[2024] IEHC 536

Record No HM 2024 60

THE HIGH COURT

FAMILY LAW

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996, AS AMENDED AND IN THE MATTER OF THE FAMILY LAW ACT 2019 AND IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995 AS AMENDED

BETWEEN:

K. C. N.

Applicant

-AND-

P. N.

Respondent

Judgment of Ms. Justice Nuala Jackson delivered on the 17th of July 2024

INTRODUCTION

1. These proceedings come for determination before me on foot of a Special Summons seeking a Decree of Judicial Separation and reliefs ancillary thereto which Summons was issued on the 11th day of February 2022. The Respondent in the within proceedings has also issued proceedings seeking a Decree of Divorce, together with ancillary reliefs, which said summons was issued on the 12th April 2024. The case was heard by me in the context of the judicial separation proceedings and I will make Orders in that context. The divorce proceedings will follow on and I have addressed this matter on the basis that the ancillary relief orders being made in the context of the judicial separation proceedings will constitute proper provision for the purposes of divorce and such Decree of Divorce and ancillary relief orders may be made in due course. In this

context, I have had regard to the guidance of the Court of Appeal in relation to the principles applicable in relation to the granting of ancillary relief in the context of divorce and judicial separation applications. In **N.O. v. P.Q.** [2021] IECA 177, Whelan J. stated, referencing the statutory amendment of section 16(1) of the Family Law Act, 1995 ('the 1995 Act') introduced by section 52(h) of the Family Law (Divorce) Act, 1996 ('the 1996 Act'):

> *"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, –*
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> > *"(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.*
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> *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 -13- 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:-*
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> > *"…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.

The focus of contention in the present case is the issue of what constitutes proper provision for the parties and the one dependent child.

BACKGROUND AND UNDISPUTED MATTERS

2. The Applicant wife ('the Applicant') and the Respondent husband ('the Respondent') were married in 2003. The Applicant is in her 50s and the Respondent is in his 60s respectively. The Respondent had been previously married and divorced and has two children from that marriage. The Respondent has a very close relationship with these, now adult, children. The Respondent also has two other children from a previous relationship but, regrettably, he does not have contact with those children. There is one child of the marriage who remains dependent but who is on the cusp of ceasing to be so dependent. It is amply clear that both parents enjoy a very close and loving relationship with this child. That she is their pride and joy was evident.

3. The parties have lived separate and apart since January 2021 when the Applicant left the family home and moved to another property owned by the parties which property is geographically distant from the family home. The Applicant has established a residential and employment base in this location.
4. In all of the circumstances, it is clear that there has been no normal marital relationship between the parties for in excess of a year prior to the date of the institution of the within proceedings (entitling them to a Decree of Judicial Separation pursuant to section 2(1)(f) of the Judicial Separation and Family Law Reform Act, 1989 ('the 1989 Act') and, additionally, they have lived separate and apart for in excess of two years in the three years prior to the issuing of divorce proceedings on the 12th April of 2024. Therefore, subject only to the issue of proper provision in the context of ancillary reliefs, the parties are entitled to a Decree of Judicial Separation and, indeed, to a Decree of Divorce.
5. There is little controversy between the parties in relation to the history of their relationship and marriage. It is clear that the parties herein are both hardworking, industrious and successful in their career fields. The Respondent was a successful businessman who had accumulated considerable assets prior to meeting the Applicant and the parties have additionally accumulated further assets since that time. The Respondent continues his occupation in the family business inherited by him and which he has operated for many years (including many years prior to his marriage with the Applicant). The Applicant is gainfully employed in a position of responsibility.
6. I have had the benefit of the evidence of the parties, the Respondent's sister and also of the evidence of their most experienced forensic accountants. I also had the benefit of Affidavits of Means sworn by the parties. This has facilitated the identification of the differences arising between the parties. A Schedule was prepared in accordance with the *D v D*[1] principles. This demonstrated that the primary valuation difference arising between the parties related to the company valuations in respect of the Respondent's main trading company. The valuation differences between the parties' respective assessments were otherwise minimal in nature.

[1] *D v D* [2015] IESC 16

FAMILY HOME

7. The first family home of the parties was a property located a number of miles from the centre of operations of the Respondent. This property was purchased by the Respondent prior to the marriage. A number of other properties adjacent thereto were acquired relatively proximate to this time, one in the name of the Applicant and one in joint names of the parties, the first family home remaining in the sole name of the Respondent as it had been from the time of its acquisition. It is clear that the funding of the first family home came entirely from the resources of the Respondent both as regards the sum paid when it was initially purchased and the later discharge of the mortgage on the said property. Subsequently, the parties acquired a second family home (this property was in the name of the Respondent and funded by him, being purchased prior but proximate to the date of the parties' marriage) but both the first and the second family homes were subsequently sold and the proceeds applied to other projects/investments primarily the renovation/construction of the current family home and the discharge of a revenue debt of the business. The current family home of the parties is a large and most comfortable residence. It derives from the family of origin of the Respondent, previously being the home of the Respondent's mother and inherited by him from her. The Applicant and the Respondent carried out extensive works of extension, construction, renovation and upgrading prior to commencing residence there in or about 2011. The said property is in the sole name of the Respondent save for a strip of land adjacent thereto which is in the joint names of the parties.
8. The Applicant left the family home in 2021 and currently resides in a property held in the joint names of the parties, with the parties' child, C, residing there with her primarily during term time while also spending time with the Respondent, primarily during holiday periods. Although the properties are very different in nature, due to their different geographical locations, the family home is valued at a lesser value than the property in which the Applicant resides. Both are unencumbered. The agreed net value of the family home (net of disposal costs) is €681,425 (inclusive of the strip of land) and the agreed net value of the premises in which the Applicant resides (net of disposal costs and CGT) is €754,443. Clearly, the parties both have accommodation requirements and both have now established residences in the premises occupied by them respectively.

