

G v G (Confiscation Order: Conduct)

IN THE FAMILY COURT AT MEDWAY

Case No ZZ21D48328

Neutral Citation Number: [2023] EWFC 16 (B)

Before HHJ Richard Robinson on the 26th January 2023

JUDGMENT (anonymised)

1. This is my Judgment on the Financial Remedy case between Mrs G and Mr G which I heard over 3 days on the 15th – 17th November 2022 and reserved my Judgment. I shall call the parties “the Wife” and “the Husband” for convenience I hope they will excuse the shorthand.
2. The applicant Wife has been represented by Ms Sarah Wood (instructed by TWM Solicitors LLP). The respondent Husband has acted in person. The Crown Prosecution Service (CPS) who are Intervenor, have been represented by Ms Fiona Jackson. I am grateful to counsel for their assistance in this complicated matter.
3. The parties started cohabiting in 1999; they were married in 2006. The Wife is now 50 and the Husband 53. They have 2 children, who are now 15 and 11.
4. The Wife worked in secretarial roles and took a part time degree. She suffers from ankylosing spondylitis which restricts her ability to work. The Husband was a doctor. In 2011 he obtained a post in a hospital; in 2012 he was suspended from work; in 2018 he was convicted of fraud in relation to the representations he made to obtain that post and sentenced to 6 years imprisonment. He was released on licence in February 2021.
5. He returned home, but on the 24th March 2021 the parties separated, and the Husband left the matrimonial home and has been living with his mother in Glasgow. The Wife petitioned for divorce on the 12th July 2021 and issued her Form A on the 26th July 2021. Decree nisi was pronounced on the 21st December 2021.
6. There was a hearing before DJ Batey on the 21st June 2021, at which he ordered costs against the Husband for non-compliance, and First appointment before DJ Wright on the 20th April 2022, at which she joined the CPS as an Intervenor and gave directions for the final hearing. I conducted a PTR on the 7th October 2022, when I gave directions that Mrs AG, the Husband’s mother should be given notice and gave directions that she could file a statement and if she did so could give evidence.

7. I heard evidence from the Wife, the Husband, and Michelle Jones, Crown Prosecutor, by CVP link. I have a well-prepared Bundle and a Supplemental Bundle.
8. Crucial to this case are three properties:
 1. **BR**, the former matrimonial home, valued at £492,000 subject to a mortgage of £64,070, net £416,070. The Wife lives there with the children, and the mortgage is currently being paid from her Universal Credit.
 2. A property in London **QG**, owned by the Husband and his mother in shares which are disputed, either equally or 66.66% to the Mother and 33% to the Husband. The parties lived there at one time and the Husband subsequently received the rental income when it was let out, but he says that it was originally owned by his parents and himself as tenants in common, and when his father died his share passed to his mother on intestacy. It is valued at £1,230,000. It has been agreed that this can be sold, and the proceeds held against the decision in the confiscation enforcement proceedings.
 3. A Scottish property, which was formerly owned by the Husband. His share was transferred to his mother after the separation but before the Petition was issued. The wife contends that he has a half share in this property, having been the sole legal owner until August 2021. It is valued at £521,375.
9. The only other significant asset is the Husband's NHS pension, which has a CTV of £517,028. The scale of this was only obtained shortly before the hearing so no attempt has been made to obtain any report from a Pension Expert.
10. The Wife seeks the transfer of the former matrimonial home to her. She also seeks a Lump Sum of £266,890 and for the Husband to pay the mortgage, £328,060 in all, and the costs orders made so far of £2,557.5 in all. She seeks 50 per cent of the Husband's pension and nominal spousal maintenance until the youngest child ceases tertiary education.
11. The Husband asks that both parties should be jointly responsible for paying the confiscation order and costs. The former matrimonial home should be sold, and the proceeds divided equally. He initially said that this should be when the youngest child ceased secondary education but altered this to say that it should be sold now, and the parties should rent. The pension should be divided in accordance with his years of service, approximately 9 out of 20 years being accrued during the marriage.
12. The interest of the Crown Prosecution Service is that the Confiscation Order should be paid. The total due is now £411,983.60 including interest which is still running. Mr S has paid £4,750 towards the total, and there may be some issues as to monies received and paid to his mother which could have been used to reduce the debt. They accept that the Wife has a majority share of 68 per cent in the former matrimonial home as her parents contributed £140,000 to the purchase price when it was purchased in 2009 for £205,000. It is their position the Husband has a 50 per cent legal and beneficial interest in the London property as found by the Crown Court.

