

**THE HIGH COURT
FAMILY COURT**

[2013 No. 4 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

P.D.

APPLICANT

AND

R.D.

RESPONDENT

JUDGMENT of Mr. Justice Keane delivered on the 13th March 2015

Introduction

1. In these proceedings, commenced by way of special summons issued on the 17th January 2013, the applicant husband ("the husband") and the respondent wife ("the wife") both seek a decree of judicial separation and each seeks various ancillary reliefs pursuant to the terms of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act") and the Family Law Act 1995 ("the 1995 Act").

Background

2. The parties were married to each other according to the laws of the State on the 16th April 1994. There are four children of the marriage, each of whom remains a dependent member of the family as that term is defined under s. 2 of the Family Law Act 1995 ("the 1995 Act").

3. The husband has worked as a businessman throughout the marriage, in which role he has enjoyed considerable success. He now owns and controls a number of companies, which cumulatively generate a large profit, and from which he is therefore capable of drawing a large income. Through substantial borrowings, the husband has also built up an extensive investment and property portfolio over the years, although it is currently in significant negative equity.

4. Prior to the marriage the wife worked in an administrative role in a number of companies. In 1995, the wife went to work in the husband's principal company, where she stayed until 1999. Between 1999 and 2002, she operated her own small business. From 2002 onwards, and upon the birth of the parties' third child, the wife became a full-time homemaker.

5. The family home is a sizeable property in the countryside a short distance from the city in which the husband's business is located. The wife and children continue to reside there. The husband, who left the family home in November 2012, immediately acquired and renovated a fine house in a suburb of that city ("the husband's home"). During the course of the marriage, the parties acquired a large holiday home abroad ("the holiday home"), although the husband contends that he is the sole owner of it.

6. Both parties are in their late forties.

Grounds for a decree of judicial separation

7. S. 2 of the 1989 Act sets out the grounds upon which a judicial separation may be obtained.

That provision provides, in relevant part, as follows:

"2.—(1) An application by a spouse for a decree of judicial separation from the other spouse may be made to the court having jurisdiction to hear and determine proceedings under Part III of this Act on one or more of the following grounds:

(a) that the respondent has committed adultery;

(b) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent;

...

...

(f) that the marriage has broken down to the extent that the court is satisfied in all the circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application."

8. The husband seeks a decree of judicial separation on two of the foregoing grounds: first, pursuant to s. 2(1)(b) on the basis that the wife has behaved in such a way that he cannot reasonably be expected to live with her and, second, pursuant to s. 2(1)(f) of the Act on the basis that the marriage has broken down to the extent that the court can be satisfied in all the circumstances that a normal marital relationship did not exist between the spouses for a period of at least one year immediately preceding the date of the application.

9. The wife also seeks a decree of judicial separation on two grounds: first, pursuant to s. 2(1)(a) of the Act on the basis that the husband has committed adultery and, second, pursuant to s. 2(1)(b) on the basis of the husband's unreasonable behaviour.

The basis for the decree

10. The husband has conducted a number of extra-marital affairs. Shortly after the birth of the parties' youngest child, the wife discovered that the husband had been conducting a sexual relationship with one of his employees, which, it transpired, had been going on for several months. The husband agreed to leave the family home for a period and the parties were reconciled later that year. In May 2012, the wife discovered that the husband was conducting a sexual relationship with a married woman who was a close neighbour of the parties and the wife's best friend and closest confidante. That affair, the husband has now admitted, had commenced in November 2011 and had continued intermittently in 2012. The husband left the family home for a period after the affair was discovered but, shortly afterwards, the parties reconciled again. On the 8th November 2012, the husband informed the wife that the marriage was over and he again left the family home on the 15th November 2012 to resume or continue his relationship with the other woman concerned. Under cross-examination, the husband conceded that he has engaged in other extra-marital sexual relationships during the currency of the marriage, which the wife asserted in her evidence was the first time she had been made aware of that fact.

11. It is surprising, against the background of the established facts just described, that it was the husband who instituted the present proceedings, rather than the wife. It is more surprising still that, in doing so, the husband did not reference or acknowledge any of those matters but instead sought, and still seeks, a decree of judicial separation on the ground of the wife's unreasonable behaviour or, in the alternative, on the ground of irretrievable marital breakdown.

12. In support of his application for a decree on the latter ground, the husband gave evidence that, in his view, the parties had not had a meaningful relationship since the birth of the parties' third child, more than 10 years prior to the trial of the action. He gave evidence that the parties had had sexual intercourse only very infrequently since that time, although he did concede that the parties had sexual relations right up to September 2012. The wife, on the other hand, gave evidence that the parties last had sexual relations in October 2012; that they resided together as husband and wife and went on holidays together; and that the husband had never expressed any misgivings about the marital relationship generally until he told her that the marriage was over on the 8th November 2012. I have no hesitation in accepting the wife's evidence in that regard. Accordingly, it is not open to the Court to grant a decree on what is often referred to as the no fault ground; that is, on the basis that the marriage between the parties has broken down to the extent that a normal marital relationship had not existed between them for a period of at least one year preceding the date of the application, bearing in mind that a special summons issued on behalf of the husband on the 17th January 2013, a little over two months after he left the family home.

13. In pursuing a decree on the former ground, that of his wife's unreasonable behaviour, the husband essentially relies on two broad allegations: first, that the wife spent excessively during the course of the marriage and, especially, after the onset of the global economic downturn in 2008; and second, that the wife struck him on two separate occasions during the course of the marriage.

