THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 177

Court of Appeal Record No. 2018/176

UNAPPROVED **REDACTED**

Whelan J.
Noonan J.
Murray J.

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

BETWEEN:

N.O.

APPELLANT

- AND -

P.Q.

RESPONDENT

Judgment of Ms. Justice Máire Whelan delivered on the 22nd day of June 2021

Introduction

1. This is an appeal from the order of the High Court (Reynolds J.) of 28 June 2017, perfected on 10 October 2017 and amended pursuant to O. 28, r. 11 on 9 March 2018, granting a decree of judicial separation together with ancillary relief in respect of the parties.

2. This appeal is directed firstly toward the temporal aspect of two of the trial judge's orders made pursuant to s. 8 of the Family Law Act 1995 ("the 1995 Act"); that the husband

pay to the wife the sum of €800 per month by way of spousal maintenance for a period of four years, to commence on 26 July 2017, and that the husband continue to pay private health insurance for the wife for a period of four years. It is also directed toward the level of spousal maintenance ordered by the trial judge.

Background

3. The wife was born in 1965 and is approximately 55 years old. The husband was born in 1966 and is approximately 54 years old. Both parties come from farming backgrounds. The husband has been working as a farmer since he was a teenager. He completed his Intermediate Certificate and the Green Cert with Teagasc. The wife obtained her Leaving Certificate and after leaving school, she undertook a course in agricultural studies which she did not complete.

4. The parties were married in 1991. They have three children. Child A is approximately 24 years old. Child B is approximately 20 years old. Child C is approximately 19 years old. Two of the children have been diagnosed with Asperger Syndrome. At the time of the High Court hearing, all three children were "dependent" within the meaning of the 1995 Act.

5. While the parties resided together, the family home comprised a farmhouse situate on over 100 acres of land. As of June 2017, the agreed valuation of the holding was €1.1M. They are held mortgage free in the sole name of the husband.

6. During the early years of the marriage, the husband worked the lands with his brother and was paid a weekly wage by his father. In 2002 the farmlands were transferred by his father into his sole name. Thereafter the parties operated a dairy farm on the said lands which constituted the family's principal source of income.

7. Since May 2015, on foot of tax advice from the husband's accountant, the farming business has been incorporated and trades as a private limited company. The directors of the company are the husband and his father. The husband is the sole shareholder of the company.

The farmlands are leased to the company for a nominal rent. At all times the husband has worked full-time on the farm.

8. Prior to the marriage and for about two years thereafter, the wife was employed in retail. For some years after the eldest child was born, the wife assisted with a curtain making enterprise from home with her mother-in-law. She worked in a secretarial capacity one day a week for some months after the youngest child was born in 2002.

9. Throughout the marriage, in addition to taking responsibility for maintaining the home, cooking family meals and caring for the children, the wife worked on the farm, providing assistance with morning and evening milking of cows and feeding calves.

10. During the marriage the wife took courses in *inter alia* reflexology, Indian head massage, the European Computer Driving License and jewellery making. It was the wife's evidence that, while attempts were made by her to obtain employment or retain clients on foot of these courses, this did not occur to any significant degree.

11. The parties' marriage broke down in or around June 2014 and they separated in September 2014. Initially, the husband resided with his parents and thereafter moved into a converted shed in the farmyard. The wife and dependent children continued to live in the family home.

12. Following a significant withdrawal of funds from a joint bank account by the husband, in December 2014 the wife withdrew €24,000 from the account leaving it overdrawn. It was the wife's evidence to the High Court that she withdrew this money in circumstances where the husband was not communicating with her and she was fearful of being unable to provide for herself and the children.

13. By order of the District Court of 19 March 2015, the wife was granted a safety order on consent against the husband. Same expired on or around 19 March 2017.

14. In May 2015 the husband provided a lump sum of €200,000 to the wife to facilitate the purchase of a new six-bedroom dwelling house for herself and the children, to furnish it and discharge legal fees and stamp duty. She took up residence in June 2015. It is held in her sole name and is mortgage free. The purchase was funded by a loan from the husband's brother in the sum of €70,000 together with a loan from his father in the sum of €130,000.

15. By order of the District Court of 18 June 2015, the husband was directed to pay maintenance in the sum of €1,700 per month; apportioned €500 for the benefit of the wife and €1,200 for the three dependent children.

16. Following the parties' separation, the wife obtained a once-off work opportunity in late 2016 on a contractual basis for approximately nine weeks. She obtained some short-term work at approximately minimum wage level. At the time of the High Court hearing in March 2017, the youngest child required to be home-schooled and in those circumstances the wife was not in a position to take up employment outside the home.

High Court judgment

17. The trial judge delivered judgment on 28 June 2017. After outlining the background to the proceedings, she noted that the wife sought provision of one third of the agreed valuation of the combined family assets. By way of further provision, under the 1995 Act, as amended, the wife sought a lump sum payment of €100,000 together with the transfer of approximately twenty acres of land to the value of €200,000 into her sole name (or held in escrow) free of all encumbrances.

18. The trial judge noted the husband's contention that the wife's requirements were excessive having regard to the provision already made by him in providing her with a mortgage-free home and where he continued to pay maintenance as *per* the District Court order. The court considered the proposals advanced on behalf of the husband, noting his submission that same constituted in excess of 30% of the net assets when capitalised maintenance is

included. He had contended such an approach to "proper provision" was fair and reasonable having regard to all the circumstances including the gifted/inherited nature of the family farm.

19. The trial judge considered the applicable law on proper provision, noting that s. 16(1) of the 1995 Act requires that proper provision is made for each spouse and for the dependent children of the marriage as is adequate and reasonable having regard to all the circumstances of the case. She considered the statutory factors as set out in s. 16(2).

Section 16(2)(a)

20. The trial judge noted that the primary source of the family's income was the farming enterprise operated by the husband. She observed that the wife was in receipt of approximately €731 per month in social welfare payments and, taking into account the €1,700 being paid by the husband, she had approximately €2,431 per month to maintain herself and the dependent children of the marriage.

21. The trial judge held that during the course of the marriage the wife had, at various intervals, engaged in employment outside the family home and had obtained short-term contract work in 2016. The court noted that due to facilitating home schooling for the youngest child the wife had been unavailable for work but it was anticipated that this child would return to mainstream schooling in September 2017. The trial judge found that the wife had a commendable history of retraining and upskilling over the years and that her direct evidence was that it was her intention to return to employment in the future.

Section 16(2)(b)

22. The trial judge considered it fortunate that each party had secure accommodation available to them which was unencumbered because both parties shared an obligation towards their three children during the course of their dependency. She noted that the husband was required to borrow €200,000 from family members to provide for alternative accommodation

for the wife and while he had almost discharged a €70,000 loan to his brother, he remained responsible for an outstanding loan of €130,000 to his parents.

