How should the innocent party be advised when seeking financial orders against a party who is already convicted or likely to become involved in proceedings as a consequence of which matrimonial assets may be the subject of a confiscation order?

There seem to be three main areas of criminality in which this issue arises and from proceeds of crime are comprised in the matrimonial pot, being drug trafficking, money laundering and tax evasion. Unfortunately the wife (and it usually is the husband who engages in the criminal activity and the wife who is the innocent party) is the last to know of her husband’s dodgy dealings by which time she is horrified to find that she too may have been living off the fruits of his dishonest labours. Where the wrongdoer is found to have assets which are the proceeds of crime, these are then the subject of a confiscation order, the consequence of which is that they are beyond the reach of the wife in settlement of her matrimonial case.

The question in many of these cases is as to which order takes priority, the matrimonial order or the confiscation order and in the process of finding out what the assets are and where they are, are there other difficulties of which practitioners need to be aware?

The Law

Webber –v- Webber [2007] 2 FLR 116 was a case in which the applicant wife had applied for an order, somewhat surprisingly, that her application for ancillary relief should be heard in the Central Criminal Court at the same time as the confiscation hearing involving her respondent husband. An order had been made for the sale of the matrimonial home and the wife was seeking an order whereby she was granted the full amount of the proceeds of sale.

The background to the matter was that the husband had been convicted of conspiracy to supply cannabis and confiscation proceedings had been instigated against him under the Proceedings of Crime Act 2002. It had been agreed between the husband and the Crown Prosecution Service that the "available amount" for confiscation was 50 per cent of the net proceeds of sale of the house on the basis that that sum represented his interest. The wife argued that the failure of the 2002 Act to have specific regard to the interests of an innocent wife seeking an order for ancillary relief under the Matrimonial Causes Act 1973 against a criminal husband and, in particular, to provide for a means whereby the application could be determined at the same time as the making of the confiscation order and the determination of the "available amount" represented a lacuna which should be filled by adopting or adapting the procedure set out in a previous case, W v H (2004) EWHC 526 (Fam), (2006) 2 FLR 258

Judgment was given by the then President of the Family Decision, Potter J following a hearing to decide the correct procedure where there were both ancillary relief proceedings and confiscation proceedings on foot. Unsurprisingly, it was held that both sets of proceedings were to be heard separately, the former by the family Court whereas the procedure to be adopted in confiscation cases was exclusively the preserve of the criminal court.

In that particular case it was held that-
It was plainly preferable that the ancillary relief application should be disposed of first, so that on the restoration of the adjourned hearing of the confiscation proceedings the trial judge would have information as to the husband’s available assets in the light of findings made in the ancillary relief application.’

Whilst that seems sensible in that the innocent spouse would obtain their financial remedy before the matrimonial assets are depleted to satisfy the wrongdoing of the other spouse there may be circumstances where the procedure has to be reversed and the innocent wife is, unfortunately, penalised. What happens in a situation where the wife does not know the full extent of the husband’s wealth, and whether or not such wealth is wholly or partly the proceeds of crime? In such circumstances, investigation will need to be made and in circumstances where a confiscation order is likely, the Crown Prosecution Service will be involved in trying to discover and locate the husband’s assets. When found, what happens if they are insufficient to satisfy the confiscation order?

*Stodgell v Stodgell [2009] 2 FLR 244* was a Court of Appeal decision in which the Wife effectively claimed a lump sum. It should also be noted that the Wife was not complicit in the Husband’s crime. The Husband was subject to a Confiscation Order of £900,453 in respect of fraudulent tax evasion. This was also a case in which the Wife asserted that the husband had hidden assets. The assets as found in the ancillary relief proceedings were indeed insufficient to meet the Confiscation Order and the wife sought leave to appeal a decision that her ancillary relief claim could not proceed until the confiscation order had been discharged. In the event the Wife was refused leave. It was said in *Stodgell* referring to existing authorities that ‘neither an ancillary relief claim nor a confiscation order enjoys automatic priority, the one over the other [8].’

It was also said at [9]-

This case is a good illustration of the fact, that while non-complicity in the crime is a necessary condition for the wife to succeed in an ancillary relief claim as a matter of discretion where she is in competition with a confiscation order, such non-complicity is not a sufficient condition. She will also fail in a number of other circumstances, including where the husband’s assets are reduced to nil by having to pay now what he ought to have paid years ago. This is not a case in which the confiscation order relates to surplus income derived from crime such as profits from drug trafficking. This is a case where the husband owed the Revenue the tax from years before his conviction. Penalties were incurred also because he failed to pay his debts. The spouses both lived well on a domestic economy which included the non-payment of tax and penalties. Of course it is relevant where assets can be traced to acquisition from the proceeds of crime, but that is not the only case in which justice requires that the confiscation order should be met before there can be any question of allocating the assets between husband and wife. Another such case, of which is this one, is where the domestic economy and the assets accumulated are only of the size they are because the husband has failed to pay the tax due. If this husband had paid his tax and penalties, his assets would be nil rather than either £880,000 or £750,000.

Further at paragraph 11(iii) it was said-

(iii) If there were surplus assets beyond what is needed to pay the confiscation order, that of course would be different. However, the wife’s assertion that there are is and was by the time of Holman J’s decision a wholly speculative one. It would not be a legitimate exercise of the court’s powers to use them in a manner which in effect requires the receiver to use up public funds on a search for such assets in the hope that both the wife and the tax can be paid.

Given that there is no automatic priority between an ancillary relief order and a confiscation order, it is suggested that common sense should prevail in individual cases. However, it seems appropriate to follow the reasoning in *Stodgell* and for any financial remedy final hearing to take
place (if it is still appropriate) after the making of a Confiscation Order, as that will determine what, if anything, remains to be divided in the financial remedy proceedings. Whilst that may seem unduly harsh on the innocent wife, the matrimonial court is likely to take into account any indirect benefit enjoyed by a wife from her husband’s criminal activity, as indeed was the case in Stodgell even though the wife was not complicit in such wrongdoing. The advice to the hapless wife will not be palatable as any monies found to her husband’s credit are likely to be proceeds of crime and therefore subject to a confiscation order before any matrimonial order is made, based on the current case law. That being the case, it is only where there is a surplus beyond what is required to satisfy the confiscation order that a wife will receive anything at all in her matrimonial financial dispute. However, one case provides some optimism and we have the Supreme Court decision in Jones –v- Kernott to thank for that!

In CPS –v Piper & Piper(Intervener), [2011] EWHC 3570 a receivership order had been made over the assets of the husband because he had failed to satisfy a confiscation order that had been made against him. The only remaining asset so far as was known was the former matrimonial home, the title to which was registered in the husband’s sole name. Applying the principles of Jones –v- Kernott, the court held that the wife was likely being truthful when she said she had made a contribution of £30,000 towards the acquisition of the property. Further the court concluded that the parties formed a common intention, prior to the husband’s arrest, that they were co-owners such that the confiscation order could only bite on the husband’s share and not the wife’s share of their matrimonial home. Consequently the court ordered a stay of the receiver’s power of sale pending an investigation of whether the wife could purchase the husband’s share, thereby retaining the home and enabling the husband to part satisfy the confiscation order. In addition the CPS was ordered to pay the wife’s costs because she had been ‘wholly successful’ in her claim.