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THE HIGH COURT

[2004 No. 19745 P]

BETWEEN

L.B.

PLAINTIFF

AND
IRELAND AND THE ATTORNEY GENERAL AND BY ORDER P.B.

DEFENDANTS

AND
THE HIGH COURT

[2005 No. 2448 P]

BETWEEN

L.B.

PLAINTIFF

AND
IRELAND AND THE ATTORNEY GENERAL AND P. B.

DEFENDANTS

CONSOLIDATED BY ORDER DATED 6th MARCH 2006

Judgment of Mr. Justice John MacMenamin dated the 7th day of July, 2006.

1. At the conclusion of this hearing I dismissed the application of the plaintiff and indicated I would furnish my reasons at an appropriate time. I now do so. The plaintiff in these proceedings married the third named defendant, P.B., on 30th December, 1964. There are five children of the marriage all of whom have attained the age of majority. The family home is in rural town in the West of Ireland. The plaintiff in these proceedings was a teacher and the third named defendant was at all relevant times a full-time housewife.

2. The plaintiff states in the statement of claim that on 25th February, 1984 he was diagnosed as suffering from a form of mental illness. He was placed in St. John's of Hospital Co. Dublin and detained there until 16th May, 1984. Further such placements took place between 27th January, 1987 until 16th April, 1987, and from 17th January, 1991 until 7th February, 1991 on foot of a similar diagnosis. The plaintiff states that he did not suffer from such an illness and that the grounds of the diagnoses were untrue and manufactured. No finding is necessary on these issues.

3. It is quite clear however that the relationship between husband and wife deteriorated. A number of legal proceedings were initiated. His wife sought maintenance against the plaintiff herein. The District Court made an order under s. 5 of the Family Law Maintenance of Spouses and Children Act 1976 directing him to maintain her.

4. Later, in 1996, the plaintiff received an application for judicial separation from his estranged wife (Record No. F63/96 Western Circuit). Orders were made in the Circuit Court and these were ultimately appealed to the High Court. Final orders were made in that case on 23rd July, 1998. These included orders that the plaintiff pay maintenance at the rate of £150 per week to his wife, that the dwelling house be sold and the net proceeds be divided on a 50:50 basis; and that the plaintiff vacate his dwelling house by 7th August, 1998 pending the sale thereof. The plaintiff states that he complied with the orders made on that day but that he refused to sign an authority for the sale of his dwelling house.

5. On 18th June, 2004 a Family Law Civil Bill was issued by the plaintiff himself (F171/03) from the Circuit Court office. Orders were made in that matter in the Circuit Court which were appealed by the plaintiff herein to the High Court on Circuit (Finlay Geoghegan J., 2nd December, 2004). During the course of this Circuit Appeal in the course of a written submission ably made by himself the plaintiff drew the attention of the court to what he contends was the "excess of" jurisdiction exercised in determining his property rights at that and previous hearings.

6. In the first place it must be observed that the decision or order of a judge of the Superior Courts exercising her jurisdiction as such is not amenable to judicial review power under the Constitution of Ireland.

7. Second Finlay Geoghegan J. having heard submissions held that ss. 12 to 21 of the Family Law (Divorce) Act 1996 enjoyed the presumption of constitutionality. The Court then made orders which included an order for the sale of the plaintiff's dwelling house, the distribution of the net proceeds of sale on the basis of 40% to the plaintiff and 60% to his wife; an Order pursuant to s. 14 of the Family Law (Divorce) Act 1996 granting the contents of the family home to the wife save for some personal effects; a further Order granting a 25% share of the retirement pension of the applicant for the reckonable period of 30th December, 1964 to 10th June, 2004 to the wife pursuant to s. 17 of the Family Law (Divorce) Act 1996; an Order pursuant to the same Act granting to the applicant the entirety of his retirement gratuity; a further Order directing that all of the contingent benefit of the applicant's pension scheme be paid to the wife; an Order pursuant to s. 17 of the same Act directing that the widow's pension of the applicant's pension scheme be payable to the respondent; an Order pursuant to s. 18(10) of the Family Law (Divorce) Act 1996 that neither applicant nor the respondent wife should be entitled to apply for relief on the death of the other; and finally, a further an Order pursuant to s. 13 of the Family Law (Divorce) Act 1996 continuing the existing maintenance whereby the plaintiff herein was directed to pay the sum of IR £140 per week to his wife. The issue which must therefore arise is whether the questions which are raised in this application are already *res judicata*.