23. The trial judge noted that the husband had a pension pot available to him valued, at the time, at approximately €55,000 and had offered to transfer pension rights to the value of approximately €25,000 for the benefit of the wife. The trial judge held that the wife was likely to get a non-contributory state pension, or otherwise a contributory state pension.

Section 16(2)(c)

24. The trial judge noted the wife's claim to an increase in maintenance payments. The trial judge expressed the view, however, that there might well be additional social welfare allowances available to her by way of a domiciliary grant for one of the dependent children and potentially a carer's allowance into the future.

25. The court took account of the fact that, post-separation, the parties' standard of living would inevitably decrease in circumstances where the parties are thereafter obliged to maintain two separate households.

Section 16(2)(d)

26. The trial judge noted the ages of the parties and the fact that they were married and lived together as husband and wife for approximately 23 years prior to the breakdown of their marriage.

Section 16(2)(f)

27. Regarding the respective contributions of the spouses to the welfare of the family, the trial judge considered that a factor of particular significance in this case was that the principal asset, the farm, was brought into the marriage by the husband, it having been transferred to him by his father in 2002. The farm had been purchased by his grandfather in 1951 and handed down to his father before being transferred to him.

28. Reliance was placed on the following passage by Murray J. (as he then was) in *D.T. v. C.T. (Divorce: Ample Resources)* [2002] 3 I.R. 334 at p. 409:-

> "Each case will necessarily depend on its own particular circumstances. Where there are quite limited resources available it may only be possible to provide for the basic needs of each spouse."

Section 16(2)(g)

29. The trial judge considered the wife's contention that, by having assumed the role of traditional homemaker since the early years of the parties' marriage, she had facilitated the husband in achieving success, expansion and progress on the farm. However, the trial judge found, based on the wife's own evidence, that there were periods during the course of the marriage when she worked outside the family home and in more recent years, that she had completely disengaged with the family business and sought to upskill and retrain with a view to obtaining employment in her own right.

30. Having regard to the financial provision already made for the wife, the court found that she had obtained a "very significant share of the available capital" (para. 32). It was held that any diminution in the scope of the family business would adversely affect the income available to support the wife, husband and the dependent children going forward.

31. The trial judge considered the authorities relied upon by the parties. The wife had relied on *D.T. v. C.T. (Divorce: Ample resources)*, in respect of the role of the spouse within the family home and as to how the courts should approach such cases, and *C. v. C.* (High Court, Abbott J., 31 July 2012) which was submitted to be "strikingly similar in nature" to the facts and issues to be determined in this case (para. 37). It was argued on behalf of the husband that *C. v. C.* was distinguishable on its facts in several material respects.

32. In her conclusions, the trial judge observed that the court was bound to follow the jurisprudence in respect of inherited/transferred assets. It was noted that any division of the

farmlands would jeopardise the viability of the farming enterprise. The court attached weight to the husband's stated intention to maintain the farmlands for the children and to provide for their future. The trial judge was satisfied that there were ample assets available to make proper provision for the wife without interfering in any way with the farmlands.

33. The court noted that, in circumstances where the husband had income potential in excess of €100,000 gross annually and where the farming enterprise was clearly viable, the husband would be in a position to adequately and properly maintain the wife and dependent children going forward, together with all their education expenses and private health insurance.

34. The trial judge, adopting the analysis of the husband, considered that the orders made constituted provision for the wife in excess of 30% of the net assets available and was a fair and equitable distribution of the assets.

<u>Order under appeal</u>

35. On 28 June 2017, the High Court granted a decree of judicial separation together with, *inter alia,* the following relevant ancillary orders:

i. pursuant to s. 8 of the 1995 Act, the husband pay to the wife a lump sum in the amount of €120,000 for her sole benefit, in two sums;

ii. pursuant to s. 8 of the 1995 Act, the husband pay to the wife the sum of €800 per month for spousal maintenance for a period of four years and pay to the wife the sum of €1,200 maintenance per month for the three dependent children until their respective dependencies cease, in addition to the husband paying for all educational costs and expenses in respect of the dependent children, together with all third level education costs and expenses;

iii. the husband continue to provide private health insurance for the three dependent children and the wife for a period of four years;

iv. the husband put in place an appropriate life assurance policy to protect the maintenance provisions ordered; and,

v. pursuant to s. 12 of the 1995 Act, the entirety of the husband's pensions amounting to approximately €55,000 be transferred to the wife for her sole benefit.

There was no order as to costs. The said order was perfected on 10 October 2017 and amended on 9 March 2018 pursuant to O. 28, r. 11.

Notice of appeal

36. Following an order of this court of 15 October 2018 allowing an extension of time to appeal, the wife filed her notice of appeal on 24 October 2018, contending that the trial judge failed to make proper financial provision for her contrary to Article 41.3.2° of the Constitution and failed to have adequate and proper regard to the factors contained in s. 16 (2) of the Family Law Act 1995 in holding:

i. that the sum of €800 per month is sufficient for the wife to support herself; and,

ii. that the periodic maintenance of €800 per month and the continuation of the wife's health insurance cover is to cease entirely after a period of four years, after which the husband has no further financial obligation in respect of the wife.

37. With regard to the first ground of appeal, it was contended, in particular, that the trial judge erred in failing to have adequate regard to:

i. the husband's income and earning capacity;

ii. the wife's contributions as homemaker and mother and contributions to the running and operation of the family farming enterprise during the marriage; and,

iii. the evidence that a domiciliary grant payable to the wife in respect of the youngest child would cease in March 2018 and children's allowance would cease in March 2020.

In addition, it was contended that the trial judge erred in affording weight to speculation that the wife may be entitled to additional social welfare allowances, in the absence of any material evidence in that regard. It was further contended that the sum of €800 a month is insufficient to support the wife and contrary to the trial judge's finding that there were "ample assets" available to maintain and make proper provision for the wife. The wife contended that the trial judge erred in finding, *inter alia,* that the provision made for the wife was in excess of 30% of the net assets available, that the wife had obtained a very significant share of the available capital and in finding that the wife had been provided with €224,000 in capital payments in circumstances where the sum of €24,000 had been used by the wife to maintain herself and the children in the first six months of the parties' separation prior to a District Court maintenance order being obtained.

38. With regard to the second ground of appeal, it was contended that the findings in relation to the wife's earning capacity were not supported by the evidence and, in particular, the trial judge erred in failing to properly evaluate:

i. the wife's future employment prospects;
ii. the fact that the wife lives in a small rural community;
iii. the fact that the wife has sole responsibility for the three children of the marriage, two of whom have special needs;
iv. the degree to which the wife's future earning capacity was impaired by reason of dedication to childrearing, home-making and working the farm thereby foregoing the opportunity of remunerative activity;
v. the wife's lack of formal qualifications;
vi. the wife's age; and
vii. the likely nature of any future employment (*e.g.* full-time or part-time; permanent or temporary) of the wife bearing in mind her duties to care for the children.

