

## THE HIGH COURT

## FAMILY LAW

[2009 No. 15 M]

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989, AND IN THE MATTER OF THE FAMILY LAW ACT 1995, AS AMENDED BY THE FAMILY LAW (DIVORCE) ACT 1996****BETWEEN****P.B.****APPLICANT****AND****A.B.****RESPONDENT****JUDGMENT of Mr. Justice Henry Abbott delivered on the 24th day of May, 2012**

1. The applicant wife and the respondent husband (hereinafter referred to as the wife and the husband respectively) were married in a faith ceremony in a neighbouring jurisdiction on the 13th May, 1989. The husband was born on the 8th January, 1963 and the wife was born on the 29th March, 1964.

2. There were three children of the marriage. The eldest (a son) born on the 12th May, 1991, the second eldest (a daughter) was born on the 5th July, 1993 and the youngest (a daughter) was born on the 20th March, 1998. All children are in education and are dependent.

3. The parties lived in the city in this jurisdiction with their children for the duration of the marriage, until the husband commenced to live apart in recent times, mainly with two of the children. The husband has been a business man throughout his married life and was employed by and was variously a shareholder in what may be described as family businesses held with various siblings in varying proportions. The wife worked in medical care in a neighbouring jurisdiction prior to her marriage and from 1993, or thereabouts, permanently ceased to work outside the home.

4. I am satisfied, on the evidence in this case, that the circumstances of the marriage were such that it is appropriate that an order for judicial separation pursuant to the Judicial Separation and Family Law Reform Act 1989 ("the Act of 1989"), ought to be granted, subject to the following provisions being made for the spouses.

**PROVISION**

5. I consider provision pursuant to s. 16 of the Family Law 1995, ("the Act of 1995") as amended, and in particular, I consider the criteria set out in subs. 2 of that section without prejudice to the generality of subs. 1 thereof by setting out such criteria and considering same *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,*

**Applicant's Income**

By the applicant's affidavit of means dated 28th June, 2011, her maintenance from the respondent was €1,300 per month, €900 per month in respect of herself and €400 per month in respect of their youngest daughter, O. At that stage she was getting Children's Allowance of two children, but this is now reduced to one in the sum of €130 per month. She had a part-time job as a child minder at €160 per month and she noted there was no prospect of any similar employment over the summer months. At the present time she is not in employment, although she does intend to seek employment in the care area in the future. For the purpose of this case her income will consist only of maintenance and Children's Allowance. Her VHI and mortgage payments on the house in which she resided (the family home) were paid by the husband, however. The maintenance figure arises from an agreement made between the parties on the 3rd July, 2009.

**The Husband's Income**

In his updated affidavit of means, the husband states that his monthly salary from the family company S. Ltd., net after deduction of income tax, PRSI and Universal Social Charge is €5,966.35 per month. He notes that rental income from letting partnership premises amounts to €6,950 per month, but that the full amount of this income is utilised towards loan payments which leave a deficit of €1,015 per month. For the moment he is solely dependent for income from the family company S. Ltd. However, this figure must be seen in the context of the report of Messrs. Browne Murphy & Hughes, Chartered and Certified Accountants, dated the 29th June, 2011 (the updated report), where on p. 9 the equivalent figure per month from his 2010 P60 was €7,029 together with company-subsistence expenses of €417 and dividends paid of €476, totalling €7,924. The historical picture in relation to the husband's income is even more dramatically shown on the gross income column of the report for the years ending December '06 to December '10 as follows:

