

THE HIGH COURT

[Circuit Court Record number F01/2016]

BETWEEN

J.B.B.

APPELLANT

AND

S.M.B.

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 22nd day of March, 2018**Introduction**

1. This matter arises out of an appeal by the husband (appellant) of the order of His Honour Judge Aylmer on the 9th November, 2017. The parties in this matter were married on 26th May, 1990. The appellant is currently working in manual labour, in addition to working as a part-time farmer. The respondent (wife) is 49, she had previously worked as a carer, but is currently unemployed. There are four children of the marriage: D. born in 1990, C. born in 1992, G., who suffers from Microdeletion Syndrome, born in 1994 and L. born in 1995. G. is still resident with the appellant. It is set out in the appellant's affidavit of welfare that G. "would not need much help, but she would not be allowed to be left in the house on her own. She needs someone present all of the time to cook/clean and make sure that she is generally okay.". all the children reside with the appellant in The Husband's House. They are out of the home between 9am – 5pm each day and C. looks after G. during the school holidays until the appellant returns home. G. is the only child of the marriage that can currently be considered a dependent under s. 2 of the Family Law (Divorce) Act 1996 as she "has a mental or physical disability to such extent that it is not reasonably possible for the child to maintain himself or herself fully".

2. Unhappy differences arose between the parties and the respondent vacated the family home on 4th November, 2013. A normal marital relationship has not existed between the parties for four out of the last five years and the parties are therefore eligible to divorce under s.5(1)a of the 1996 Act.

3. There are three significant assets to consider in these proceedings. First the family home, where the couple resided together with their four children until the breakdown of the marriage in November 2013. The appellant still resides in this property and it will hereinafter be referred to as "The Husband's House". The second significant asset is the agricultural land and buildings inherited by the appellant from his parents in 1987, hereinafter referred to as "The Farm". The final significant asset is a property inherited by the respondent in 2012 in which she currently resides, hereinafter referred to as "The Wife's House".

The Appellant's Submissions

4. An initial issue that arose at the hearing of this case was that of the valuation of the three significant assets. The court heard evidence from auctioneers on behalf of the appellant and respondent. The appellant's auctioneer described The Husband's House as a 140 sq/m, detached, dormer, rural property, located up a side lane, a few hundred meters from the main road, and is 7Km from the local town. He stated that it encompassed an entrance hall, 5 bedrooms, a sitting room, kitchen and three bathrooms. His valuation of this property was €120,000. In reaching this valuation he assessed a number of comparable properties which he detailed to the court. He compared properties in the local area, these included a detached two story property under offer for €150,000, a 4 bedroom bungalow sold for €83,000 and a 3 bedroom detached property sold for €122,00. He stated that he sold a house in the locality of The Husbands House, a 5 bedroom dormer bungalow, that was a larger property and a better presented property in a better location on a larger site for €175,000. Notably, he highlighted that the house next door to The Husband's House, a small 3 bedroom bungalow is sale agreed at €75,000. He highlighted that this is not a directly comparable property in terms of size or presentation. The respondent's auctioneer's valuation of The Husband's House at €175,000 was put to the appellant's auctioneer, he stated that he believed this valuation to be too high. In relation to the two extra bedrooms, added by way of dormer extension, that planning permission is required for, he stated that the absence of such permission may cause difficulties in selling the property, but it would depend on the buyer. He highlighted that if it was a mortgage buyer this would be a more significant issue.

5. In cross-examination the respondent's auctioneer's valuation of The Husband's House of €150,000, if planning permission is not sought for the two extended bedrooms, or €175,000, if permission is sought, was put to the appellant's auctioneer as being based on comparable properties in the local area, including a property advertised on the appellant auctioneer's website for €195,000. He stated that he valued this property at €175,000, but it was the owner's choice to list it at a higher price. It had already been reduced from €200,000. The appellant's auctioneer stated that this was merely a guide price. He agreed that this was also a dormer property on a similar sized site, but highlighted that it is five years younger and significantly larger than the Husband's House at 250sq/m. He stated that this is a 7/8 bedroom house. He accepted that it is possible that The Husband's House may go for more, because his valuation is one year old.

6. The appellant's auctioneer stated that The Farm is of a typical land quality for the area, encompassing 19 acres of land divided into two parcels on either side of the lane that passes The Husband's House. It includes a barn, a three bay slatted house and a parcel of bog nearby. He stated that this is primarily grazing land, but parts could be used as meadow on one side of the road where the land is flat, the land is at a gradient on the other side. A portion of this land was sold as housing sites a number of years ago. There are no ESB, or water services to the area and the houses built in the locality are attached to private water wells, so there is no water service to the area. He stated that in recent times the primary driver of land price variations has been forestry and that prices vary widely. He highlighted that there is little uptake in the purchasing of land by farmers. The appellant's auctioneer valued the land at €70,000, approximately €3,684 per acre. In reaching this valuation he used a number of comparators of agricultural land recently sold in the local area. He set these valuations out in detail; the first was 26.7 acres of land, that is under offer for €3,700 per acre. He stated this is slightly better quality land, but the general lay out is comparable and this is an offer from a farmer. The second comparator is 49.48 acres of land, that are sale agreed at €2,393 per acre. The third is 18.77 acres sold at €2,290 per acre. He stated that this is rougher land, but it is one parcel of land unlike The Farm. The fourth he stated is at the higher end of land values at €4,500 per acre for 52 acres, which included 10 acres of bog, but 8 acres of the bog is to be planted as forestry. He stated that the agricultural land of that holding is of a better quality than that of the subject property. The fifth comparator was 25 acres of land, including five stables and a sand arena, currently under offer for €4,500 per acre. In considering the respondent's auctioneer's valuation of €5,000 per acre, €98,850 in total, he stated that possibly if it was a larger parcel of land and it was desirable for forestry plantation, or a neighbour really wanted the piece of land, it might yield this price, but he would not value the land this high. In cross-examination he stated that the best value would be obtained by selling it for forestry use at base line values. He stated that the

