

THE HIGH COURT**RECORD NO. 2004 No. 43 M****FAMILY LAW****IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989****AND IN THE MATTER OF THE FAMILY LAW ACT, 1995****BETWEEN****M. L.****APPLICANT****AND****S. L.****RESPONDENT****AND****THE HIGH COURT****RECORD NO. 2007 No.23 M****IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996****BETWEEN****S. L.****APPLICANT****AND****M. L.****RESPONDENT****Judgment of Mr. Justice Sheehan delivered the 16th day of October, 2007.**

1. The wife instituted proceedings in June, 2004 for a decree of judicial separation and various ancillary reliefs pursuant to the Judicial Separation and Family Law Reform Act, 1989 and the Family Law Act, 1995, in June, 2004, and the husband instituted proceedings in June, 2007 for a decree of divorce pursuant to the Family Law (Divorce) Act, 1996.

2. The parties have agreed that this judgment should be given pursuant to the Family Law (Divorce) Act, 1996 and in it the parties will be referred to as the husband and wife.

3. Background

3.1 The husband and the wife are from the same town in the south of Ireland and were married to one another in the Roman Catholic Church on 19th day of May, 1984. They have four children D. aged 22, M. aged 20, E. aged 18, and K. aged 15.

3.2 The eldest child is studying architecture and has two years to complete his studies. The second child M. was in his second year at University but did not sit his end of year exams in May of this year due to illness. The third child and only daughter has just completed her leaving certificate and is due to start third level education. The youngest son K. is still at secondary school.

3.3 While the husband meets all the educational expenses of the children the wife also makes a contribution to their upkeep and it seems that the children now spend about half of their time with the wife.

3.4 The husband left school at eighteen years of age and started work on building sites as a carpenter. He started his own business as a subcontractor when he was twenty years old and at twenty-one purchased the site for what was to be the first family home. The purchase price was funded by the husband from his savings and the sale of a car and he continued to work in Dublin while building the house in his home town at the same time. The first mortgage was less than 50% of the value of the home which was completed prior to the marriage in 1984. The wife assisted in its decoration and was working full time in the post office at the time. In late 1985 two sites behind the family home were purchased by the husband and the wife and subsequently planning permission was obtained for three houses which the husband built.

3.5 The husband and the wife entered into a partnership with a third party in 1989 when a 22 house development scheme was completed and sold. Further lands were purchased by the partnership which then ceased and the husband and wife set up a building company, which is now the principal asset in this case. The wife ceased to be a director of this company a number of years ago. From 1989 this company was involved in purchasing and developing sites and acquiring and retaining various investment properties. In 1991 the husband and wife moved into a substantial new family home. Earlier that year a thirteen house development was commenced with one house being retained by the husband and the wife.

3.6 In May, 1992 a site adjacent to the family home was purchased and in 1993 an investment property was purchased. In 1995 a further 22 house development was commenced and later that year a further eight house development was commenced. 3.7 In 1996 a substantial development was commenced which involved the building of *circa* 100 houses.

3.8 That same year a public house was purchased which is now leased by the building company and a site was bought which has not yet been developed. Subsequently the husband acquired 45% of business which he holds through a private company.

3.9 Since 1999 the following assets were acquired by the husband.

1. Apartment.
2. A Public House, Restaurant and Night Club – April, 1999.
3. A second Public House and Restaurant - 2000.
4. The husband built his own family home on a site previously purchased.

3.10 Major difficulties first arose in the marriage as a result of the wife's adulterous relationship with M. in 1987. Following discussions between the husband and the wife and assurances given by her, the husband and wife were reconciled. Family life appears to have progressed normally for the next ten years with the husband and the wife continuing to work. A housekeeper was employed. The

business flourished and the family moved to a substantial new home. However the wife became involved again with M. in 1997 and the husband became aware of this in December, 1998 shortly before a family holiday was due to take place. In January, 1999 the wife went to live in a town about eight miles away and the relationship with M. continued. The wife returned to the family home in August, 1999. The husband and wife subsequently went for counselling and the husband left the family home in 2001. The husband and wife have been living apart since that time and as both parties accept there is no reasonable prospect of reconciliation it remains to be decided as to what is proper provision for the spouses and the dependent children.