8. In the first set of proceedings brought presently before this court (2004 No. 19745 P) the plaintiff seeks to impugn the constitutionality of s. 5(1)(a) of the Family Law (Maintenance of Spouses and Children) Act 1976; and a declaration that s. 5 and ss. 12 to 21 inclusive of the Family Law (Divorce) Act 1996 are repugnant to the provisions of the Constitution of Ireland on the basis that the orders made in the divorce proceedings are invalid, and constitute legislation pursuant to the provisions of Article 43 of the Constitution of Ireland 1937 and are thereby *ultra vires* the judicial power of the State. The plaintiff also seeks an order of certiorari quashing all the orders made in the matrimonial proceedings between himself and his wife insofar as they impinge on his constitutional property rights.

9. On 14th July, 2005 the plaintiff issued a second set of proceedings wherein he sought similar declarations with regard to s. 2(1)(f)

and s. 3(1) of the Judicial Separation and Family Law Reform Act 1989 together with declarations that, by enacting the said provisions, the State had failed to guard with special care the institution of marriage and in particular the marriage of the plaintiff. The plaintiff further seeks a declaration against the second named defendant that he, in his role as Attorney General, failed in his constitutional duty to the plaintiff to ensure that the State was governed in accordance with the mandate of the Constitution of 1937. The plaintiff also seeks damages.

10. The above two actions were consolidated by Order of the High Court on consent on 16th March, 2006.

11. It will be convenient to identify the basis of the essential case made by the plaintiff.

12. He contends first that the Acts in question are contrary to Articles 34, 40.3 and 43 of the Constitution of Ireland. Each of the orders made in the matrimonial proceedings effect his property rights. In essence it is only the State which is entitled to make orders which delimit the property rights of the citizen. The powers which the State has vested in the courts to make orders as to maintenance property and pension rights constitute "legislation" and consequently form an unlawful derogation of the State's powers to legislate in this area which powers should be reserved to the legislature.

13. Many of the issues and the principles applicable in this case have already been considered in the cases of *T.F. v. Ireland and the Attorney General* [1995] 2 ILRM and *D.T. v. C.T.* [2002] 3 I.R.

14. In the former, the constitutionality of s. 2(1)(f) and s. 3, 16(a) and s. 19 of the Judicial Separation and Family Law Reform Act was at issue. In the latter the obligations of spouses and the status of marriage in the context of the Fifteenth Amendment in the Constitution, was in issue.

15. An order under s. 2(1)(f) of the Act of 1989 permits the court to grant a decree of judicial separation in circumstances where the marriage between the parties has broken down to the extent that the court is satisfied that in all the circumstances a normal marital relationship had not existed between the spouses for a period of at least one year immediately proceeding the date of the application. Section 3(1) of that Act provides that where the court is satisfied that any of the grounds referred to in s. 2(1) relied upon by an applicant for a decree of judicial separation have been proved on the balance of probabilities, the court shall, subject to s. 3(2), 5 and 6 of that Act grant a decree of judicial separation.

16. In T.F. the Supreme Court held that although s. 2(1)(f) might allow a spouse (who has withdrawn consent to the continuation of the marriage and is thus in breach of the marriage contract) to seek a decree of judicial separation, this did not amount to a failure on the part of the State to guard the institution of marriage with special care and to protect it from attack, or an attack on the family or the personal rights of the plaintiff. Instead it held that the 1989 Act as a whole constituted an appropriate and proportionate attempt by the Oireachtas to deal with the unfortunate situation created by the breakdown of a marriage and the inability of one of the spouses to cohabit with the other, while providing various safeguards for the right of the persons involved.

17. The court further held that the 1989 Act made every effort to protect the family once there had been a breakdown in normal martial relations, with courts exercising such jurisdiction being obliged by s. 19 of the Act of 1989 to have regard to the welfare of the family as a whole, and in particular whether proper and secure accommodation was provided for a dependent spouse and a dependent child of the family. Likewise s. 20 of that Act required the courts to ensure that such provision as is made for any spouse or any dependent child of the family was adequate and reasonable having regard to all the circumstances of the case.