lowest he believes a forestry company would offer for a piece of land in that locality is €4,000 per acre and the highest €5,300 per acre. He stated that when he is valuing a piece of land he contacts people associated with forestry, to see if they would be interested in purchasing the land. He stated that if it was sold for use as forestry it would be closer to the respondent's auctioneer's valuation. He put in the caveat that there are electricity lines running through the land and it is adjacent to houses, which forestry cannot be planted near, this would limit the land available to plant. He stated that forestry companies assess what land they can plant and the bid they make is based on what can actually be planted.

7. In relation to The Wife's House he stated that it is slightly closer to the town than the other property, located 2.3km from it. It is along a main road but it is not a busy road. It is a bungalow in average-good condition and is 65sq/m in size. He stated that it encompasses three bedrooms, has double glazed windows and is dry-lined throughout. It is an unusual lay out because one bedroom has to be accessed through another. It is located on a 1.2 acre site, a larger site than The Husband's House. He valued the property at €75,000. In reaching this valuation he used a number of comparator properties that had recently sold in the local area. The first was a 75sq/m cottage, with 3/4 bedrooms and a rear extension, it is not drylined and does not have central heating, but is generally in good condition, with double glazed windows. This sold for €80,000. The second comparator was a 2/3 bed semi-detached ex-council cottage, set on a 1 acre site in a more rural location than that of the subject property. This property is sale agreed at €68,000. The third comparator is the house next door to The Husband's House, a 3 bed bungalow, that is sale agreed at €75,000. The fifth comparator is a 4 bedroom cottage, that he stated needs significant refurbishment internally. That is sale agreed at €60,000. The sixth comparator is a 3 bedroom farmhouse in a rural location, that required a substantial amount of refurbishment and has poor access. It was sold for €56,000. The sixth comparator is a 4 bedroom, two story 1980's build, with single glazed windows which sold for €75,000. In relation to the respondent's auctioneer's valuation of The Wife's House at €55,000 the appellant's auctioneer stated that he felt that this was a low valuation.

8. It was put to the appellant's auctioneer, in cross-examination, that his firm carried out a valuation for probate purposes in 2013, which valued the property at €43,000. He explained the difference in valuations as being due to the price of property increasing nationally since 2013. He stated that he had based his valuation on similar property he had recently sold and what he believes he could sell this property for. Additionally he stated that work had been done to the property since that valuation. He accepted that probate valuations are often conservative.

9. The appellant stated that he was married to the respondent on 26th May, 1990 and separated from his wife in November 2013. He stated that there were four children of the marriage. The eldest D. is currently 27 years old and was 23 years old in 2013, when the respondent (wife) left the home, C. who is currently 25 was 21 in 2013 when the respondent moved from the family home, G. who is currently 23 was 19 in 2013 and L. who is currently 22 was 18 in 2013. C. is currently in college in Dublin and the fees for this course are paid by a higher education grant. He stated that G. is currently attending an institute of further education. The fees of €250 annually for this course are paid by him.

10. The appellant stated that G. has Microdeletion Syndrome. He explained that this manifests itself in the form of an intellectual disability and it can be noticed in her physical appearance.

11. He stated that his parents gave him The Farm in 1987. His parents had bought The Farm, the year he was born. There was a house on The Farm and the appellant and respondent lived in this house for approximately 1.5 years when they first married. He stated that they then moved to rented accommodation, across the road from The Farm, where they resided for 1 year. The rent on this property was £40 a week. Following this, they moved to a rented council house in the local town. This was a semi-detached house. They resided in this property from approximately 1992 until 2002. They received a council loan, which enabled them to purchase this property in 1999. He stated that the children's allowance payments were used to fund the mortgage on this property. He had also put £2,000 of his own savings toward the purchase of the property. They moved into the house in which he currently resides, referred to in this judgment as The Husband's House, in 2002.

12. He stated that he bought the site on which The Husband's House is currently built for £15,000 (approx. €19,000 at the time). A contractor was commissioned to build a three bedroom bungalow. The children's allowance payment received by the parties was used to pay the mortgage. He stated that the only payments into the bank account designated for payment of the mortgage were the children's allowance and any farm payments he received. He stated that the initial mortgage repayment was €320 per-month. A top-up loan was taken out by the parties to cover additional debts that were acquired as a result of the purchase of a car by way of finance in 2002. There is controversy in relation to this issue, as to which of the parties purchased this vehicle. The mortgage repayment increased from €320 to €520 and this remained the monthly repayment until 2015. The repayment returned to €310 for the last two years of the mortgage, which is now redeemed.

13. He stated that as the children aged, the children's allowance payments reduced and that when it ceased to cover the mortgage repayments, the respondent would transfer €100 per week from her personal bank account into the mortgage account. This was in the year 2013. He stated that he believed that this money was coming from the daughter G's. disability allowance payment, to which she became entitled when she turned 18 years of age. It was €118 weekly. He stated that from November 2013, when the respondent left the family home, G. was providing him with €100 per week to pay the mortgage. He stated that he could not have afforded to discharge the mortgage without this assistance from his daughter, as he was repaying a credit union loan that he had taken out to assist the respondent.