4. The Assets

4.1 The assets in this case are set out in the report of the wife's accountants at p. 3 of their report:-

	Schedule	Wife	Husband	Total
A.	Property	€927,500	€1,635,386	€2,562,886
B.	Private Companies			€11,236,562
C.	Pensions			€731,759
D.	Loans Receivable			€200,691
E.	Quoted Investments			€12,711
F.	Cash/Misc			€86,787.00
G.	Bankdraft/Loans			(€165,839)
Total		€927,500	€13,738,057	€14,665,557

The above schedule of net worth is before taking into account capital gains tax and costs of realisation. In addition to the above there is a sum of €82,000 which the husband and wife have put into savings accounts for the children and a further sum to be included in respect of the wife's pension who, on reaching the age of 60, will be entitled to a sum of €5,669.28 per year plus a lump sum of €17,007.48.

4.2 Leaving aside the wife's pension and the sum of €82,000 in savings, the net value of the assets after CGT/Realisation costs was according to the wife's accountant, just under twelve million euro. A considerable amount of court time was taken up with the assets and two valuations were questioned. One related to a site where the planning position was unclear. The other matter related to the value of the company which owns the Public House, Restaurant and Night Club because the nightclub turnover had not been disclosed. The Court was urged to attach a greater value to these assets.

4.3 The Court has considered the submissions made on behalf of the husband and on behalf of the wife. The Court notes that the valuation of the Public House, Restaurant and Night Club was prepared by a reputable valuer and accepts that valuation. A chartered valuation surveyor and auctioneer gave evidence in relation to a site whose value was disputed by the wife. Originally he had valued this site at €650,000 on the basis of his then understanding of the planning position. During the course of his evidence he said he was unable to value the site as the planning position was unclear. The husband said he was prepared to accept a valuation of €140,000. As the valuer understandably could not commit himself to a valuation in the absence of clarity concerning planning the Court deems this site to be valued at €140,000.

4.4 For the sake of completeness the schedule of personal property at p. 4 of the report by the wife's accountant is set out hereunder.

	Agreed Valuation	Debt	Net
Family home	€800,000		Joint
Site beside family home	€165,000		Joint
Investment Property A	€155,000		Joint
Investment Property B	€145,000		Joint
Investment Property B	€210,000		Joint
Husbands Home	€570,000	€374,514	H
Investment Property D	€240,000		Joint
Investment Property E	€550,000	€117,600	H
Site adjacent to Investment	€140,000		Joint
Property C			

4.5 The figure for the husbands home was originally at €650k in the wife's accountants report but during the hearing the Court was told that €570k was now the agreed figure.

5. Section 20(2)(a) to (l) of the Family Law (Divorce) Act, 1996

5.1 The Court will now consider s. 20(2)(a) to (l) of the Family Law (Divorce) Act, 1996

"(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."

5.2 It is clear from the evidence that the husband has built a successful building company which is the principal asset in this case. The wife undoubtedly assisted and encouraged the husband in his development of this company. Part of the wife's evidence was directed at suggesting that this company in her husband's control is likely to prosper in the foreseeable future thereby increasing her husband's income. She also suggested that the Public House, Restaurant and Nightclub had a greater value than that put on it by the Auctioneers. It is clear that the husband is an able and successful businessman who in the right circumstances will continue to flourish. The wife equally is an able businesswoman who has successfully managed a number of investment properties. She indicated a desire to return to fulltime work and stated she would be interested in owning and managing the second Public House and Restaurant. She was engaged in fulltime employment until 2002 and had been promoted during her career there. Since that time apart from her work in the home and managing several investment properties she has not been engaged in other work. In the past two years the wife successfully completed a two year course in interior design. When questioned about this she said that this was really a hobby. However the wife would be well able to run a business in the area of property management, property sales, lettings, interior design and is undoubtedly capable of generating a good income for herself or alternatively obtaining decent employment in that area. It is clear from the evidence that the wife could be earning €50k in a relatively short space of time and if she goes into business could be

earning well in excess of €50k in a few years time. Again under this heading the court notes the husband's evidence that the construction company incurred losses of €150k in its latest year.

