

**THE HIGH COURT  
WESTERN CIRCUIT COUNTY OF GALWAY**

**F 14703  
2005 5 CA**

**IN THE MATTER OF  
THE FAMILY LAW (DIVORCE) ACT, 1996  
THE FAMILY LAW ACT, 1995 AND  
THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989**

**BETWEEN**

**R. G.**

**APPLICANT**

**AND  
C. G.**

**RESPONDENT**

**Judgment of Ms. Justice Finlay Geoghegan delivered on the 8th day of February 2005.**

1. The applicant and the respondent whom I will hereafter refer to as the husband and the wife were married on the 20th March, 1982.

2. The husband and wife have three children of the marriage; MC, a daughter born on the 24th August, 1983; W a son born on the 15th January, 1986 and I a daughter born on the 14th September, 1989.

3. The husband and wife separated in December 1998 due to irreconcilable differences. In 1998, the wife, as applicant seeking a decree of judicial separation and ancillary relief, commenced proceedings in the High Court. On the 24th October, 2000 a decree of judicial separation was granted to the husband and wife pursuant to s. 2(1)(f) of the Judicial Separation and Family Law Reform Act, 1989. A hearing took place before the High Court in relation to the claims for ancillary relief. After seven or eight days, following negotiations the husband and wife agreed to compromise their respective claims for ancillary relief upon the terms set out in a written agreement dated the 7th November, 2000 ("the Consent") and signed by each and witnessed by their respective solicitors.

4. On the following day the 8th November, 2000 an order, on consent was made by the High Court ("the Consent Order") which records that counsel for the husband and wife informed the court that "a settlement has been reached on the terms of a Consent now reduced to writing" and then by consent the court made the following orders:-

"1. In the terms of the said Consent:- and

2. That the said Consent be received and be filed with and derived to be part of this order.

*AND* the court *DOETH NOTE* the undertaking set forth in the said Consent *AND* by consent the court doth make no order as to cost".

5. It is unnecessary at this stage to recite in full the Consent. It is sufficient to record that it provides for the making of orders pursuant to specific sections of the Family Law Act, 1995, The Guardianship of Infants Act, 1964 and records several agreements and undertakings of the parties. Paragraph (F) provides:-

"(F) The parties hereto acknowledge that the within terms constitute a full and final settlement of all matters arising pursuant to the Judicial Separation and Family Law Reform Act, 1989, the Family Law Act, 1995 and any amending legislation and further acknowledge that neither parties shall be entitled to issue proceedings one against the other save for a decree of Divorce pursuant to the Family Law (Divorce) Act, 1996. The parties in particular acknowledge that the within terms constitute "proper provision" within the meaning of the Family Law (Divorce) Act, 1996 and that neither party shall be entitled to make a claim one against the other save for periodic maintenance."

6. On the 20th May, 2003, the husband issued a Family Law Civil Bill seeking a decree of divorce pursuant to s. 5 of the Family Law (Divorce) Act, 1996. The ground relied upon is that the parties have separated for in excess of four out of the five years preceding the Family Law Civil Bill and that there is no reasonable prospect of reconciliation between them. The only other relief sought is an order pursuant to s. 18(10) of the Act of 1996. Express reference is made to the Consent Order and it is expressly pleaded that such order deals with all matters at issue between the parties and provides for the security of the wife and children of the marriage and pleads that there are no further or other orders which need to be made in respect of the said matters.

7. The wife in her defence and counterclaim denies the entitlement to a decree of divorce on the grounds that proper provision does not exist for her and the children of the marriage. It is also denied that the Consent Order deals with all matters at issue between the parties or provides security for the wife and children. Specific claims were also made on behalf of the wife for ancillary orders.

8. The circuit proceedings were heard and determined by the Circuit Judge on the 28th September, 2004. He granted a decree of divorce and made certain ancillary orders primarily in favour of the wife. Both parties served notices of appeal. Each of the notices of appeal purports to appeal against the whole of the judgment of the Circuit Court given on the 28th September, 2004 "save and except that part of the judgment which granted the parties herein a decree of divorce under s. 5(1) of the Family Law (Divorce) Act, 1996". Each of the parties contends, albeit for completely different reasons, that the ancillary orders made by the Circuit Judge do not constitute proper provision for the husband and wife and children of the marriage. Counsel for both parties were in agreement at the commencement of the hearing before me that the logic of their respective positions was that as each contended that proper provision did not exist for the parties and the children of the marriage within the meaning of s. 5(1)(c) of the Act of 1996 that the Circuit Judge did not have jurisdiction to grant the decree of divorce. Accordingly, it necessarily followed that the substance of the appeal of each was against the entire of the judgment and order of the Circuit Judge. I permitted the appeals to proceed on that basis.