14. He stated that he sold a site of land, for which he had received €55,000. With the proceeds he installed the dormer conversion in the house and did external works to the house, including landscaping. He believes that he spent €35,000- €36,000 on these works to the property. He stated that he gave his wife €5,000 at this time for her own use.

15. He accepted that the respondent would have put €5,000- €6,000 from an inheritance she received in the year 2002, into The Husband's House. She paid the contractor €2,700, she invested in the decoration of the house and the purchase of soft furnishings.

16. The appellant stated that the respondent inherited the house she currently lives in in 2012. He stated that the respondent owed money in inheritance tax as a result of this inheritance and her solicitor's fees had to be paid. He stated that he was delighted that the respondent had inherited this property and he felt that it could be used by the children in the future. The respondent however wanted to sell the property. He stated that to discourage her from selling the property he took out a loan of €15,000 in October 2013 from the Credit Union to pay the debts associated with the inheritance. The total cost of this loan, including interest amounted to €19,000. He stated that he had almost completed paying back this loan.

17. He stated that he wanted to get a return on the money invested in The Wife's House and wanted to rent the property. He did renovations to the property himself in the latter part of 2012, including drylining 2 bedrooms, a hallway and a living room. These works caused the house to be fully drylined. He painted the property, put in skirting boards in the property, painted outbuildings and

replaced doors on these buildings, in addition to clearing the grounds around the house. He believed it would be easy to rent as it is a good area for fishermen. The property was rented out for €300 a month for approximately two months beginning in April 2013. He stated that this yielded approximately €600 and that the respondent received this income.

18. He stated that the respondent commenced work for the HSE in the area of home help in the late 1990's, when the children of the marriage were "on their feet". He said she would be at home most of the time and that initially she did very few hours. These increased as the children got older. He does not know how much she earned or what happened to her earnings. He stated that he was buying the weekly groceries. The bank statements from the respondent's discovery, showed that the weekly shop was bought out of the appellant's salary. He stated that the respondent was in receipt of a carers' allowance for G., which would have commenced in approximately 2001. He was unaware when the respondent ceased receiving carers' allowance

19. He is currently working near where he lives. He is paid €393 weekly. He stated that this is stable employment. He has been working there since 1999. However he stated that the man who owns the company is elderly and may retire. He fears for the future of the company. He stated that The Farm is running at a loss. He detailed that he has 10 head of cattle. He stated that his oldest son D. has a great interest in agriculture and he would like to give The Farm to his son D in the future, if this were possible.

20. The appellant detailed his weekly expenses, as set out in his affidavit of means. His weekly outgoings amount to €150 per week. He also pays for car insurance for L. who is 22 and is currently an apprentice.

21. He stated that the respondent brought District Court proceedings claiming maintenance. The District Court Judge said that he was making great efforts to fund what he was doing and was unable to take on any other financial burdens.

22. In cross-examination, the appellant accepted that the respondent had put part of the €25,000 she inherited from her aunt in 2002 into works on The Husband's House. He disagreed with the proposition that she had put the majority of this inheritance into the property.

23. He did not accept that the respondent transferred €400 into the mortgage account monthly and that the balance of €120, required to pay the mortgage monthly, came from him. He reiterated that the children's allowance payments were used to pay the mortgage. He stated that the most they ever received in children's allowance payments monthly was €735.

The Respondent's Evidence

24. The respondent's auctioneer valued The Wife's House at €55,000. He stated that in his opinion this is a 2 bedroom property not a 3 bedroom property, because the third bedroom needs to be accessed through another room, and this causes issues with fire safety. He also stated that this property needed work to be done to it. He stated that it is located very near the main road and there are issues with the sewage system. In reaching this valuation, he used properties sold in the local area as comparators. He gave three comparator properties. First he compared a 4 bedroom semi-detached modern property, built 10 years ago, in a town in the locality, approximately 3 km away from The Wife's House, which sold for €53,000. The second comparator property is a 3 bedroom detached property, currently sale agreed at €55,000. The third comparator property is a 3 bedroom property on Main Street in the local town, that was recently sold for €44,000. He stated that the location of the house close to the main road would reduce its desirability, and therefore the value, of the property. In cross-examination, he accepted that the property is well maintained and has many out buildings. He did not agree that his valuation was an under valuation of the property, even though no properties in the locality on www.daft.ie are currently marketed that low. He stated that the three properties he compared are sale agreed and two of the properties are located in the local town and one was not.

25. The respondent's auctioneer's valuation of The Farm was €98,000. He said he was being conservative with this valuation at just under €5,000 per acre. He stated that it was better quality land, than forestry would ordinarily purchase and so, if a local farmer wanted the land it might push up the price. He stated that this figure accounts for the farm buildings also on the land. The respondent's auctioneer stated that the demand for land generally is very good and that this is being driven by forestry plantation. He feels that generally there would be interest in the land. He did not provide any comparable properties for this valuation.

