

Ref: Master58

Judgment: approved by the Court for handing down

Delivered: 22/10/2008

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

McG

Petitioner;

v

McG

Respondent.

MASTER REDPATH

[1] In this case the parties were married on the 25th August 1993 having cohabited from in or about 1982. The parties separated in August 2005 and accordingly this should be regarded as a twenty-three year relationship. On the 20th December 2006 the Petitioner was granted a Decree Nisi on the grounds of the Respondent's adultery and unreasonable behaviour.

[2] On the face of it, in terms of the assets, this is a straightforward case involving a house, a modest hairdressing business and some issues concerning an inheritance, jewellery, and house contents. The case however was significantly complicated by the conviction of the Respondent for benefits fraud and on the 14th June 2007 a Confiscation Order pursuant to

Article 4 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 was made in relation to the Respondent requiring him to pay to the Chief Clerk on or before the 14th December 2007 the figure of £122,687.36.

[3] This figure was arrived at following a report to the Crown Court from an accredited financial investigator.

[4] Pursuant to Article 8(1)(a) of the Proceeds of Crime (Northern Ireland) Order 1996 (the 1996 Order) and Article 4(1) of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (the 1990 Order) the Crown Court may order, if it believes that a Defendant has benefited from his relevant criminal conduct, confiscation of assets to the extent determined by the Court.

[5] In this case the Respondent claimed Income Support for himself, his wife and child from the period of 14th June 1993 to 12th April 2004 on the basis that he was unfit for work due to incapacity and that neither he nor his wife had any other source of income.

[6] It subsequently transpired that throughout this period the Petitioner was working as the sole proprietor of a hairdressing business. It was further proved that the drawings from this business exceeded the capital limits for benefit purposes and that the Respondent had failed to declare the Petitioner's interest in this business. It was also alleged that the Respondent had injected a least £18,800.00 into this business and had maintained throughout a personal interest in the business by contacting both the Accountants and Inland Revenue regarding VAT demands.

[7] It was determined that an overpayment in benefits had been made to the Respondent amounting to £81,847.74.

[8] It was also shown that during the relevant period the Respondent had set up and run a company known as F Limited dealing in the import, export, wholesale distribution and retail of household goods and furniture. He was a company director and sole shareholder in this

company. Accounts for the company showed profits of £48,912.00 and £81,860.00 for the financial years ending 2003 and 2004 respectively. A Winding-up Order was made against F Limited on 6th March 2006 and no realisable assets have been identified in connection with the company.

[9] It was established that throughout the period of his claim for Social Security Benefits the Respondent claimed for and received payments in respect of the mortgage and the family home in Belfast. The Respondent qualified for one hundred percent mortgage interest payments after twenty-seven weeks from the date of the claim which was from the 19th December 1993 and from that date onwards the mortgage payments were wholly met from Social Security Funds.

[10] In her report the accredited financial investigator calculated that the value of the property at the date of the commencement of the payments was £43,949.00 with an equity at that date of £8,042.33. She calculated that the increase in equity from the period 25th August 1993 to the 12th April 2004 when the payment of benefits ceased was £82,661.00 which including the other payments made she calculated gave a total benefit from the particular criminal conduct of £172,162.36 to include inflation linked to the change in the value of property. In the event, the Court as already stated, made the Confiscation Order in the figure referred to above.

[11] The effects of the Proceeds of Crime legislation are becoming increasingly felt in Ancillary Relief proceedings.

[12] This case has been somewhat long running, not helped by the fact that earlier in the year it was thought that the case had settled. Regrettably the crash in the property market led to that agreement unravelling and a full hearing of the case becoming unavoidable.

[13] This is a complicated area. In the case of Webber v Webber [2007] 2FLR 116 Sir Mark Potter considered the situation prior to the enactment of the Proceeds of Crime Act

2002. In particular he refers at paragraph 23 to the case of Customs & Excise Commissioners v A & Anor, AVA and he notes:-

“[23] In Customs & Excise Commissioner’s v A & Anor, AVA [2002] EWCA Civ 1039, [2003] Fam 55, the Court of Appeal clearly disposed of the suggestion that the jurisdiction of the Family Court under part 2 of the MCA [Matrimonial Causes Act] 1973 was ousted by, or obliged to take second place to, proceedings to enforce orders under the Drugs Trafficking Act 1994”.