14. The husband's assertion of excessive spending on the part of the wife is impossible to sustain. Happily, the husband's business has been highly profitable throughout the marriage. Consequently, both parties have enjoyed a very high standard of living and both have spent freely. Although the husband's property investment portfolio went into significant negative equity after the collapse in the Irish property market in 2008, he remains capable of servicing the associated debt. He was certainly capable of doing so throughout the duration of the marriage. There is no evidence that the household budget was under any specific financial constraint at any time during the marriage, nor is there any evidence that the husband exercised any particular restraint in his own personal spending during that time. Accordingly, no meaningful criterion was ever established in evidence by reference to which the level of the wife's spending could be assessed, much less found to be excessive, in proportion to the family's overall means or in comparison to the husband's spending,

15. The wife accepts that she struck the husband on two separate occasions. However, those incidents, viewed in context, do not support the grant of a decree based on the conclusion that such behaviour made it unreasonable to expect the husband to live with her.

16. The first incident, which was not pleaded but which was nevertheless referred to by the husband in direct examination, occurred while the parties were on holiday with friends while temporarily reconciled in or about July 2012. The wife gave evidence that her husband had asked her to take that holiday with him as part of the reconciliation process. She continued that, when they went out to dinner on the second evening of the trip, the husband spent a significant period of time in the company of another woman, the wife of one of their friends, which she felt was particularly disrespectful and embarrassing to her in the circumstances of that holiday, and which upset her deeply. The wife testified that she left the venue on her own and that, when her husband returned to their holiday home, she slapped him twice in the face. There was no suggestion that either of these blows caused the husband any physical injury. While the husband in his evidence asserted that his wife's behaviour on the evening in question was hysterical and unwarranted, the wife was not cross-examined on her evidence in that regard.

17. The second incident occurred on the 9th November 2012. It will be remembered that, on the previous day, the 8th November 2012, the husband had told the wife that he was ending the marriage, despite their apparent reconciliation after the discovery by the wife in May of the husband's affair with a near neighbour. In that context, the parties had previously agreed to move away from the area in which those events occurred and had put the family home up for sale. The parties had agreed to attend an auction that was due to take place on the 9th November 2012 to bid on a property in which they were interested. In what must have been circumstances of some considerable stress and emotional turmoil, the wife decided to go ahead with that arrangement on the basis that the house they had hoped to purchase as a family unit was now to be acquired instead solely for herself and the children. At the auction, the husband's highest bid of €650,000 was unsuccessful and the house sold for €660,000. The wife felt a higher bid could, and should, have been made. There was an argument between the parties immediately after they left the auction and the wife again struck the husband once, without causing any apparent injury.

18. While physical assault can never be condoned, viewing each of these minor incidents both in the broad context of the husband's repeated and admitted infidelities and in the more specific context of the particular circumstances in which each occurred, it is impossible to conclude that they can be properly characterised, either separately or together, as amounting to behaviour on the part of the wife such that the husband could not reasonably be expected to live with her.

19. Accordingly, the husband, as applicant, has failed to satisfy me that he is entitled to a decree of judicial separation on either of the grounds upon which he relies.

20. On the basis of the husband's admission of repeated and continuing adultery in the circumstances already described, the wife is

plainly entitled to a decree of judicial separation under s. 2(1)(a) of the 1989 Act. Moreover, insofar as it may be necessary, I find that the wife cannot reasonably be expected to live with the husband in light of the husband's behaviour in that regard, such that she is also entitled to the same decree under s. 2(1)(b) of that Act. I will therefore grant a decree of separation on each of the two grounds advanced by the wife.

Proper Provision

21. The next issue that arises is that of the appropriate ancillary orders to be made, bearing in mind the obligation imposed on the Court under s. 16 of the 1995 Act to endeavour to ensure that proper provision is made for each spouse concerned and for each of their four dependent children, having regard to all of the circumstances of the case.

22. Under s. 16(2) of the 1995 Act, in deciding on what order to make and in determining the provisions of any such order, without prejudice to the general obligation just described, the Court is required to have regard to a number of identified matters. I now propose to consider each of those matters in turn.

Financial resources

23. The first such matter is *"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."*

i. Summary of assets

24. The family home is held in the joint names of the parties, free of debt, and has an agreed valuation of €1.6 million.

25. The husband's new home - which he acquired in late 2012 for €475,000, expended €300,000 in renovating immediately afterwards, and holds free of debt - has an agreed valuation for the purpose of these proceedings of €600,000.

26. There is a dispute between the parties concerning both the ownership and the valuation of the holiday home, another property that is held entirely free of debt. The husband's original evidence was that he purchased the holiday home from his own funds in his own name. The wife's evidence was that the property was purchased in the husband's sole name because she was unable to travel when the transaction was being concluded due to the illness of one of the parties' children. The husband denied this. The wife's evidence in that regard was corroborated by that of a family friend, a professional person, who stated he was aware of the relevant arrangements and of the child's illness at the time. The husband conceded under cross-examination that the property had been acquired in part with bridging finance in the sum of €750,000, arranged in joint names and secured against the family home, and also in part with €200,000 transferred from the parties' joint account.

27. The expert property valuer called on behalf of the wife expressed the view (based on the application of a technical formula for calculating market value) that the value of the holiday home is €1,771,300. The husband's expert property valuer, based on her experience in the market, attributed a value of €1.8 million to the property, although she acknowledged that, currently, it is a buyer's market for property at that location and that the market is slow. In view of that evidence, for the purpose of the present proceedings, I propose to attribute a value of €1.775 million to the holiday home.