In addition, it was contended that the trial judge erred in finding that the wife is likely to receive a non-contributory state pension, or in the alternative, a contributory state pension where there was no evidence of this before the court. It was argued that the trial judge had undue regard to the inherited nature of the farm and failed to adequately regard the contributions made by the wife to the family and farming enterprise.

39. The wife sought an order pursuant to s. 8 of 1995 Act that the husband pay an increased sum per month for spousal maintenance for life and an order that he continue to discharge the private health insurance of the wife as heretofore together with costs.

40. The husband opposed the appeal in its entirety.

The standard of review

41. As the remarks of Keane C.J. in *D.T. v. C.T. (Divorce: Ample resources)* at p. 365 (cited more fully below) make clear, the trial judge must be regarded as having a relatively broad discretion under s. 16 of the 1995 Act in reaching what she considers a just resolution in all the circumstances:-

> "While an appellate court will inevitably endeavour, 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."

Proper provision

Is the jurisprudence in relation to s. 20 of the Family Law (Divorce) Act 1996 - the analogous divorce provision - relevant?

42. The statutory approach to the making of maintenance orders in judicial separation proceedings, whether periodical or by way of lump sum, is informed by the principles set forth in s. 16(1) of the Family Law Act 1995, as amended by s. 52(h) of the Family Law (Divorce) Act 1996, which latter amendment became effective on 27 February 1997.

43. In its original iteration s. 16(1) provided: -

> "In deciding whether to make an order under section…8…and in determining the provisions of such an order, the court shall endeavour to ensure that such provision is made for each spouse concerned and for any dependent member of the family concerned as is adequate and reasonable having regard to all the circumstances of the case." (emphasis added)

The amended iteration of subs. 1 provides that:–

> "…the court shall endeavour to ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case." (emphasis added)

44. The material distinction, if any, between "adequate and reasonable" provision on the one hand and "proper" provision on the other is nowhere identified in the legislation. The immediate reason triggering the amendment appears to have been the introduction of the Family Law (Divorce) Act 1996 which, in the context of decrees of divorce, mirrored the language of the constitutional referendum which brought about the inclusion of Article 41.3.2° in the Constitution providing for the dissolution of marriage in the State only where a court is satisfied that, *inter alia,* –

> "(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…"

45. In the absence of any statutory definition or explanation as to the respective scope and ambit of either "adequate and reasonable" or "proper" provision, it is not possible to definitively state whether the change is a distinction without a difference.

46. This court in *Q.R. v. S.T.* [2016] IECA 421 had to consider whether any material distinction existed between s. 16 of the 1995 Act, as amended by s. 52(h) of the Family Law (Divorce) Act 1996 (the statutory provision under consideration in this appeal), on the one

hand, and s. 20 of the Family Law (Divorce) Act 1996, on the other. Irvine J. (as she then was) rejected the suggestion that a difference of approach was called for depending on which statutory regime was being considered by the court, offering the following reasons at para. 51:-

> "…First, s. 16(1) of the 1995 Act, as originally enacted, was amended by s. 52(h) of the 1996 Act with the result that the words 'adequate and reasonable' as originally appeared in that section were replaced by the word 'proper' thus bringing that section into conformity with s. 20(1) of the 1996 Act. That amendment would suggest that the legislature intended to standardise the approach of the court to the making of proper provision and to eradicate any distinction between the two regimes regardless of whether the court was dealing with divorce or judicial separation. Second, the twelve statutory factors to which the court is required to have regard to when making proper provision are identical as is the wording of the relevant subparagraphs, and the test to be applied. I see no reason why the provisions of s. 16 of the 1995 Act would have been replicated in s. 20 of the 1996 Act if it was intended that the sections would operate differently."

47. While the focus of Irvine J.'s consideration was directed to the issue of spousal conduct and s. 16(2)(i) of the 1995 Act, I am satisfied that her observations are equally apposite to all relevant aspects of s. 16, as amended, and I adopt her reasoning. The role of the court under each statutory framework is the same; namely, to endeavour to ensure that the couple together with their dependants are properly provided for having due regard to the non-exhaustive statutory checklist of factors adumbrated and "all the circumstances of the case" as s. 16(1) mandates.

48. The extensive jurisprudence in regard to "proper provision", in the context of the granting of decrees of divorce, is therefore relevant and of assistance in carrying out the statutory exercise, particularly having regard to the factors specified in s. 16(2) which are to be

taken into account by the court in carrying out that exercise. The said factors and matters are not in any sense exhaustive as the words “in particular” in s. 16(2) make clear.

The statutory provision - s. 16 of the 1995 Act

49. The section, as amended, provides:-

> “16.— (1) In deciding whether to make an order under section 7, 8, 9, 10(1)(a), 11, 12, 13, 14, 15A, 18 or 25 and in determining the provisions of such an order, the court shall endeavour to ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case.
>
> (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,
> >
> > (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),
> >
> > (c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be,
> >
> > (d) the age of each of the spouses and the length of time during which the spouses lived together,
> >
> > (e) any physical or mental disability of either of the spouses,
> >
> > (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,

(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 together and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,

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

(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,

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

(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 judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring,

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

Jurisprudence on the exercise of discretion

50. This is an appeal against the exercise of discretion by the trial judge in determining what constituted proper provision for the wife and the dependant family members as of the date of the hearing based on the evidence before her and in her evaluation of the discrete issues arising pursuant to s. 16(2)(a) to (1), inclusive, of the 1995 Act. It will be recalled that Murphy

J. in *D.T. v. C.T. (Divorce: Ample resources)* had regard to the earlier decision of McGuinness J. in *M.K. v. J.P. (otherwise S.K.) (Divorce: ancillary relief)* [2001] 3 I.R. 371 wherein, observing that the courts should be guided in the exercise of discretion when determining the issue of "proper provision" by having regard to the express provisions of the statute, she stated:-

> "The provisions of the 1996 Act, 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 of the factors set out in s. 20, measuring their relevance and weight according to the facts of the individual case. In giving the decision of the court, a judge should give reasons for the way in which his or her discretion has been exercised in the light of the statutory guidelines." (pp. 383 to 384)

51. That analysis found favour particularly with Murphy J. in *D.T. v. C.T. (Divorce: Ample resources).* Keane C.J. agreed, observing: –

> "While s. 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…, 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 endeavour, 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.
>
> Some principles which are to be applied in the exercise of the discretion are beyond dispute. As Hoffmann L.J. said of the corresponding English legislation in *Piglowska v. Piglowski* [1999] 1 W.L.R. 1360, it establishes no hierarchy of factors. In what is probably still the typical Irish case, where one or both parties are in receipt of income,

but their joint assets are not of such significant value as is the case here, the first task of the court will almost certainly be to consider what the financial needs of the spouses and the dependent children are." (p. 365)

52. As to how the trial judge might ascertain the "reasonable requirements" of both spouses, Keane C.J. cited with approval the extract from Lord Nicholls of Birkenhead in *White v. White* [2001] 1 A.C. 596 where the latter had observed at p. 605: -

"This is not to introduce a presumption of equal division under another guise. Generally accepted standards of fairness in a field such as this change and develop, sometimes quite radically, over comparatively short periods of time. The discretionary powers, conferred by Parliament 30 years ago, enable the courts to recognise and respond to developments of this sort."