Dec '06 Dec '07 Dec '08 Dec '09 Dec '10

€ € € € €

A later column relating to net income shows the highest net income over that period at €185,255 and the lowest (December, 2010) at €89,229. The husband also has the benefit of a small share in apartments both in Spain and South Africa on the basis of contribution towards outgoings. As a manager in the family business the husband is involved considerably in travelling and manages (according to the wife) to play golf in southern Europe on a frequent basis. The husband argues that this is part of his normal routine and involves leisure time taken and is a part of a busy management routine, especially liaising with a foreign company owned by the family together with an outsider (hereinafter referred to as "the outsider"). There are two property partnerships in varying stages of being able to produce income, (were it not for tightening of banking conditions and the dramatic fall in the Irish property market). For the foreseeable future these property partnerships are not likely to produce in income, but in the medium to long term they are not so highly geared as to be incapable of producing some income, but more especially capital appreciation. In the view I have taken of the case, I disregard the property partnerships as income producers in any shape or form reserving their function to replace pension assets of the husband, which generally I intend to adjust towards the wife in making provision in this case. Much of the disclosure and time taken up during the course of the hearing was involved in showing how the income of the husband had declined so rapidly. I accept the husband's evidence and that of Mr. Browne that the family company S. Ltd., is a company operating in the domestic and foreign markets mainly the United Kingdom ("the U.K.") in supplying a manufactured product to the retail trade (mainly supermarket chains). It operates in an international market of near perfect competition where companies such as S. Ltd. are price takers rather than price makers. It depends on low-priced, attractively designed products and on the manufacture of high volumes, to keep average costs down. The accountant's evidence was that the profitability of the company was, at the best of time, low having regard to the high turnover of same. My view is that the company is not one that would have been expected to survive Ireland's entry into the free trade conditions introduced by common market entry, and later by its development to the single market of the E.U. and the liberalisation of world trade generally. The secret of such survival against the odds appears to be due to two factors (apart from the obvious management skill of the husband's family) as follows:

- (1) Transfer of much of the manufacturing process to the foreign company which operates in a lower costs economy; and
- (2) The ability of S. Ltd. and the husband's family with their colleagues to come up with new designs to follow consumer preferences which, although sufficient to hold onto market share, are never enough to establish an oligopoly position or a "brand position" which might enable them to have a financially beneficial influence on the price which they charge for their goods. The biggest risk to a company supplying foreign markets to a large degree arises from exchange rate fluctuations. While fluctuations may operate to the benefit of the company at certain times, when the movement is adverse then there is a grave risk that such exchange rate changes may seriously reduce or eliminate profit margins and threaten the viability of the company. It is, therefore, no surprise that there is a significant cash reserve in the company approaching €1 million.

A major part of the wife's inquiries related to questioning by Ms. Clissmann S.C., counsel for the wife, in relation to the possibility of the company paying out of its cash reserve dividends as it had done in the recent past, notwithstanding the recent plunge by the company into loss-making territory. The husband explained the reduction in wages and payment of dividends in terms of the effects of the dramatic downturn following the collapse of Lehman Brothers in 2008, and the necessity for management to take a lead amongst all the workforce to reduce wages to maintain competitiveness, and the need to maintain reserves without reduction by way of dividend to ensure the success of the company in difficult times. He also explained that he was a minority shareholder and that he could not secure the agreement of the rest of the family shareholders to any exceptional payment to fund the special requirements of his separation case. This proposition I accept in large measure, so that in dealing with provision in this case, the court may only expect, at best, the possibility of a marginal increase in income, or re-budgeting of the husband's various sources of income and benefits-in-kind, together with his expenditure arising therefrom, so as to have a marginal increase in maintenance for the wife for the future. As a last resort in her quest to persuade the company of the possibility of greater income for the husband when considering provision, counsel for the wife launched an inquiry in relation to the finances of the foreign company which has significant reserves and operates at a profit. This attempt was met with a strong case being made by the husband against the family members taking money out of this company by way of income, by reason of the fact that it had been set up by the family with the strong assistance of the outsider – a man in his senior years who had been headhunted by them to set up and lead this company in the challenging conditions of an African economy. By all accounts, the outsider had done a stellar job on the development and profitability of the foreign company. However, he was of a certain age where retirement beckoned and he had no pension provision at all. The foreign company, therefore, as a moral duty, owed him a pension and also required a replacement, and I accept that unless the outsider could be catered for by way of an attractive pension, it would be very difficult, if not impossible, to recruit a replacement of similar calibre and commitment. In view of my conclusion that the family company would not have survived without the parallel operation of the foreign company, I find the explanation of the husband for the retention of cash reserves in the foreign company to fund a pension for the outsider to be credible. However, there may be some possibility for the husband to persuade his fellow shareholders to agree to some income or dividend payment from the foreign company which would augment his present income, at least on a once-off basis, given that the decision on the pension of the outsider would give rise to a negotiating moment for the family where they might all expect a modest dividend of some description.