28. The husband controls a number of businesses. The principal business, hereinafter "Company A", is based in the city in which the husband resides. The husband holds a 99.9% shareholding in that company and the wife owns the single remaining share. In 2011, Company A acquired all of the shares in a smaller company engaged in the same business in another part of the country, hereinafter "Company B". The husband also owns 76% of the shares in a third company engaged in related business activities, hereinafter "Company C", and a business partner of his owns the remaining 24% of that company. The parties are in dispute as to the valuation of these companies.

29. Each party called an expert in the valuation of businesses that operate in the relevant sphere. While each of those witnesses approached the relevant valuation exercise from distinctly different professional backgrounds, I am quite satisfied that each had the necessary qualities of independence and expertise for the purpose of the exercise they were asked to conduct. The experts agreed that the necessary calculation involves the application of a different multiplier to each of two distinct past income streams, although they disagreed slightly concerning the manner in which each relevant past income stream was to be calculated, and differed fundamentally on the appropriate multiplier. Whereas the husband's expert valuer arrived at a figure for the value of each business, excluding the value of its cash reserves, the wife's valuer added the amount of the cash reserves held by each business to his valuation of each. It seems to me that nothing turns on this difference of approach since, one way or the other, account must be taken of the value of those cash reserves.

30. The husband's valuer applied a lower multiplier to each of the relevant past income streams, by reference to the more pessimistic view that she took of various factors suggesting intensifying competition and increasingly restrictive regulation in the relevant industry. Conversely, the wife's valuer took a much more sanguine view of these matters, and also laid great emphasis on, what he considered to be, the exceptional profitability of Company A compared to the industry norm, in applying a higher multiplier. In consequence, the husband's expert valued the trade of, and cash held by, the three companies cumulatively at approximately €7.4 million at the date of trial, whereas the wife's expert valued the same assets in the sum of approximately €9 million as of that date. Having carefully considered these conflicting views, I propose to value the husband's companies, together with the cash reserves of each, in the cumulative sum of €8.5 million for the purpose of these proceedings.

31. Before leaving the issue of the valuation of the husband's companies, it is necessary to refer to a controversy that was ventilated at some length at trial concerning whether a particular property investment entered into by Company A had been properly or fully disclosed by the husband and, more particularly, whether its value materially affects the value of Company A. It is common case that, in 2007, Company A invested €1.1 million for a 12.5% shareholding in a property development company engaged in a development project abroad. The project ran into financial and logistical difficulties and the property development company went into liquidation in March 2012. The promoter of the property development company, who gave evidence at the trial of the action, was subsequently involved in the completion of the project by other interests, with the agreement of the shareholders in the insolvent company, including Company A. In that context, whether in consideration for that agreement or, as he contends, on a "without prejudice" basis, the company promoter indicated that he would share with those former shareholders any profits he obtained as a result of his continuing involvement in the project. The company promoter ultimately received the sums of £550,000 and €180,000 in April 2014. Accordingly, Company A has a potential claim to a legal entitlement to a one eighth share of those sums, although in evidence the company promoter refused to accept that the obligation concerned was legally binding upon him.

32. Despite the great length at which this issue was addressed before and during trial, it seems to me that little or nothing turns upon it for the purpose of the matters I must now consider. This is because the wife's own forensic accountant acknowledged that

contingent claims are not normally accorded any value under standard accounting practice. Certainly, it was not suggested to, or by, either of the expert company valuers whose evidence I have already summarised that the existence of this potential claim against the company promoter was material to the valuation exercise they either had conducted in respect of Company A.

33. The husband has acquired a large portfolio of investment properties, comprising office and apartment accommodation in various locations in the State. The parties agree on the aggregate valuation of those properties (including certain car parking spaces) as of January 2014 in the amount of €2,370,436. However, those investments were (for the most part) acquired through loan finance, the aggregate total of which, the parties also agree, stood at €7,718,567 as of that date. The wife is co-borrower guarantor in respect of a significant proportion of those loans.

34. It is further agreed that the husband was also part of an investment partnership that acquired certain investment property. It is agreed that the husband's share of that property is valued at €162,500. However, the uncontroverted evidence before the Court was that the husband remains jointly and severally liable in respect of a partnership loan in the sum of €401,920 secured upon that property. The relevant loan is currently the subject of pending or anticipated renegotiation with the lender, and no repayments are currently being made upon it. Nevertheless, the relevant investment currently stands on the husband's balance sheet as one in negative equity to the tune of €239,567.

35. At the date of trial, the husband had a director's loan outstanding to Company A in the sum of €210,571 and a director's loan outstanding to Company C in the sum of €3,972.

36. The parties agree concerning the valuation of a number of other assets at the date of trial. The husband owns a share portfolio valued at approximately €280,000 and has bank accounts (current and deposit) in the approximate sum of €440,000. The wife has bank accounts (current and deposit) in the sum of approximately €16,000. The parties have a joint account that was approximately €5,000 in credit at, or shortly prior to, the date of trial. There is an investment account in the joint names of the wife and the parties' children with a balance of approximately €16,000. The wife has a Credit Union Account with a negligible balance. The wife owns a motor vehicle valued at €50,000.