53. Denham J. (as she then was) in *D.T. v. C.T.* likewise agreed that the discretion specified in the legislation was "ample". She observed: -

"While it would be better practice to refer *ad seriatim* to each of the provisions of s. 20 and to give reasons for the relevance and weight of each subsection to the determination, in all the circumstances of the case, I am satisfied that this ground of appeal fails. The discretion given by the legislature to the trial judge under this scheme is ample." (p. 388)

54. Worthy of particular note, in the context of this case, are the observations in regard to discretion of Murray J. (as he then was) whose views accorded with those of Keane C.J.: –

"The Oireachtas studiously avoided giving any prescriptive guidelines as to how the court should deal with the income and assets of the parties in making proper provision for the spouses. I draw attention to the particularly broad discretion conferred on a court in order to emphasise that while this court may decide on principles which should guide a court when exercising its jurisdiction under the Act of 1996, the very broad discretion

conferred on a judge hearing a case of this nature will still remain to be exercised having regard to the circumstances of any particular case. Furthermore, it must be borne in mind that this is a case which the Chief Justice has aptly described as an ‘ample resources case’, which has the effect of giving full reign to the discretion which a court exercises in such cases. Normally, even in cases where the parties might be considered to enjoy a substantial decree of financial comfort, the finite resources of the parties will be an underlying prescriptive factor in the exercise of a discretion as to how those resources can be applied in making proper or fair provision for both spouses.” (pp. 401 to 402)

55. The decision of Hogan J. in *C. v. C.* [2016] IECA 410, insofar as directly relevant to the facts in the instant case, is of some assistance in approaching a determination as to whether the trial judge properly exercised her discretion in deciding the issue of proper provision. Hogan J. extrapolated the following principles from the jurisprudence which albeit directed to the like provision in the divorce legislation is equally germane to the exercise under the 1995 Act, as amended:

(1) Under the relevant section, “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 children. Thus this duty requires a court to make proper provision, having regard to all the circumstances.

(2) The requirement is to make proper provision and it is not a requirement for the redistribution of wealth.

(3) 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.

(4) 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.

(5) If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project by the 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.

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

(7) The standard of living of a dependant spouse should be commensurate with that enjoyed when the marriage ended. The 1996 Act 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.

(8) 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.

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

56. In *Q.R. v. S.T.* Irvine J. (as she then was) had characterised the approach to the exercise of discretion by the trial judge in accordance with the statutory provision thus: -

> "106. The onus on the trial judge in the present case was to consider all of the assets potentially available and then to fashion orders for ancillary relief that would likely secure for the parties and for their lifetime the lifestyle which they enjoyed prior to the marriage breakdown…"

"…having regard to all the circumstances…"

57. In my view it is important that the provisions of s. 16(1) are not overlooked when a trial judge approaches the exercise of identifying proper provision under the legislation. That sub-section explicitly identifies the obligation on the court to ensure proper provision for each spouse, as well as for dependent members of the family, "having regard to all the circumstances of the case". The language of subs. (1) vests a wide discretion in the trial judge as to the ambit and extent of factors determined as relevant in a given case and implicitly the checklist in s. 16(2) is not to be treated as exhaustive. It also, by necessary implication, entitles a court to disregard issues not considered to be relevant or material irrespective of how strenuously same may have been canvassed at the hearing on behalf of one party or the other.

Section 16(2) of the 1995 Act

58. The twelve discrete subcategories at s. 16(2)(a) to (l), inclusive, are not to be considered as ranked in any particular hierarchy. Which carries the greatest weight or are to be considered relevant or irrelevant or where they may lie in the spectrum must depend on the particular facts and circumstances of the case under consideration. It is important that the trial judge engages with the subcategories in a checklist manner and carries out the exercise of evaluation rigorously, clearly identifying those subcategories that are, on the facts of a given case, considered relevant and also irrelevant and identifying the reasons for the determination in each case.

59. It is of critical importance in the making of ancillary relief orders, which potentially will have far reaching and lifelong repercussions for both parties, that the checklist evaluation is transparent and reflects a clear rationality. It should be based on principles derived from the statute or authority and an application of the relevant factors to the salient facts of the case. The objective is to ensure a bespoke approach to the circumstances, means and needs of the parties and dependants appropriate to meet the justice of the particular case, engaging insofar as

relevant with each of the discrete subheadings in s. 16(2) together with any other material factor or element as the court identifies and considers relevant. There must be a sufficient degree of clarity as to the manner in which the principles were applied to the facts and matters found to be relevant in all the circumstances of the case.

60. Having regard to the extensive, albeit non-exhaustive, checklist of considerations and factors to be evaluated as specified in s. 16(2) of the 1995 Act, the clear objective is to provide a fair outcome, bespoke to the individual and specific circumstances of each case that comes before the court with the overarching aim of achieving fairness and justice as between the parties.

Article 41.2

61. Article 41.2 of the Constitution provides: -

> "1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

62. In the course of this appeal the wife argued that in carrying out the exercise of ascertaining "proper provision" for her pursuant to s. 8 of the 1995 Act , as amended, the trial judge erred in failing to have regard to her contributions as a homemaker and mother and that the obligation to take account of same was constitutionally mandated by the provisions of Article 41.2.1°.

63. In recent decades the ambit, operation and future of the said constitutional provision has been the subject of extensive consideration and review including in the reports of the Second Commission on the Status of Women (1993) and the Constitution Review Group (1996); the first (1997) and tenth (2006) progress reports of the All-Party Oireachtas Committee on the Constitution and the second report of the Convention on the Constitution

(2013); each proposing somewhat differing outcomes ranging from outright deletion to modification or amendment of the provision to achieve gender neutrality.

64. The effective scope of Article 41.2 provision can be inferred to be somewhat limited in light of the views expressed by six of the seven members of the Supreme Court in *Sinnott v. Minister for Education* [2001] 2 I.R. 545, a case that did not concern matrimonial proceedings.