26. The respondent's auctioneer had very recently valued The Husbands House. He stated that no one could clarify for him if planning permission was required for the two additional bedrooms added to the house in a dormer conversion. He valued the property at €170,000 if there is planning permission for these rooms and at €155,000 if there is not, as it would then be considered a 3 bedroom house. In relation to the appellant's auctioneer valuation of €120,000, he stated that he believed this was a low valuation. In reaching his valuation, he used a number of comparators of sales of properties in the local area in recent times. His first comparator was a 5 bedroom property advertised on the respondent auctioneer's website for €200,000. He stated that this property is similar in size to The Husband's House. In cross-examination it was put to him that this property was over 250sq/m and that The Husband's House was only 140sq/m, he was of the opinion that this property was larger when the dormer conversion is taken into consideration. He believes The Husbands House is of a better standard to the property on the website. The second comparator is a 4 bedroom detached property on a similar sized site, with a similar finish, but slightly larger than the subject property, which sold for €178,000. The third comparator is a three bedroom bungalow of 110 sq/m, which sold for €139,000. He stated that it is harder to sell larger more expensive properties because of the income levels in the region and the ability to get finance based on new lending regulations. It was put to him in cross-examination that considering this difficulty in selling larger properties it should be very easy to sell The Wife's House, he disagreed because of the location of the property, being very near to the main road.

27. The respondent stated that she currently lives alone and is in receipt of Job Seekers allowance of €183 per week. She stated that she has no prospect of a job at the moment and is doing computer courses with the JobPath social welfare programme. She stated that she owns a car and can drive, but is only in possession of a provisional driving licence. She agreed that she could travel to seek employment, but felt she may have to travel as far as to a neighbouring county. She stated that she has a prolapsed kidney and is currently waiting to go into hospital to have an operation to address this problem. She currently has kidney failure and that this leads to a level of incapacity, as she has to plan her route to be near a restroom when she is out. She stated that she does not have a relationship with her four children.

28. She stated that she is currently in debt to the sum of approximately €16,100. She purchased a new car in 2007, which she later had to sell. She is in debt in the sum of approximately €11,400 as a result of this. Additionally she owes the Department of Social Welfare €4,700, which is currently being deducted from her social welfare payments in the sum of €10 per week. She stated this debt arose as a result of working too many hours while being in receipt of social welfare.

29. She stated that from 1990 she was a full time mother, until she began working short hours in home help when her youngest child L. was approximately 9 years old. She stated that as the children got older, she increased her hours of work and earned more money. She stated that she would put this money into the house and would pay for things for the children.

30. She stated that she received an inheritance of €25,000 in 2002 and invested this sum in the family home in furnishing the property. She bought beds, curtains and flooring for the house.

31. She stated that she was in receipt of carers' allowance and she was paying €100 a week towards the mortgage, when the children's allowance payments reduced. She stated that she paid that up until she left the home in 2013.

32. In relation to the purchase of a car in 2002, which is an issue in dispute between the parties, she stated that she was in hospital in 2002 with pleurisy and when she returned home, a new car had been purchased on finance by the appellant. She stated that this car had nothing to do with her at all

33. She inherited the house she currently lives in in 2012. She stated that she had cared for the woman who lived there. She died and left her the property. The house is near the main road and in the respondent's opinion is nosy as a result. The respondent accepted that the appellant took out a loan from the Credit Union of €15,000 to pay the inheritance tax and solicitor's fees, owed by her in association with her inheritance of The Wife's House. She also accepted that the appellant did substantial works to that property after she inherited it.

34. The respondent accepted that when she first married, she lived in the appellant's parent's property, that they then moved to a rented property, then to the property initially rented from the council and eventually purchased by the parties and finally they moved to The Husband's House in 2002.

35. She accepted that it is stated in her defence, at paragraph 4, that she was employed by the HSE and that she discharged the whole of the mortgage payment from the money she earned from this work. She did not accept that this was not true. It was put to her that as part of her discovery she had given the appellant the mortgage account statements from 2009. It was put to her that the only payments going into that account were the children's allowance payments and The Farm payments. It was put to her that in 2013 she was paying €100 from her account into the mortgage account, but there was no evidence of her paying €100 a week in 2009. It was put to her that she only began paying €100 per week in 2013. While not accepting that assertion, the respondent did not deny it; she just replied "if you say so", when these matters were put to her.

36. It was put to her that the €100 a week she was paying in 2013, was out of her daughter G's. disability allowance payment and was not money she earned. She stated she was getting carers' allowance and therefore had no reason to take money from G.. She received carers' allowance from 2001 until May 2014. She accepted that she left the family home in November 2013 and therefor received carers' allowance for the care of G. for six months, when she was not living with G.. Her explanation for this was that she was told by social welfare officers that they were hoping her daughter would come to live with her and she was instructed to continue to claim carers' allowance in the hope that G. would move in with her. G. never went to live with the respondent. She agreed that before G. turned 18, she was also in receipt of Domiciliary Care Allowance for G. and that that was the only payment that would have been coming into the house in respect of G.

37. She accepted that when G. turned 18 she was entitled to Disability Allowance in her own right. She agreed that a difficulty arose in getting that allowance as G. had to travel to Dublin to be officially diagnosed. It was put to her that as a result of this delay in receiving the allowance, G. was entitled to arrears totalling €15,282. The respondent stated that she did not have any knowledge of this. It was put to her that she did in fact know about this money and that she had taken it for her own use. A number of withdrawals from this account were put to the respondent, which she denied making, including withdrawals which were payments to a credit card held in her name. She then accepted that a withdrawal of €7,800 to pay a credit card debt, was made by her. It is the appellant's case that the respondent withdrew the rest of this money. The respondent denied doing so and stated that G. took out this money for her own use. She accepted that in the space of 2 months this money was taken from the account. She did not have a satisfactory answer when it was put to her that she had used this money for her own ends; again she just replied; "if you say so".

38. She denied that the appellant ever gave her €5,000 for her own use.

39. She accepted that the money she earned was kept separate from that of the appellant. She stated that she used to pay household expenses. She accepted that it was evidenced in the accounts that the appellant paid for the household expenses such as groceries. When it was put to her that she used her money for herself she said "Ok if you say so".