37. Accordingly, the total value of the assets held by each of the parties is €15,646,436, from which must be subtracted the total indebtedness of each of the parties amounting to €8,172, 530, leaving a figure of €7,473,906 representing the value of the pool of matrimonial assets currently available to the parties.

ii. income and earning capacity

38. According to the expert forensic accountant who gave evidence on behalf of the husband, considering the five year period to the end of 2013 (and taking due account of the fact that Company B has only traded for the last two years of that period), the average of the relevant earnings per annum from each of the three companies combined is €1,610, 358. Of course, it must at once be acknowledged that the husband has a business partner who holds 24% of the shares in Company C. However, the contribution of that company to the overall total over that five year period is an average of €208,854 *per annum*. Accordingly, and ignoring entirely for present purposes the contribution of a company in which the husband has a 76% shareholding, he has had available to him from the companies he controls, average earnings of €1.4 million in each of the last five years.

39. While the husband averred in the most recent affidavit of means that he swore on the 20th December 2013 that his annual gross salary from Company A and Company B combined was then €250,000, the P60s issued to him in respect of each of those companies in December 2013 record a combined annual gross salary from those companies of €299,757.15. The applicant's evidence is that he has recently increased his own overall annual salary from the companies to €750,000, largely to provide him with a sufficient income to continue servicing his very substantial loan commitments in connection with his personal property investments. In circumstances where the proportion of the companies' earnings that the husband elects to pay himself by way of salary or bonus is a matter entirely under the husband's control (no doubt influenced by whatever relevant accounting or tax advice he may receive), it is unsurprising that the expert forensic accountant called on behalf of the husband conceded that he knew of no reason why the companies could not pay the husband a combined salary of, say, €900,000 on a sustainable basis.

40. In his affidavit of means, the husband avers to an annual income from his personal property investments of €264,065 and an annual income from his share portfolio of €823.

41. The wife works in the home, where she looks after the parties' four children who range in age from 8 years to 15 years. She has no independent income. As already noted earlier in this judgment, she worked in a succession of administrative roles during the early years of her marriage and briefly ran her own business. Her income from those endeavours was modest. Accordingly, the wife's earning capacity is relatively limited and there is no prospect of her earning any income in the foreseeable future.

Financial needs, obligations and responsibilities

42. The second specific factor I must consider is *"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 parties share an obligation and responsibility towards their four dependent children.

43. The wife acknowledges that the husband currently pays maintenance to her amounting to €4,000 *per month*. The husband has sworn that he discharges further outgoings associated with the family home in the further approximate amount of €3,500 *per month* on the basis that those sums are drawn from a joint account that was set up at the direction of the Court but which is in turn funded by intermittent payments drawn from a sterling account that the husband undertook to the Court in March 2013 not to dissipate below a certain level.

44. The husband avers to total weekly outgoings of €6,080.96, to include his personal outgoings; certain outgoings he claims to discharge on behalf of the wife and children (to include the interim maintenance payment described above), and in respect of the family home (see above, also); various outgoings associated with the upkeep and maintenance of the holiday home; and the sum of €2,131.83 comprising the shortfall between the rental income received from, and the loan repayments associated with, his investment properties.

45. The husband has been at pains throughout these proceedings to emphasise the significant indebtedness associated with his personal property investments, involving, for example, a total repayment figure for 2014 of €417,853, as against €240,490 in anticipated rental revenue for that year. As against that, the expert forensic accountant called on behalf of the husband acknowledged that the necessary loan repayments are expected to fall and rental income is anticipated to rise as the years progress. Although issues are likely to arise at various points in the future concerning the falling due of agreed bullet payments and the end of

interest only repayment periods, it is impossible to ignore the fact that, to assist him in meeting any such difficulties as matters stand, the husband can rely on his complete control of companies with current average annual earnings of €1.4 million.

46. In her most recent affidavit of means sworn on the 15th July 2014, the wife avers to total weekly outgoings of €2,197.96, to include general household expenditure; car related expenditure; her own personal and medical expenses; and the childrens' personal, medical and educational expenses. However, as already noted above, the husband also currently discharges certain outgoings on behalf of the wife and children, and in respect of the family home, as against which the wife gave extensive evidence of the substantial economies she has effected since the breakdown of the marriage to reduce her outgoings to their present level.

Standard of living, age of spouses, duration of marriage, disability

47. The third factor to be considered is *"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 parties agree that they have both enjoyed an exceptionally high standard of living throughout the course of their marriage.

48. The fourth factor is *"the age of each of the spouses and the length of time during which the spouses lived together."* In this instance, both parties are in their late forties and their marriage lasted for just over eighteen years.

49. The fifth factor that I must consider is *"any physical or mental disability of either of the spouses"*. Happily, that factor does not arise in this case.

Contributions

50. The sixth factor is *"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."*

51. On behalf of the wife, submissions were made and certain evidence was adduced urging the Court to accept that the business conducted by the three companies was a joint venture between the parties (and that, accordingly, the husband holds fifty percent of the shares in the companies in trust for the wife) or, alternatively, that the wife made a significant direct contribution to the inception and growth of the business, which should be recognised in the context of the appropriate proper provision.