He continues at paragraph 26

“[26] In Crown Prosecution Service v Richards & Anor [2006] EWCA Civ 849, [2006] 2 FLR at 1220, the Court of Appeal rejected a submission that the Court was deprived of its jurisdiction under the MCA 1973 to make provision for ... matrimonial assets, even though they were tainted. It held that where assets were tainted with the Proceeds of Crime and subject to confiscation they should not ordinarily, as a matter of public justice and public policy, be distributed. However, that was not to say that the Court was deprived of jurisdiction to make a distribution in favour of the wife, nor to say that no circumstances could exist in which such an order would be justified”.

The learned judge (now Lord Justice) continued at paragraph 29:

“[29] In relation to this provision Schiemann LJ concluded:
[44] ... there is nothing in the provisions of either MCA [1973] or DTA [1994] which requires the Court to hold that either statute takes priority over the other when the provisions of each are invoked in relation to the same property. Both statutes conferred discretion on the courts, which the court may or may not choose to exercise, to make orders. The terms of those orders will depend on the facts of the individual case ... equally, it does not seem to me to be axiomatic that it is more in the public interest to enforce an order under Section 31 DTA 1994 than to make a Property Adjustment Order under Section 24 MCA 1973. If the former has the effect of forcing a spouse to sell her home and become dependent on the State for housing and housing support in order to meet a Confiscation Order in relation to property which was not acquired by the profits of crimes; if the wife has made a substantial financial or other contribution to the acquisition of that property; if the crime involved is one of which she was ignorant and by which she is untainted, it seems to me that public policy argument may well go the other way. Each case must depend on its on facts.

[45] Accordingly, the fact that Section 31(2)(6) DTA 1994 require the court's powers for the realisation of property be exercised in a particular way in enforcement proceedings under that Act does not, in my judgment, mean that by necessary implication that those sub-sections either exclude or take priority over powers of the court under MCA 1973 Section 24. Unlike bankruptcy proceedings, the property which is subject to the Confiscation Order does not vest in the Receiver appointed under Section 26 or 29 DTA 1994. It remains the property of the defendant drug trafficker, and is capable of being transferred to the Defendant's former spouse under MCA Section 24".

Judge LJ in the same case states at paragraph [92]:-

"Looking at the matter generally the outcome should not depend on whether an order made under the 1973 Act had been concluded in the wife's favour before the confiscation was made against her husband. Carried to its logical conclusion that would offer a material advantage to a spouse who rushed into divorce and ancillary relief proceedings as soon as she discovered the slightest grounds for suspicion that a husband was involved in drug dealing and a corresponding disadvantage if she delayed ... "

[14] Sir Mark Potter concludes at paragraph 43:-

"[43] Thus, at the time when the matter came before me, it was clear that the High Court had the power to make a Property Adjustment Order in favour of the wife to an extent which went beyond the half share conceded by the CPS not to be tainted as the proceeds of crime.

[44] So far as concerns the representation of a third party, such as the wife in this case, in relation to confiscation proceedings in the Crown Court, there is no provision contained in the POCA for representation or argument to be presented by the third party at the stage when the Confiscation Order is made. In this respect the position is the same as that which existed under the CJA 1988 and the DTA 1994. This is because, when making a confiscation order, the Crown Court must disregard what a former wife may obtain in other proceedings over and above any interest in which she holds at the time the Confiscation Order is made. The mere right of the wife to apply for relief under the MCA 1973 does not amount to "an interest" falling within the terms of Section 69(3)(a) of the POCA see Section 84(2)(f). At that stage, the Crown Court has no regard to, and makes no allowance for, any possible adverse consequences for a former spouse and her child when deciding the amount to be confiscated. The court's function is

simply to conduct an arithmetical exercise to determine the assets available for confiscation; see R v Ahmed; R v Qureshi [2004] EWCA Crim 2599, [2000] 1WLR 122, [2005] 1 FLR at 679”.

[15] In the case of R v Qureshi noted above Latham LJ stated:-

“[11] The court is merely concerned with the arithmetic exercise of computing what is, in effect, a statutory debt. That process does not involve any assessment, or judgment, of the way in which that debt may ultimately be paid, anymore than the assessment of any other debt. No questions therefore arises under Article 8 at this stage in the process.