9. The appeal to the High Court is a full rehearing of the husbands claim for a decree of divorce and ancillary order claimed and the wife's counter claim for ancillary orders.

**Jurisdiction of the Courts**

10. The jurisdiction of the court to grant a decree of divorce is conferred by Article 41.3.2 of the Constitution, which provides:

A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that

- i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- 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.

11. Further statutory provision is made by s. 5 of the Family Law (Divorce) Act, 1996 which provides:

5.—(1) Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that—

- (a) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- (b) there is no reasonable prospect of a reconciliation between the spouses, and
- (c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family,

the court may, in exercise of the jurisdiction conferred by Article 41.3.2° of the Constitution, grant a decree of divorce in respect of the marriage concerned.

(2) Upon the grant of a decree of divorce, the court may, where appropriate, give such directions under section 11 of the Act of 1964 as it considers proper regarding the welfare (within the meaning of that Act), custody of, or right of access to, any dependent member of the family concerned who is an infant (within the meaning of that Act) as if an application had been made to it in that behalf under that section.

12. No issue arises in these proceedings in relation to the welfare, custody or right of access in relation to the children of the marriage. An order pursuant to s. 11 of the Act of 1964 forms part of the Consent Order made on the 8th November, 2000 and no variation of it is sought.

13. On the evidence given on the appeal I find that the parties have lived apart for at least four years during the five years preceding the commencement of the Circuit Court proceedings and that there is no reasonable prospect of a reconciliation between them. The only issue is what, if any, ancillary orders should now be made in order that the court is satisfied that proper provision exists or will be made for the husband, wife, and children of the marriage.

14. The existence of the Consent and the Consent Order gives rise to a preliminary issue as to the jurisdiction of this court now to make ancillary orders pursuant to the provisions of Part III of the Act of 1996 and the extent if any to which the court should have regard to the Consent Order and Consent and in particular para. (F) thereof in determining what is proper provision for the husband and wife and children of the marriage.

15. The primary contention made on behalf of the husband was that the wife should not now be permitted to depart from the agreement reached in 2000 as reflected in the Consent and that the court should not now make any additional provision for the wife by way of ancillary order or otherwise unless the court forms the view that there is a manifest want of proper provision for the wife under the terms of the Consent Order or other good reason such as the non-implementation of same by the husband can be shown.

16. The primary submission on behalf of the wife was that the court should have no regard to the Consent or the Consent Order.

17. In addition, counsel for each of the parties made in the alternative more nuanced submissions for what might be termed intermediate positions, which I have considered, and which are reflected in the conclusions which I have reached. Counsel also referred me to a number of authorities, which I have considered and to some of which I refer below.

## Conclusions

18. The jurisdiction of the court to grant a decree of divorce only arises inter alia where the court considers proper provision exists or will be made for the spouses and children of either. This follows from the express wording of Article 41.3.2 and in particular “where, but only where it is satisfied” in the opening phrase of that Article and s. 5(1) of the Act of 1996. These provisions require the court to exercise its judgment to what constitutes proper provision. The obligation on the court to make such determination cannot be removed either by an acknowledgement or agreement such as that contained in para. (F) set out above of the Consent between the parties herein.

19. The time for the assessment of the assets of the husband and wife for the purpose of exercising such judgment is the date of the divorce hearing (in this case the current appeal hearing) as determined by the Supreme Court in *D.T. v. C.T.* [2002] 3 IR 334. This also appears to be the date at which the court must be satisfied that proper provision exists or will be made for the spouses and children.

20. I reject the submission made on behalf of the wife that the court should have no regard to the Consent. For the reasons already stated, the court only has jurisdiction to grant a decree of divorce if it is satisfied that proper provision exists or will be made for the spouses and children. The Act of 1996 gives the Court the express power to make ancillary orders in order that it be satisfied such proper provision exist. Section 20(1) of the Act of 1996 obliges the court in deciding whether to make an ancillary order or orders or in determining the provisions of such orders to “ensure that such provisions as the court considers proper having regard to the circumstances exist or will be made for the spouses . . .”.