OCCUPATIONS AND SOURCE(S) OF INCOME

9. The Respondent has at all material times been a businessman, carrying out his businesses in the context of companies in which he has a substantial interest. The Respondent works in a business which derived from his family and in which he became involved as a very young adult, perhaps earlier. This is a most successful business and one to which the Respondent has clearly devoted considerable time and commitment. The Applicant was originally employed in the banking sphere but commenced her own businesses during the course of the marriage. The Respondent was supportive, financially and practically, in this context. The Applicant also pursued educational courses, again with the financial and practical support of the Respondent. The Applicant is now in employment with a third party where she is in receipt of a gross income of circa. €45,000 per annum. The parties also have joint corporate and business interests to which they have both contributed. These interests include the Company A (jointly held), Company B (jointly held), Company C (jointly held) and Company D (jointly held). There is little dispute between the parties in relation to the first two entities aforementioned. The evidence before me is that the Applicant made direct contributions thereto derived from the sale of properties held solely by her or jointly between the parties. The Applicant's shareholdings in the latter two companies were transferred to her in or about 2017/2018 and they are investment holding companies. Both companies were established during the marriage, Company C in 2016 and Company D in 2017. The manner in which the Applicant's shareholdings in the latter two corporate interests should be treated by me was a matter of controversy between the parties.
10. While the Applicant has played a role in these business/corporate interests in the past (in particular the first two above mentioned), the current position is that the Respondent controls and oversees them. The Applicant has most recently received an annual income of approximately €24,000 per annum from Company D. Her gross annual income from these combined sources has been in the sum of approximately €70,000 per annum. She also continues to receive a monthly maintenance sum from the Respondent (€1,646 per month per her Affidavit of Means of the 24th April 2024) who also discharges household expenses and utilities in respect of her residence.
11. The Respondent has a number of other interests, some held in the context of businesses operated jointly with a third party. These interests include a 50% shareholding in

Company E (the other 50% being held by a third party) and a 16.67% shareholding in Company F (the remaining shareholding being held by third parties). The Respondent's income has varied considerably over recent years as has the source from which such income has derived (as between his various corporate interests). In 2023, his gross income was in the sum of €273,867 derived from Company E, Company C and Company D.

PENSIONS

12. The Applicant has a modest pension provision (transfer value circa. €27,000). The Respondent has pension assets with a transfer value of circa. €1,500,000.

OTHER ASSETS

13. **Business assets**:

Company G (jointly held by parties) (agreed value €319,666)

This company owns 50% of the third business premises from which Company E operates. A number of issues arose in relation to this asset arising from the purchase by it of a property to be used in the main trading business of the Respondent. The Applicant asserts a lack of knowledge of this transaction; she asserts that the transaction was improvident and intended to defeat her claims in the within proceedings; she references the very considerably reduced market value of the core asset from the time of its acquisition and also the existence of an option to purchase the said premises held by Company E (albeit that the option would appear to be at a most favourable rate based upon the current market value of the asset). It also emerged during the course of these proceedings that a lease had been put in place between Company G and the other 50% owner of this property and the trading company, Company E. The Applicant also asserts that this was done without her knowledge. It would appear that the lease is on commercially favourable terms from the perspective of the landlord. It is also common case that the main trading company, Company E, expended a very significant sum (€1,500,000) carrying out works of renovation to the premises concerned.

Company B (jointly held by parties) (valuations €650,536/€654,630)

This company holds 40% of a property portfolio, the remaining 60% of which is held by the Company A. The company is held jointly as between the parties with each having a 50% shareholding. The portfolio consists of five residential mews properties. While it would appear that the rental/Airbnb income from these properties was more significant previously, the evidence was that only three of these units were currently rented out and yielding an income. It would also appear that the management and consequent income return from these properties was sub-optimal but that this is a portfolio capable of yielding a secure income going forward. The evidence supported the conclusion that this portfolio and the management thereof has not received optimal attention from either party in the recent past. Neither party would appear to be taking an income from this company or from the Company A at present. The Respondent's forensic accountant opined that these properties could generate a rental income of between €7,000 and €10,000 per month. I did not have the benefit of valuation evidence in this regard and I formed the view that the estimate of the Respondent's forensic accountant might well be somewhat generous but it is common case that this property portfolio is a valuable asset and is capable of yielding income levels greater than is currently the position if assiduously managed.

Company C (jointly held by parties) (valuations €621,010/€621,011)

This is an asset holding company, held jointly by the parties. As with Company G, the 'seed' capital for this investment company derived from the business activities of the Respondent.

Company E (50% owned by Respondent) (€3,546,525 (Applicant's valuation)/€2,637,066 (Respondent's valuation))

Company E is a trading company in which the Respondent is a 50% shareholder with a third party. This business operates from three premises, two of which are owned by the company itself and the third of which is held by Company G as to 50% (the other 50% being held by a third party company). A lease dated the 1st February 2022 in respect of this premises in favour of Company E was disclosed during the course of the proceedings which lease was signed only by the Respondent on behalf of the landlord Company D and the evidence of the Applicant is that she was unaware of this formal lease. The value of the Respondent's interest in this company was a major source of disagreement between the parties.

Company F[2] (16.67% owned by Respondent) (€1,099,651 (Applicant's valuation)/€1,091,291 (Respondent's valuation).