18. That Court further held that while the 1989 Act may have amended and extended the grounds upon which a judicial separation might be granted, it further provided that no such order could be granted unless the court was satisfied that provision was made for dependent children, that the spouses be made aware of the alternatives to judicial separation, if appropriate and that proceedings be adjourned in order to assist reconciliation. The various ancillary steps provided by virtue the legislation demonstrated the concern of the Oireachtas to safeguard the institution of marriage while at the same time making provision for the situation created by marriage breakdown.

19. The Court therefore concluded that the granting of a decree of judicial separation under s. 3 of the Act of 1989 on the grounds set out in s. 2(1)(f) of the Act was an official recognition of an existing and often tragic state of affairs and was an appropriate attempt by the Oireachtas to reconcile the needs and rights of the parties to the marriage, the family, and the community of which the family is the fundamental group.

20. It is important to emphasise that the Court held that the provisions of ss. 16(a) and 19 of the Act of 1989 could not be viewed in isolation from the wide powers conferred on the courts to make and revise orders in relation to the financial provision and property rights of parties to a marriage which has broken down. It held the granting of a right to one spouse to occupy the family home to the exclusion of the other spouse does not constitute an unjust attack on the property rights of the other spouse. It does not in anyway purport to deprive the excluded spouse of such rights of ownership as he or she may enjoy in the family home. Furthermore any order made by the court pursuant to s. 16(a) of the Act is not necessarily final or conclusive and s. 22(1) thereof allows for it to be varied or discharged on the application of either spouse if the court considers it proper to do so having regard to change of circumstances. The court also held that s. 16(a) did not infringe the right of a married couple to make a joint decision as to the ownership of a matrimonial home.

21. That decision sets out in detail relevant provisions of the Act of 1989 and it is not necessary to repeat them in the course of this judgment save only by comparison with the relevant provisions of the Acts of 1995 and 1996 which will be considered later in this judgment.

22. The submissions made by the plaintiff must therefore be seen in the context of the specific findings of the Supreme Court in T.F. He says that the facts of T.F. are so distinguishable, that this Court is not bound by the doctrine of stare decisis; alternatively or that T.F. should be distinguished by virtue of the fact that the authority of *Blake v. The Attorney General* [1982] I.R. 117 was not referred to in the course of the judgment.

23. The plaintiff relies on certain dicta of Pringle J. in the case of *M. v. An Bord Uchtála* [1975] I.R. 81 and O'Higgins C.J. in *Loftus v. The Attorney General* [1979] I.R. 221 in impugning to the constitutionality of the provisions. He asserts the legislation in question is unconstitutional on its face.

24. In the first place it is clear that insofar as relates to the Act of 1989 the provisions thereof which were impugned in these proceedings have been considered by the Supreme Court in T.F. and held to be consistent with the Constitution. It is not possible to argue, as the plaintiff seeks to do, that the provisions are unconstitutional on their face, a situation which arose in the case of *M. v.*

25. Moreover in considering the submissions of O'Higgins J. in Loftus it is important to recollect that an Act of the Oireachtas post-1937 enjoys a presumption of constitutionality which ensures that the courts when considering any provision impugned as being repugnant to the Constitution must first be examined for a meaning or a way of doing what is provided for which accords with constitutionality. Only if such a meaning cannot be found or such a way is not open will invalidity be declared. Having regard to the decision in T.F. I do not consider it is open to the plaintiff in these proceedings to even contend that the relevant sections which are impugned in the 1989 Act are unconstitutional on their face as they have been specifically considered by the Supreme Court and declarations made as to their consistency with the Constitution. Nor can I see any relevant factual or legal distinction based on the authorities cited in that decision. This matter was decided by Finlay Geoghegan J. in the Circuit Appeal herein.

26. The next element of the plaintiff's case is that (relying on the judgment of O'Byrne J. in the case of *Buckley and Others (Sinn Féin) v. The Attorney General and Another* [1950] I.R. at p. 81; *Crotty v. An Taoiseach* [1987] I.R. 713 and *T.D. v. The Minister for Education and Others* [2001] 4 I.R. 259), he asserts that the doctrine of the separation of powers determines and mandates that the constitutionally embedded power of legislation may only be exercised by the Oireachtas, and that this doctrine dictates that where the Oireachtas or the Executive are found whether by act or omission to have acted in a manner which violates the Constitution, they are entitled to expect that the other responsible organs of government take such steps as are necessary to redress the wrongs in question.