21. The principal argument of counsel for the wife was that s. 20(3) of the Act of 1996 obliges a court in deciding whether to make ancillary orders or in determining their provisions to have regard to the terms of any separation agreement which is still in force. It is common case that the Consent is not a separation agreement. Counsel submitted that the court should construe the intention of the Oireachtas in expressly referring to separation agreements in s. 20(3) as implicitly precluding the court from having regard to a previous order such as the Consent Order of 8th November, 2000 i.e. an order providing for ancillary reliefs in judicial separation proceedings made upon the basis of and incorporating a written consent of the parties.

22. I have concluded that s. 20 of the Act of 1996 does not contain any such implicit prohibition. On the contrary the court is obliged to have regard to all the circumstances of the parties and their children. Such circumstances on the facts of this case include the Consent which was received and filed and incorporated into the Consent Order and I am satisfied that s. 20 of the Act of 1996 requires this Court to have regard to it.

23. The submission made on behalf of the husband relied firstly upon the principle of certainty and finality in litigation as applied to family and divorce proceedings by the Supreme Court in *D.T. v. C.T.* following the earlier observation of Denham J.

24. In *F. v. F. (Judicial Separation)* [1995] 2 IR 354. In *D.T. v. C.T.* Keane C.J. at p. 364 stated:

"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. (Judicial Separation)* [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 favoured 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."

25. It appears that in accordance with the above save as precluded from doing so by the Constitution and the relevant statutes that the court should in family proceedings seek to uphold the principle of certainty and finality of litigation and the avoidance of further litigation.

26. Counsel for the husband also submitted that the court should not permit parties to an agreement such as that in the Consent to depart from it and that such an agreement properly and fairly arrived at with the benefit of competent legal advice should be upheld by the court unless there are good and substantial grounds for concluding that some injustice would be done by holding the parties to it. He referred me to the decision of Munby J. in *X. v. X.* [2002] 1 FLR 508 and the cases referred to therein.

27. I have carefully considered the decision of Munby J. in *X. v. X.*, which is helpful, and a thorough analysis of the approach of the English courts to agreements reached between parties to divorce proceedings in the context of ss. 23 and 25 of the Matrimonial Causes Act, 1973.

28. Prior to considering the principles referred to by Munby J. it is necessary to consider the nature of the Consent and how it should now be regarded by the court. Counsel for the wife submitted that while the Consent was an agreement in writing between the parties once it was received and filed and incorporated into a court order it thereafter derives its legal status from the court order. This appears to be correct. However, that does not preclude the court from having regard to the fact that the terms of the Consent Order derive from an agreement negotiated between the parties with the benefit of legal advice.

29. It is necessary next to consider what was to be covered by the agreement. The terms of the Consent, and in particular para. (F) set out above and the Consent Order into which it is incorporated suggest that they were intended firstly in full and final settlement of all matters arising in the then extant judicial separation proceedings pursuant to the Judicial Separation and Family Law Reform Act, 1989 and the Family Law Act, 1995. Secondly, there is what is termed "an acknowledgment" that neither party should issue proceedings against each other save for a decree of divorce pursuant to the Family Law Divorce Act, 1996. Thirdly, there is then a further "acknowledgment" that the terms of the Consent constitute "proper provision" within the meaning of the Family Law Divorce Act, 1996 and fourthly, what appears to be a related agreement in relation to any proceedings under the Act of 1996 that neither party is to be entitled to make a claim against the other save for periodic maintenance.

30. The principles of certainty and finality of litigation contended for and the principles as explained and applied by Munby J. in *X. v. X.* [2002] 1 F.L.R. 508 in relation to the upholding of agreements made between parties and properly and fairly arrived at with competent legal advice are such that I am satisfied that this Court should have regard to the Consent Order and Consent as a full and final settlement (subject to any applications for variations permitted) of the then extant judicial separation proceedings under the Acts of 1989 and 1995.

31. It is unnecessary for this Court now to consider what I have described as the second part of para. (F) namely the preclusion against issuing proceedings other than a decree for divorce.

