

Master 76

Ref:

*Judgment: approved by the Court for handing
(subject to editorial corrections)*

Delivered: 17/11/09

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

PROBATE AND MATRIMONIAL

BETWEEN:

McK

Petitioner;

and

McK

Respondent.

MASTER REDPATH

[1] In this application the husband was convicted in November 2006 of keeping controlled waste on lands at X and sentenced to twelve months in prison. That being an offence to which the Proceeds of Crime Act 2002 applied, he was subsequently on the 6th May 2008 ordered to pay the sum of £252,252.00 on or before the 6th May 2008, or in default to serve a term of imprisonment of five years consecutive to the term of twelve months which he received for the original offence, which twelve months he has served. I understand that this figure was arrived at by calculating the amount of land

fill tax avoided by allowing this dumping, together with a sum that it was deemed he was paid for allowing the dumping to take place. The case is made, and it does not appear to be contested, that the dumping has rendered the land worthless, along with the house attaching thereto.

[2] The parties married on 18th July 1981 and separated after a fifteen year marriage with a Decree Nisi not issuing until ten years after the separation. The parties have five children, the youngest of whom was four at the date of separation in 1996, and is now seventeen. It was accepted that the wife had taken primary care and substantial responsibility for the five children since the date of separation in April of 1996. All five children continue to reside with their mother.

[3] There were three main assets in the marriage:-

1. Land and dwelling at X valued at £350,000.00 uncontaminated, but in its current condition, nil;
2. Lands at Y valued at £150,000.00;
3. Dwelling at Z valued at £70,000.00.

[4] The dwelling at Z was purchased by the wife in her sole name after the separation with a loan from the Credit Union of which £4,500.00 remains outstanding.

[5] The lands at X and Y were transferred into the husband's name during the course of the marriage by a neighbour who had long standing family connections to originally the wife's family; but it was accepted by the wife that he had been extremely friendly with her husband.

[6] In the normal course of events in a case such as this, with assets that should have been worth £570,000.00, the starting point would have been equality; with a departure from equality in favour of the wife as a result of her care for the five children; and in all likelihood that would have been a significant departure. However, this case is somewhat out of the ordinary for the reasons outlined above.

[7] The nexus between assets recovery and ancillary relief proceedings has been considered by the courts on a number of occasions in recent years. I understand in this case that the order for recovery is presently under appeal and that no receiver has been appointed.

[8] 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 ...".

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".

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: Norrris [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.

[9] 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.

[10] It should therefore be clear that the fact that assets recovery proceedings are ongoing and that a Confiscation Order has been made cannot affect the rights of the wife in this particular case. It is also important to note that all of the assets in the case were acquired prior to the behaviour complained of. Had any of the assets been acquired as a result of the criminal conduct the outcome might be different, see CS S v S [2008] EWHC 1925.

[11] It was conceded by the husband that his wife, having been separated from him for many years before the dumping started to commence, knew nothing about the contamination of the ground in question and had nothing to do with it. He also did not help his case by giving evidence on oath before me that he knew nothing about the dumping, even though he had already been convicted by a jury and served a sentence of twelve months for the very thing that he was telling me he knew nothing about.

[12] So how then does this conduct of the husband affect how the assets in this case should be divided up?

[13] The starting point for any analysis of this type of behaviour has to be Article 27(2)(g) of the Matrimonial Causes Order (Northern Ireland) 1978

which directs the court to take into account any conduct of a spouse which it would be inequitable for the court to disregard.

[14] This matter has also been considered by the courts on a number of occasions, the starting point being Primavera v Primavera [1992] 1FLR 16.

In Primavera v Primavera Lady Butler Sloss notes 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 as it would in the opinion of the court be an equitable 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)”.

[15] In that case the English and Welsh Court of Appeal took the view that expenditure which could be regarded as reckless could be regarded as such conduct.

[16] The matter was further considered in the case of McCartney v McCartney [2008] EWHC 401 (Fam) where Bennett J refers at para 159 to his own judgment in

Norris v Norris [2003] 1 FLR at 1142 where he said:

“The overspend ie the expenditure over income of £350,000 in a little of two years, at a time when he was about to and then did enter into protracted litigation with the wife, can only be classified as reckless, and particularly at a time later on when the dot.com and the stock market collapsed. A modest overspend in the context of a rich man would be understandable and could not be classified as reckless. But in the

circumstances of this case, as I have set them out, in my judgment, the scale and extent of that over spend was reckless. I do not think it appropriate to add back the entire overspend, but I do not consider it unfair to add back into the husband's assets the figure of £250,000. In my judgment, there is no answer that the husband can sensibly give to the question, 'why should the wife be disadvantaged in the split of the assets by the husband's reckless expenditure?'. A spouse can of course, spend his or her money as he or she chooses, but it is only fair to add back into the spouses assets the amount by which he or she recklessly depletes the assets and thus potentially disadvantages the other spouse within ancillary relief proceedings".

[17] This is part of a line of authority that goes back to Martin v Martin [1976] (Fam) 335 in which Kearns LJ says at 342(h):

"A spouse cannot be allowed to fritter away the assets by extravagant living or reckless expenditure and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably".

[18] I am also mindful of what Bennett J says at paragraph 160 of McCartney v McCartney:

"The only obvious caveats are that a notional reattribution has to be conducted very cautiously by reference only to clear evidence of dissipation (in which there is wanton element) and that the figure does not extend to treatment of the sums reattributed to a spouse as cash which he can re-deploy in meeting his needs, for example, in the purchase of accommodation ...".

[19] It is quite clear that the conduct of the husband in this case is such as it would be inequitable for the Court to disregard. His actions in allowing toxic waste to be dumped on this property was deliberate, wanton, and reckless, and has in fact had the effect of depriving the wife, even if I award her all of the uncontaminated assets in the case, of a considerable portion of what

would be her due share of the matrimonial assets. I say this even though I appreciate that the consequences of the order that I intend to make could well be catastrophic for the husband and is likely to lead to him serving a further five years in jail, subject to his appeal, which I have already said is due to be heard shortly.

[20] Accordingly I intend to order the transfer of the uncontroverted lands at Y to the wife and direct that she retains her interest in the home that she purchased in 1997. I can see little point in ordering further payments to be made by the husband.

[21] Finally as both sides are legally assisted I intend to order that there should be no order for costs save for legal aid taxation of the parties costs. I will also certify, given the potential consequences for the husband for Senior and Junior Counsel for both parties.