13. The Husband's mother Mrs AG is not a party. She did provide a statement, but after the time specified in my order. She did not attend and was not called as a witness. I did consider her statement notwithstanding, but I am cautious about relying on what she says in the absence of documentary evidence. What I cannot do is to make any findings binding on her, whether in these proceedings or in respect of the confiscation proceedings.
14. The real issues were not immediately clear to me, partly because Mr G is not represented. It comes to this: if he owns 50 per cent of the London property, there is enough equity to pay the confiscation order as his share would be £509,164. If he only has a one third share, his share is worth £336,982, and not sufficient to pay the order. In fact, Mr G told me, and this seems to be confirmed in correspondence, that his mother agrees that the confiscation order should be paid from the sale of the London property even if some of this comes from her share. It does not leave any scope for a lump sum order. If I were to make an order which transfers the London property or has the effect of preventing it being applied to the confiscation order, there is a prospect of the Husband being ordered to return to prison. The Wife has not sought to make a claim directly against the Scottish property or have the transfer set aside but says that the Husband holds an interest in it which can be used to pay a lump sum if necessary.
15. Accordingly, the major issues I have to consider can be summarised:
 - (1) The ownership of the London property;
 - (2) The ownership of the Scottish property;
 - (3) The relationship between the properties and the confiscation order;
 - (4) The s 25 exercise;
 - (5) Whether there should be a sale of the former matrimonial home;
 - (6) The distribution of the Husband's pension.
16. There are numerous points of dispute which have been considered during the course of the hearing. These include the treatment of a sum of about £33,000 which the Husband paid to his mother after he came out of prison, the various items, mostly importantly a car, which he passed to his mother.
17. There is relatively little contentious law, but it was necessary to understand the working of the Proceeds of Crime Act 2002 ("POCA"). The confiscation order was made at hearing in May 2019. I have seen a transcript. The confiscation order was assessed in the full sum of £337,214.78. The court also considered the available assets to meet this debt. The Wife and the Husband's mother Mrs AG were given the opportunity to make representations, but the Husband says the hearing was mostly concerned with the quantification and his mother did not attend. Ms Jackson and Ms Wood agree that confiscation and family law principles may involve consideration of different tests but relate to the same people and the same assets. Neither the Proceeds of Crime Act 2002 nor the Matrimonial Causes Act 1973 takes priority over each other. If a court dealing with financial remedy proceedings makes a property adjustment order after the confiscation order has been made but before enforcement proceedings have concluded in relation to the confiscation order, there will have to be an adjustment order by the Crown Court of the relevant amount available.
18. It is not suggested that the Wife's property is "tainted" by knowledge of the Husband's criminal activities. In ***Stodgell v Stodgell [2009] EWCA Civ 243*** the Court of Appeal held that

it was not appropriate to make a financial order that would have reduced the assets available to satisfy the confiscation order, but the facts were different as the amount of confiscation ordered exceeded the value of all the assets and the whole could have been pursued through bankruptcy. In this case there were found to be sufficient assets comprising a 50 per cent share of the London property and any balance from the former matrimonial home. The Scottish property was not considered as it was not necessary.