32. It is the last part of para. (F) which gives rise to most difficulty in the present proceedings. It provides:

"the parties in particular acknowledge that the within terms constitute "proper provision" within the meaning of the Family Law (Divorce) Act, 1996 and that neither party shall be entitled to make a claim one against the other save for periodic maintenance."

33. I have concluded that this Court in having regard to the Consent and Consent Order in this appeal should ignore both the acknowledgment and restriction on bringing claims in the above sentence.

34. Counsel for the husband, properly did not contend that para. (F) of the Consent should be construed as precluding the wife from making a claim for ancillary orders in the divorce proceedings. As stated by Munby J. in *X. v. X.* at para. [81]:

"A contract which purports to deprive the court of a jurisdiction which it would otherwise have is contrary to public policy. Thus, a spouse cannot validly agree, whether expressly or impliedly, not to apply for maintenance or other forms of ancillary relief. Such a stipulation is contrary to public policy and unenforceable: *Hyman v. Hyman* [1929] AC 601, *Sutton v. Sutton* [1984] Ch 184 [1984] FLR 579 and *N. v. N. (Jurisdiction: Pre nuptial agreement)* [1999] 2 FLR 745. This rule remains, but can have no application in the present case where the agreement expressly contemplates the obtaining of the courts approval."

35. Insofar as the wife purported to agree not to apply for ancillary orders in any divorce proceedings, it is unenforceable in accordance with the above principles.

36. Counsel for the husband does however seek to rely on the acknowledgment of "proper provision". I have concluded that it would not be appropriate for this Court to take such acknowledgment into account on the facts of this case. This was an agreement negotiated in November 2000. At that time, whilst it can be said that divorce proceedings were contemplated they do not appear to have been imminent. This may have been because of the four year requirement in s. 5(1)(a) of the Act of 1996. On the evidence, the parties had only been living apart at that stage for a period of approximately two years.

37. The proper provision for the parties must exist at the date of the hearing of the application for the decree of divorce. Further, it must be based upon the value of the assets of the parties at that date and the circumstances as they then exist. The acknowledgment included in the Consent of 7th November, 2000 if it is to relate to a proper construction of the Act of 1996 must be considered to be an acknowledgment of potential proper provision at a future unknown date. What if divorce proceedings had not been brought for a period of 10 years? When so properly construed it appears too uncertain to be a matter which this Court should take into account.

38. In so concluding on the facts of this case, it is necessary to point out that the Consent of 7th November, 2000 appears to me to be quite different in nature and in character to an agreement that is entered into between parties with appropriate legal advice either during divorce proceedings already commenced or in contemplation of proximate divorce proceedings. Section 8(2) of the Act of 1996 expressly enables a court to adjourn proceedings to enable attempts to be made by spouses to reach agreement on some or all of the terms of the proposed divorce. Many if not all of the principles set out by Munby J. in *X. v. X.* [2002] 1 F.L.R. 508 in relation to upholding agreements between parties may well properly apply in relation to the proper approach of a court in the making of financial ancillary orders under the Act of 1996 following an agreement reached between parties either in the course of or in contemplation of proximate divorce proceedings. For the reasons already stated on the facts of this case insofar as the Consent Order includes the acknowledgement of proper provision for the purposes of the Act of 1996 it is not an agreement either reached in the course of or in contemplation of proximate divorce proceedings.

39. In summary therefore it appears appropriate that the court should have regard to the Consent Order of 8th November, 2000 as an order made by consent of the parties pursuant to an agreement entered into by them on 7th November, 2000 (each with the benefit of appropriate legal advice) in full and final settlement of their respective claims for ancillary relief under the Acts of 1989 and 1995 in the judicial separation proceedings. However, the court must also have regard to the fact that it was an agreement based upon the then assets of the parties (including in respect of certain assets envisaged potential development and increase in value). The court should also have regard to the similarity of the provisions in s. 20 of the Act of 1989 and s. 16 of the Act of 1995 with that of s. 20 of the Act of 1996.

40. It also appears proper that the court should have regard as part of the circumstances which now exist to the implementation by the parties of the provisions of the Consent Order of 8th November, 2000 and the liabilities incurred by the husband to make the payments and transfers of properties provided therein.

41. Finally, it is also important to note that the Consent Order does not reflect an intention by the parties in 2000 to achieve a "clean break" financially even in so far as permitted under Irish law. On the contrary, it indicates an intention that the husband should continue indefinitely to support the wife with periodical payments for her benefit and separate payments in respect of the dependent children. In addition, the house in which the wife was to live was to be purchased in the name of the husband and held in trust for the wife with other consequential provisions.