[12] Different considerations, will, however, arise if a debt is not met and the prosecution determined to take enforcement action, for example, by obtaining an order for a Receiver. As the House of Lords explained in Re: Norris [2001] UKHL 34, this is the stage of the procedure in which third parties right’s cannot only be taken into account but resolved. If the court is asked at that stage to make an Order for the sale of the matrimonial home Art 8 rights are clearly engaged. It would be at that stage that the court would have to consider whether or not it would be proportionate to make an order selling the home in the circumstances of the particular case. That is a decision that can only be made as the facts at that time. The court would undoubtedly be concerned to ensure that proper weight is given to the public policy objective behind the making of the confiscation orders, which is to ensure that criminals do not profit from their crimes. And the court will have a range of enforcement options available with which to take account of the rights of third parties such as other members of the Ahmed family.

[16] This issue was also considered in this jurisdiction by Weatherup J in the case of O’Rawe v O’Rawe [2006] NI unreported. During the course of that case, although the ancillary relief aspect of the case was fairly minor, the judge concluded that if there was a conflict between the statutes the jurisdiction of the matrimonial court was not necessarily ousted.

[17] How then does that leave this particular case? The assets in the case are modest. The first is the matrimonial home which has been on the market for sale for some considerable time with only one viewer. It was valued for the Respondent in April in the region of

£325,000.00. The parties have agreed that the house be sold and the proceeds divided as directed by the court. The other asset in the case is a hairdressing business set up by the Petitioner in approximately 1984/1985. The case was made on behalf of the husband that he worked in the business. On the evidence before me it was clear that he make no significant day to day contribution. The case was made by the Petitioner that he took money out of the business. The business employs two part-time employees, one full-time employee, and the Petitioner. The main asset in the business are the premises in the sole name of the Petitioner valued in January 2008 at £170,000.

[18] The Petitioner also has a one-fifth interest in her mother's estate which subject to the sale of the house in the estate might come up to £50,000.00 less costs. The Petitioner's mother died three years after separation.

[19] Much of the value in the Petitioner's business lies in the value of the premises held on a mortgage in the sole name of the Petitioner. 50% of the value of these premises in the confiscation proceedings was ascribed to the Respondent. To put it mildly this is a broad brush approach. Having heard the evidence of the parties, even though it is probable that the Respondent at some stage introduced money into the Petitioner's business, I take the view that even if that were so, it seems to me likely, on a balance of probabilities, that he took much more out of it than he put into it. It seems clear to me that the history in this case was of the Petitioner working hard at her business, whilst the Respondent seems to have moved from business to business and the Petitioner saw very little benefit from any of the businesses that he engaged in. Accordingly I do not intend to ascribe any value to the business over and above the premises, as any value that it might have is, probably entirely due to the presence of the Petitioner in the business, and if she were to leave it it would have no value worth talking about.

[20] I then have to move to the issue of the payment of the mortgage and rates by the various Government Departments. It cannot be denied that the Petitioner has got a benefit from these payments.

[21] It is difficult to quantify exactly what that benefit is and some of the documentation in the case is confusing.

[22] It seems to me, and the case was never made to the contrary, that the Petitioner in this case was entirely innocent of what was taking place, and had no knowledge that these payments were being made. She therefore comes to this situation, in equitable terms, as an innocent volunteer. It seems to me that the fairest way of dealing with these payments is to ascribe fifty per cent of them as being to her benefit, but as she is an innocent volunteer I intend to order that she returns that fifty per cent to the Respondent, who will of course have to account for it in due course, on foot of the Confiscation Order. As I have said the documents are confusing, and it is not clear to me exactly how much was paid, but it appears to have been in the region of £32,000. Accordingly I would like the solicitors involved in the case to try and agree a figure for the payments for the rates and the mortgage, fifty per cent of which as I have already said, will be returned to the Respondent's share of the eventual proceeds.

[23] A further matter relates to the inheritance received by the Petitioner from her mother's estate which will only be realised when her mother's house is sold.

[24] The issue of inheritance has exercised the matrimonial courts for some time and was closely analysed in White v White [2002] 2FLR at 981 and the cases following thereafter.