40. She accepted that the appellant took out a loan of €15,000, which came to a total of €19,000 when interest is taken into consideration. She also accepted that he put money into the renovation of The Wife's House. She stated that the house was in good/average condition. She stated that there is insufficient insulation in the property and these were issues with mildew and the septic tank.

41. In relation to her recent work, she accepted that she took a trip to the United States in 2015 to care for her aunt. Her family paid for her air fare and she stayed with them. She stated she did not have to pay for anything while in the United States and they gave her \$100 going home.

42. It was put to her that her current partner is residing with her in The Wife's House. She stated that he does not live with her anymore. She stated that he used to stay in the house a couple of days a week and that this does "not work at all now", so he is no longer resident with her. It was put to her that her partner's bank statements were given to the appellant in her discovery by accident and she said that that could not be possible because he does not live with her and he has a mortgage with his ex-partner and resides at a different address. She stated that his bank statements did not come to her house.

43. She accepted that she made an insurance claim because her house was broken into in 2014. She stated that a lodgement in January 2014 of €4,800 was made when she sold a car. She stated that she had had to sell the car because she had no money. She stated she purchased that car with a loan and she could not afford it. She accepted that she sold the car for a significant loss.

The Law

44. In a recent decision of *C.C. v. N.C.* [2016] IECA 410 in the Court of Appeal, Hogan J. provided a helpful narrative of the development of the making of an order for proper provision in divorce and judicial separation. This judgment concerns an ample resources case and therefore is not directly comparable to the case at hand, but it helpfully addresses the issue of inherited assets in divorce proceedings. Hogan J. set out the jurisdiction of the court in divorce proceedings and the factors to be considered in making an order of proper provision at paras. 23 and 24:-

"The jurisdiction of the Court is ultimately derived from Article 41.3.2 of the Constitution. This constitutional provision requires the Court to be satisfied in respect of four particular pre-conditions before a decree of divorce can be granted.

The first two pre-conditions – namely, that the spouses have lived apart for at least four years and there is no prospect of reconciliation – are plainly satisfied. The dispute in the present case concerns the third and fourth pre-conditions prescribed by Article 41.3.2:

'(iii) such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them, and any other person prescribed by law, and

(iv) any further conditions prescribed by law are complied with.'

24. The Family Law (Divorce) Act 1996 ('the 1996 Act') may be said to give effect to the fourth pre-condition prescribed by Article 41.3.2...."

Hogan J. went on to set out the provisions of s.20 of the 1996 Act.

45. In *C.C. v. M.C* Hogan J. went on to discuss the judgment of Denham J. in *Y.G. v. N.G.* [2011] 3 I.R. 717 in which she set out a number of principles to consider in enforcing a separation agreement. These principles need to be considered in addition to those set out in s.20 of the 1996 Act. Three of these principles are of particular relevance in the present case. First, the legitimate expectation of accommodating a clean break divorce aimed at achieving finality, second how inherited assets are to be treated on divorce and third that the court is to look at all the circumstances of the case in making proper provision and not enter into the redistribution of wealth. Denham J. stated:-

(i) A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight. This is so especially if the separation agreement, as here, provides that it was agreed between the parties that the agreement was intended to be a full and final settlement of all matters arising between the parties; and, in the event of either party being granted a court decree, the terms of the agreement should be incorporated into the court order.

(ii) Irish law does not establish a right to a 'clean break'. However, it is a legitimate aspiration. As Keane C.J. said in *D.T. v. C.T.* [2003] 2 I.R. 334, 364 :-

'It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the 'clean break' approach which are clearly beneficial. As Denham J. observed in *F. v. F.* [1995] 2 I.R. 354, certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and of the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the 'clean break' approach to the extent favored in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties.'

In that case, Murray J. stated at p.411:-

'I also agree that when making proper provision for the spouses, a court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s. 22 of the Act of 1996, where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit.'

(iii) The constitutional and legislative scheme gives to the Court a specific jurisdiction and duty under the Act of 1996.

(iv) Under s. 20(1) of the Act of 1996 'the court shall ensure that such provision as the court considers proper having regard to the circumstances exists' will be made for the spouses and any dependent children. Thus this duty requires the Court to make proper provision, having regard to all the circumstances. A deed of separation stated to be in full and final settlement is a significant factor.

(v) If the circumstances are the same as when the separation agreement was signed then prima facie the provision made by the Court would be the same, as long as it was considered to be proper provision.

(vi) If the circumstances of the spouses, one or both, have changed significantly then the Court is required to consider all the circumstances carefully. However, the requirement is to make proper provision and it is not a requirement for the redistribution of wealth.

(vii) Relevant changed circumstances may include the changed needs of a spouse. If there is a new or different need, that may be a relevant factor. Such a need may be an illness.

(viii) The changed circumstances which may be relevant include the bursting of a property bubble which has altered the value of the assets so as to render an earlier provision unjust. These are two example illustrations and are not intended to be a conclusive list of relevant changed circumstances.

(ix) If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project by spouses during their married life, then that is not a factor of itself to vest in the other spouse a right to further monies or assets.

(x) If, in the period subsequent to the conclusion of a separation agreement, one spouse becomes very wealthy, there is no right to an automatic increase in money or other assets for the other spouse.

(xi) If a party seeks additional funds, the Court has to look at all the circumstances and its duty is to make proper provision, not to enter into a redistribution of wealth.

(xii) The facts and circumstances to be considered will include the length of time since the separation agreement was entered into. The greater the length of time which has passed, barring catastrophic circumstances, the less likely a court

will be to alter arrangements.