#### Earning Capacity of Wife

The wife has always worked in the care industry until 1993 when she became a fulltime housewife working in the home and caring for their children. She has little qualifications and if she were to obtain employment, it may be for little more than the minimum wage, and not necessarily for five days a week. She is disciplined and determined in her habits and has expressed an interest in working in the care area again. She already, in her affidavit of means, indicated that she has had a short spell of employment in the childminding area with modest income. Having regard to the foregoing, I consider that she may have a possibility of re-establishing herself in the workforce for an average gross income of €800 per month. While this may be modest, it would be an important contribution to her lifestyle established with the assistance of the moderate maintenance to be given to her in the provision in this case, and also to assist her in accumulating further pension provision with the aid of the existing tax benefits relating thereto.

#### Earning Capacity of Husband

As indicated by the horizontal table of gross income above, the past income experience of the husband is indicative of the potential to earn significantly more in future years. This improvement on income would depend on improved trading conditions and an up-lift in consumer demand, coupled with favourable exchange rate conditions. In the light of this potential, it is certainly not appropriate to consider the provision in this case to be an attempt at reaching some kind of finality. This does not mean that either husband or wife should be watching the other to see if conditions improve income-wise for either of them in the next year or two, as such a process would be a wasteful one in terms of costs being drained from family resources, and from the point of view of distracting attention from the main career challenges facing the parties after separation. For that reason, I propose to prohibit either party from seeking a variation of maintenance by reason only of the wife taking up employment for a period of three years, and by reason only of the S. Ltd. profits increasing for a period of three years. The capacity of the husband arising from the foreign company is as described above and may only be a once-off increase, which may be useful to allay the financial strain of both parties arising from the separation. I have already dealt with the income of the property partnerships and disregard them in terms of husband's income, as in the absence of his existing formal pension provision, the property partnerships are best viewed as activities which in the medium or long-term will provide pension substitute funds. However, it must be remembered that the husband is a minority shareholder of these partnerships and a massive growth in his shares would be required to match the amount of pension funds being adjusted over to the wife in this case. Finally, the financial strain of which both husband and wife complain in this case may be alleviated by the family-orientated philosophy of S. Ltd., which envisages at least some of the children taking up employment in the company and working from the bottom up as the husband did, and also to take temporary jobs. The temporary work of the children in the company, when obtained will, no doubt, alleviate the strain on the husband who from time-to-time must look after all three children. While the updated report does show the existence of some assets which may have some income arising from same, the net effect of such assets on the overall income is minimal, if not negative, and I do not propose to deal with the detail therein.

#### Property and other Financial Resources of Wife

The property and other financial resources which the wife has or is likely to have in the foreseeable future are as follows:

- (1) €500,000.00 proceeds from the sale of the family home.
- (2) Contents of same (subject to contents of family home agreed to be given to husband).
- (3) Future adjustment of pension €250,000 approximately.

#### Property and other Financial Resources of Husband

Allowing for the fact that the family home was sold for the sum of €950,000.00, leaving the husband a net €340,000 and the wife a net €500,000, the bottom line net value of the husband's assets as outlined on p. 1 of the final report (and not including net transfer of pensions) amounts to €2,680,071. Comparing the capital provision for the wife to the likely capital retained by the husband as a result of provision in this case, the wife receives approximately 22%. The reasons for such capital allocation appear later in this judgment.

*(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 affidavit of means of both parties sets out the financial needs and obligations greatly in excess of their existing or likely income. It is likely that the wife should keep house for the youngest daughter on a permanent basis, and she may also have some hope of entertaining her two older children. Her current income of €1,200 to €1,300 per month together with Children's Allowances is hardly enough to give her a lifestyle anywhere approaching her husband's. I consider €1,500 per month on the basis of the youngest daughter remaining (as she should) within her care.

#### Needs of the Husband

Now that the house has been sold and the husband has been spared the cost of paying the mortgage, I am informed on receiving the results of the sale of the family home, that the husband has obtained better accommodation at a more reasonable rent. He is, however, feeling the full blast of the recession at a time when his children are at their most expensive. The balancing factor against this is that he has the capacity to provide employment for them in the family business, and he may get some financial relief from this outcome in relation to provision for pocket money etc., as discussed in evidence.