This is a holding company in respect of the shareholdings in two hotels and 33% of the issued share capital therein is held by another corporate entity and the Respondent is a 50% shareholder (with a third party) in that company. There is no income derived from this investment and the Applicant contended that there was ample capacity for income from this asset given the underlying success of the hotel businesses concerned. There was little dispute between the parties as to the value of the Respondent's shareholding in this company.

14. **Cash assets/investments**:

Company A Capital Account (capital account of 'Company A') (jointly held by parties) (€379,362/€379,724). Company A holds 60% of the property portfolio (30% holding to each of the parties) with the 40% ownership balance being held by Company B.

Misc. bank (Applicant) circa. €17,000
Investments (Respondent) circa. €20,000
Misc. bank (Respondent) circa. €12,500

15. **Other assets**:

Motor vehicles (each party has their own motor vehicle(s) with those of the Respondent being of higher value than that of the Applicant). There was some dispute as to whether the most valuable of the Respondent's vehicles was being sold or not.

Art works/jewellery (€300,000/€280,000 (divided €220,000/€200,000 (Applicant) and €80,000 (Respondent))

Miscellaneous small interests of negligible value in context of assets held by the parties.

16. There were two other investment properties acquired by the parties in close proximity to the first family home, one in the joint names of the parties and one in the sole name of the Applicant. It would appear that these two properties were sold in or about

[2] The Respondent's shareholding is held by a company, Company H.

2017/2018 and the proceeds reinvested in the portfolio of properties referenced at Company B and Company A above.

17. It is clear from the foregoing that there was substantial agreement between the parties as to the current valuations of the assets save in relation to the valuations of the Respondent's shareholding in Company E.

OPEN OFFERS MADE BY THE PARTIES

18. Both parties made open offers to me as to what they contended would constitute proper provision in all of the circumstances.

OPEN OFFER OF THE APPLICANT

(i) The premises in which the Applicant now resides with an agreed net value of €754,000;
(ii) The assets comprised in Company B and Company A being the portfolio of five rental properties (approximately €1,030,000);
(iii) 100% of Company C (approximately €620,000)
(iv) Company D (approximately €320,000) (the Applicant references this as a guaranteed future income and future financial security)
(v) Cash sum of €675,000;
(vi) Equalisation of pensions (circa. €763,500)

I assume that the Applicant would wish to retain her jewellery and paintings (valued at €200,000/220,000) together with her car, the cash at bank sum together with the credit for the €30,000 received previously (it being acknowledged in the Interim Order of the 28th July 2023 that the payment of this lump sum "may be taken into account by the Court when assessing the issue of proper provision at the full Hearing.")

Total: Approximately €4,458,500

OPEN OFFER OF THE RESPONDENT

(i) The premises in which the Applicant now resides with an agreed net value of €754,000;

(ii) The assets comprised in Company B and Company A being the portfolio of five rental properties;

(iii) Jewellery and paintings (valued at €200,000/220,000) subject to the jewellery of the Respondent's mother being returned;

(iv) 50% of Company C valued at €310,000;

(v) 30% of the Respondent's pension plans (valued at circa. €450,000);

(vi) The Applicant to retain her car valued at €40,000/50,000;

(vii) The Applicant to retain her pension fund valued at €27,000;

(viii) The Applicant to retain her cash in the sum of €16,000/19,000;

(ix) Credit for €30,000 paid during the course of the within proceedings.

Total: Approximately €2,867,000

EVIDENCE

19. I heard the following evidence in the course of the hearing, the case being heard on the basis of oral testimony in accordance with Order 70A, rule 13(2) of the Rules of the Superior Courts. Insofar as reference is made to averments made in the verifying or replying Affidavits of the parties, this is simply by way of useful synopsis of and accords with the oral evidence of the parties at hearing:

20. There was a considerable degree of agreement between the parties in relation to the history of their relationship and marriage. The material facts upon which they were agreed have been referenced above. As to matters in dispute, the following arise:

A. <u>The Applicant:</u>

The Applicant contended that she had left a successful career in order to relocate to the area in which the Respondent resided following the birth of the parties' child. It must be recorded, however, that this was also the place of origin of the Applicant herself. There is no doubt that the Applicant engaged in a number of commercial endeavours over the years in addition to assuming family responsibilities both in relation to the parties and their child and also in relation to wider family members.

These commercial endeavours would appear to have had sporadic success but have now almost entirely ceased operating. The Applicant asserted an involvement in the Respondent's business and that she had assisted in the amelioration of same. She asserted that she had undertaken courses of study which were particularly aimed at equipping her to assist the Respondent in his business, which she did. Her oral evidence accorded with her averment at paragraph 11 of her verifying Affidavit of the 3rd July 2022:

> *"I say that the Respondent and I commenced our relationship in the month of October 1999. I say that I have since that time been involved in the Respondent's business and during that time the business has evolved and is financially very successful as a consequence."*

The Applicant made certain specific complaints in relation to the recent actions of the Respondent in respect of the financial affairs of the family. She asserts that he has unilaterally depleted the parties' joint assets. In particular, she referenced his considerably larger withdrawals from the joint asset of the parties, Company D, than those of which she has had the benefit. These withdrawals included a very much greater income being taken by the Respondent and also the use of Company D funds to purchase a 50% interest in the premises leased to Company E (while, arguably, the purchase did not deplete the assets of the company, the property replacing the purchase funds), the Applicant contends a lack of openness in this regard and that she was not aware of the transactions in question and also that this served to inter-mingle and apply the joint assets of the parties in such a manner as to benefit the Respondent's core Company E business . She asserts that he has derived his income primarily from the joint assets of the parties while diminishing the income derived from his sole assets, notwithstanding that the commercial success of the businesses underpinning them which would have amply supported an income being derived therefrom. She contended that these actions were intentional, done with a view to interfering with her claims in the within proceedings.