(xiii) The standard of living of a dependent spouse should be commensurate with that enjoyed when the marriage ended. The Act of 1996 specifically refers to matters to which the Court shall have regard and these include the standard of living enjoyed by the family before the proceedings were instituted or before the spouses commenced to live apart, as the case may be.

(xiv) However, if a party has new needs, for example a debilitating illness, that will be a factor to be considered by a court in all the circumstances of the case.

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

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

(xvii) If there has been an exceptional change in the value of assets, which was unforeseen at the time of the judicial separation or High Court hearing, it is a relevant factor, as not to take account of such a factor would result in an injustice. See *M.D. v. N.D.* [2011] IESC 18."

46. Hogan J. stated "as YG makes clear... inherited assets are not to be treated in the same way as the joint assets of the parties acquired in the course of marriage." In discussing the importance of this concept in relation to the case at hand, he stated that even if the land could be sold considering the circumstance of the particular case "this would destroy the income generating capabilities of the husband." Hogan J. also considered the further important point highlighted in Y.G. that "the task of the Court is to make proper provision and not to ordain some kind of wealth distribution between the parties."

47. In the Court of Appeal decision of *Q.R. v. S.T.* [2016] IECA 421 Irvine J. also discussed all income being available for the purposes of making proper provision:-

"70. As to the assets to which the court must have regard when determining proper provision, the authorities make clear that all property and income, no matter how it was acquired is available for the purposes of making proper provision. This is so regardless of whether any particular asset was acquired by one of the parties through inheritance, or as a result of their own endeavours prior to marriage. However, not all assets are to be treated in the same manner and the fact that an asset may have been acquired, in the aforementioned manner will be a factor to be taken into account by the court in the exercise of its discretion. If it is established that an asset had absolutely no connection with the other spouse, as might be said concerning many of the husband's assets in the present case, it might be unjust to take such an asset into account when determining proper provision. As Fennelly J. remarked in *D.T. v. C. T.* at p. 416:-

'This suggests that any property, whenever acquired, of either spouse and whenever and no matter how acquired, is, in principle, available for the purposes of the provision. Thus, property acquired by inheritance, by chance, or the exclusive labours of one spouse does not necessarily escape the net. I lay emphasis on the term, 'in principle.' On the other hand, not all such property is automatically available either. It is easy to think of cases where such a result would not be just. A short-lived marriage by a fortune hunter to a wealthy heiress comes to mind.'

71. In this regard, the date upon which an asset was acquired and the duration of the relationship are often relevant considerations."

48. Additionally in *Q.R. v. S.T.* Irvine J. in the Court of Appeal discussed the discretion of the trial judge in making an order for proper provision in divorce proceedings. She stated at para 43:-

"It has long been accepted that the trial judge enjoys a relatively broad discretion when it comes to making an order for proper provision as was stated by Keane C.J. in *DT v. CT* where at p. 365 of his judgment he described that discretion, albeit in the context of the 1996 Act, in the following manner:-

'...While section 20(2) of the act of 1996, lists in detail the factors to which the court is required to have regard in making the various financial orders provided for in part III of the said Act, it is obvious that the circumstances of individual cases will vary so widely that, ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances. While an appellate court will inevitably endeavor, so far as it can, to ensure consistency in the approach of trial judges, it is also bound to give reasonable latitude to the trial judge in the exercise of that discretion.'

44. It is nonetheless clear that the Court's discretion when making proper provision under either s. 16 of the 1995 Act or s. 20 of the 1996 Act is not a free one. The use of the word 'shall' in ss. 2 imposes upon the trial judge a mandatory obligation to have regard to each of the factors set out in sub. paras. (a) - (i) as was made clear by McGuinness J. in *MK v. JP (otherwise SK)* and *MB* [2001] 3 I.R. 371, where at pp. 383 to 384 she stated, concerning the Court's discretion under s. 20 of the 1996 Act, as follows:-

'The provisions of the Act of 1996 leave a considerable area of discretion to the court in making proper financial provision for spouses in divorce cases. This discretion, however, is not to be exercised at large. The statute lays down mandatory guidelines. The court must have regard to all the factors set out in s. 20, measuring their relevance and weight according to the facts of the individual case.'

45. McGuinness J. also explained the approach which she considered should be adopted by a trial judge when making proper provision; namely, that they should give reasons explaining the manner in which they exercised their discretion in light of the statutory guidelines. A bald pronouncement by a judge that they have had regard to the statutory factors is not satisfactory. On this subject, Denham J. in the course of her judgment in *D.T. v. C.T.*, concerning the pronouncement by the trial judge that he had considered the relevant statutory factors and had taken them into

account, stated that the 'better practice would be to consider all the circumstances and each particular factor *ad seriatim* and give reasons for their relative weights in the case'. Such an approach is, however, neither universal nor mandatory and there appears to be no authority to suggest that failure on the part of a trial judge to adopt such an approach necessarily warrants interference from an appellate court. Indeed at p. 386 of her judgment Denham J. observed that while it was better practice to consider more expressly the needs of the parties, a failure to do so would not necessarily warrant allowing the appeal by reason of that omission.