27. The plaintiff says that Article 15 of the Constitution of Ireland vests sole and exclusive power of law-making in the State in the Oireachtas and that no other body has power to make laws for the State. He asserts that from this it must follow that when the Constitution speaks of law it means legislation duly enacted and promulgated by the Oireachtas. The Oireachtas he states has no power to delegate its legislative function to any other organ of State including the courts.

28. He relies on Article 15.4.1 of the Constitution which provides: "the Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof". From this premise he asserts that there is a right held by every citizen to be subject *only* to laws which "conform" (i.e. are not repugnant) to the Constitution.

29. Having referred on the definition of justice as outlined in the Code of Justinian the plaintiff states that, by virtue of Article 43.2.2. of the Constitution, the power of dealing with property rights by law with a view to reconciling their exercise with the exigencies of the common good may only be exercised by legislation in the Oireachtas. There is no legislation on the statute book, he contends, that may delimit his interest in any of his properties with a view to reconciling their exercise of the exigencies of the common good. He asserts that since the Oireachtas may not delegate its legislative function to another organ of State, the Oireachtas therefore acted ultra vires in purporting to delegate such a power to the courts by legislation as he asserts was done in the Family Law Acts of 1995 and 1996.

30. The plaintiff says he was the sole contributory with regard to his own earnings, dwelling house income and pension. These are his private property.

31. He relies on a number of further authorities. These include In *Re Article 26 and The Matrimonial Home Bill* [1994] 1 ILRM 241 and *L. v. L.* and *N. v. N.* both reported in [1992] ILRM 115.

32. In the Article 26 reference the Supreme Court had to consider a Bill which is provided that where a dwelling, had been occupied by a married couple and either or both of the spouses had an interest in the dwelling the equitable interest in that dwelling was automatically to vest in both spouses as joint tenants. The Court held that the encouragement by appropriate means of joint ownership in family homes was conducive to the stability of marriage and the general protection of the institution of the family. However, it added, that the application by the Bill of automatic ownership as joint tenants to every instance of a dwelling occupied by a married couple interfered with the decisions which may have been jointly made in relation to the ownership of the matrimonial home. The application was universal. Such universal application could result in the automatic cancellation of a joint decision freely made by both spouses and its substitution with a wholly different decision unless the spouses could agree to a new joint decision. Thus the Court held that the Bill did not constitute a reasonably proportionate intervention by the State with the rights of the family and amounted to a failure by the State to protect the authority of the family guaranteed by Article 41.

33. In *L. v. L.* the Supreme Court held that to allow the courts to extend the circumstances in which a wife might claim a beneficial interest in the family home to a situation where she had made no direct or indirect financial contribution to the acquisition of the property or to a family fund would be to create an entirely new right previously not recognised by the law. Unless this result was clearly and unambiguously warranted by the Constitution or made necessary for the protection of a specified or unspecified right provided for by the Constitution such a course of action would constitute legislation and would be a usurpation by the courts of the function of the legislature.

34. It should be observed however that in *L. v. L.* the finding by the learned High Court judge (Barr J.) was made in the absence of specific legislation which empowered the courts to make such findings and provisions. For this reason it was reversed on appeal. A related question informed the decision of the Court in the case of *N. v. N.*, but with the distinction in that case that the non owning spouse had both directly and indirectly contributed to the repayment of the mortgage and upon that basis the non owing spouse is entitled to a 50% interest in the family home. Thus the Court held that *absent legislation*, or contributions which gave rise to an entitlement a non contributing spouse had no property entitlement per se.

35. It is now necessary to consider in some more detail the provisions of the Act of 1989. Under s. 2(1) it is provided that:

> "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 and at 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;
>
> (c) subject to subs. (2) of this section that there has been an assertion by the respondent of the applicant for a continuous period of one year immediately proceeding the date of the application;
>
> (d) subject to subs. (2) of this section that the spouses have lived apart from one another for a continuous period

> of at least one year immediately proceeding the date of the application and the respondent consents to a decree being granted
>
> (e) subject to subs. (2) of this section that the spouses have lived apart from one another for a continuous period of at least three years immediately proceeding the date of the application;
>
> (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.

36. Section 3(1) of the Act of 1989 provides that

> "Where on an application under s. 2 of this Act the court is satisfied that any of the grounds referred to in subs. (1) of that section which have been relied on by the applicant have been proved on the balance of probabilities the court shall, subject to subs. (2) of this section and sections 5 and 6 of this Act grant a decree of judicial separation in respect of the spouses concerned".