The Applicant also alleged non-disclosure on the part of the Respondent. She stated that she believed the Respondent to have additional income and resources from a

luxury car dealing business based in Northern Ireland and referenced two such vehicles included in his Affidavit of Means of the 21st October 2022

The Applicant contended that the Respondent had an interest in an apartment property in Spain. The Respondent's position was that this apartment belonged to his sister. It is clear that the parties did use this property when visiting Spain and their use of it does not appear to have been curtailed. The evidence of the Respondent's sister (who has legal title to the property) was that the respective interests of the Respondent and herself remained unclear and undetermined. The evidence of the Respondent's sister was not definitively in support of the assertion of no interest in the said property by the Respondent. This witness gave evidence that she was the legal owner of the premises concerned but further confirmed that the Respondent provided funds of approximately €40,000.00. Her evidence, which I found to be most balanced, was that the property was purchased for family use which various family members having benefitted from the use of the property since the purchase. She stated that it is intended that in the future, when she is older and needs to be within walking distance of a town and facilities, that she will take up full-time use of the apartment.

B. <u>The Respondent:</u>

The Respondent did not dispute the commercial activities operated by the Applicant during the course of the marriage. He indicated that he was supportive of same including expending an inheritance from his aunt to renovate part of the family home for this purpose. He also indicated that he funded training courses which the Applicant wished to pursue and that he also funded another business premises and the fitting out of same for the Applicant's benefit. This support was acknowledged by the Applicant. The Respondent strongly denied that the Applicant had any involvement in his businesses being those which he had been operating for many years prior to the parties' meeting. In this regard, his evidence accorded with the relatively detailed averments in this regard in his replying Affidavit and, in particular, at paragraphs 11 and 12 thereof. In this regard, I would refer in particular to the following:

"I ... deny that the Applicant has ever been involved in my business or that it has evolved and been financially successful as a result of any involvement by her. I say that when I left school in and around [redacted] it was with the express intention of working in and later taking over my father's business. [Company E] was a business owned and operated by my father and his business partner, L.C, which was incorporated in [redacted] to carry on their existing [redacted] Business. On leaving school I first undertook a one-year electronics technician apprenticeship in [redacted] and then went to work and college in [locations in America] for a number of years in order to gain experience. On my return home I was initially an employee of my father's business until [redacted] when I became a 50% Shareholder and in [redacted] a Director when my father had a stroke. On the death of my father in [redacted] I continued to operate the business as Director and 50% Shareholder with L.C.. The Applicant has never expressed any interest in the [redacted] Business and has never undertaken any form of employment for or on behalf of any of the Companies associated with the [redacted] Business or indeed any of the companies which I operate."

The Respondent did not deny the involvement of the Applicant in certain property acquisitions during the course of the marriage while contending that the 'launch pad' for such investments was very significantly derived from the proceeds of his pre-marital assets. He acknowledged the Applicant's caring role within the family. He denied any impropriety in relation to his management of the financial affairs of the family and he indicated that his more significant withdrawals for income purposes were due to additional family expenditure responsibilities assumed by him including discharging all household and utility expenses in respect of the family home and the residence of the Applicant together with discharging certain expenses relating to the dependent child. He denied any intention to deplete assets. He denied any non-disclosure.

The Respondent acknowledged that he had engaged in luxury car dealings in the past but indicated that the business in question was no longer operating, having been

severely impacted upon by the Covid-19 pandemic, and that the cars in question had been sold.

His evidence was that the Spanish apartment belonged to his sister.

The Respondent's evidence is that he has been most generous to the Applicant throughout the marriage of the parties.

C. The Applicant's forensic accountant:

Mr. Kirby stated that his preferred method of company valuation was based on the profit before tax. He indicated that he preferred this to using EBIDA as the latter is subject to too many variables such as depreciation, add backs and interest. He indicated that his opposite had used the EBIDA method but that he considered profit before tax to be much less subjective. Mr. Kirby indicated that he considered Peelo "The Valuation of Business and Shares: A Practitioner's Guide" (2023, 3rd Ed) to be a good yardstick and he agreed with the author's suggestion of using a multiplier in the range of 5-8, applied to profit before tax. It emerged from Mr. Kirby's evidence that he was starting with a figure of €1,229,000 but that his opposite had adjusted this to reflect appropriate marketplace salaries for the directors (the actual salaries being significantly less than this) so that the base figure being used by Mr. Browne was €994,000. Based on the high profitability levels of the company, Mr. Kirby opined that a multiplier of 6.5 was appropriate, the range for medium sized companies being 5 - 8. It transpired that the differences between the forensic accountants related primarily to the adjustment for directors' salaries and the multiplier. The witness informed me that he could not opine on the potential impact of new regulations in the company's area of operation as he was not qualified so to do but he indicated that the shareholders appeared to retain full confidence as the draft accounts for 2023 indicated a plan for further investment and future expansion. Mr. Kirby expressed the view that historic figures were the most accurate way in which to value a company. Mr. Kirby conceded that 50% shareholdings carried a degree of risk but noted that the company held quality assets.

D. The Respondent's forensic accountant:

Mr. Browne had applied a multiplier of 5 and he considered this to be appropriate. He applied weights of 1 for 2022 and 2 for 2023 to the profits arrived at. He also considered that adjustment to net profit was justified to take account of the higher directors' salaries which would be required based upon market salary rates. Adjustment for repairs was also required. The multiplier was determined, Mr. Browne opined, having regard, *inter alia*, to market factors, national (new regulations) and local (competing business 70 km away). Mr. Browne referred to the fact that other investments, albeit that they are now held in the joint names of the parties, had been substantially funded by the trading companies.