46. What is required of the trial judge under the section is that they 'have regard' to each of the factors specified in s. 16(2)(a) – (l). This statutory obligation, in my view, provides an invaluable guide or check list without which a trial judge might easily omit to consider matters of fundamental or critical importance to a just and fair result in terms of proper provision. The Court's obligation is to consider and reflect upon each of these statutory factors. The relevance and weight to be attached to each of them is a matter for the trial judge, who may decide that any one or more of such factors should not influence the overall provision to be made for the parties and dependant family members. A judge is quite entitled to consider a matter and then exclude it as immaterial in the exercise of his discretion. As was said by Murray J. in *D.T. v. C.T.* at p. 401, again in the context of s. 20 of the 1996 Act, 'Often many of the factors mentioned in s. 20 will have no pertinence to the particular case and, therefore, will not be taken into account'."

Factors to be considered pursuant to s.20 of the Family Law (Divorce) Act 1996.

49. Section 20 of the 1996 Act is of direct relevance to this case. It provides:-

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

(2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:

(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,

The parties in this case have three significant assets, as set out above. The appellant has a reliable income from his current employment of €393 per week and his farm income. The respondent is currently receiving job seeks allowance of €183 per week but accepted she has the capacity to earn an income as a carer, as she has in the past, or using the new skills she has developed through the JobPath programme.

50. Sub-section (b) provides:-

(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise),

The respondent has debt of €16,100 that needs to be repaid. The appellant is repaying a Credit Union loan he has almost redeemed. None of the properties have any debts secured against them. The parties' second daughter, who is considered dependent under the 1996 Act, is currently residing with the appellant and has her educational fees paid for by the appellant.

51. Sub-section (c) provides:-

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

The parties in the case enjoyed an average standard of living. The appellant has always worked full time. In the early years of the marriage the respondent did not work, but increased her hours of work in later years.

52. Sub-section (d) provides:-

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

The parties are middle-aged currently and resided together for the 23 years of the marriage.

53. Sub-section (e) provides:-

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

The respondent is suffering from kidney failure. She informed the court that she is awaiting an operation to address this. She stated that this has a somewhat limiting effect on her, as she must plan her journeys to ensure she is always near a restroom but is not significantly limited in this regard. The appellant states in his affidavit of welfare that the respondent has been diagnosed with narcissistic personality disorder. The respondent states in her affidavit of welfare that she is in good physical health, but has suffered from depression for many years.

54. Sub-section (f) provides:-

(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,

The appellant made a more significant financial contribution to the family during the years of the marriage, as is documented by the

bank statements provided to the court. It is clear from these that he paid for the household necessities. The respondent also worked in the later years of the marriage and stated that she used this income to provide for the children. Additionally, the wife worked in the home for the early part of the marriage rearing the couple's four children. Both parties contributed to the home by way of lump sums during the marriage. The appellant invested income from the sale of a site of land into the conversion of the home and the respondent invested income that was inherited into the decoration of the home. The appellant stated that he provided the respondent with €5,000 during the course of the marriage, but this is disputed. It is accepted by both parties that the appellant took out a loan of €15,000 to assist in matters regarding costs associated with the inheritance of The Wife's House.

55. Sub-section (g) provides:-

(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,

The respondent in the early years of the marriage worked within the home when the parties' children were young. She then took up part-time caring work outside the home and increased her hours in this activity as the children aged. As the wife actively engaged in the work force from the late 1990's, when the parties' children were still relatively young, it cannot be said that her position in the work force was significantly diminished by her work in the home.

56. Sub-section (h) provides:-

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

The respondent is currently in receipt of jobseekers allowance. The respondent during the course of the marriage received Domically Carers' Allowance for the care of the parties' daughter G. until she turned 18 and after that, received Carers' Allowance. The respondent was no longer entitled to this when she was no longer living with G. and ceased receipt of this payment in May 2014, 6 months after she left the family home.

57. Sub-section (i) provides:-

(i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it,

It was put to the respondent in cross-examination that she spent €15,282 that belonged to her daughter G. without permission. In cross-examination she denied this and later accepted that a payment for a similar amount made to a credit card account in her name, was a payment she had made. This Court is satisfied that the respondent used these monies for her own purposes.

58. In the recent Court of Appeal judgment of *Q.R. v. S.T.* [2016] IECA 421 Irvine J. set out the law in relation to the impact the conduct of a party; personal misconduct, financial misconduct or litigation misconduct, may have on the making of an order for proper provision. Irvine J., at para. 55 stated:-

"As to the type of personal conduct that might lead to the imposition of what has often been described as a financial penalty upon the offending party, the authorities advise that it is only conduct which can be described as 'obvious and gross' that should result in either the imposition of a financial penalty or the denial of provision. Keane C.J. in his judgment in *D.T. v. C.T.* endorsed the approach of Lord Denning MR, to this issue in *Wachtel*, a decision given at a time when there was no statutory equivalent in England to s. 20(2)(i) of the 1996 Act or s. 16(2)(i) of the 1995 Act. This is what he said at page 370:-

'In *Wachtel v. Wachtel* [1973] Fam. 72, Denning M.R. said at p. 90 that:-

'There will no doubt be a residue of cases where the conduct of one of the parties is... 'both obvious and gross', so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life ... in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place.'

56. As to whether significant infidelity should be considered conduct that is so obvious and gross such that it would be 'unjust to ignore' it for the purposes of s. 16(2)(i), there are a number of helpful decisions in this jurisdiction, albeit concerning the interpretation of s. 20 of the 1996 Act."

In relation to financial misconduct Irvine J. stated:-

"59. It is very clear from the authorities that in certain circumstances it would be unjust for a court, when determining proper provision under s. 16(2)(i), to fail to reflect the financial misconduct of one of the parties. This makes particular sense if that conduct led to the depletion or diminution of the assets available for consideration, as was the position in *H v. O.N.* In this case the husband's conduct had interfered with resources such that the court's ability make proper provision was undermined."