37. The plaintiff asserts that he what terms "no fault separation" as stated to be introduced by s. 2(1)(f) of the Act of 1989 precludes the court from the consideration of the cause of the breakdown and is an interference with the full and original jurisdiction of the High Court and the administration of justice. These issues were both considered in the *T.F.* case to which reference has been made earlier.

38. There the plaintiff contended that s. 2(1)(f) set too low a threshold for the granting of a decree of judicial separation, which it was contended, would impair his constitutional rights to marriage and the institution of marriage generally. It was accepted that the other grounds set out in s. 2 of the Act involves specific wrongdoing. The plaintiff took exception only to grounds (e) and (f) on the basis that they were "neutral" on the issues of fault and silent on the question of consent to a decree. The essential objection of the plaintiff's case in T.F. was that the grounds set out in (f) required evidence only of a breakdown of marriage for one year prior to the issuing of the application.

39. Dealing with this issue Murphy J. stated at p. 342 of the judgment in the High Court

> "In my view the granting of a decree of judicial separation under s. 3 of the Act of 1989 on grounds set out in s. 2(1)(f) thereof as properly interpreted, is little more than an official recognition of an existing, and usually tragic state of affairs and a not inappropriate attempt by the Oireachtas to reconcile the needs and rights of the parties to the marriage, the family and the community of which the family is a fundamental unit group.

40. In considering this matter in the Supreme Court Hamilton C.J. reiterated that the granting of a decree of judicial separation did not per se constitute a failure to guard with special care the institution of marriage or a failure to protect it against attack.

41. In its consideration of the Act of 1989 the Court had regard to the totality of safeguards which were embedded in the Act. These included provision for the dependent children, awareness of the alternatives to separation such as reconciliation, mediation, agreed separation and the adjournment to proceedings to assist reconciliation.

42. The court specifically held that the appeal based on the inadequacy of the period for one year provided for in s. 2(1)(f) failed, and further held that the fact that s. 2 allowed for a decree in circumstances where there is no apportionment of fault was not a basis upon which the section could be considered unconstitutional. Having outlined the provisions of s. 2(1)(f) and consequences Hamilton C.J. said on behalf of the court

> "Is the provision of an entitlement to a decree of judicial separation in such a situation a failure to guard with special care the institution of marriage and to protect it from attack or is it an attempt by the Oireachtas to deal with the unfortunate situation created by the breakdown and the inability of one or other of the spouses to cohabit with the other? It is the view of this court that is the latter and having regard to the numerous safeguards of people's rights contained in the Act as a whole, some of which have been referred to in the course of this judgment, does not constitute an attack on the institution of marriage or a failure to guard it with special care or an unjust attack on the personal rights of the plaintiff appellant. Neither does it constitute an attack on the family: which is the foundation of the institution of marriage …"

43. The attack in *T.F.* was not confined to that of the grant of decree of judicial separation. The plaintiff also sought to impugn the provisions of ss. 16(a) and 19 of the Act of 1989. The former provision empowered the court to confer on one spouse either for life or such other period (definite or contingent) as the court might specify the right to occupy the family home to the exclusion of the other spouse. At p. 353 of the judgment Hamilton C.J. found:

> "The granting of the right to one spouse to occupy the family home to the exclusion of the other spouse does not constitute an unjust attack on the property rights of the excluded spouse. It does not in anyway purport to deprive the excluded spouse of such rights of ownership as he or she may enjoy in the family home".

44. He added:

> " … the provisions of s. 16(1) and 19 of the Act must be considered in the light of the other provisions at Part II of the Act and for what they are viz part of all the overall scheme of Part II of the said Act to ensure as far as practicable that provision is made in the interest of the family as a whole consisting of both spouses and their dependent children but must be regarded as an effort by the Oireachtas to protect so far as practicable the rights of the family and members thereof. Considered in that context the provisions of s. 16(a) and 19 cannot in anyway be regarded as unjust attack on the property rights of the plaintiff appellant.

45. It is apposite to repeat the dictum of McCarthy J. in the case of *N. v. K.* [1985] I.R. 733 cited with approval by Hamilton C.J. in T.F.

> "Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which effects both the parties to the contract and the community as a whole".

46. It will also be recollected that one of the bases for that judgment was the specific reliance of the court of the judgment of Kenny

J. in *Ryan v. The Attorney General* [1965] I.R. 294 at p. 312 wherein dealing with personal rights he said:

> "None of the personal rights of the citizen are unlimited: their exercise may be regulated when the common good requires it. When dealing with controversial social economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and a decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proposition between the benefit which the legislation would confer on the citizen or a substantial body of them and the interference with the personal rights of the citizen".