Perhaps, as is to be expected, I found the evidence of the Respondent's forensic accountant to be extremely negative in relation to a business which has clearly been extremely lucrative and successful over many years. Additionally, the low salary being drawn by the Respondent was being used to justify increased provision in circumstances in which the value of the investment holding companies was also being diminished due to the Respondent supplementing his below market director's salary with drawings from these companies. In this context, the Applicant seems to have been shouldering a double negative. Had the Respondent being deriving the opined market income from the trading company, clearly the values of the investment companies should have improved as withdrawals to supplement the Respondent's salary would not have been required. However, clearly factors such as the extent of the shareholding and impending regulatory change would have a negative impact on valuation. The valuation of private companies could in no way be described as a science. Clearly there is an artificiality (as with all valuations) in that true values can only be achieved with a willing buyer and a willing seller. This is particularly acute, however, in the case of private companies where there is a dearth of comparators. Overall, this is a long standing business with an established trade. There were compelling arguments made by both accountants. In all of the circumstances, I formed the view that attributing a median value was probably the fairest approach. In this context, I have attributed a value of €3,091,796 to the Respondent's 50% share in Company E.

FACTUAL DETERMINATIONS

21. The Respondent came into the marriage with very considerable assets including a number of most lucrative businesses. These are assets which were gifted to him by his father. He has worked in them since early adulthood and they were well established long prior to his marriage with the Applicant. He also received other gifted/inherited assets during the course of the marriage some of which were utilised in establishing a business of the Applicant which is no longer operating. It is undoubtedly the case that the bedrock of the most comfortable financial position of the family came from the Respondent's pre-marital circumstances and also inheritances which he received before and during the course of the marriage.

22. The Applicant engaged in a number of commercial endeavours during the course of the marriage and also carried out family care activities. She was financially and practically supported by the Respondent in relation to her commercial activities. It was acknowledged that she played a significant caring role for the parties' child and also for other family members including elderly members of the Respondent's family. The commitment of both parties to their child/children and to the support of family members in need of care is most commendable.

23. I have not formed the view that the Applicant was engaged in the businesses of the Respondent in a commercial manner although I do not doubt that, in the context of normal family life, she provided familial support to the Respondent in relation to his business and personal activities (as he did her). I have no doubt that they had conversations in relation to the various business and investments endeavours of the family but I did not form the view from the evidence before me that the Applicant had any significant or extensive or functional involvement in the commercial activities of the Respondent which had been established by his family pre-marriage.

24. The parties did acquire a number of joint property interests during the course of the marriage but the financing of same came primarily from the Respondent with a degree of self-funding thereafter. The Applicant was involved in these investment activities. It is clear that the parties both invested their individual resources in the [REDACTED] property portfolio (Company A and Company B). It is furthermore clear that the

Respondent transferred to the Applicant a 50% shareholding in two property/investment holding companies (being Company D and Company C) in or about 2018.

25. The Respondent is 13 years older than the Applicant and in consequence most likely has a shorter work life ahead of him although I expect that he will continue to work in the businesses to which he has devoted his life for many years to come.

26. The Applicant has made very admirable strides in returning to the workplace but she has done so well into her likely work-life trajectory and her earnings, while not modest, are not at the level which equate to the lifestyle of the family during the course of the marriage. She also has most modest pension provision although she will have pension growth into the future for a considerably longer period than the Respondent together with a longer period of opportunity to make pension provision. Of course, in order to make such provision, the resources so to do are required.

27. This is a long marriage and the Applicant did alter her career circumstances in the context of pursing her relationship with the Respondent and in assuming familial responsibilities, *inter alia*, towards the parties' child.

28. There was demonstrably a comfortable lifestyle enjoyed during the course of the marriage. This was evident in the context of the usual such matters such as holidays, entertainment, vehicles, accommodation and investment provision.

29. The Applicant has been a dependent spouse during the course of the marriage and to date in that she has continued to receive support from the Respondent in the context of periodical payments and in the discharge by him of the household/utility expenses for her residence.

30. I formed the view from the evidence of both parties that the Respondent had an interest in luxury cars and likely did engage in dealings in such vehicles currently and in the past but that this was not on a significant scale being in the nature of an extension of his pastime interest in such vehicles.

THE LAW

31. As was stated by Whelan J. in **N.O. v. P.Q.** [2021] IECA 177 (at paragraph 48), the now:

> *"... 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."*

32. The learned Judge thereafter proceeded to examine in detail the authorities in this regard and the manner in which the discretion in relation to proper provision ought to be exercised. The following principles emerge, relevant to the present case:

(i) The discretion being exercised, although considerable (it was described by Denham J. (as she then was) in **D.T. v. C.T.** [2002] 3 IR 334 as *"ample"*), does not leave a court *"at large"*;

(ii) The factors referenced in the 1995 and 1996 Act constitute mandatory guidelines, to which a court must have regard with the relevance and weight to be attached to each factor being subjective to the case under consideration;

(iii) The discretion should be exercised in a reasoned manner;

(iv) There is no hierarchy of factors insofar as the statutory guidelines are concerned;

(v) Specific mention was made to the principles set out by Hogan J. in **C. v. C.** [2016] IECA 410:

> *"(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."

(vi) A court must have regard to *"all the circumstances of the case"* as mandated by section 16(1) of the 1995 Act (section 20(1) of the 1996 Act).