65. In *Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional, 2018), the authors observe at para. 7.7.119:-

> "Article 41.2, referring to woman's life within the home and obliging the State to endeavour to ensure that mothers shall not be compelled by economic necessity to work outside the home, is, perhaps, the single most dated provision of the Constitution and, until recently, had received relatively little attention from the judiciary."

At fn. 298 to the above paragraph, the authors note:-

> "…Evidence of some judicial unease with this provision may perhaps be seen in Barrington J.'s classification of the duty imposed on the State by Article 41.2.2º as one of 'imperfect obligation': see *Hyland v. Minister for Social Welfare* [1989] I.R. 624, [1990] I.L.R.M. 213."

66. That the Article did not confer any proprietary interest in a family home on a non-owning spouse was confirmed unanimously by the Supreme Court in *L. v. L.* [1992] 2 I.R. 77. Turning to the issue of maintenance, however, Finlay C.J. observed that Article 41.2 could affect the judicial determination of an application, stating: -

> "If a court is assessing the alimony or maintenance payable by a husband to a wife and mother, either pursuant to a petition for separation or to a claim under the Family Law (Maintenance of Spouses and Children) Act, 1976, it should, in my view, have regard to and exercise its duty under [Article 41.2] in a case where the husband was capable of making proper provision for his wife within the home by refusing to have any regard

to a capacity of the wife to earn herself, if she was a mother in addition to a wife and if the obligation so to earn could lead to the neglect of her duties in the home. In other words, maintenance or alimony could and must be set by a court so as to avoid forcing by an economic necessity the wife and mother to labour out of the home to the neglect of her duties in it. Beyond that capacity of the judiciary to take part in the endeavour to comply with the provisions of Article 41, s. 2, sub-s. 2…I do not consider that the transfer of any particular property right could be a general jurisdiction capable of being exercised in pursuance of that sub-section of the Constitution." (pp. 108 to 109)

67. In *Kelly*, *op. cit.*, the authors by fn. 298 note:-

"…it would appear that Article 41.2.2º might give rise to justiciable claims. Thus, in *L. v. L.* [1992] 2 I.R. 77, [1992] I.L.R.M. 115, Finlay C.J. accepted (at 121) that this provision imposed an obligation on the judiciary as well as on the legislature and executive…"

68. At para. 7.7.125 the authors observe regarding *L. v. L.*:-

"Dealing specifically with Article 41.2, the Chief Justice suggested that the provision would affect the judicial determination of an alimony or maintenance application by a wife who is also a mother."

69. Perhaps the most apposite authority from the Supreme Court in the context of the present case addressing the relevance of Article 41.2 is to be found in *D.T. v. C.T. (Divorce: Ample resources)* where Murray J. (as he then was) observed: -

"In many marriages one spouse either does not work outside the home, works part-time or works intermittently over the years in casual or part-time work. All of these private decisions are taken because there is a fundamental importance to the role of parents in the home and it is frequently seen as desirable for the welfare of the family that one parent should devote most of his or her time to the home, particularly, where the rearing

of children is involved. While these considerations may apply to either spouse, it must be said that in the vast majority of cases the spouse who gives the primary commitment to working in the home is the wife.

…

In my view, the work of a spouse in the home, in this case the respondent wife, cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or the breadwinner during the course of the marriage. The Constitution views the family as indispensable to the welfare of the State. Article 41.2.1° recognises that, by her life in the home, the woman gives to the State a support without which the common good cannot be achieved. No doubt the exclusive reference to women in that provision reflects social thinking and conditions at the time. It does, however, expressly recognise that work in the home by a parent is indispensable to the welfare of the State by virtue of the fact that it promotes the welfare of the family as a fundamental unit in society. *A fortiori* it recognises that work in the home is indispensable for the welfare of the family, husband, wife and children, where there are children. In my view, in ensuring that proper provision is made for the spouses of a marriage before a decree of divorce, the courts should, in principle, attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner. The value to be attached to their respective contributions in those circumstances is, perhaps, underscored by Article 42.1 of the Constitution which refers, *inter alia*, to the '…duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.'" (pp. 406 to 407)

He also noted:-

> "…the Constitution…is to be interpreted as a contemporary document. The duties and obligations of spouses are mutual and, without elaborating further since nothing turns on this point in this case, it seems to me, that it implicitly recognises similarly the value of a man's contribution in the home as a parent." (p. 407)

70. Whilst the decision in *D.T. v. C.T. (Divorce: Ample resources)* concerned an ample resources case and for the reasons stated hereafter I am satisfied that, by contrast, the case in hand concerns a family of modest resources, nevertheless certain of the *dicta* of Murray J. directed towards the concept of "proper provision" and its parameters are of relevance. He observed for instance at p. 408: -

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

needs to be left in the hands of the earning spouse in order that the income necessary to make proper provision for both spouses can be generated."

He further observed:-

"…the Constitution and, in particular, Article 41 reflects a shared value of society concerning the status of the 'family' in the social order as a natural primary and fundamental unit group in society. The State is required to protect the family, *inter alia*, because it is indispensable to the welfare of the nation and the state." (p. 404)

71. Only a proper and robust application of the specific criteria and considerations identified in s. 16(2) in each case, as the statute mandates, will meet the constitutional objective adumbrated in Article 41.2.1°.

The treatment of inherited property in the context of "proper provision"

72. In *Y.G. v. N.G.* [2011] IESC 40, [2011] 3 I.R. 717, in regard to inherited property, Denham C.J. at p. 732 observed:-

"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."

"Earning capacity"

73. An evaluation of future earning capacity within s. 16(2)(a) can present particular difficulties for the trial judge. The court is called upon to evaluate and predict how a party who is either not working outside the home, who has not been in the work-force for an appreciable period of time by reason of family duties and childrearing or who merely produces a relatively

small income ought to be generating an income and what their future prospects in joining the workforce and the level of income to be earned are likely to be.

74. The court has to consider whether a party, usually a home-making spouse, should reasonably be expected to acquire the skillset and training to achieve an earning capacity which she presently does not have, such as by undergoing training or upskilling. Where a spouse asserts that the other party has or is likely to have or ought reasonably to be expected to acquire earning capacity, the burden rests upon them to adduce evidence to satisfy the court that in all the circumstances the claimant spouse has earning capacity or ought reasonably be expected to acquire an earning capacity which they lack and that their employment in a given field suited to their skills and abilities presents, as a likelihood, a real prospect of generating a reasonable income.

75. Regard ought to be had to relevant current employment opportunities in the location where the applicant spouse resides having due regard to the skills and abilities of the said spouse. In the case of a lengthy marriage, it is insufficient to rely on employment experience that either pre-dated the marriage or pre-dated the birth of children in the marriage or otherwise was of short duration. Work experience during the marriage or short-term activities are not to be confused with evidence of capacity to find remunerative employment.