In this case, although the respondent's behaviour could certainly be considered misconduct, it could not be said to have "led to the depletion or diminution of the assets available for consideration", as these monies were those of G., not the parties'.

59. Sub-section (j) provides:-

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

Both spouses are currently living in separate dwellings adequate for their needs, that are unencumbered with debt.

60. Sub-section (k) provides:-

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

This does not arise.

61. Sub-section (l) provides:-

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

This does not arise.

Conclusions

62. The first issue to be considered is the valuation of the properties which are owned by the parties. When considering the valuation of The Husband's House, the court has had regard to the following factors: the difficulty with the planning permission concerning the second floor extension and the impact that this has on the valuation of the property; the location of the property and the difficulty in selling large properties in rural areas. Taking account of these matters, I consider the proper valuation of The Husband's House to be €130,000. This value is reached in particular having regard to the planning difficulty, the comparator properties referred to by both auctioneers and it takes account of the increase in property values generally throughout the country.

63. The second property is The Farm there are a number of issues to be assessed in valuing this property. Firstly, the variation in sale prices obtained for agricultural land, which is largely dependent upon the purpose for which it is being sold. Secondly, whether the land would be seen as being a desirable site for the plantation of forestry and finally, whether the quality of the land could potentially lead to it yielding a significant price, as an attractive prospect for a local farmer. I consider that the valuation of €98,000 placed on the site by the wife's auctioneer, which values the land at €5,000 per acre, is too high. It does not take account of the fact that there are ESB lines running through the property, nor that there are houses close by on adjacent sites, which would adversely impact on the use of the site for forestry. Taking these matters into account, I am of opinion that the valuation placed by the husband's auctioneer of circa €3,571 per acre to be more accurate. Accordingly, I value The Farm at €70,000.

64. In relation to the valuation of The Wife's House, it was agreed by both auctioneers that this is an older property, to which substantial improvements have been made, including installing double glazed windows, dry lining the interior of the property and replacing doors on exterior sheds. It was agreed that the property is in good condition. It is a three bedroomed detached property, albeit the third bedroom has to be accessed through another bedroom. I have had regard to the fact that a four bedroomed semi-detached property, which is nearby, recently sold for €55,000. Having regard to that and to the increase in house prices generally, I would value this property at €65,000.

65. Considering the foregoing in conjunction with the statutory factors to be considered under s.20 of the 1996 Act, which have been considered earlier in this judgment, this Court has decided that the Circuit Court order failed to make proper provision for the appellant and the dependent child G.. Considering the needs of G. and the need to provide accommodation into the future for G., this Court finds that the accommodation needs of the parties and G. are best served if the current accommodation provisions remain in place. The appellant therefore is entitled to retain possession of the property referred to in this judgment as "The Husband's House" and the respondent is entitled to retain possession of the property referred to in this judgment as "The Wife's House".

66. The Farm is a significant issue in this case and considering the case law on the matter, namely *D.T. v. C.T.* and *Y.G. v. N.G.*, and more recently *C.C. v. N.C.* and *Q.R. v. S.T.*, this Court acknowledges that in divorce proceedings all property, no matter how it has come within the reach of the parties, is available to be considered in the making of an order for proper provision. However the court has had consideration to the special place of inherited property when the distribution of such property is not necessary for the making of proper provision, but could more correctly be considered the redistribution of wealth as was set out in *Y.G. v. N.G.* and *C.C. v. N.C.*.

67. Considering this, in addition to the decision in *C.C. v. N.C.*, where it was considered that the sale of the property would remove the husband's livelihood, although this is not so in this case, as the appellant works independently of the farm and the farm runs at a loss, this Court has decided that The Farm should remain in the possession of the appellant. The court is of the opinion that the respondent, as a relatively young woman with experience in the caring industry, who has the ability to travel for work and with the new skills she has acquired, she is in a position to support herself into the future.

68. Considering the immediate needs of the respondent, being the need for surgery and the recuperation time that this may require, the court finds that to be properly provided for, this time must be taken into account in making proper provision. To cater for this state of affairs, the Court directs that the appellant is to pay the respondent the sum of €10,000.

69. Additionally, considering that the appellant worked full-time outside the home for the duration of the marriage, an area where the respondent may be considered to be at a disadvantage in the future, will be in relation to receipt of the contributory old age pension, as she has not paid as much PAYE as the appellant over the course of her working life, due to approximately 10 years when she ceased working, to care for the parties' children. To account for this deficiency the court awards the respondent €15,000

70. Thus the total sum of €25,000 is to be paid to the respondent (wife) by the appellant (husband). The Court is of the opinion that the appellant is in a position to source these monies by way of the sale of property, or through a loan. The sum of €15,000 previously taken out as a loan by him, which with interest amounts to €19,000, has been considered in the division of this property. It is considered that these monies can be viewed as a factor in the respondent being properly provided for by the appellant, as these monies enabled her to become comfortable in her current accommodation. The court acknowledges that both parties made significant contributions to the home, both financially and in the care for the children of the marriage. The question to be answered on the dissolution of a marriage is not to account for each payment made by each party and the financial value that that equates to on divorce, but to ensure that both parties are properly provided for into the future. Accordingly, I allow the appellant's appeal and I direct that proper provision be made for the parties in the manner outlined in this judgment. I affirm the grant of the decree of divorce to the parties as made by His Honour Judge Aylmer in the Circuit Court. I further affirm the order made by the learned Circuit Court Judge pursuant to s. 18(10) of the 1996 Act, as appearing at paragraph 7 of the Circuit Court Order.