Lord Nicholls states at page 994 in White v White:-

“Clearly when present this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, the time when and the circumstances in which the property was

acquired are among the factors to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimants financial needs can be met without recourse to the property.”

[25] In this case, as I have already stated this inheritance was received three years after the parties separated. in the light of the current property market it is not clear what benefit the Petitioner will receive. In my view, given the circumstances of this case, and in particular the fact that the Petitioner as a result not only of the breakdown of the marriage, but largely as a result of the Respondent’s wrongdoing is losing her home, I do not intend to place any value on the Petitioner’s inheritance for the purposes of the proceedings.

[26] The last issue concerned allegedly valuable jewellery owned by the Petitioner gifted to her by the Respondent. This is an issue that arises regularly in ancillary relief. The Respondent alleged that this jewellery was worth £150,000. The Petitioner produced a valuation of £19,000 which I accept. It is distasteful in the extreme to have to enter into a debate about how much of a gift, freely given, should be taken into account in proceedings such as these. Given the valuation provided, and the other circumstances of this case, I do not intend to take the jewellery into account.

[27] This is a lengthy marriage with no minor children. Both the parties are healthy and both the parties appear to have worked and contributed to the running of the matrimonial home over the years, although as I have already stated, I suspect that the Respondent received somewhat more during the marriage than the Petitioner.

[28] That said the starting point in this case should be equality. I have already said that because of circumstances of the case I do not intend to take into account any value for the Petitioner’s business or her inheritance.

[29] Accordingly I intend to order that the matrimonial home be sold and that the proceeds be divided fifty – fifty save for the fact that the Petitioner shall account to the Respondent for

fifty per cent of the monies received from Housing Benefit and the Department of Health & Social Services in respect of the mortgage and rates payments.

[30] As regards the value of the business premises, in the normal course of events a Respondent in a case such as this could expect to receive a significant portion of these premises, if not quite 50 per cent, due to the fact that the premises would be considered part of a business unnecessary for the continuation of that business. In this particular case I have decided upon a significant departure from equality because of the circumstances of this case many of which I have already alluded to.

[31] Annexed to the Petitioner's affidavit was a sample, and I believe only a sample, of the Respondent's various bookmaker's accounts. He seems to have been a man much interested in sporting pursuits, particularly of the equine variety. These samples show that on any given day the Respondent might have placed a number of bets. They show that for instance on the 3rd October 2004 he placed £320.00 on bets on football matches and on the same date over £1200.00 on horse races.

[32] Another example would be the 9th October 2004 when he bet £775.57 on a rugby match. On the 10th October 2004 £300.00 was bet on football matches and £1500.00 was bet on horses.

[33] In the normal course of events some of these bets were successful but many were unsuccessful and I have no doubt that this was a course of action pursued by the Respondent throughout the life of the marriage. This clearly constitutes conduct which cannot be disregarded pursuant to Article 27(1)(g) of the Matrimonial Causes (Northern Ireland) Order 1978. In the case of Primavera v Primavera [1992] 1FLR at 16 Butler-Sloss LJ states at page 26:-

“In addition, it is necessary to look from section 31(7) to the relatively new section 25, as amended by the Matrimonial and Family Proceedings Act 1984, and the court has to have regard, in particular to the following matters, which include the

conduct of each of the parties, if that conduct was such that it would in the opinion of the court, be inequitable to disregard it.

Speaking entirely for myself the conduct of a spouse in relation to financial matters, both those during the marriage and those taking place subsequent to the marriage, are capable of being considered conduct which comes within section 25(2)(g)".

[34] Accordingly taking into account this reckless expenditure and all of the circumstances of this case I feel that a fair figure to award the Respondent by way of his interest in the premises of the Petitioner's business would be £10,000.

[35] The above will be on the basis of a clean break and on the basis that the parties retain all other assets held in their own names.

[36] I am acutely aware that on the figures available, given the uncertainty in the housing market, and the mortgage of approximately £35,000 owed on the matrimonial home it is possible that the Respondent may face a shortfall in relation to the monies due under the Confiscation Order. I am also however mindful of the Respondent's right to apply under Article 22 of the 1996 Order to have the Confiscation Order varied.

[37] I will also extend the time for appeal of this order to 56 days from the date of the order and will consider argument as to costs in due course.