47. It follows from this that the Supreme Court considered that any delimiting of personal rights as arose in the Act of 1989 were not oppressive and bore a reasonable and proportionate relationship between the benefit which the legislation would confer to family members on the one hand and the interference with the personal right of the citizen on the other.

48. Having regard to the totality of the decision in *T.F.* it is quite clear that the complaints of the plaintiff as to s. 2(1)(f) and in relation to other provisions of the Act of 1989 are unsustainable in the light of the specific findings made by the Supreme Court.

49. Similar considerations relate to orders made as to maintenance and the Family Law (Maintenance of Spouses and Children) Act, 1976. As pointed out by Hamilton C.J., the power to order maintenance is of long standing. It derives first from the common law and thereafter the ecclesiastical courts. With the disestablishment of the Church of Ireland a new civil court for matrimonial causes and matters was established inheriting the jurisdiction of the ecclesiastical court pursuant to s.13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870. The jurisdiction conferred by that Act was merged into the High Court of Justice of Ireland on its establishment by the Judicature (Ireland) Act, 1887 and was exercised by the probate and matrimonial division of the High Court. That jurisdiction was in turn by the provisions of s.17 of the Court of Justice Act, 1924, which in turn was vested in the High Court by virtue of s.2 of the Courts (Establishment and Constitution) Act, 1961. Such powers are designed to protect the members of the family and each of them and to make provision for them in a manner mandated by the provisions of the Constitution.

50. The following general observations may be made:

> 1. Historically no right to an interest in a family home or matrimonial property unless established by the former contribution of the spouses.
>
> 2. By legislation the Oireachtas empowered the Courts to make determinations as to the family home, maintenance, property and pension entitlements.
>
> 3. Such legislation was further encompassed in the Act of 1989. There laws were permitted to make a wide range of orders on the issues of judicial separation the family have matrimonial property and the rights of spouses to other assets or entitlements.
>
> 4. Such orders were appropriate, proportionate and in accord with the provisions of the Constitution of Ireland on the institution of marriage itself and the rights of each family member.
>
> 5. The long established right to maintenance in accordance with needs and means derived from common law and the Ecclesiastical Courts. Ultimately this right was the subject of statutory recognition in the Acts of 1976 and 1989, and further recognised in legislation in 1995 and 1996. This right too was constitutionally acknowledged in T.F.

51. The court must then turn to the plaintiff's submissions regarding the Family Law (Divorce) Act, 1996. It is contended that these provisions are unconstitutional as they constitute an unjust attack on his property rights pursuant to Article 43 of the Constitution.

52. However the plaintiff has not established any fundamental distinction between the maintenance and property rights already thereby enacted and those already specified in the Act of 1989. The bases of a decree of judicial separation are therein acknowledged. The effect of the Act of 1996 is to permit divorce on certain conditions which are established by the Constitution itself. The Fifteenth Amendment to the Constitution of Ireland introduced the concept of divorce to Irish law and the provisions of Article 41 prohibiting the granting of a decree of divorce were deleted from the Constitution. In their place was inserted a provision whereby the courts were conferred with the power to grant decrees of divorce subject to the conditions set out by that constitutional amendment.

53. A decree of divorce may be granted only where the court is satisfied that "proper provision" has been made for the spouses and children of the family.

54. The requirement to make "proper provision" for the spouse led the Oireachtas to pass into law the provisions of the Family Law (Divorce) Act, 1996, which also encompasses ancillary orders. The Act reflects the provisions of the Fifteenth Amendment itself. Applying the principles and for the reasons identified by the Supreme Court earlier in the case of *T.F*. the provisions of the Act must be within the legislative authority of the Oireachtas: no distinction has been drawn between them. They must be seen therefore as having been made to provide for and to balance the interests of the family as a whole and the members of that family unit. No submission has been made herein as to any basis upon which there is a constitutional infirmity having regard to the Fifteenth Amendment. The requirement having been stipulated under the Constitution that "proper provision" be made for spouses, it was a matter for the Oireachtas to set out how that "proper provision" was to be achieved.