52. I have not been persuaded by either of these submissions. The evidence established (and, indeed, the wife acknowledged) that the husband is an extremely dynamic businessman and the moving force behind the development of the companies. The wife had little or no direct involvement in their operation, beyond working for Company A in a clerical or administrative role from 1995 to 1999, and acting on occasion as hostess when clients were being entertained. While I do not doubt that the wife comes from a highly regarded family that is well known in the city in which the business is located, no evidence was adduced to establish that this was responsible for any specific custom or identified part of the overall custom secured by the companies. The wife's uncle was called to give evidence that, at the material time, he held a senior position in the bank that provided the relatively modest loan that the husband used to acquire Company A in 1995. While it had earlier been represented that the uncle's intervention had been instrumental, if not decisive, in obtaining the relevant loan, it was ultimately conceded by the uncle under cross-examination that the husband met all of the bank's credit eligibility criteria; that the loan was a commercially sound (and, ultimately, profitable) one; and that the practical extent of the uncle's involvement was in not using his senior position in the bank to veto the making of the loan.

53. On the other hand, I do not think that the wife's contribution to the income, earning capacity, property and resources of the husband, in looking after the home and caring for the family can, or should, be underestimated.

54. In this context, I am particularly conscious of the following statement of Murray J. in the case of *D.T. v C.T.* [2002] 3 I.R. 334, (at 407):

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

55. I also rely on the following passage from the judgment of Denham J. in the same case (at 381-2):

"Article 41.3.2 of the Constitution and the Act of 1996, clearly require that value be placed on the work of a spouse caring for dependents, the family and the home. This is consistent with the express recognition within the Constitution of the work done by the women in the home. Article 41.2 provides:-

"1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

This Article expresses an important fundamental principle underlying the constitutional family in Ireland. I referred to this Article of the Constitution in *Sinnot v. Minister for Education* [2001] 2 I.R. 545 at pp. 662 to 665.

In this case the learned trial judge assessed correctly the family role of the respondent and gave significant weighting to the time spent in the home. A long lasting marriage, especially in the primary childbearing and rearing years of a woman's life, carries significant weight, especially if the wife has been the major home and family carer."

Effect on earning capacity

56. The seventh factor the court must consider is *"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."*

57. I have already addressed many of the issues relevant to an assessment of this factor in considering the preceding one. I accept

that, to a significant degree, the marital responsibilities assumed by the wife have forced her to relinquish the opportunity of remunerative activity and have diminished her future earning capacity.

Statutory entitlements

58. The eighth factor is "*any income or benefits to which either of the spouses is entitled by or under statute.*" The wife currently receives €660 per month in children's allowance payments. Her total annual income from these sources is approximately €8,000.

Conduct

59. The ninth factor I must consider is "*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.*" With some hesitation, I have come to the conclusion that the husband's established misconduct in this case is not sufficiently gross or obvious to engage this provision.

Accommodation needs

60. The tenth factor is "*the accommodation needs of either of the spouses.*" I have already described the present accommodation arrangements of the parties.

Benefits forfeited

61. The eleventh factor that I must consider is "*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.*" The husband holds a private pension fund, the value of which at the date of trial, the parties agree, was €1,808,058. The parties have indicated their agreement to the equal division of that fund.

Third party rights

62. The twelfth and final factor to which the Court is obliged to have regard under s. 16(2) of the 1995 Act is "*the rights of any person other than the spouses but including a person to whom either spouse is remarried.*" There was no suggestion on the evidence before me that the rights of any other person are affected by any of the matters at issue between the parties in this case, other than those of the parties' four dependent children, for whom proper provision will, of course, have to be made.

Positions of the parties

63. Counsel for the husband made an open offer on his behalf at the beginning of the trial on the 3rd February 2013, the husband having issued proceedings on the 17th January 2012. Beyond rejecting that offer, the wife did not adopt any position concerning the question of what would constitute proper provision for herself and the children, until closing submissions were made on the 11th August 2013. I will return to the issue of the duration of the trial and the approach to the litigation adopted by the parties later in this judgment.

64. From the positions ultimately adopted by the parties, it is clear that they agree on the following matters, subject to the order of the court:

- (a) that the wife should be given sole ownership of the family home;
- (b) that the husband should be given sole ownership of his home;
- (c) that a pension adjustment order should be made so that the wife will enjoy 50% of the benefit of the husband's self-administered pension scheme;
- (d) that the husband should be given sole ownership of the investment properties and that the wife should be indemnified in respect of any borrowings or personal guarantees she has entered into in respect of them.

65. In his open offer, in addition to the agreed reliefs just described, the husband contends that proper provision would be represented by:

- (a) an order granting the husband sole ownership of the holiday home;
- (b) an order directing the husband to make a lump sum payment of €150,000 to the wife;
- (c) an order that the husband pay the wife €24,000 per annum in maintenance for her own needs and a further €36,000 per annum in maintenance to cover the needs of their four dependent children;
- (d) an order that the husband discharge 50% of the medical, educational, and dental expenses of the four dependent children;
- (e) an order that the sum currently held in the parties' joint account should be split equally between them (an account with a fluctuating balance which, as already noted above, stood at approximately €5,000 in May 2014).