19. I take the view that neither act takes priority. The court must consider the order it makes on the principle in s25 of the Matrimonial Causes Act, including "all the circumstances of the case". I am not bound by the decisions of the Crown Court, but I can take them into account.
20. The Husband's mother Mrs AG did not participate in the confiscation proceedings. Even if she was not served with notice, she is now out of time to appeal. However, in Enforcement proceedings, it would still be open to her to claim that she owns two thirds of the London property. Mr S said, and it was accepted, that Mrs AG has accepted that she would agree to the discharge of the full sum, even if it meant using part of the 50 per cent she claims. This however does not bind me, and the issue of ownership is live before me. Mrs AS would also have the right to make representations as to the ownership of the Scottish property by virtue of s 51(8) of POCA.
21. If I were to make an order in respect of the London property that meant that the confiscation order could not be discharged from the Husband's share of the properties the Crown Court took into account, the CPS could seek to proceed against the Scottish property. If the Husband does not make payment of the confiscation order, he is liable to be recalled to prison. What the result would actually be is a matter of speculation.
22. I shall consider the ownership of the properties with this background. The former matrimonial home is plainly a matrimonial asset. It was accepted by the Husband in the confiscation proceedings that the Wife's parents had contributed the substantial deposit as a gift when it was purchased. Plainly, it has been the matrimonial home since then.
23. The London property was originally owned by the Husband and his parents as tenants in common. There is an issue as to what happened to the Father's share when he died. In principle, it would pass on intestacy. This is a matter of Scottish intestacy law. The mother was the executor. The Husband says that it would have passed to her. Ms Wood raises a question as to the limit of the amount which passes automatically to a Wife on intestacy. In the Crown Court, the Schedule showed a 50 per cent interest in the London property with an equity of £420,000. Mr G says his counsel did not put forward his correction to the schedule and that it passed unchallenged. Mrs AS did not attend and did not make representations. Whatever happened, the findings of the Crown Court have not been appealed and are conclusive as far as they go. However, Mrs AG would be able to raise her interest in Enforcement proceedings.
24. On the evidence before me, I have real doubts as to how it can be said that the Husband acquired a half share when it had previously been held as tenants in common. It is not sufficient to speculate as to Scottish inheritance law, and there is no will, or bequest. It is true that the parties to the marriage lived in the property as a home for a short time and that the husband thereafter kept the rental income. He says that he is now repaying his

mother, and a sum of money was paid to her. The explanation is not self-evident. In my view it is as consistent with family members working together as a family as clear evidence of ownership. Whatever may be the result in Enforcement proceedings I cannot find that the Husband's interest is more than 33.33 per cent, or £336,982, now completely subsumed by the confiscation debt. Further, there can be no doubt that even if taken as a matrimonial asset as a result of the parties having cohabited there, it came entirely from the Husband's family.

25. The Sottish property was not considered in detail by the Crown Court. There is no doubt that the Husband was the legal owner until recently. He accepted that he did make some payments of the mortgage long ago before he moved to England, but he says that the reality is that he held it on behalf of his mother. I am inclined to the view that he did have a share in this property before he transferred it to his mother in August 2021. But there has been no application to set aside this transfer, and Mrs AG is not before me so I cannot make findings which are binding on her. I do not find that he is the beneficial owner of this property. However, I do consider that he is likely to receive further support from his mother in the future, and it may take the form of an interest in this property. If he held a half share it would be worth £260,687. In any event it is plainly a non-matrimonial asset.
26. I am driven to the conclusion that the matrimonial pot is in fact limited to the former matrimonial home and the Husband's pension. However, I have no doubt that the Husband and his mother are working together. She did not provide her statement in time, though she blames misunderstanding. However, she could have been called to give evidence, by remote video if appropriate and the Husband did not seek to call her. She has offered to utilise part of her share in the London property to ensure the Confiscation Order is paid, and I have little doubt that she will continue to support her son.
27. Mr S says that he is not working as he is his mother's full-time carer, but he also said that he wishes to relocate to the South East of England so as to be able to see his children. This is a matter to be determined elsewhere, but I am aware that there are difficulties in his relationship with them. He would be giving up free accommodation with his mother, where he has stayed since the summer of 2021. There is a history of joint ownership of family property, and as I have indicated the history of the Scottish property leads me to consider that her support is likely to continue.
28. The Wife's situation is not easy. She is living in the family home, and raising two girls, effectively as a single parent. She needs a 3 bedroomed property and has had to live frugally on Universal Credit. She is fortunate that her parents have assisted her with her legal fees. Her health issues make obtaining employment more difficult, and this has to be balanced against the advantage of Universal Credit in paying the interest on the mortgage. Her pension has a CETV of about £3,000.
29. The Husband is living with his mother at the moment. He says that it is not easy, with a conviction for fraud, to obtain employment, and I accept that this is a handicap, but I have seen no evidence of real attempts, and the reality is that he is being funded by his mother. He wishes to be nearer at hand to see his children, but there are issues about the effect that his conviction and absence has had on them, which is being considered in Children Act proceedings.