76. The court has to make a fair assessment of the long-term earning capacity of both parties including the likelihood of any increase in current earning capacity as is considered reasonable for the claimant to take steps to acquire in the foreseeable future. A distinction must be drawn between cogent evidence of established current earning capacity of a claimant spouse, on the one hand, and, on the other, mere contentions advanced by a spouse who wishes to resist a claim for proper provision that in substance are hypothetical, based on supposition, conjecture, vague generalisations or speculation as to the other's future earning capacity or instances of previous occasional gainful activity which generated some income. The court must be satisfied

that the prospect of stable employment is real, and endeavour to assess the likely nature and extent of the income to be derived from it and the availability or likely availability of ongoing employment in that field within a reasonable distance of the place of residence of the dependant spouse before ascribing an earning capacity amounting to self-sufficiency and reducing or denying periodic spousal maintenance payments *in futuro*.

Application of the principles

Family farm

77. In the instant case the sole source of income in the family is the family farm of approximately 110 acres acquired by the husband from his father. There was no evidence that the husband had any other skill, expertise or work experience throughout his entire life, save and except running, operating and managing the small holding.

78. The statutory remit and the principle of fairness requires a more calibrated approach where a farm holding has been within one spouse's family for generations and was assured to one spouse, who carries on the business of farming on a full-time, or substantially full-time, basis and where it constitutes the sole or a significant source of income to the family, particularly if it was acquired from a parent or relative with at least an implicit expectation that it would be retained *in specie* for future generations. In my view the nature of the inherited property is relevant as are all the material circumstances surrounding its acquisition. Furthermore, if an inherited property provides the entire or a substantial portion of the income for one of the spouses and/or provides employment for a spouse, same are material factors which must be taken into account in balancing the competing rights and interests of the parties.

79. Having said that, I do not think that there are any strict rules governing the approach of a trial judge in "farming cases" *per se*. Each case will turn on its own particular facts and the circumstances of the case. The nature and source of an asset and the moral duties and obligations implicitly attendant upon the acquisition of same may well be factors to be taken

into account by a trial judge in determining what constitutes "proper provision" in the context of a claim where one of the parties derives a significant source of income from an inherited or acquired farm holding.

80. In a case such as the matter under appeal, the proper approach is to make provision based on the wife's reasonably foreseeable needs for support and maintenance in light of the s. 16 evaluation. This necessitated, on the evidence, a lump sum order for the benefit of the wife as the trial judge correctly made. It also necessitated the making of a periodic maintenance order of a sufficient sum and of adequate duration to meet the needs of the wife. The term order of maintenance in the sum ordered did not constitute proper provision for the wife in all the circumstances of this case in my view.

A term order of maintenance

81. The key emphasis of s. 16 is on "proper provision", as was stated by Denham J. in *D.T. v. C.T. (Divorce: Ample resources).*

82. Accordingly, where a court considers building into a maintenance order a future automatic reduction or "step-down" in the level of periodic payments within a specified time, or where a court contemplates imposing a term upon the order, it must be based on a high degree of confidence and certitude that by the contemplated date the dependant spouse will be in a position to obtain adequate employment at a specific level of remuneration of a permanent and stable nature.

83. The proven track record and material circumstances in the instant case, insofar as the wife's earning capacity and potential into the future was concerned, included that she was at the date of the hearing 51 years of age. Almost two decades previously she had worked in a secretarial capacity. She had engaged in employment fitfully and sporadically. For instance she was a sales representative for a gas company for nine weeks. This occurred once-off in the year 2016. To characterise her capacity to be self-supporting in perpetuity based on her

"commendable history of retraining and upskilling over the years", as the trial judge did, calls for close analysis. It was based on the fact that she had, years before, undertaken courses in reflexology, Indian head massage and suchlike alternative therapies. There was no consideration as to who precisely would employ the wife on a permanent or ongoing basis in the small rural town where she resided based on those skills or indeed whether the standard of her training and qualifications were in anywise recognised such that she could readily anticipate entering the workforce on the strength of them.

84. The activity engaged in by the wife of making curtains in conjunction with her mother-in-law was alluded to. However, there was no evidence as to the duration of the said activity, the level of income that was derived from same and whether she in effect had worked in assisting her mother-in-law with a part-time home-based enterprise that was managed by the latter. As with the alternative therapies, there was no consideration as to the costs in setting up an independent business and operating same such as rental of workspace and whether same would necessitate payment of rates and the like.

85. The wife had been employed as a typist for a time following the birth of the youngest child over sixteen years previously. There was no evidence before the court as to the market in the locality or its vicinity for trained typists, nor as to the real prospects of a woman such as the wife, in her fifties, upskilling sufficiently so as to have a realistic prospect of gaining such employment such that it warranted a fixed term order of maintenance confined to four years alone from the date the order was made.

86. The evidence was that prior to the marriage in 1991 the wife had worked in a general merchant's shop in a nearby town. With regard to typing, the evidence before the High Court was that the wife had done typing at home. She made "zero money" because the income generated went into childminding. At the time she commenced same, her youngest child was two months old and the middle child was twenty months old. She found the work "therapeutic".

In all, that typing activity lasted less than one year. The wife's evidence was that she gave the job up because "it wasn't paying" (transcript of 27 March 2017, p. 40, lines 28 to 34).

87. It would appear that the reflexology course was undertaken when the oldest child was about two years of age which places that course in or about the year 1998 – upwards of nineteen years prior to the hearing in the High Court. According to the clear evidence before the High Court, attempts to set up such a business proved not viable, taking account of travel to a nearby town, the rental of space and the costs of operating the enterprise. At p. 41, lines 25 to 30 of the transcript of 27 March 2017, the wife testified, "I didn't want to do something that didn't pay me" and "that didn't work".

88. It will be recalled in the instant case that in an affidavit sworn by the husband on the 10 December 2015 he deposed at para. 7(f): -

> "…whilst the applicant is the primary carer for the children and that was the situation throughout the marriage at all times it was agreed between the parties that your deponent herein would be the main earner and person responsible for maintaining the parties and our children."

He further deposed: –

> "I further say that the nature of your deponent's farming enterprise requires your deponent to be present on the farm and/or within short distance thereof. Dairy farming is particularly intensive especially during the calving season."

There was no evidence before the trial judge to gainsay the husband's contention that he was the main earner throughout the marriage which commenced in November 1991 and until they separated in September 2014. That continued after the break-down of the marriage.