"(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)."

5.3 The Court does not propose to consider the possible remarriage of either party. The husband now has a girlfriend and they go on holidays together while the wife goes on holidays with an auctioneer friend who is separated. Neither party raised remarriage as being under consideration.

5.4 A considerable amount of court time was spent considering the wife's needs.

5.5 While she sought to maintain a requirement of €3,000 per week she conceded that she had sworn an incorrect affidavit of means. The best that could be said about her evidence concerning her financial needs was that it was confused. In response to the queries from the husband's solicitor, the wife's solicitor furnished a document suggesting the wife's annual spending was €109,325.00. Again this sum included a sum of €5,074 for education fees relating to the interior design course as well as a €5,000 watch for her son's 21st birthday as part of the €12,305 marked down for gifts. The Court finds that the true figure for the wife's needs is about €100k.

5.6 While the husband's personal needs were of a similar order, he has assumed full responsibility for the children's education and he is likely to have considerable ongoing expenses in this regard for at least another seven years. Three of the children are now likely to be away from home for a substantial period. The wife's maintenance costs in relation to them will decrease. The children seem to divide their time equally between the parents. Already two are university students living away from home and the daughter is likely to be in the same position this year.

5.7 In recent years the husband has developed two public houses. Between them these two businesses employ over 100 people and must have a significant impact on the local economy. While the wife's accountants evidence suggested that the husband is employing more people than he may need to it was clear from the husband's evidence that he is committed to the development of his own locality and has obligations and responsibilities to those who work in these businesses.

5.8 The wife will continue to have some maintenance costs in respect of the children.

"(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."

5.9 The family had and maintained a good standard of living before the husband and wife commenced living apart. However the evidence did not disclose an extravagant lifestyle. The children were clearly well provided for. A housekeeper was employed and both husband and wife continued to work hard. Obviously some of the husband's financial gains were used for the maintenance of a good standard of living as was the wife's income. It would appear that a considerable amount of the husband's financial gains were reinvested.

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

5.10 The husband is 48 years of age and the wife is 45 years of age. They lived together from 1984 to January, 1999 when the wife went to live in Enniscrone for eight months. The wife returned in August, 1999 and the parties then lived together until January, 2001 when the husband left the family home to live in alternative accommodation.

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

There was no evidence of any mental or physical disability of either spouse.

"(f) the contribution 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."

5.11 In this case the wife has always worked outside of the home and for much of the time a housekeeper was employed. The husband was always involved in the care and upbringing of the children and in a particular way from January, 1999 onwards. It is significant that notwithstanding the fact that the wife has not been working in recent years, that the children spent 50% of the time with the father.

5.12 The family finances were given a great start by the husband having built the family home at the time of the marriage. There is no doubt that the wife's income was also an important factor as it enabled them to save and invest in building land. While the wife played an important role in the development of the building company that role ceased to be of significance from December, 1998 when the parties effectively separated for eight months. The wife stated in evidence that she wanted 50% of the assets and this desire may have led her to exaggerate the role she actually played in the development of the construction company. The husband acknowledged that she did make a significant contribution but not as significant as she had claimed and on this matter the Court preferred the husband's evidence. Towards the end of her cross examination the wife alleged that the husband had received cash payment related to the night club. She said there were handed over to her husband by his accountant. The husband and the accountant both gave evidence on this issue and refuted the wife's allegation. On this issue the Court also preferred the evidence of the husband.

"(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."

5.13 As neither husband nor wife relinquished or forewent the opportunity of remunerative activity in order to look after the home or care for the family the Court does not consider this section to be relevant.

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

5.14 Again there was no evidence to suggest this consideration had relevance in the circumstances of this case.

"(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."