42. The court must however now assess whether proper provision exists for the parties and the three dependant children of the marriage at the date of the hearing of the appeal, and the necessity of any ancillary orders and if so the terms of same in accordance with s. 20 of the Act of 1996 when construed in accordance with the case law of these courts and in particular the decisions of the Supreme Court to which I have been referred. The court should only make an ancillary order if it considers it would be in the interests of justice to do so.

43. It follows from the above that insofar as the submissions made on behalf of the husband were to the effect that by reason of the Consent of 8th November, 2000 as incorporated into the Consent Order that the wife has to establish a material change of circumstances since 2000 to obtain ancillary financial orders under the Act of 1996 that I reject same.

#### **Findings of fact**

44. On the evidence given, I have reached the following conclusions on the facts. The husband has a professional qualification and has practised in his profession since the time of his marriage in 1982. He has established a firm and a limited company through which he conducts his professional practice. The practice is largely dependent on his personal skills. There are also extraneous factors relating to changes, in particular in litigation that may to some extent affect the nature of his practice. For the year ended 2002 the income available to him from his practice before tax was in the order of €138,000. For the year ended 2003 it was €230,000.

45. The husband for a number of years now has also been involved in property development. He appears to have been successful and acquired considerable knowledge and skills in relation to the identification of and carrying through of successful property development. One major development at X has been particularly successful. This was at an early stage in November 2000. I have concluded that it has been significantly more profitable than anticipated by either party in November 2000. I have also concluded that in general the property owned by both the husband and the wife has increased in value between November 2000 and December 2004 to a greater extent than was in contemplation of the parties in 2000.

46. At the date of her marriage, the wife had a degree that permitted her to work in a professional area. A statutory authority employed her. She continued to work after her marriage and after the birth of her children.

47. In 1989, the husband, wife, and children moved to a country area. The wife agreed to help to look after an uncle of the husband from whom he later inherited what was the family home at the time of the break up of the marriage. During this period, the couple were not in a strong financial position. The husband appears to have been working a three-day week. The wife gave up her permanent employment to look after the three children of the marriage who were then 6, 4 and 1½ and also supported the husband in the build up of his professional practice and assisted in looking after the uncle. The wife received a lump sum of approximately IR£3,000 on leaving employment that she contributed to the joint expenses.

48. Subsequently the wife opened a craft shop in a local town. She came from a family who were involved in both manufacturing and retail. She worked part-time in this and had a flexibility to look after the children. The income was low.

49. The wife subsequently sold shares she held in her own family's business and realised approximately IR£130,000. She used this partly to provide a deposit on one of the centre city properties with development potential. She transferred her interest in this property to the husband under the Consent Order.

50. Since the separation of the husband and wife, the three children have lived with the wife and spent some holidays and weekends with the husband. The two elder are at college and the third is in her second last year at school.

51. After the birth of the third child, the wife suffered from what she describes as a stress related illness. She suffered from depression for a period but happily is not now suffering from depression. She says she has to get some help from time to time and sees a counsellor periodically. The wife has done some work with both a brother and a sister over the past few years. The wife states she would like to work and I have concluded that as a matter of probability she will obtain work and will be able to create an income for herself in the near future. However I also find on the facts that by reason of the fact that she left employment in 1989 for the purposes of looking after the children of the marriage and contributing to the joint family life that she has been significantly reduced in her present earning capacity. She is not likely to return to her previous profession and more likely to work in a business environment

52. The husband is now 51 and the wife is 46.

53. The wife's current expenses including those associated with the three children living with her are in the order of €60,000 per annum. Her income, including the maintenance currently paid is in the order of €46,000 per annum. This includes deposit interest on sums received under the consent order of 8th November, 2000 of €8,000, rent from a seaside apartment owned of €4,000 and children's allowances of €1,500. The maintenance currently payable in respect of herself is €14,871 per annum and in respect of the children €18,284.

54. There is no dispute about the property owned by each party. The only dispute relates to the current value of it. Much of the property now owned by the husband has development potential. The planning position in relation to certain of the properties is uncertain. I appreciate the valuation of such properties is difficult but the evidence of the respective valuers is only of limited assistance as both I consider to have given valuations at the extreme of the probable range as suitable to their client. The conclusions that I have reached on the value of the properties are only intended as a mid position of a probable range of values to assist in an overall conclusion as to what constitutes proper provision.