89. Insufficient weight was given by the trial judge to that incontrovertible fact. The expectations, hopes and aspirations of the wife and the (no doubt sincerely held) beliefs of the

husband that she could go about finding gainful employment did not constitute cogent evidence of earning capacity which was likely to materialise in the short-term, or foreseeable, future.

90. In all the circumstances of the case, irrespective of the level of assets available, likely future income must always be apprised and in certain circumstances such an assessment may have a bearing on the division of property which best achieves fairness in the overall outcome which is an inherent facet of any provision that is to be determined "proper" within s. 16(1).

91. There was a significant overestimation by the trial judge of the future likelihood of the wife earning an income. There was an absence of cogent, reliable evidence before the High Court regarding her employment prospects. There was no evidence on which the trial judge could prudently rely to be satisfied that the wife would be self-employed and self-sufficient within four years of the trial. There was no probative evidence on which the trial judge could safely rely in making a term order of four years' duration in respect of maintenance. It was incumbent on the husband to adduce such evidence to support a contention that he should be relieved from all obligation to pay maintenance to his wife once the youngest child had ceased second-level education. He failed to discharge that burden.

92. At its height the evidence available to the court was that for the duration of the marriage the wife primarily worked as a home-maker and in child rearing. On the farm, she was clearly hardworking and industrious and, as demonstrated for instance in the testimony at p. 44 of the transcript of 27 March 2017, capable of milking over 100 cows on her own as part of the farming enterprise. By non-farming activities, the totality of the evidence showed that she had generated little more than "pin money"; the work was non-profitable and scarcely covered childcare costs incurred whilst she carried out the work in question. Her capacity to become financially self-sufficient was not realistically evaluated taking into account various factors including her age and her employment history.

93. The trial judge fell into error in failing, notwithstanding clear evidence of same, to properly value the significant contribution the work of the appellant made to the successful dairy enterprise on the farm during the 23 years of the marriage and, in the absence of probative evidence, significantly over-estimating the realistic prospect of the wife to become wholly financially self-sufficient in respect of periodic maintenance within 4 years of the hearing.

94. Furthermore, in light of Article 41.2, the trial judge afforded insufficient weight to the continuing disabilities of a number of the children including the middle child in respect of whom clear red flags were indicated in the welfare affidavit which was before the High Court and which detailed troubling aspects of his behaviour. Indeed, subsequent to the hearing it is noteworthy that this child suffered a mental breakdown. There was evidence of considerable vulnerabilities and disabilities on the part of the children, particularly the youngest child, and the appellant's ongoing and likely future obligations in regard to same – both legal and moral – arising in that context were not afforded sufficient weight by the trial judge.

95. It was further relevant and a factor not adequately weighed in the balance by the trial judge that the wife's negligible earning capacity was a direct result of the marriage and the parties' joint decision, as deposed to by the husband, that she should devote her life to being primarily a wife and a mother actively assisting in the operations of the family farm which continued to be held in the sole name of the husband.

96. Each of those factors required appropriate consideration and represented highly salient circumstances of the case in the context of her maintenance application to which sufficient weight was not afforded by the trial judge in the assessment of the quantum and duration of periodic maintenance payments and the provision of adequate health insurance.

97. The evidence in its totality regarding her immediate and foreseeable prospects of having a self-sufficient earning capacity was at best based on vague generalisations and unrealistic aspirations which on balance could be viewed as no more than substantially

speculative bearing in mind that such an outcome was to be achieved by the wife at the latest by July 2021. There simply was no sufficient evidence before the court that the wife had any realistic prospect of finding remunerative employment in her mid-50's at a level sufficient to render her financially independent and not requiring maintenance.

98. There was no finding by the trial judge that the wife had any specific potential earning capacity *per annum*. Neither was there sufficient weight attached to the extent to which she was no longer in the position she would have been in but for the marriage, its consequences and its breakdown, to have an earning capacity she clearly enjoyed prior to the marriage. It was highly material to consider the undoubted difficulties that she was likely to have in re-entering the labour market and resuming a fractured career and becoming financially self-sufficient from a maintenance perspective at the age of 56 as the court order envisaged.

99. Since evaluating future earning capacity may to an extent involve crystal ball gazing, regard does need to be had to the length of the marriage, the duration of the period of time that the non-earning spouse has been out of the workforce, current labour market circumstances and the availability of suitable, viable work on an ongoing basis in the locality or vicinity of where the dependant spouse resides.

100. Further, there was no evidence of the wife's entitlement to receive a non-contributory state pension or a contributory state pension contrary to the finding at para. 24 of the judgment.

The adequacy of a maintenance payment of €800 per month

101. The second key issue is the level of maintenance awarded and this is particularly relevant to s. 16(2)(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)".

102. As regards financial needs and in particular prospective financial needs likely to arise in the foreseeable future, it is important for the trial judge to have regard to the fact that "needs"

in this context is a variable and subjective concept. Indeed as Lord Nicholls of Birkenhead stated in *White v. White*: -

> "Financial needs are relative. Standards of living vary. In assessing financial needs, the court will have regard to a person's age, health and accustomed standard of living. The court may have also regard to the available pool of resources." (pp. 608 to 609)

103. Key operative factors in the discretionary exercise under s. 16 include the scale of the paying spouse's wealth, the duration of the marriage, the applicant spouse's age and state of health and the standard of living that can realistically be expected to be enjoyed bearing in mind the inevitable reality that subsequent to separation "financial needs" within the meaning of s. 16(2)(b), in the context of s. 8 of the 1995 Act, necessarily involves a narrower ambit and more bespoke sweep of considerations specific to periodical payments, secured periodical payments and/or lump sum payments as the case may be.

104. In reaching her conclusion regarding the quantum of maintenance payable by way of periodic payment, the trial judge fell into further error in adverting to a series of speculations and surmises which were not supported by probative evidence.

105. The loan from his brother to the husband was stated to be €70,000, repayable at €3,000 per month, i.e. €36,000 *per annum*. There was also an outstanding loan of €130,000 from the husband's father. While the trial judge was correct to have regard to the husband's ongoing liabilities to his relatives, this was not a factor which could justify setting the level of spousal maintenance at €800 per month, in all the circumstances of this case.

106. The trial judge appeared to take into account the possibility that the wife might obtain a respite grant in respect of the youngest child, C, and that she "may well be" entitled to further welfare payments in the future. The trial judge erred in speculating that "there may well be additional social welfare allowances due to the applicant by way of domiciliary grant for one of the dependent children and a possible carer's allowance into the future". There was no

probative evidence before the court in regard to same which appears to be based on conjecture and supposition.

107. The domiciliary care allowance payable to the wife at the date of the hearing was due to cease and did in fact cease in March 2018. It was payable in the sum of €309.50 per month. Insufficient weight was given to the imminent determination of that payment.