33. Section 16 of the 1995 Act and section 20 of the 1996 Act provide for the factors to be taken into account in determining proper provision. Sub-section (1) mandates that regard to had *"to all the circumstances of the case"* while sub-section (2) proceeds to list a number of particular factors. I have had regard to all of these factors and to all of the circumstances of the case in the context of the present case.

(a) In the present case, there is comprehensive evidence available as to the income, earning capacity, property and other financial resources of the parties now and in

the foreseeable future. Details of these resources have been set out in detail above. It is clear that this is a case within the category of what is referred to as "ample resources" cases.

(b) Affidavits of Means have been sworn and vouched by the parties and analysed by their respective forensic accountants such that the financial needs, obligations and responsibilities of each spouse now and in the foreseeable future are clear. In this regard and in light of the open offers put by the parties, it is clear that each wishes to effect a clean break such that there would not be ongoing financial obligations as between them. Fortunately, the financial resources of this family are sufficient to enable this to occur.

(c) It is clear from the evidence heard that the family enjoyed a comfortable standard of living. This was evident in terms of accommodation, lifestyle (holidays, entertainment and such like), motor vehicles acquired and investments accumulated.

(d) The Respondent is thirteen years older than the Applicant. He is closer to usual retirement age but clearly, he will have to option to continue to operate his very successful business for years into the future. He has had consistency of occupation yielding a most comfortable income over many years. Indeed, the evidence is that he could avail of a larger income if he so desired. His businesses have enabled family investment vehicles to be established and resourced. The Applicant has had a more checkered career with alterations made in the context of family life. Her earnings at this point are admirable given that she has embarked on a new career path in middle age. However, her earnings are much less than those of the Respondent and any increase is likely to be modest. This has been a long relationship with the marriage having endured for in excess of twenty years with the parties having lived together for a similar period.

(e) The parties do not have any physical or mental disabilities.

(f) Both parties have contributed to the welfare of the family. The Respondent acknowledged the contribution of the Applicant both as a mother to the parties' child and also her contribution to the welfare of other family members in his family of origin. The evidence would support the view that the Applicant did make career sacrifices in the context of family welfare.

(g) The Applicant has altered her work commitments in the context of marital and family commitments, all the while endeavouring to remain in gainful occupation.

The Applicant has undertaken a number of career endeavours during the course of the marriage, with relatively modest returns. However, she has enjoyed career success and achieved a level of remuneration since separation which indicates that she has substantially overcome any impairment which might be attributed to her role within the marriage.

(h) Statutory entitlements/benefits do not arise.

(i) The Applicant in her submissions to me sought to place considerable emphasis on allegations of financial misconduct on the part of the Respondent. The Applicant made reference to the judgment of Irvine J. in **QR v. ST** [2016] IECA 421 at paragraph 59 in this regard. The statutory provision indicates that the court should have regard to conduct *"if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it."* It is clear from the judgment of Irvine J. that financial misconduct may trigger sub-section (2)(i). At paragraph 60, Irvine J. states:

> *"Likewise efforts on the part of a spouse to hide money or dispose of assets to frustrate the court's ability to make proper provision are but a few examples of the types of conduct it might be unjust to ignore. However, as the section clearly provides, the decision to take conduct into account ultimately depends on all of the circumstances of the case. As the caselaw shows, the conduct in question will generally amount to financial misconduct affecting the capacity of one spouse to make proper provision for the other."*

34. The Applicant makes reference to authorities involving excess expenditure and the frittering away of assets by *"extravagant living or reckless speculation"* (**Martin v. Martin** [1976] Fam 335 (Cairns J.)). The Respondent submits that there has been no such conduct on his part such as reaches the evidential standards of financial misconduct, the ignoring of which would be unjust. In the regard, I believe it appropriate to make reference to the dictum of Moylan J. (as he then was) in **J.E. v. M.E.** [2013] EWHC 506 (Fam) at paragraph 105 (referenced by the Applicant in her submissions):

> *"There is, therefore, an evidential element – is there clear evidence of wanton dissipation – and a legal/discretionary element – would it be inequitable to*

disregard it or, to put it another way, is notional reattribution required to achieve an outcome that is fair?"

35. The Respondent makes reference to **H v O'N** (McMenamin J.) Unreported High Court 23 June 2011 being a case where the standard of proof required for financial misconduct was met. Reference is made to the conclusion that the husband's actions amounted to *"simply bizarre behaviour"* and reference is made to paragraph 98 of the judgment where the scheme put in place was such as resulted in the conclusion that *"the intent and effect of which can only have been to defeat the wife's rights"*. In this context, it is therefore necessary to examine the evidence adduced and the nature of the financial conduct on the part of the Respondent to which the Applicant seeks to have the attribution "misconduct" applied.

    The allegations are:

    - The withdrawal of income/resources from joint companies rather than from the trading company in which the Applicant has no shareholding;
    - The purchase of a premises by the joint investment company which premises was for the use of the trading company;
    - Concealing the acquisition of such premises and other arrangements concerning the said premises and the from the Applicant;
    - The concealing of a car dealing business.

36. Having analysed the financial information available to me, I do not find that the evidence supports "wanton dissipation" or dissipation leading to inequity. I do not consider that the standard referenced in **H v. O'N** has been reached. It is clear that the level of income extraction from the trading company reduced in the era of Covid-19 but this occurred in circumstances in which the consequences of the pandemic severely impacted the trading business. The Applicant became a shareholder in the investment companies in 2017/2018 and the figures presented to me show that in 2019, shortly thereafter and prior to the separation of the parties, the income which the Respondent withdrew from the investment companies was, in fact, higher than any year since. The income thus extracted was gross and the income tax payable in respect of it would have diminished it by approximately 50%. It is clear that the Respondent has continued to discharge a support payment to the Applicant, discharged expenses relating to the

parties' child and that he has also discharged the household and utility bills attaching to the residences of both parties. I do not believe that the totality of the circumstances in this regard achieves the standard required to prove financial misconduct.