55. I find the husband's assets (excluding the house in which the wife is now living) to be the following (with the present probable approximate values):-

1. The house in which he is living on 35 acres with some limited development potential near the road frontage. €800,000
2. Two adjoining centre city properties with development potential. €1.25m
3. A one-third interest in 5.3 acres adjacent to a town with a difficult planning history but with development potential. €600,000
4. A one third interest in approximately 7 acres adjacent to an existing development. This is zoned residential but unlikely to obtain planning permission until a certain road has been constructed. €1m

56. In addition to the above property, the husband has an interest in a large development, which is nearing completion. The evidence given on behalf of the husband, without the production of precise figures was to the effect that the probable distribution to the husband on completion of the development in approximately twelve months time would, nett of capital gains tax, aggregate €3.6m. The evidence given on behalf of the wife, based upon a general approach to probable margins in comparable developments was that distribution to the husband (prior to capital gains tax) should be in the order of €7.4m. On this issue, the evidence given by and on behalf of the husband appears to me more convincing. However, I have concluded that the estimate is probably on the conservative side. The likely distribution to the husband will be in approximately twelve months time. I understood from the evidence that some of the money would become available to him at an earlier date. Against this, he has liabilities to the bank that were estimated at €2.11m. This sum includes the outstanding balance on a mortgage taken out on the house in which the wife now lives which was purchased by the husband pursuant to the Consent Order.

57. It is accepted on behalf of the husband that any proper provision should include a direction that the husband transfer to the wife the house in which she now lives free of incumbrances within approximately nine months from the date of the hearing of the appeal. Hence, I propose considering that house as an asset of the wife for the purposes of considering additional ancillary orders.

58. I find the wife's assets to include the following:

1. A sea-side three bedroomed apartment €400,000
2. The house in which she is now living €1.1m (upon completion of a transfer pursuant to an order which I propose making).
3. A deposit account in a bank €310,000

59. Pursuant to the Consent and Consent Order, the husband paid to the wife in total €890,000. Out of that sum, the wife gave evidence that she paid approximately €247,000 in costs in connection with the first set of proceedings. In addition, that she spent approximately €80,000 on the house in which she now lives. Taking into account the €310,000 now in the bank this leaves a sum of €253,000 that she received and which is not directly accounted for. Her evidence was to the effect that the maintenance payments under the Consent Order were not meeting her expenses and that she was eating into the lump sum at a rate of approximately €20,000 - €23,000 per annum. In addition, she bought a car at approximately €20,000 per annum. Even taking into account those payments her evidence still leaves a sum of approximately €150,000 unaccounted for. She gave evidence of some trading in shares on cross examination but without any particulars of the shares now held. On balance I have concluded that whilst, there may be some additional expenditure over the four-year period, which she did not recall she has or ought to have as a result of the payments made to her by the husband pursuant to the Consent Order additional assets of approximately €120,000.

60. I have concluded that in considering the capital assets of the parties I should not attribute any value of the business of the husband. Undoubtedly, it is relevant to his earning potential but I have concluded that its capital value is significantly dependent upon the earning ability of the husband and better to have regard to it in considering the appropriate maintenance payable rather

than any transfer of capital assets.

### Conclusions

61. I have concluded that it is necessary to make certain ancillary orders to ensure that proper provision exists for the parties and three dependant children and further that it is in the interests of justice to make the orders set out below. In reaching this conclusion, I have had regard to the above legal principles, the matters as set out in s. 20 of the Act of 1996 and all the circumstances in relation to this family.

62. In concluding that a lump sum should now be payable by the husband and the amount of same I have had regard inter alia to the fact that this appears to be a case in the category of what the courts have described as "ample resources"; the terms of settlement of the judicial separation proceedings; the implementation of the Consent Order made pursuant to that agreement; the increase in property values since 2000 and the success of the husband's development at X in each instance beyond what I have concluded to have been in the contemplation of either party in 2000.

63. The submissions of both parties was to the effect that continuing maintenance payments were appropriate on the facts of this case and I have concluded that such payments should have a bearing on the division of the capital assets. This distinguishes this case on the facts from the decision of the Supreme Court in *D.T. v. C.T.* [2002] 3 IR 334 and to warrant a different approach to any suggested division therein which would give the wife approximately 30% to 40% of the total assets of the husband and wife.

