, before the property would be insufficient to provide for the purchase of an annuity because the projected value of the property is nearly double the projected cost of purchasing the annuity. Under this proposal the maintenance will continue to be paid by standing order and the sums are guaranteed into the future. No calculations of any type have to be made up to the time when the applicant is 70 years old at the earliest and if an annuity has to be purchased after that there are ample funds to secure it.

The Law
92. The following are the legal principles applicable to this case in applying the provisions of the Family Law (Divorce) Act, 1996:

> (1) The function and responsibility of the court is to determine what is "proper provision" in the circumstances of the case. Proper provision is not necessarily the same as 'adequate and reasonable' which was the criteria in relation to the provisions made under s. 21 of the Judicial Separation and Family Law Reform Act, 1989. However, in the facts of any particular case it is open to a court to hold that provisions which were adequate and reasonable having regard to all the circumstances of the case as were constituted proper provision for the purposes of the Family Law (Divorce) Act, 1996.
>
> (2) The assets are to be assessed at the time of the hearing. As Denham J. in *T. v. T*. [2002] 3 I.R. 334 stated at p. 383:
>
> > "Thus, the ordinary meaning of the words make it clear that assessment is as of the date of trial. However, while the assessment of assets is as of the date of the trial or the appeal, there may be important factors relevant to that sum to be taken into consideration in determining proper provision for the spouses. It may impact on the particular factors stated in s. 20(2)(a) to (l) of the Act of 1996, it may be relevant to the generality of the

provision, or it may impact on the fairness of the provision. Thus, the fact that a considerable sum of money was acquired by the spouse after their separation, the basis for such a new acquired sum, or the existence of a deed of separation, may be very relevant."

In the present case the fact that at the separation the applicant obtained the vast bulk of the assets of the parties and the respondent was obliged to start anew does not mean that the wealth which he acquired since the date of separation cannot be taken into account – but it is of relevance in the present case because it impacts on the fairness of the provisions, which is something the court must take into account. Likewise the fact that the bulk of the assets were built up without the emotional support of the applicant does not preclude those assets from being taken into account by the court, as is clear from the judgment in the case of *T v. T* [2002] 3 I.R. 334. However, that fact may be of significance in determining what is proper provision. It should be acknowledged, however, that the respondent's care for the children (in accordance with the settlement) helped the respondent in continuing his successful career

(3) There should be no discrimination based on the roles of the spouses where one was the homemaker and the other was a bread winner. As Murray J. (as he then was) said in *T v. T* [2003] 3 I.R. 334 at p. 407:

"In my view in ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the court should, in principle, attribute the same value to the contribution to the spouse who works primarily in the home as it does to a spouse who works primarily outside the home as the principal earner".

(4) In regard to the amount of proper provision which may be ordered in any case wide discretion is vested in the court. Fennelly J. observed at p. 418:-

"It is only with the greatest care, therefore, that one should formulate any general propositions. The judge must always, and in every case, have particular regard to the particular circumstances of the case."

(5) The concept of a one third division as a benchmark maybe helpful in some cases but may have little or no relevance to others. Denham J. discussed the matter as follows:-

"The concept of one third as a check on fairness may well be useful in some cases, however, it may have no application in many cases. It may not be applicable to a family with inadequate assets. It may not be relevant to a family of adequate means if, for example, such a sum could only be achieved by sale of assets which would destroy a business, or the future income of a party or parties, or if it related to a property bought solely by one party to the marriage, or any other relevant circumstance. It may not be applicable to a situation where a party has wealth from his or her own endeavours to which the other party has no claim except under the factors set out in s. 20 (2) (a) to (l) of the Act of 1996."

(6) Section 20 (5) of the Family Law (Divorce) Act, 1996 provides:-

"The court shall not make an order under a provision referred to in subsection (1) unless it would be in the interests of justice to do so. The court therefore is not obliged to make any order unless it would be in the interest of justice to do so. The concept of justice therefore is at the core of the legislation insofar as the making of orders is concerned and this provision underlines the discretion vested in the judge.

93. As Denham J. stated at p. 382:

"A 'clean break' principle may be found in the law as to financial orders relating to divorce in other jurisdictions. However, such a provision is not part of the Irish Constitution or legislation. There is no provision providing for a single payment to a spouse to meet all financial obligations. Rather the fundamental principle is one of 'proper provision'. 'However, the absence of a 'clean break' principle does not exclude a lump sum order. The principles of certainty apply to family law as to other areas of the law. Certainty is important in all litigation. Certainty and consistency are at the core of the legal system. However, the concepts of certainty and consistency are subject to the necessity of fairness. Consequently, each case must be considered on its own facts, in light of the principles set out in the law, so as to achieve a just result. Thus while the underlining constitution principle is one of making proper provision for the spouses and children, this is to be administered with justice to achieve fairness.