*(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be*

The wife, without doubt, will enjoy a lower standard of living than she enjoyed at the height of the husband's earning capacity, and while she was living in, what was admitted by both parties to be, a house of outstanding character in the city suburbs which was kept immaculately by her. There was some debate as to whether she needed a three or four bedroomed house as she had an interest in providing accommodation occasionally for a sister from another city who is not a dependent under the law in this case. The intention of the parties in selling the family home before the final determination by this Court of the provision to be made was a good one and was to facilitate the wife at least in finding a property by way of purchase without loan finance, so that she would have the security of same and so that the court would have the certainty of knowing that she had found accommodation in accordance with her wishes, whether at the three bedroom or four bedroom level. Notwithstanding the time given by the court to enable this outcome to have happened, the wife had the misfortune of signing a contract for a house which was satisfactory in everyway but which sadly had title difficulties resulting in the sale falling through. She is house hunting again, but I am confident that she is prudent enough to be in a position to buy another house, taking advantage of the slight further fall in the market since. It was always envisaged that out of the €500,000 she would also be in a position to take care of her legal fees. Equally, the husband must take care of his own fees, but by reason of the fact that he has opted to continue to rent the property, he has some capital to cater for same and also take the strain of having a fuller household of children at an expensive stage. This dipping into capital was not encouraged by me in the wife's case but the court must be quite sanguine about it in the case of the husband's situation as, in the medium term, he has many opportunities to recoup this capital situation from his

diverse interests, and also, he has greater leeway in terms of saving on luxuries than that enjoyed by the wife.

The wife's standard of living has and is likely to decrease. Also the husband's standard of living has decreased, but not by as much as he still enjoys many fringe benefits of the company, as well as small shares in holiday apartments in exotic locations.

*(d) the age of each of the spouses and the length of time during which the spouses lived together*

Both spouses are in their mid forties to early fifties and the marriage was a reasonably long one. The implication of this is that the wife has some time to build up a further pension and also, perhaps, share at some future date the underlying income producing capacity of the company (if not much of its capital value) if economic conditions improve dramatically. Equally, the husband has time on his side to build up a pension, either by further contributions to formal pension funds from his company with tax advantages (which are not limited by tax threshold), or by awaiting the maturing of the moderately geared property partnerships, or both.

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

Neither spouse has any physical or mental disability which will prevent them from working in their chosen way, and the separation in this case will greatly reduce their stress and aid their health.

*(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*

The contribution of the wife in raising the family and looking after the home was not contested by the husband. It is true that in later years that the greater number of the children chose to live with their father, but he did not use this outcome to dispute his appreciation for the work done by the wife as a homemaker and a mother. She still has a very significant contribution to make to the parenting of the youngest daughter. I have had the assistance of expert witnesses and also spoke to the youngest daughter in relation to this matter, and I am satisfied that the relationship is important and will continue (although sometimes in a tumultuous fashion). The contribution of the wife was also evidenced by the fact that the house (and the home) was sold at €950,000 almost in line with the husband's valuation of €865,124 of the net equity, allowing for a reduction of €76,000 for mortgage. This was a tremendous result in a difficult market as I expressed my doubts as to whether such a level would be reached in this market.

The husband's contribution to the family in taking care of the children and the home was, and continues to be, substantial. His income earnings have been stellar by Irish standards in the past and remain substantial. In the event of the upturn of the economy facing the family business, the husband's earning capacity may increase in the future.

*(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 together 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*

The wife's earning capacity has obviously suffered by reason of her taking on marital responsibilities as she ceased working outside the home in 1993. She has lost the prospect of developing her career and securing her income and contributing to a modest pension during the time when she may have been employed, during her time as a homemaker. However, the provision in this case goes very substantially towards remedying this minor enough deficiency and she is still young enough to make up for lost time. The husband's career does not appear to have been adversely affected by his taking on marital responsibilities as he was supported by the wife in the home in rearing the children in the early ages and even now he appears by his affidavit of means to be employing some home help as a cleaner.

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

Neither spouse appears to have any entitlements under statute although the wife may now look to have her pension contributions under the Social Welfare Code contributed from her Irish employment and employment abroad, so that she may now work towards getting a good average up to the age of 68, or whatever age she may face, so that she may receive such a pension. This avenue does not appear to be open to the husband under current legislation as he is a company director.

*(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*

This does not arise.

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

I have dealt with the accommodation needs of the spouses under other categories and both seem to be satisfied with the vista facing them, and I am also satisfied that these needs will be met by purchase or rent in the future.

*(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 judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring*

I have explained how it is intended to adjust the formal pensions funds set out in the husband's latest affidavit of means and the means by which the husband may supplement the same to cater for the need for a pension in later years.