64. In relation to the amount of maintenance I have had particular regard to the amounts agreed between the parties in settlement of the judicial separation proceedings in 2000; the absence of any indexation thereto; the increase in the consumer price index of nearly 14% since that date; the significant increase in the husband's earnings in 2003 over 2002; the wife's current expenses and income and potential though diminished future earning capacity.

65. In relation to the children, the husband has undertaken certain financial obligations in respect of their education under the Consent Order. In addition the husband accepts that for so long as each is a dependent child within the meaning of the Act of 1996 and is living with the wife he should continue to make a periodical payment to the wife in respect of that child to be increased in accordance with consumer price index. The wife in evidence suggested that the payments might be made directly to the eldest. It should be a matter for the wife as to whether such payment is made to her or to any child directly.

66. It now appears appropriate that the husband should cease to be responsible for maintaining a V.H.I. policy for the wife.

67. Accordingly, I will grant the Decree of Divorce and make the following orders:

1. An order pursuant to s. 13(1)(a)(i) of the Act of 1996 that the husband pay to the wife a monthly sum for her own benefit of €2000 to be increased hereafter in accordance with the consumer price index.
2. An order pursuant to s. 13(1)(a)(ii) of the Act of 1996 that the husband shall make to the wife each month the payment of a sum of €600 in respect of each of the three children for so long as s/he remains a dependent child within the meaning of the Act and is living at home unless the wife consents in writing that such payment should be made directly to the relevant child. Such payments to be increased hereafter in accordance with consumer price index.
3. The husband shall cease to be responsible for V.H.I. insurance in respect of the wife. The husband shall continue to be responsible for maintaining V.H.I. insurance in respect of the three dependent children.
4. An order pursuant to s. 14(1)(a) that the husband transfer to the wife, free of encumbrances, on or before the 1st of October, 2005 the full legal and beneficial interest in the house in which she is living (to be identified by name and address in the order herein).
5. An order pursuant to s. 14(1)(a) that the husband transfer to the wife on or before the 1st December, 2005 the sum of €400,000.
6. An order pursuant to s. 14(6) of the Act of 1996 that each party bear their own costs in connection with the transfer of the house in which the wife is now living.
7. An order pursuant to s. 26(1)(c) of the Act of 1996 discharging the order made on the 8th November, 2000 pursuant to s. 8 of the Act of 1995 for the payment by the husband of periodic sums to the wife in respect of her self and the three children and the payment of annual VHI premium in respect of the wife.
8. An order pursuant to s. 26(1)(c) of the Act of 1996 discharging so much of the order made on the 8th November, 2000 pursuant to s. 9(1)(b) of the Act of 1995 as requires the husband to continue to hold in trust for the wife the house in which she is now living. Such discharge to take effect from the date upon which the husband transfers the said property to the wife pursuant to the orders now made in these proceedings.

68. It is my intention that in addition the wife be provided with security for the continuation of the periodical payments referred to above (or any variation thereof) after the death of the husband or a lump sum at that time in lieu thereof. I raised this issue in the course of the hearing. The parties are aware that I am considering making an order under s. 16(1)(i) in relation to the taking out of a life policy by the husband and the assigning of the benefit thereof to the wife. I have indicated that I will give the parties an opportunity after the delivery of this judgment to consider the appropriate form of security, including the possibility of securing such payments against the estate of the husband and will accordingly defer any decision on the application for an order under s. 18(10) of the Act of 1996 until this issue is determined.

69. In the light of the above lump sum to be paid by the husband I do not propose making any order for costs in either the Circuit Court or in the High Court.

### Addendum of 9th March 2005.

70. Having regard to the submissions by counsel of behalf of the parties as to the appropriate security to be given by the husband for the payments ordered herein I determine that the orders set out at paragraphs 1 and 2 above should be made pursuant to s. 13(1)(b) of the Act of 1996 rather than s. 13(1)(a). Further that such payments should be secured by the husband creating a first registered charge over certain properties identified by him as potentially available unencumbered and that subject to the completion and registration of such charge that an order be made pursuant to s. 18(10) of the Act of 1996 that neither spouse be entitled on the

death of the other to apply for an order under that section.