94. In *T. v. T.* [2003] 3 I.R. 334 Murray J. (as he then was) stated at p. 401 to 402:

"It is common case that the discretion conferred on the courts in the exercise of their jurisdiction to grant a divorce is extremely broad. The very statement in Article 41.3.20.iii of the Constitution that the courts must be satisfied that proper provision has been made for the spouses *'having regard to the circumstances'* is reflected in the broad and general manner in which the relevant provision of the Act of 1996 are framed. Section 20 of the Act of 1996, which is set out in full in the judgment of the Chief Justice, describes an extensive range of factors to which the court shall have particular regard in deciding whether or not to grant a decree of divorce. The weight to be attached to each of these matters will always depend on the particular circumstances of the case. Often many of the factors mentioned in s. 20 will have no pertinence to the particular case, and therefore, will not be taken into account. The Oireachtas studiously avoided giving any prescriptive guidelines as to how the court should deal with the income and assets of parties in making proper provision for the spouses. I draw attention to the particularly broad discretion conferred on a court in order to emphasise that while this court may decided on principles which should guide a court when exercising its jurisdiction under the Act of 1996, the very broad discretion conferred on a judge hearing a case of this nature will still remain to be exercised having regard to the circumstances of any particular case".

95. That observation seems to me to be particularly pertinent in the circumstances of the present case in which a very considerable lump sum was allocated to the applicant and a very favourable settlement from her point of view was achieved in 1992. In this case, I have decided not to make a large lump sum order, although, it is in many cases (perhaps even the majority of cases) the making of such an order may be essential in providing for the proper provision of a spouse.

96. This is in marked contrast to the position in the case of *K v. K* [2003] 1 I.R. 326, where the income of the respondent could hardly

have been anticipated. Having said that, it is only fair to point out that the bulk of the assets in the case of *T v. T* [2003] 3 I.R. 334 were acquired by the acquisition of a property subsequent to the settlement. Moreover, I am entitled to have regard to the fact that the bulk of the present day assets were built up after the marriage. Denham J. at p. 383 of *T. v. T.* said:

> "However while the assessment of assets is at the date of the trial or the appeal, there may be important factors relevant to that sum to be taken into consideration in determining the proper provision for the spouses. It may impact on the particular factors stated in s. 20(2)(a) to (l) of the Act of 1996, it may be relevant to the generality of the provision, or it impact on the fairness of the provision. Thus, the fact that a considerable sum of money was acquired by a spouse after their separation, the basis for such a new acquired sum or the existence of a deed of separation, maybe very relevant".

97. In this case the assets were built up without the support of the applicant and in the context of ongoing litigation while it is true that they were earned because of the professional expertise of the applicant, some of which was acquired in the course of the marriage, the argument is not strong as it would be in the case of where a practice was built up because of the support of the spouse. Such is the case in *T v. T* [2003] 3 I.R. 334.

98. The analysis of previous cases and the comparison with the present case of the factors to which the court is obliged to have regard by virtue of the provisions of s. 20(1)(a) to (l) of the Family Law (Divorce) Act, 1996 is of limited value, because of the number of those provisions, their varying importance from case to case, and the fact that those factors have no particular hierarchy of importance.

99. Counsel has pointed out the similarities between *T v. T* [2003] 3 I.R. 334 and the present case. There are indeed certain factors in common such as (1) the duration of the marriage which is similar in both cases, (2) in *T v. T* the applicant sacrificed her medical career for a considerable period. In the present case the applicant sacrificed her career also for a period of perhaps 18 years, that is from the time of the arrival of the first child until the second child was established in secondary school, at which time in my view she could have returned to work. The marriage and the minding of the children was the background against which the respondent pursued his career both before and after the settlement. It may be that there is a difference of degree insofar as the respondent was working in a well established and successful firm whereas the support of the wife in the case of *T v. T* enabled him to establish his practice.

100. However, a major difference in this case, is the fact of the settlement in 1992 and also its terms. The fact that the wife had stayed at home to mind the children and had given up her career at least temporarily, and that she would look after the children was the factual background against which the case was settled in 1992 and this is a factor that the court must take into account. In my view, comparison with *K. v. K.*[2003] 1 I.R. 326, is not very helpful in deciding this case because of the very substantial factual differences including the fact that after the settlement in that case the circumstances of the parties had changed radically in a way that had not been envisaged at the time of the settlement. Also the time between the settlement and the hearing was in *K. v. K.* was greatly in excess of that in the present case.