37. Likewise, the evidence does not support the purchase of the premises by Company D as being a dissipation of assets. The property was purchased in an arm's length transaction from a third party vendor by the Respondent and his business partner, both using their investment vehicles. The purchasing companies received an asset. While the asset may have fallen in value due to the market, there is simply no logical reason why the Respondent and his business partner would have sought to benefit a third party with an inflated purchase price. In addition, the investment company owners received and continue to have the benefit of a lucrative lease (indeed, the Applicant in her open offer seeks to have Company D transferred to her for this very reason, stating that it has "a guaranteed source of income and future financial security"). The purchase of this premises and the proposed diversification of business envisaged seems to have been sensible and considered and pursued for sound business reasons. The Applicant accepted this in her evidence. Additionally, the evidence shows that Company E discharged the very considerable costs relating to the refurbishment of the premises.

38. Overall, the Applicant has been critical of the usage of funds within these investment companies by the Respondent. The Respondent seeks to justify the usage of these funds. It is my determination that there are merits and demerits to each such argument. The usage of the funds, in my view was commercially reasonable and cannot be viewed as asset dissipation. The criticism is justified, however, in so far as the Applicant, a 50% owner of the said assets, same having been voluntarily gifted to her by her husband, was not kept meaningfully informed of the manner in which the funds were being used and the investments being made with them. The Respondent in his submissions makes reference to a number of circumstances in the context of which the Applicant ought to have known of the expenditure about which the Applicant complains. However, the obvious appears to be ignored namely that her co-director and equal shareholder did not inform her of his plans in this regard which plans were unilaterally deployed and pursued by him. Regrettably, such lack of communication is probably an inherent part of the dynamic of family breakdown albeit that this does not excuse it. I do not form the view that there was asset dissipation. I do not form the

view that the Respondent engaged in actions intended to defeat the claims of the Applicant herein. These were commercial transactions and, in the context of the business circumstances of the family, made commercial sense. I do not consider that the standards required by the authorities to trigger concerns of financial misconduct have been met in this case.

(j) The accommodation needs of the parties can be met in circumstances in which they are residing in separate residences, both of which are unencumbered. There is no doubt that, despite the residence of the Applicant having a higher market value than that of the Respondent, it is of a lesser accommodation standard. This is, however, due to her geographical choice of accommodation location. It will be a matter for her whether or not she chooses to invest her resources in the acquisition of alternative accommodation going forward. The residence concerned is sufficient for the current needs of the Applicant and the child of the marriage who is, in any event, likely to be making her own way in early course.

(k) and (l) of sub-section (2) of section 16 do not have an application in this instance.

Other matters of relevance:

A. <u>The source of the assets</u>

In this regard, there are two well established principles of Irish law namely that, unlike in England and Wales, Ireland does not have a regime of matrimonial and non-matrimonial assets. However, it is clearly established that the source of assets is a relevant factor for consideration and inherited or gifted assets are not to be treated in the same way as the joint assets of the parties acquired during the course of the marriage. In this regard, I make reference to **CC v. NC** [2016] IECA 410 paragraphs 27 and 32;

> *"27. The blunt reality is that the husband had the good fortune to inherit a vast landed fortune and it is essentially this capital and income which has enabled the family to live in the style to which they have become accustomed. As YG makes clear, this is a relevant factor because Denham J. expressly stated that inherited assets are not to be treated in the same way as the joint assets of the parties acquired in the course of marriage. There are two reasons why that*

principle is especially relevant here. First, as both O'Higgins J. and Abbott J. recognised in their separate judgments, much of this inherited land is essentially illiquid and difficult to sell. Second, even if it could be sold, this would destroy the income generating abilities of the husband…."

and

"32. Given the inherited nature of the husband's wealth and the fact that proper provision is not intended to operate as a form of wealth distribution, I find it difficult, however, to say that the sum of €3.3m. directed by O'Higgins J. – approximately 15% of the estimated net value of the husband's assets – was inadequate for this purpose when regard is had to the size of the maintenance award. Even with the enhanced land valuations which obtained in 2005 – 2006 immediately prior to the financial crash, the sum of €3.3m. ought nevertheless to have been sufficient to enable the wife to purchase a fine country house with some land in the period from 2005 – 2006."

I refer also to **YG v. NG** [2011] 3 IR 717 at paragraph 22(xv):

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

The matter was further addressed in **NO v. PQ** [2021] IECA 177 at paragraph 72 where there was concurrence with the dicta of Denham CJ cited above.

I was also referred to the recent English Court of Appeal decision in **Standish v. Standish** [2024] EWCA Civ 567 at paragraphs 162 – 163 (albeit that English authorities, operating in the context of applying the sharing principle, are not entirely reflective of the principles applicable under Irish law):

'162. As has been discussed in many cases, when setting out the principles applicable to the determination of financial remedy cases there is a balance to

be struck between flexibility and certainty. The flexibility to achieve a fair outcome in the individual case and a sufficient degree of certainty as to the likely outcome. I consider that it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle. There may well be situations when, as referred to above, fairness justifies this. However, because, as Mr Bishop submitted, it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly. This is so that it is not used by parties in a way which would undermine the clarity of the sharing principle, namely that it is the sharing of property generated by the parties' endeavours during the marriage.