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

While I have mentioned the wife's sister from another jurisdiction, I do not consider that she has any legal right under this paragraph. This is not to say that the court does not appreciate the kindness which the wife has shown her sister and the importance of that sister in making up the family contact with the wife's family from another jurisdiction, which in

future years will be more important to the children in this family.

### SUBMISSIONS ON PROVISION

6. As the judgment of the Supreme Court in the case *Y.G. v. N.G.* [2011] IESC 40, [2011] 3 I.R.717 was given after the hearing herein, I invited submissions from the parties in relation to the fact of this decision and the law generally relating to.

7. Before dealing with the submissions it is important that the court holds and finds certain facts in relation to the origins of the family's business wealth as follows.

8. While the husband's father had a company in the same type of business, albeit at a more luxury based end, this company ultimately did not prosper and went into liquidation. The husband was old enough to have a strong hand in directing the father towards the present business and, in due course, the father increased the son's shareholding of S. Ltd. S. Ltd. in turn has been the engine of the growth of the family's business wealth since. The case is therefore not one of pure inherited wealth as the son obviously had a very strong and decisive influence on the setting up of S. Ltd., but nevertheless the intangibles such as expertise and business contacts not having a market value in the event of their being put up for sale were, to a certain extent, items of value inherited from the father when they became incorporated, and were the most significant factor in the success of S. Ltd. To that extent, the business wealth of S. Ltd. is inherited from the father. However, the residual of the aspect of S. Ltd. and the wealth and other corporate entities which it has generated have another aspect which is very close to the inherited aspect, and that is the fact that they are a business held in partnership within a family with expectation of it being handed on within the family by way of inheritance, and also with the parallel practical difficulties of extracting the wealth out of the family. So for all practical purposes, the business wealth of the family may be regarded as inherited wealth when discussing the submissions made.

### THE WIFE'S SUBMISSIONS

9. Counsel for the wife argued that while it was held by Denham C.J. in *Y.G. v. N.G.* [2011] 3 I.R. 717 that assets inherited by one spouse will not always be treated as though they were obtained by both parties in a marriage, she did state that notwithstanding this approach that the circumstances of each case should be considered specifically. Counsel for the wife laid particular emphasis on the higher standard of living enjoyed by the parties before the downturn and suggested property adjustment orders or such other arrangements as might be appropriate in respect of the private company shares of S. Ltd. following the format in *McM v. McM* [2006] IEHC 451, Unreported, High Court, Abbott J., 19th November, 2006. Counsel for the wife also brought the attention of the court to decisions in relation to making postponed orders for provision in the event of a pick up and realisation of business, such as *G.B. v. A.B.* [2007] IEHC 491, Unreported, High Court, 15th March, 2007, and went on to give an example of English case law setting out this approach. Counsel for the wife stated in para. 15 of her submission as follows:

"The case *N v. N* [2001] 2 F.L.R. 69 demonstrates that in England and Wales there is scope for the court to include the business interest which may provide capital in the future when making ancillary relief orders. Although as Longrigg and Higgins state:

'...the courts will refrain from being too speculative in these analysis.'

In ordering the husband to pay a sum of £1m within little over two years, whether or not he had sold the company, the court stated:

"There is no doubt that had this case been heard before the *White* decision last year, the court would have strained to prevent a disruption of the husband's business and professional activities except to the minimum extent necessary to meet the wife's needs. However, I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to the market for sale, but if it is necessary to sell her, it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed."

Counsel for the wife went on to cite *Wells v. Wells* [2002] Fam. Law 512 a case similar to *N v. N* [2001] 2 F.L.R. 69 which demonstrates that the English and Welsh courts will consider a business interest disposition which may provide capital in the future in ancillary relief orders. In this particular case, Thorpe L.J. made an order whereby the wife was essentially able to benefit from the sale of the husband's company if it was sold within five years of the making of the order. As Longrigg and Higgins further explain:

"In other words, Thorpe L.J. evidently wanted to ensure as far as possible that the wife would benefit from this asset which had largely been built up during the course of the marriage although its value is impossible to ascertain at the time of the hearing."

In applying the arguments arising from these cases, counsel for the wife proposed that the court would consider a transfer of shares of S. Ltd. or such other corporate entity as might be found by the court with suitable protection so as to prevent undue interference by the wife by having the husband hold the shares transferred to the wife for the benefit of the wife. Counsel for the wife argued that the wife had a connection to the business as follows:

- A. The wife accepted a moderate standard of living and made a sacrifice to ensure that the financial stability and viability of the business in the early stages of the marriage.
- B. The respondent's business was and is the primary source of the family assets.
- C. The respondent's business the most valuable asset upon the judicial separation of the parties which occurs at a time of unprecedented difficulties.