108. The court failed to have regard to the fact that even were a disability allowance to be payable, such a social welfare benefit would be payable to the individual child in his own right once he attained the age of sixteen years and could not be treated as income of the wife for maintenance purposes.

109. There was no cogent evidence before the court of an entitlement on the part of the child in question to disability allowance nor whether such a payment is available while children's allowance is being paid in respect of a minor.

110. Neither were the criteria regarding eligibility for a carer's allowance before the court or any evidence as to whether the applicant would meet the same. If the husband sought to rely on the availability of social welfare type payments for the wife the burden rested with him to adduce evidence at the trial to demonstrate *prima facie* entitlement to same. That was not done.

111. The High Court judge at para. 20 observed: -

> "…the applicant currently receives €731 approximately per month in social welfare payments as set out in her affidavit of means and … taking into account the €1,700 currently being paid by the respondent, this gives her a total of €2,431 approximately per month to maintain herself and the dependent children of the marriage."

In taking into account social welfare payments it was imperative that there be an assessment as to the duration and purpose of such payments and the circumstances where eligibility arose. Further, the likelihood of any such payments being terminated was relevant, particularly if they pertained to a child or dependant.

112. The fact that the wife had obtained contract work in the autumn of 2016 for a period of nine weeks which had resulted in a total income of €6,197.76 was accorded disproportionate weight as evidencing her likely future earning capacity. It was a short-term one-off contract. It was not employment in the conventional sense. There was no evidence of any prospect that the wife would find a like form of work on foot of a contract for services or by way of employment at any time in the foreseeable future.

113. Further, the youngest child of the marriage, given his dependency and vulnerability was likely to be residing with the applicant for the foreseeable future and it was clear that given his extensive absences from school and his prolonged difficulty in engaging socially and with the educational process that he was unlikely in the short term to be entering third level education, whilst and at the same time, his children's allowance payments would cease in early 2020 as they did. This would necessarily give rise to, at the least, a moral obligation on the part of the wife to provide accommodation for him.

114. Where an income generating spouse is in a position to pay maintenance then it is necessary for the court to frame an order to provide such maintenance as amounts to proper provision for the dependant spouse having regard to all the circumstances of the case and to frame a periodical payment order accordingly. Two critical factors are central to the evaluation of the quantum of the said maintenance in every case: the needs of the dependant spouse and the means of the payor.

115. In the circumstances the trial judge's approach to the statutory obligations pursuant to s. 16(2) were deficient in the respects outlined above.

Context

116. The order made in the instant case pursuant to s. 8 of the 1995 Act was for payment of €800 per month by way of spousal maintenance for a period of four years. There are 4.33 weeks

on average in a calendar month. This results in an average weekly payment of €184.75 by way of maintenance to the wife for a four year period reducing to nil thereafter.

117. Additionally, a maintenance order in respect of the three children, being €400 per month per child until their respective dependencies ceased, was made. Child A is now aged 24, in employment and payments in respect of her have ceased. Child B, who was born in summer 2000, is a student at a third level institution albeit that he was absent from his studies for an entire year by reason of having suffered a mental breakdown. It was asserted and not denied by the husband that no child support was being paid in respect of B. Likewise, child C attained the age of 18 in March 2020. He suffers from a disability and has dropped out of secondary school and is not in any third level educational programme. This has resulted in the husband being relieved of a maintenance payment per month of €1,200. It was foreseeable to the trial judge that the husband's child maintenance obligations were of a relatively short future duration in light of the ages of the children yet same was not a factor weighed in the balance.

118. The context further was that the court directed a lump sum in the amount of €120,000 be paid to the wife; €50,000 payable on 15 January 2018, the balance on 28 June 2018. The court also granted an order pursuant to s. 12 of the 1995 Act that the entirety of the husband's pensions amounting in value to approximately €55,000 be transferred to the wife for her sole benefit.

119. In the context of this case it must be noted that the wife had established a clear entitlement to a lump sum order pursuant to s. 8 of the 1995 Act to the amount of €120,000. This court was informed in the course of the appeal hearing that the said funds had been expended. Her legal costs to date as provided in the *D. v D.* Schedule amounted to €75,000. These proceedings might more prudently have been instituted in the Circuit Court. Counsel for the wife appeared to characterise the determination of the High Court as being that this was an "ample resources case". Underpinning that contention was the observation of the trial judge

that "there are ample assets available to make proper provision for the applicant without interfering in any way with the farm lands". Nothing in the judgment can be said to warrant a contention that the High Court determined that this was an ample resources case. It was not. The High Court did not so find.

Conclusion

120. The orders of the High Court did not make proper provision for the wife in respect of periodic maintenance into the future. The provision thereby made insofar as maintenance was concerned was so deficient as to quantum and as to duration as to be incapable of constituting proper provision on the particular facts of this case resulting in an unfair outcome for the wife. The trial judge fell into error in the approach adopted particularly in her application of the checklist specified at s. 16(2)(a), (b), (g) and (h). In the circumstances the orders at 3 and 5, respectively, in the curial part of the order of 28 June 2017 require to be set aside and in their place a maintenance order pursuant to s. 8(1)(a) of the 1995 Act that the husband pay to the wife the sum of €1,600 per calendar month by way of spousal maintenance, the said payment to commence with effect from 24 October 2018, being the date on which the notice of appeal was filed by the wife and to be payable monthly on the 24th of each month thereafter. A sum of €1,600 per calendar month, being approximately €369.23 per week, represents a reasonable, fair and proportionate sum in all the circumstances. That sum will require to be reviewed downwards on the date or dates on which the wife becomes entitled to any pension payments.

121. This court is in as good a position as the High Court to make an evaluation as to the correct ambit of proper provision in relation to periodic payments. To remit the matter back to the High Court would incur further unnecessary expenditure and would be disproportionate in all the circumstances.

122. Further, proper provision warrants an order that the husband pay private health insurance for the wife from the date of the making of this order.

Costs

123. This appeal was necessitated in light of the deficiencies in the sum payable and the duration of the order in respect of periodic maintenance made by the High Court pursuant to s. 8 of the 1995 Act together with the concomitant deficiencies in the order providing for private health insurance for the wife.

124. It is my initial view that in the circumstances of this appeal the appellant was justified in pursuing same and it thus seems appropriate that as to the allocation of costs the husband pay a contribution to the wife in the sum of €10,000 towards the costs of this appeal. The sum is set at this low figure to reflect the fact that proceedings might reasonably have been instituted in the Circuit Court in the first instance. The said contribution to be paid within six months of this judgment being delivered.

125. If either party wishes to contend for a different order, they should notify the Office of the Court of Appeal within five days of the date of this judgment whereupon a date will be fixed for an oral hearing on the matter of costs.

126. Noonan and Murray JJ. agree with this judgment and the proposed orders.