In this context, regard must be had to the fact that the valuable trading companies herein derive from businesses gifted to the Respondent through inheritance long prior to the marriage.

B. <u>The transferred shareholdings</u>

The Respondent has also referred me to the English **Standish** decision in another context and urges me to adopt the approach therein to the shareholdings in the property/investment holding companies transferred by the Respondent to the Applicant. It was urged upon me by the Respondent that I should have regard not to the current title to the said assets, being the 50% share of the Applicant, but rather that I should have regard to the source of such assets being derived from the pre-marriage assets of the Respondent, such that these assets should be differently treated from other assets acquired during the course of the marriage and treated more akin to inherited assets. Reference was made to the dictum of Moylan LJ in **Standish** that:

"163. In my view, therefore, it would be helpful to make clear, expressly, that the concept of matrimonialisation should be applied narrowly. This is not a hard and fast line but remains a question of fairness, reflecting, as Wilson LJ said in K v L at [18], that "the importance of the [non-marital] source of [an asset or assets] may diminish over time". With some diffidence, I would propose the following slight reformulation of the situations to which Wilson LJ referred in K v L, having regard to the developments that have taken place since that decision as follows: (a) The percentage of the parties' assets (or of an asset),

which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth; (b) The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle; and (c) Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own."

I do not find the **Standish** decision of assistance in the carrying out of the task imposed upon me herein. The **Standish** case is clearly distinguishable. The assets transferred to the wife in that instance were assets acquired by the husband pre-marriage. The transfer had taken place in the context of tax advice while the marriage was ongoing. The position is entirely different in the present case. Company structures were put in place by the Respondent during the course of the marriage with a view to establishing an investment structure for the future financial security of the family. In this context and while the marital relationship was ongoing, he voluntarily transferred 50% of the shareholding in such investment holding companies to his spouse. Undoubtedly, the financial resources utilised in the establishment of these investment companies derived from the profits of and funds derived from the trading companies but these profits were part of the earnings and accumulations of the Respondent during the course of the marriage. Furthermore, the issue being discussed in that instance was whether or not the assets in question should be categorised as matrimonial or non-matrimonial assets, where the former would result in the application of the asset sharing principle under English law. It seems to me that the *dicta* referenced in this regard relate to the application of the sharing principle and whether the application of such principle should be directed to the issue of source of property or title to property. I have considered the interesting *dicta* of Moylan LJ in this regard. However, the sharing principle is not one which operates in Irish law. My focus must be on proper provision rather than asset division or asset exclusion. No asset is excluded. My primary focus must be to make proper provision albeit that, in this context, certain categories of assets may be considered in a different manner. In this case, there are pre-marital family/inherited assets. There are assets acquired due to the joint endeavours of the parties during the marriage including their endeavours resulting in asset augmentation due to business

success. To seek to exclude these resources is, in effect, to seek to exclude or treat differently assets derived from income generated during the course of the marriage. I do not believe that such assets are to be considered in the same manner as inheritances and pre-marital assets. The over-arching principle in respect of all of these different scenarios is that there must be proper provision made for both parties and their dependent children.

PROPER PROVISION

39. Having considered all of the evidence in this case and having regard to the legal principles to be applied, I have determined that proper provision may be made at follows:

(i) The Respondent's share in the premises in which the Applicant now resides with an agreed net value of €754,000 should be transferred to the Applicant for her sole and exclusive benefit. This will ensure that the accommodation requirements of the Applicant are addressed;

(ii) The Respondent is to be entitled to the family home and the strip of land in joint names is to be transferred to him;

(iii) The Respondent's share in Company B and Company A, being the portfolio of five rental properties (approximately €1,030,000) should be transferred to the Applicant for her sole and exclusive benefit. This will supplement the income of the Applicant now and in the future so that she will have a secure income over and above earned income, commensurate with the lifestyle of the family and addressing her earning capacity in the context of career sacrifices made in the context of marriage;

(iv) The Applicant should, within six months of the perfection of the Orders herein receive from the Respondent a lump sum of €470,000 being 50% of the agreed values of Company C and Company D on the basis that her shareholdings in the said companies are transferred to the Respondent or his nominee. This will provide a fund for the Applicant from which she may discharge the liabilities arising in the context of litigation with a balancing sum remaining for other contingencies;

(v) The status quo in relation to financial support for the Applicant in terms of income and maintenance and discharge of bills should continue until the transfer

at (ii) and the lump sum at (iii) hereof are discharged. The Affidavit of Means of the Applicant of the 24th April 2024 states the maintenance sum to be €1,646 per month;

(vi) 40% of the Respondent's pension fund should be transferred to the Applicant. The Applicant is considerably younger than the Respondent and therefore she will have the benefit of fund growth for a much longer period. However, the Respondent has other assets which will generate income or capital going forward and which will consequently supplement his income in retirement. This will provide a pension fund for the Applicant in retirement together with such further provision in this regard as she may choose to make between this time and her retirement.

(vii) The parties to otherwise retain their own assets and liabilities.

40. The Applicant to retain her jewellery and paintings (valued at €200,000/220,000) save that the jewellery of the Respondent's mother should be returned to him. The Applicant should also retain her car and the cash at bank sum. I do not consider it appropriate to have regard to the €30,000 lump sum paid to the Applicant in the context of an interim maintenance application as this was provision for her support and the support of the dependent child pending the hearing herein. I do not consider it necessary to make provision for the dependent child given that dependency is about to end and also the parties have both made suitable provision in this regard in the past and I have no doubt they will continue to do so. The provisions which I have ordered are on the basis that there should be no order for costs.