### THE HUSBAND'S SUBMISSIONS

10. Ms. Brown S.C., counsel for the husband, set out in her submissions the factual difference between the *Y.G. v. N.G.* [2011] IESC 40, [2011] 3 I.R. 717 case and the instant case.

11. In para. 3 of the submissions, counsel for the husband argues *that Y.G. v. N.G.* sets out general principles which apply not just to cases where there is prior agreement, but to any application for degree of judicial separation or divorce as follows:

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

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

C. The standard of living of the dependent spouse should be commensurate with that enjoyed when the marriage ended. For the court when dealing with the requirements of the Act of 1996 stated that the requirement is to make proper provision and is not a requirement for the redistribution of wealth.

D. The court indicated the provision must be reasonable in all the circumstances but emphasised the provision of accommodation, the provisions of security into the future and maintenance as the Supreme Court identified needs as the primary factor in making ancillary orders.

Counsel for the husband argued on the facts that the uncontroverted evidence was that the respondent's mother and father had set up S. Ltd. in 1990s. The respondent's parents retired from the business and his father gifted the shares of his business to the respondent, his brother and sisters. Counsel for the husband submitted that gifted assets should be treated in a similar manner to inherited assets. On foot of the judgment of the Supreme Court in *Y.G. v. N.G.*, this Court must distinguish this asset from assets which are accumulated by both parties in the course of the marriage and to which both parties have contributed.

12. Counsel for the husband submitted that in an open offer the husband had made proposals for providing mortgage free accommodation for the wife for the payment of maintenance and for provision for the applicant from this pension, and she submitted that that type of provision was mandated by the act in accordance with the Supreme Court decision in the case of *Y.G. v. N.G.* [2011] IESC 40, [2011] 3 I.R. 717 and to go further would be to engage in a redistribution of wealth. The sole income available for the parties and for the dependent children is that derived from S. Ltd., and the continued viability of this income depends on the husband's continued hard work and commitment, and the continuance of good will and co-operation between himself and his siblings. The parties did not maintain a luxurious staff lifestyle in the course of the marriage, and the evidence was that the lifestyle of the husband and children had deteriorated in the context of their present accommodation. The court must make provision on the present value of the assets and it was not reasonable to foresee any increase in the value of the assets. She argued that the first priority was to have proper accommodation, maintenance and security for the future for all parties, including the children. Finally, she argued that it was open to both parties to make an application for further relief on the hearing of a divorce as there is no agreement for consent containing a full and final settlement clause, and that such divorce application would be decided on general principles including the general principles set out herein. By this submission I am taking it that it may be the husband's intention to seek a divorce in the future.

#### **CONCLUSION IN RELATION TO THE LAW**

13. This Court is bound by the decision of *Y.G. v. N.G.* [2011] IESC 40, [2011] 3 I.R. 717 which, in general terms, refocuses the attention of the court to the requirements of s. 16 of the Act of 1995 and avoiding an interest in redistribution of wealth, especially inherited wealth or wealth contained within a family business regardless of the fact that the needs of the parties having regard to the statutory requirements have been met. This represents a new emphasis on attention to the express provisions of the statute, which of necessity must be in general terms, as each case is separate, and depends on a vast multiplicity of factors which interplay with the many criteria set out in s. 16 of the Act.

14. In the light of this decision the change in the law in the U.K. and Wales, brought about by *White v. White* [2000] F.L.R. 981, referred to in the above quotation from *N v. N* [2001] 2 F.L.R. 69, and quickly reflected in this jurisdiction, must now be viewed more critically.

15. The conclusion I reach in relation to the submissions is that provision in this case must be confined to provision of accommodation, maintenance and pension considerations with the usual provision regulating hasty applications in respect of income earning capacity so as to avoid unnecessary costs and abuse of process and to provide an incentive for each party to do better. Four factors underlie this view:

(1) The business assets of the company including S. Ltd., from which they all originated, are semi-inherited assets as described above, and in the light of *Y.G. v. N.G.* [2011] IESC 40, [2011] 3 I.R. 717 the court should be wary of redistributing them when basic needs are met in hard times.