55. In *D.T. v. C.T.* [2002] 3 I.R. 334 the Supreme Court, on appeal from the High Court had to consider whether proper provision for a spouse had been made in the particular circumstances of that case. In the course of his judgment Murray J. (as he then was) stated at p.404:-

> "As I have previously had occasion to state, the Constitution and, in particular, Article 41 reflects the shared value of society concerning the status of the "family" in the social order as a natural primary and fundamental unit group in society. The State is required to protect the family, *inter alia*, because it is indispensable to the welfare of the nation as a State. Moreover the Constitution requires the State 'to guard with special care the institution of marriage'…
>
> With these purposes in mind, the Constitution as adopted in 1937, contained a complete prohibition on the dissolution of marriage. The Fifteenth Amendment to the Constitution with which we are now dealing replaced that prohibition and, clearly, with those purposes also in mind, was placed in Article 41 and specified four pre-conditions which must be fulfilled before an order dissolving a marriage may be granted. It is in this context that the notion of proper provision for the

spouses must be interpreted."

56. That judge added:-

> "The moment a man and a woman marry their bond acquires a legal status. The relationship once formed, the law steps in and holds the parties to certain obligations and liabilities. Even where marriage is dissolved by judicial decree, the laws of many, if not most, States require that the divorced spouses continue to respect and fulfil certain obligations deriving from their dissolved marriage for their mutual protection and welfare, usually of a financial nature. This reflects the fact that marriage is, in principle, intended to be a lifetime commitment and that each spouse has fashioned his or her life on that premise. If the law permitted a spouse to cut himself or herself adrift of a marriage on divorce without any continuing obligation to the former spouse, it would undermine the very nature of the marriage contract itself and fail to protect the value which society has placed on it as an institution. It would give rise, for example, to a complete disregard for the status of the spouse whose principal role in the marriage was working in the home in support of the other partner who is a principal earner or breadwinner. Hence the constitutional imperative of proper provision for spouses."

57. He concluded:-

> "In my view in ensuring that proper provisions made for the spouses of a marriage before a decree of divorce, the court 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."

58. As can be clearly seen from this and the other judgments in that decision therefore, "proper provision" should be based on a consideration of all the circumstances of the case including the financial resources and needs of both spouses and dependents; their obligations and responsibilities both present and future; the standard of living of the parties before the breakdown of the marriage, their respective ages; the duration of the marriage and terms of any separation agreements; the role of the spouses in relation to the welfare of the family; their contribution to looking after the home or caring for the family; the effect on their earning capacity as a result of the marital responsibilities they assumed; the degree to which future earning capacity was impaired by reason of the spouse having relinquished the opportunity of remunerative activity in order to look after the home or care for the family whether one spouse contributed directly or indirectly to the resources of the other and to the corresponding detriment suffered by that spouse in terms of their own resources. Thus far from the Family Law Act of 1996 being unconstitutional, insofar as it allows the court to make financial provision for spouses the Act is a recognition of the constitutional obligation which the Act of 1996 was passed to serve. Not only are the provisions of the Act of 1996 not unconstitutional but they are in fact mandated by the Constitution itself. The provisions of the 1996 Act with regard to financial relief are in harmony with, the terms of the relief that may be granted by the court under the Act of 1989. Thus insofar as the provision of Act of 1989 are constitutional then, (unless some fundamental distinction in principle is shown) *ipso facto*, the 1996 Act must also be constitutional in its provisions. No such distinction has been urged, identified or established herein.

59. A further point is raised regarding the role of the Attorney General. This appears linked to a contention made by the plaintiff, as long ago as 1992 in correspondence with the then Attorney General, that the Attorney as guardian of the Constitution, should seek a High Court injunction to suspend the operation of s.260 of the Mental Treatment Act, 1945, pending a full hearing with regard to its constitutionality.

60. While the point made by the plaintiff in these proceedings is somewhat opaque, I infer that it is contended that it is incumbent upon the Attorney General to ensure that the plaintiff (personally) is governed only by laws not repugnant to the Constitution and that his personal rights are not set at nought by legislation. No basis for this argument is established. The plaintiff has not raised a justiciable issue. Even if he had, I am satisfied that in the instant case the facts disclosed show that the legislation in question (which the plaintiff seeks to impugn) are provisions which have been held consistent with the Constitution of Ireland and, additionally in the case of the Act of 1996, are mandated thereby or reflect its provisions. In the circumstances therefore I do not consider there is any substance in this submission.

61. The court will decline the relief sought.