66. In opposition to the additional reliefs sought by the husband the wife seeks proper provision for herself and the parties' four dependent children in the form of two alternative sets of reliefs. Leaving aside for the time being orders sought in respect of custody of, and access to, the dependent children, the first alternative set of reliefs sought by the wife appears to be broadly as follows:

- a) a declaration that the wife has a 50% beneficial interest in the holiday home;
- b) an order for sale in respect of the holiday home, subject to a minimum reserve of €1,771,000, with the wife being entitled to 50% of any sale proceeds in excess of that figure, and the husband retaining the balance (this reserve, of course, presupposes the unqualified acceptance of the wife's evidence in relation to the value of that property);
- c) an order that the husband pay the wife a lump sum of €1 million within two months;
- d) an order that the husband should pay the wife an annual sum of €180,000 by way of spousal maintenance and €36,000 by way of maintenance for the parties' four children, which sum (whether the former, the latter, or both is unclear) is to include any net interest earned on the lump sum of €1 million (thereby, presumably, requiring some form of continuing calculation concerning interest earned and the consequential reduction in maintenance payable);

e) and an order requiring the husband to fully indemnify the wife in respect of the costs of these proceedings, to include the costs of the several interim applications made by the parties pending trial;

f) and, in the event of the foregoing provision, whatever orders are necessary to recognise or effect the resignation by the wife of her directorships in Company A and Company B and the transfer of her shareholding in Company A to the husband or his nominee/s.

67. The alternative proposal advanced on behalf of the wife is prefaced by the qualification that it is to be considered "if the Court considers the [husband's] position to be reasonable and that all the property and cash reserves of the companies should be retained." It seeks orders in the following terms:

a) a declaration that the husband holds 50% of his shareholding interest in the companies and properties in trust for the wife;

b) declarations and orders concerning the wife's ownership of the family home and the husband's ownership of the husband's home;

c) a declaration that the wife has a 50% beneficial interest in the holiday home;

d) an order that a shareholders' agreement be entered into concerning company governance, to include agreed salary withdrawals;

e) an order directing the husband to withdraw from the companies a salary sufficient to enable him to continue paying the shortfall between rents received from, and loan repayments due on, his personal property investments and to pay the wife an annual sum of €180,000 by way of spousal maintenance and €36,000 by way of maintenance for the parties' four dependent children;

f) an order that the remaining funds in the frozen sterling account be encashed and divided equally between the parties within 30 days;

g) an order that the husband's personal shareholdings be sold and the net proceeds divided equally between the parties within 30 days;

h) an Order that the Applicant repay/manage/service the outstanding loans in respect of his personal property investments and that no property or asset (apart from the frozen account and husband's personal shareholdings) or part thereof be mortgaged/further mortgaged/remortgaged /leased /conveyed /transferred or sold without the prior written consent of the wife.

i) A 50% Pension Adjustment Order in favour of the Respondent on the Applicant's pension entitlements accumulated to date.

j) an order requiring the husband to fully indemnify the wife in respect of the costs of these proceedings, including the costs arising from any interim applications;

k) and liberty to apply in the event of a proposed sale of or other action affecting assets or distribution of company reserve funds.

Observations and analysis

68. It is common case that the husband left the family home on or about the 15th November 2012 in what must have been fraught circumstances for the whole family and, in particular, the wife and the parties' four dependent children. Under cross-examination, the husband acknowledged that his solicitors wrote a letter to the wife's solicitors on the 16th January 2013, addressing certain issues that arose in the context of the marital breakdown, which letter concluded in the following terms:

"We note that you are seeking an amicable separation herein, as does our Client. Accordingly we would be most obliged if you would kindly outline to us your client's reasonable settlement proposals, so that we can take instructions."

69. When asked to explain on what possible basis he could have instructed his solicitors to issue the special summons that initiated these proceedings on the following day, the 17th January 2013, the husband responded that he had issued proceedings "to start the ball rolling and to bring [the wife] to the table for mediation." Indeed, the husband's solicitors wrote to the wife's solicitors on the 30th January 2013, prior to the service of the proceedings, confirming that proceedings had issued on behalf of the husband "in an effort to move this matter on." It seems to me that this is the very antithesis of what the Judicial Separation and Family Law Reform Act 1989 is designed to accomplish, that is, the promotion of reconciliation, mediation or negotiation as a preferable alternative to litigation. I would go further and say that it is an abuse of the process of the Courts to initiate proceedings primarily as a tactic to gain leverage in any mediation or negotiation.

70. However, the Court's criticisms of the conduct of this litigation cannot fairly be directed solely at the husband. The position adopted by the wife from its unfortunate commencement, as just described, until the conclusion of the trial was that she could not address the issue of proper provision until the full extent of the husband's assets, as part of the pool of matrimonial assets, had been properly established.

71. This was so despite the fact that the husband swore an affidavit of means on the 27th February 2013, which was received by the wife's solicitors no later than the 5th March 2013. Indeed, on the 3rd April 2013, the wife issued a motion under s. 35 of the Family Law Act 1995 seeking an injunction to freeze a sterling bank account from which the husband had withdrawn significant sums of money in connection with the renovation or refurbishment of the husband's home. S. 35 deals with dispositions or transfers of property for the purpose of defeating the other spouse's claim for relief. The affidavit of the wife grounding that application asserted a number of instances of alleged material non-disclosure of his assets by the husband. The motion was dealt with on the basis of the husband's undertaking not to reduce the monies in that account below £400,000.

72. Moreover, although the husband's companies, and the husband's stewardship of them, are the engine of the parties' past, present

and, likely, future affluence and prosperity, the wife has sought to restrain the husband's plans to appoint a particular employee as a director of Company A and to restructure the companies, again on the basis of an apparent assertion that these steps were contemplated with a view to defeating her claim for relief. Indeed, the wife moved, unsuccessfully, for the husband's attachment and committal on that basis. The husband, in turn, was obliged to apply for orders permitting his planned restructuring of the companies. That application was, ultimately, adjourned to the trial of the action, by which time the husband had abandoned those plans.