(2) Insofar as some shares of S. Ltd. were gifted, a gift may be regarded in the same light as an inheritance for the purpose of the analysis of *Y.G. v. N.G.*

(3) The partnership family nature of the holding in S. Ltd., and other corporate entities flowing from it, is such that it would be extremely impracticable and counterproductive to insert a separate corporate shareholding for the wife which, despite the most light touch treatment suggested by counsel for the wife, could represent a destabilising effect on the whole family business by destroying confidence, encouraging enmity from siblings and their partners, not to mention their children. This would risk a classic family feud the like of which have notoriously destroyed or seriously challenged businesses historically and down to the most recent times. The relatively high reserve position of S. Ltd. and the other corporated entities, (particularly the foreign company), are such as to be required to ensure the future income earning capacity of these entities, which is in the interest of the parties to these proceedings, and children, from the point of view of maintenance and accommodation, but also providing employment opportunities for the children during the course of their education and, in some instances, for the rest of their career.

(4) That there is no full and final settlement possible in the provision in this case and in the event of improved economic conditions and higher income resulting for all partners in S. Ltd. and related companies, there is a possibility of revision of maintenance and the in the event of the parties or either of them choosing the divorce route, there may be a healthier climate for looking at lump sum or share adjustment arrangements, although I would not be so optimistic on that score in the light of the analysis to date.

## **PROVISION**

16. On the basis that the judicial separation order has already been made upon the approval of the sale of the family home for €950,000 subject to further provision to be made as set out in this judgment, I set out the provision to be made as follows:

1. Sale of family home for the sum of €950,000.
2. Out of proceeds of family home sale of €950,000 after discharge of mortgage and sale costs, the sum of €500,000 to be paid to the wife (which has been received by the wife). The balance of such proceeds (estimated to be €340,000) to be paid to the husband (which has been received by the husband),
3. The husband to pay to the wife the sum of €1,500 per calendar month on the basis that the maintenance for the youngest daughter is €400 per month, and on the basis that the wife be separately assessed for income tax so that the gross sum to be paid is such as to ensure that the gross maintenance payable to the wife is such sum as will result in a sum net of tax and other deductions of €1,100 per month.
4. Pension adjustment orders on the basis of 99% to 1% in favour of the wife in respect of the following pensions:-  
  
(a) Standard Life S. Ltd., Pension Plan No. L5570 BDO Simpson Xavier, including accounts references 1552070 and 12164301, and Hibernian Aviva S. Ltd No. SO67351.
5. An order assigning the husband's interest in any life assurance policies available for the securing of maintenance until age 65, and in the absence of available life assurance policies, the wife is at liberty to apply for such alternative order going towards provision of reasonable security for maintenance.
6. Custody arrangements for youngest child O., to remain as ordered by the court.
7. The court does not make an order extinguishing the share of either wife or husband in the estate of the other.
8. An order inviting the parties to nominate an arbitrator or mediator to decide upon or mediate any future disagreements between the parties prior to and without prejudice to their right to apply to court in respect of same, and in default of such nomination, the court shall further consider the matter and nominate a mediator for such duties.
9. The husband shall procure the payment of Voluntary Health Insurance ("VHI") or health insurance as hitherto.
10. The proceedings shall be adjourned for the purpose of finalising pension adjustment orders and making such further orders in relation thereto as may be indicated by the terms of the pension schemes and to enable the parties to calculate for the court the gross amount to be paid to the wife in respect of her own maintenance so as to receive the net sum of €1,100 per month.
11. No order as to costs.

## **CONCLUSION**

17. Section 16(5) of the Act of 1995 provides that the court shall not make an order under the provision referred to in subs. 1 unless it would be in the interests of justice to do so. This subsection invites the court to take an overview of the justice of the situation so that the technical proposals are not unduly harsh or unworkable. While the wife has received little over 20% of the assets in terms of capital location, it must be realised that this capital location represents by far the greatest share of available capital outside the family business which is struggling to get through hard economic conditions, and she has also received an order for periodical payments which, having regard to the duties and obligations and needs of the husband represent a very substantial share of family income, the wife's outcome involves far less risk taking than that for the husband. While the husband has been obliged to take the burden of the provision made for his wife in this order, he has the consolation that he may continue for the foreseeable future in the medium term to work and generate income and wealth in his company with his family without impairment of the burdens of litigation. In all the circumstances the provision is consistent with the interests of justice having regard to the provisions of section 16.