5.15 Counsel on behalf of the husband has urged the Court to take the wife's conduct into consideration. This essentially involves considering the wife's adulterous relationship with M. which went on for some time prior to it being brought to the husband's attention in 1987 and who then confronted his wife about the matter. On the evidence before the Court the wife signed an agreement in a solicitor's office to the effect that the relationship with M. was over. Following this the parties reconciled and the husband stated in evidence that at times he thought he was the happiest man in the country during the following ten years. However this happiness ended with the revelation in December, 1998 that the wife was again involved with M. According to the wife the relationship had recommenced in the summer of 1997. In January, 1999 the wife left the family home and the relationship with M. continued for some time. The husband was devastated by this revelation and the wife accepts that he was devastated. While the Court does not wish to underestimate the husband's suffering or that of the children the Court takes the view in the light of various reports opened to it and in particular the decision of the Supreme Court in *T. v. T.* [2002] 3 I.R. 334 that it should not take conduct into account. Based upon the meaning given in that judgment to the words "obvious and gross" the Court holds that the conduct of the wife in this case does not come within that meaning and accordingly the Court disregards her conduct.

"(j) the accommodation needs of either of the spouses."

5.16 No issue arises under this heading as the husband has provided a fine family home in which the wife resides and built ample alternative accommodation for himself and the children.

"(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."

5.17 Under this heading the Court notes the pension provisions of the wife as a result of her work and the pension provisions of the husband. The Court also notes that the husband has five life assurance policies to the value of €523,333.00 in place and a pension to the value of €731,759.00.

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

5.18 The Court notes the interests of the dependant children. It is clear that the husband has been paying for the educational and related accommodation needs of the two eldest children who are both at University. It is also accepted that the husband will continue to be responsible for the remaining educational requirements of the children.

6. Decision

6.1 In light of the above the Court must now endeavour to ensure that proper provision is made for the husband, the wife and the children.

As O'Higgins J. stated in *C. v. C.* [2005] IEHC 276:-

"The law provides very specific statutory guidance as to the factors to be taken into account by the court in deciding what constitutes proper provision in any given case. The widely different circumstances from one case to another however make it desirable that there be considerable discretion vested in the court of trial."

6.2 This has been recognised by the Supreme Court in the case of *T. v. T.* [2002] 3 I.R. 344 where that point was emphasised in the judgment of Keane C.J. where he said at p. 365:-

"...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."

6.3 In the present case there are strong reasons for awarding property and a lump sum to the wife in lieu of maintenance. In the course of his judgment in *T. v. T.* [2002] 3 I.R. 344 Keane C.J. stated at p. 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.* (Judicial Separation) [1995] 2 I.R. 354 certainty and finality can be as important in this as in other areas of law."

6.4 The first matter the court proposes to deal with are the two public houses. These premises have been purchased and developed by the husband and are responsible for employing over 100 people locally. It is in the interests of these two businesses and particularly in the interest of the employees that these businesses continue to be owned and run by the husband. It is also clear that the building company should stay with the husband though the court is aware that the order about to be made will probably impact significantly on that company.

6.5 The Court is satisfied that the husband will meet all the educational expenses of the children and their associated accommodation expenses. And in this regard, the court directs that the sum of €82,000 held in various savings accounts for the children be used by the husband for the maintenance and education of the children as he sees fit.

Accordingly the Court directs as follows:

(1) Transfer to the sole ownership of the wife the following properties -

1. Family home.
2. Site adjoining family home.
3. Investment property A.

4. Investment property B.
5. Investment property C.
6. Site adjacent to Investment property C.
7. Investment property D.

(2) The husband shall pay the wife the sum of €5,000 per annum per dependent child as long as that child continues in third level education and not beyond the age of 23 years. This maintenance to be index linked with the consumer price index.

(3) 70% of the value of the husband's pension be transferred to the wife.

(4) The husband to make a payment of 1.8 million euro to the wife by way of lump sum payment.

The Court directs that this payment be structured in the following way:

€600,000 to be paid by the 1st December, 2007;

And three further payments of €400,000 to be paid on the 1st March, 2008, the 1st June, 2008 and the 1st October, 2008.

(5) The Court will discuss the terms of the order with counsel and the manner in which the children's maintenance payments are to be secured if that is required.