30. This is a case when it is helpful to look at the s25 criteria in a little detail. The welfare of the children is the first consideration. Without going into detail, it is obvious that they must have been affected by the change in the family circumstances. It is important that they are able to live as normal a life as possible.
31. I have considered the parties respective resources and income potential. The Wife is limited in her ability to improve her situation. The Husband has difficulties but could make more effort and he has the advantage of family support.
32. The Wife needs to maintain a home for the children and support them at an important stage in their life. Their standard of living is inevitably much less than it was and could have been. The Husband does not seem to have been particularly good at managing his money, but they must have had a comfortable life style. Both parties are in their early 50s. The Wife has a limiting health condition.
33. Both made contributions to the family, some of which came from their respective families. I cannot ignore the substantial support that the Wife's parents (and grandparents) made to the purchase of the former matrimonial home. They also contributed to property costs elsewhere over the years and to his costs of his appeal. I am not clear to what extent these payments were loans or gifts, but I take them into account on the basis that the Wife would wish to be able to repay at least some of them if she were able. It is right that the Husband's parents also contributed in respect of the properties, particularly the London property.
34. This is clearly a case in which the Husband's conduct would be inequitable to disregard. As the Wife puts it in her statement

"Mr SS's suspension, conviction, imprisonment and being struck off has been catastrophic for myself, [and the children]. I feel completely duped and defrauded by him"

The term of 6 years gives an idea of the seriousness of his offending. I have no difficulty in accepting this, and it is plainly a factor to which I give considerable weight.

35. I also take into account the loss of benefits, particularly pension benefits to the Wife.
36. I have no doubt that I should transfer the Husband's interest in the former matrimonial home to the Wife. She and the children need security to the extent that this can provide it. The Husband's position is unrealistic and untenable. The idea that she should have to rent with a limited and diminishing pool of money (which would disqualify her from most benefits) is out of the question.
37. However, I do not accede to the request for a large lump sum payment. Firstly, on my findings, the money is not there. Despite what was said in the confiscation proceedings, I do not consider that the Husband has a half share in the London property, but only one third. In any event, Mrs AS has a realistic chance of establishing this in Enforcement proceedings. That she is willing to contribute to paying the Confiscation Order in any event shows family co-operation rather than the beneficial ownership. Secondly, in any event, the Confiscation Order has to be paid to avoid the prospect of the husband having to return to prison if the

Confiscation Order not being met. If I were to make the level of order the Wife seeks, there would be a risk of this unless Mrs AG contributed deeply from her unchallenged share. However critical I am of the Husband's conduct, I do not think that it would be right to place him at this risk, and it would be giving the Family Court's orders priority if I were to transfer his share in the London property to the Wife. I do not give POCA priority, but in the circumstances of this case, I recognise it and take it into account.

38. This leaves the mortgage debt, and the Wife's costs which even if they have been met by her parents, are a significant liability. I have little information about the Husband's pension save for the CTV of £517,028. Ms Wood tells me that he will be able to draw down £61,588 from his pension in seven years' time. This would be sufficient to pay off the mortgage on the family home.
39. Ms Wood argued before me that as there was no time to obtain a pension report, all she could do was to ask for an equal division on the CETV. I have not accepted one of her major submissions, but I have much sympathy for her client's position. I think that is likely that the Husband will continue to be supported by his mother. I think that he could and should make more efforts to obtain employment, unless he is content to care for his mother and be supported by her. I think that as between the Husband and his mother, there is a strong likelihood that he will have the benefit of the Scottish property.
40. I therefore consider that it would be appropriate to divide the pension unequally so as to give the Wife the prospect of at least substantially paying off the mortgage when she reaches the age of 55, and without giving up the benefits of the pension. This point was not fully argued before me, so I indicate that I am inclined to direct that the Husband's pension should be shared so as to give the Wife two thirds and the Husband one third. This will give her the opportunity to take a lump sum to discharge the mortgage and some security for her retirement. I expect the Husband to have support from his own mother. I would not take into account her own small pension. I do not have the exact figure that I would have from a pension report, but I do not think that adjourning to obtain a report from a pension expert to undertake a more accurate calculation would be justified. I will however hear argument on this point.
41. This is not a case where I can make a real attempt to justify my conclusion by percentage. If I ignore the Confiscation Order, the Husband keeps £336,982 and the Wife £416,070, (55%) and the pension is divided £172,377 to £344,650 (66%). However, once the Confiscation Order is considered this is misleading.
42. I will consider the issue of costs after this Judgment. Plainly, the Husband must pay the costs already ordered. [The Husband was ordered to pay some relatively small costs of litigation and transfer].

Richard Robinson

26th January 2023