73. However, neither the most recent affidavit of means sworn by the husband on the 20th December 2013, nor a consideration of the voluminous documentation obtained on discovery from the husband and under the Bankers' Books Evidence Act from the husband's bank, nor any evidence adduced at trial, nor the very lengthy cross-examination of the husband in the course of the trial, succeeded in establishing any significant non-disclosure on the husband's part when he swore his original affidavit of means on the 27th February 2013. While the Court was not addressed on this specific point at the conclusion of the trial, the only discrepancy I have been able to identify between the disclosure of assets now valued at over €15 million in that original affidavit and the pool of matrimonial assets disclosed in the husband's second affidavit of means and, later, established at trial, is the omission (no doubt, entirely inadvertent) from the original affidavit of the husband's ownership of three car-parking spaces with an agreed valuation of €27,000.

74. Moreover, no evidence was adduced at trial to satisfy the Court that any of the husband's transactions or proposed transactions prior to the trial of the action was capable of defeating the wife's claim to proper provision from a pool of matrimonial assets, net of borrowing, now valued at in excess of €8 million or from the established substantial ongoing earnings of the husband, or both.

75. To take a single example, although it is common case that the current value of the husband's new home is less than the monies expended by the husband in its purchase, renovation, and refurbishment, the repeated references throughout the trial and in the written submissions filed on behalf of the wife to the relevant shortfall as representing monies "wasted" by the husband seem to me to betray a fundamental misunderstanding about the nature of the exercise upon which the Court is now engaged. The husband's home is not a commercial investment, anymore than the family home is. The Court is not concerned with whether money spent on the home or, for that matter, on personal transport, personal wellbeing, food, clothing or holidays has retained, or increased, its value. It is, after all, personal consumption. The monies expended by the husband on the refurbishment of the property may have been substantial, but it was never in doubt that the resources available to the parties are much greater. The Court is only properly concerned with making proper provision for each of the parties and, to that end, ensuring that no disposition of property (or dissipation of funds) is permitted that is intended, or likely, to have the effect of defeating the other spouse's claim for relief. No evidence was ever laid before the Court that would suggest, much less establish, that the husband's expenditure on the acquisition, renovation and refurbishment of his new home was intended to defeat the wife's claim for proper provision in this case, or that it was capable of doing so.

76. Nor do I accept that the mere fact of the husband's proposed restructuring of the companies is capable of establishing an intention to defeat the wife's claim for relief, absent any evidence from which that intention could be inferred or from which it could be concluded that the wife's claim would be defeated thereby, regardless of the husband's intent.

77. It seems to me, therefore, that this litigation, which the husband should never have commenced in the precipitate manner he did, was significantly and unnecessarily prolonged by the manner in which it was approached by the wife. It was at all times open to the wife to put forward a provisional or contingent position on proper provision by reference to the husband's portion of the matrimonial assets as originally disclosed, with the assistance of the expert valuers available to her, while reserving the right to revise that position in the event of any subsequently established material non-disclosure. Instead, the wife sought to reserve to herself the entitlement to adopt no position at all on the issue of proper provision until the last day of the trial, more than eighteen months after the commencement of the proceedings, apparently on the basis that it was unfair to expect her to set out her position until the husband's evidence in relation to his assets and income had been fully and exhaustively tested. The adoption of that stance meant that the husband had only a very limited opportunity to contest the reasonableness or feasibility of the wife's countervailing position on proper provision at the conclusion of the trial and no opportunity to do so in the course of the trial.

78. In the recent case of *M.D. v. N.D.* [2015] IESC 16, in which judgment was delivered after the trial of the present action was concluded, the Supreme Court set out several points of suggested good practice in matrimonial proceedings where there are any issues of significant controversy or complexity. I refer to aspects of this suggested good practice, not to criticise the parties for failing to anticipate the views of the Supreme Court subsequently expressed, but rather to illustrate, by contrast with best practice, the difficulties that have arisen in this case.

79. Having noted that the ascertainment and valuation of the parties' resources is an important starting point, Clarke and MacMenamin JJ., in giving judgment for the Court, held that, in any but the most straightforward of resources cases, the Court should be presented, in the simplest way, with the competing positions of the parties on the available resources issue. Later in the same section of the judgment, having noted that the Court should be presented by each of the parties with a single simple schedule of assets, Clarke and MacMenamin JJ went on to set out what other information each of the parties should set out in writing at the commencement of the trial, stating in relevant part: "Furthermore, each party should specify what it says would be proper provision in the overall picture of the assets and other resources which emerges from the relevant schedule or schedules."

80. While the foregoing represents recently identified best practice that I do not suggest the parties could, or should, have been aware of prior to the trial of the present action, I refer to it on the basis that it reflects an obvious concern for the fair and reasonably expeditious conduct of litigation. At the commencement of the trial of this action, I was informed by Counsel for each of the parties that it had been called on for four days. The trial lasted for 15 days and, as I have already noted, was preceded by a number of interlocutory applications, one of which, before me, lasted for three days. Because the trial exceeded its original time estimate and subsequent revised estimates, it had to be repeatedly rescheduled for resumption on various dates in April, May, July and August 2013.

81. As the Supreme Court has since explained in *M.D. v. N.D.* (at para. 4.13) the appropriate pre-trial management procedures should attempt:

"to detail with some reasonable precision the length of time which each element of the case is expected to take. In the absence of unexpected developments it is reasonable for a trial judge to keep the parties to such estimates or to reflect any failure to do so in costs or an adjournment. It is important to emphasise that significant overruns in the length of matrimonial cases eat into the available resources."