Decision

101. I have dealt with the factors which the court has to take into account pursuant to the provisions of s. 20 (1) which are to be assessed in the determining the proper provision that has to be made in the circumstances of the case. Those factors are, however, not to be taken in isolation. They must be taken in conjunction with the settlement of 1992 to which I am obliged to have regard pursuant to the provisions of s. 20(2) of the Act of 1996.

102. It is clear that the law does not mandate any particular ancillary form of order in divorce cases. Although it is true that in many, if not most, cases there will be a division of the assets existing at the time of the hearing, there is no requirement that that be done in every case. What is required is that 'proper provision' be made and it is clear that the consequences of such provision is very often an appropriate division of the assets.

103. The fact that the assets of the respondent are considerably in excess of those of the applicant is something which would usually warrant a property adjustment order. I am not convinced that such is necessary or desirable in the circumstances of this case. In so concluding I have had regard to the provisions of the settlement which I have discussed already.

104. It seems clear to the court that at the time of the agreement the applicant expected that she would have her maintenance without the obligation to pay tax on it. This was not to the understanding of the respondent and this misunderstanding let to protracted and expensive litigation. It is unnecessary for this Court to interpret the meaning of the agreement on this point. The maintenance appears to have been adequate although not generous otherwise I am satisfied that the applicant, who was not tardy in having recourse to the court, would have taken proceedings. There were however a few hitches which not unnaturally caused frustration to the applicant.

105. In my view, it is only proper that an adjustment be made in the maintenance, to take into account the applicant's understanding of the agreement because it was a factor with significant financial consequences. Moreover, although the maintenance agreed between the parties was adequate, it would be wrong to ignore the huge disparity in income between the parties – even taking into account the other commitments of the respondent, and the findings of the court in regard to the settlement provisions and the observations relating to the failure to prudently deal with the settlement monies. The income paid to the applicant is a very small percentage of the respondent's income and it is clear that at present the applicant is having some difficulty in living on the maintenance provided as appears from her affidavit of means. Even after he retires the respondent is likely to have a significant income from his pension fund. It now stands at over €2m and it is his intention to make significant contributions up until the date of his retirement. In addition, he is likely to have funds from his partnership which are likely to be in excess of €1m. In those circumstances it seems appropriate to the court that the maintenance be further increased to a sum which after tax will be €38,000 – an increase which is relatively modest but which takes into account the huge disparity of income and in my view constituted proper provision for the applicant. The sum of €38,000 is an increase of somewhat less than €10,000 after tax, an increase on the present sum of €28,800. In making that increase, I am conscious that the percentage of income agreed in the settlement was also a small percentage of the respondent's earnings at that time but the court assesses the position as of the time of the hearing. I am also taking into account that on retirement the respondent will have a pension likely to produce in the region of €118,000 index linked or €170,000 fixed income. This sum will be available without taking into consideration the capital which will be available to the respondent at that time or the monies payable by way of monthly sum under the consultancy agreement. The increase will not affect the operation of the scheme proposed by the respondent as the securities provided by the monthly sum and the property in Churchtown will still be sufficient.

106. The extinguishing of Succession Act rights must also be considered. That cannot be considered in isolation from the maintenance which the court determines. The fact that the respondent too is to forfeit his rights under the Succession Act must be taken into

account. There is a considerable disparity in the assets the subject of rights under the Succession Act. It appears to the court that having regard to the totality of the circumstances and the fact that the respondent's rights also are to be extinguished only a relatively modest sum which I assess at €50,000 should be awarded in this regard. In addition it is desirable to have finality in respect of the provision of cars and I consider it appropriate to vacate that order on the payment of €50,000.

107. It is also desirable that the applicant to be responsible for her own health insurance hereafter and in increasing the maintenance this has been taken into account.

108. The court therefore orders:-

(1) a decree of divorce pursuant to section 5 of the Family Law (Divorce) Act, 1996.

(2) order extinguishing the succession rights of each of the parties.

(3) that the maintenance to the applicant should be increased from its present level to a sum which yields to the applicant a sum of €38,000 without the obligation on her to have to pay tax thereon, the payment to commence on the first week in May, 2005. The said maintenance payments are to be paid weekly by way of standing order and the payments are to increase in accordance with the Consumer Price Index. The payments are to be secured by the applicant purchasing an insurance policy sufficient to guarantee such payments until he reaches the age of 60. The payments from that time until the respondent is 72 are to be secured and payable out of the consultancy fees of €3,120 per month (index linked from April 2002) to the applicant in the event of his predeceasing the applicant. The payment from his 70th birthday is to be secured by the purchase of an annuity to be secured as a charge on the respondent's property in Churchtown.

109. In relation to the children I consider that the present arrangements should continue.

110. I will discuss the form of orders to be made with counsel as well as hearing submissions as to costs.