82. In my view, there were no significant unexpected developments in the course of the trial of this action. To the observation of the Supreme Court that I have just cited on the resource implications of trials that overrun, I would add, as an observation of my own,

that it is not just the effect on the pool of resources available to the parties that is at stake. Unnecessarily or unreasonably protracted litigation has resource implications for the courts system and access to justice implications for other litigants.

83. In summary, I am forced to the conclusion that the commencement of this litigation by the husband was unreasonably and improperly precipitate and that its subsequent duration and the costs associated with it have been significantly and unnecessarily increased by the position adopted by the wife.

Conclusion

84. The decision I have come to concerning the proper provision to be made by the husband for the wife and children reflects neither the position urged on me by the husband nor either of the alternative positions ultimately contended for on behalf of the wife.

85. I will order that the husband pay the wife €18,000 *per* month (gross) by way of periodical payment order under s. 8 of the Family Law Act 1995, of which €15,000 (gross) is for the maintenance of the wife and €3,000 is for the maintenance of the parties' four dependent children.

86. In making that order I rely upon the following dictum of Murray J. in *D.T. v. C.T.* [2002] 3 I.R. 334 (at 408):

"Proper provision for a spouse who falls into the category of a financially dependent spouse (where the other spouse is the source or owner of all or the bulk of income or assets of the marriage) should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligations, continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such control confers, without necessarily being dependent on receiving periodic payments for the rest of her life from her former husband. I say "in principle" because it is evident that in so many cases the resources or circumstances of parties will dictate that the only means of making future provision for the spouse in question will be periodic payments from the husband. Quite evidently this may be because, for example, the sole source of income may be a salary or income from a business or profession. The latter two may have an asset value which needs to be left in the hands of the earning spouse in order that the income necessary to make proper provision for both spouses can be generated."

87. I further rely upon the following statement of Barr J. in *J.H. v. R.H.* [1996] 3 I.R. 257 (at 265):

"It is the function of the Court to consider whether the husband has failed to provide such maintenance for the wife and the dependent children as is proper in the circumstances. In the vast majority of cases where marriages break down there is some inevitable decline in existing living standards for both spouses and the dependent children. Sadly, this must be accepted as part of the harsh reality of marital breakdown. However, in circumstances where the husband's assets and annual income are substantial, in my opinion what is "proper in the circumstances" as contemplated in s. 5, sub-s. 1, is the continuance of a standard of living as near as reasonably practicable to that enjoyed by the wife and dependent children before the breakdown of the marriage, taking into account, as provided in sub-s. 4, all the relevant circumstances of both spouses and the dependent children, including capital payments made to the wife by the husband, and bearing in mind that the husband also is entitled to a reasonable post-breakdown standard of living."

88. I will hear the parties on whether it is appropriate or necessary to grant any further relief to secure the periodical payment orders I propose to make against any of the husband's retained assets.

89. I will not order the husband to make any lump sum payment to the wife.

90. However, I will make the necessary order(s) to transfer ownership of the holiday home from the husband to the wife.

91. I will make whatever order or orders may be necessary to recognise or effect the resignation by the wife of her directorships in Company A and Company B and the transfer of her shareholding in Company A to the husband or his nominee(s). In circumstances where I propose to leave the husband in control of the companies in which he is involved to the exclusion of the wife, and where I have not ordered the payment of any lump sum that would have been extracted from any of the companies in order to be discharged by the husband, it seems to me that the position here is thus quite different than that which was being considered by Hardiman J. in *B.D. v. J.D.* [2004] IESC 101.

92. I will make the necessary order(s) to transfer ownership of the family home and its contents to the wife.

93. I will make whatever order or orders may be necessary to establish or confirm the husband's ownership of the husband's home.

94. I will make the necessary order(s) to enable the wife to enjoy 50% of the benefit of the husband's self-administered pension scheme.

95. I will make whatever order(s) may be necessary to give sole ownership of the various investment properties to the husband and to release or indemnify the wife in respect of any loan repayment or guarantee obligations she has assumed in respect of any such property.

96. I will make any order(s) necessary to divide the proceeds of the joint current account held by the parties.

97. I will not make any order interfering with the husband's ownership or control of the various bank accounts or of the share portfolio.

98. I will order the husband to be responsible for each of the four dependent children's medical and dental expenses, to include the provision of health insurance for each of the children.

99. I will order the wife to be responsible for the educational expenses of each of the four dependent children.

100. The foregoing orders are based on the Courts understanding that the parties agree that they are to have joint custody of the dependent children of the marriage, with the wife to have day to day care and control of them. While I am aware that there was some disagreement between the parties concerning certain proposed alterations or modifications to the previously existing interim access arrangements for the husband and perhaps also in relation to the educational arrangements in respect of certain of the

children, in view of the time that has elapsed since the trial of the action, I do not propose to address any such issue, much less make any order upon it. If there remains any disagreement concerning any aspect of those arrangements that the parties are unable to resolve through mediation or negotiation, the necessary application should now be brought before the Family division of the High Court in the usual way.

101. I will hear the parties on the issue of whether it is appropriate or desirable to make cross-orders pursuant to s. 14 and s. 15A(10) of the 1995 Act.

102. The Court will hear any submissions the parties may wish to make on the form of Order appropriate to reflect the findings of the Court set out above.