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Family Law
[2018] Fam Law 1548
The width of the court's discretion under s 31(1), MCA 1973 – for width read uncertainty: Mills v Mills

Ashley Murray Barrister-at-Law, Ashley Murray Chambers, Liverpool
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ABOUT THE AUTHOR

Ashley Murray is one of the few senior Circuit specialists outside London with a recognised big money ancillary relief practice. He is known for his knowledge and ability in this area of the law and his detailed preparation and attention to his brief.

The heightened expectations of the Supreme Court's anticipated decision in the variation of periodical payments case of *Mills v Mills* [2018] UKSC 38 proved in the event to be more hype than reality. However, as set out in the 'Commentary' below, the outcome of this appeal is not without some controversy.

FACTS

As is now well rehearsed, the Supreme Court had granted leave to appeal to H on a narrow basis, being 'whether, in light of the fact that provision had already been made for W's housing needs in the capital settlement, the Court of Appeal was entitled to interfere with the judge's decision not to increase the periodical payments so as to cover all of the wife's current rental costs'.

H and W were each aged 52 and had married in 1987. They had, an adult son. W had had a history of painful gynaecological difficulties following a late miscarriage in the marriage. Their separation occurred in 2000. In 2002 the first instance judge within the divorce financial proceedings had approved a consent order whereby the joint former matrimonial home ('FMH') was to be sold and the net proceeds divided whereby W gained £230k and H £23k plus a policy of the same value and his two survey company shares on the basis of a capital clean break. In addition, W was to have joint lives spousal periodical payments order of £13,200 pa.

Whilst W at the time of the consent order had maintained that her ongoing health problems prevented her from working and H had conceded W did not have a mortgage capacity, but from the £230k settlement could purchase a suitable home mortgage free, in fact later in 2002, W went on to purchase a home for £345k using the settlement provided and raising the balance of £125k on mortgage. She had explained at the time to H's solicitors, upon their expressed concern over her ability to manage such property or mortgage, that she had been unable to acquire a suitable home for herself and the adult son for less. W had by then returned part time to her former beauty therapy employment.

In 2006, W sold her £345k Weybridge home to acquire a Wimbledon flat for £323k. By then her mortgage had risen by £93k to (£218k) and placing just £45k down as a deposit on the flat she undertook an increased mortgage of (£275k). The first instance judge found W unable to satisfactorily explain these mortgage increases or what she

had spent the same on, including finding £62k of the mortgage increase on the flat had not been spent on that property. In 2007, W sold the Wimbledon flat for £435k against a mortgage then of (£277k). She then purchased a flat in Battersea for £520k with a deposit of £78k and a (£442k) mortgage. Again the first instance judge found that c£44k of the Wimbledon flat proceeds had not been spent on the new Battersea property. By 2009, W was moving again and sold the Battersea flat for £580k achieving an increased equity on that property of £120k and, thereafter, she successively rented up to 2015 some six properties.

By the first instance hearing before Judge Everall QC in April 2015, W had no capital and overdrafts, credit card and tax liabilities of (£42k). The court was presented with cross applications for variation of W's periodical payments order - H's to capitalise for a modest £26k/set a term or vary the same downwards and W's to increase the same. The first instance judge had found W unable to give him a clear financial picture of her dealings or income since 2002. He accepted between 2004 and 2010 she had undergone in relation to her gynaecological problems some seven surgical procedures affecting her earning capacity, albeit she had exaggerated their current earnings impact. The judge ascribed her with an ongoing net income of £18.5k pa.

In contrast, the judge found H's evidence reliable and truthful in all respects having remarried and having a 9-year-old son and adult step daughter living with his second wife and himself. H's survey companies were now financially strengthening from an indifferent past and the judge ascribed H's household with an income of £55k net pa.

The judge accepted W's needs budget as 'very modest' and 'basic' and assessed the same as £35,792 pa against which she had her net income of £18.5k pa leaving a shortfall of £17,292 pa of which £10.2k was her rent. Her current periodical payments order of £13.2k pa left her with a shortfall of £4,092 pa. However, the judge rejected both variation applications and left the original periodical payments order to stand. Giving the lead judgment for the Supreme Court, Lord Wilson noted ([19]) the judge's expressed reasoning as being:

1. (i) the 2002 award would then have enabled W to buy a home mortgage free;
2. (ii) it had however been reasonable for her to be ambitious and to secure a mortgage to buy Weybridge house;
3. (iii) thereafter she had not managed her finances wisely;
4. (iv) like others at that time, she had committed herself to borrowings which were too high;
5. (v) it would be wrong to describe her approach to finances as profligate or wanton;
6. (vi) but her needs had been augmented by reason of the choices which she had made.

Having so found, the judge had rejected H's contention that the entire rent of £10.2k pa should be removed from her needs, but rather found that it was:

> '... fair that the husband's contribution to the wife's needs should not include a full contribution to her housing costs.'

Accordingly, His Lordship stated, the judge had determined that H's contribution should do no more than to enable W to meet her 'bare minimum needs', to which she would have to adjust her expenditure to in order to live within her means ([23]). H, the judge found, could meet the existing periodical payments order and also the claimed extra if it had been ordered ([24]). This in effect amounted to H making a 60% contribution to her £10.2k pa rent. There existed no basis on the evidence for concluding W could adjust without undue hardship to terminating the periodical payments order and so the same would continue on the existing joint lives basis ([26]). Suffice it to say, the Court of Appeals' subsequent determination allowing W's appeal from the first instance decision and ordering H to meet W's increased needs budget at £17,292 pa was founded upon an incorrect

reading of the judge's reserved judgment believing erroneously that the judge had failed to give any specific reasoning for his decision not to fully meet W's needs budget as presented. The Court of Appeal had also rejected H's application for leave to appeal the judge's order on the basis of there being no prospect of success.

Notwithstanding H's appeal from the Court of Appeal's decision to the Supreme Court, including his wider basis of challenge to W's periodical payments order, including whether the same should continue at all (etc), the Supreme Court proceeded only upon the limited basis of appeal as identified above in view of there being no appeal allowable against such a refusal of permission to appeal (see Access to Justice Act 1999, s 54(4)).

Lord Wilson considered the trilogy of cases of *Pearce v Pearce* [2003] EWCA Civ 1054, [2003] 2 FLR 1144, *North v North* [2007] EWCA Civ 760, [2008] 1 FLR 158 and *Yates v Yates* [2012] EWCA Civ 532, [2013] 2 FLR 1070 was considered. In *Pearce*, where a wife had depleted the proceeds of the FMH retained by her at the time of the original order by unfortunate speculation in Ireland and subsequently acquired a home on a mortgage as a result, the Court of Appeal had, when considering the capitalisation of her remaining periodical payments order, removed the wife's mortgage repayments from the calculation. Thorpe LJ said at para [36] that the judge:

> '... should not have allowed the wife to discharge her mortgage at the husband's expense. Such an indemnity violates the principle that capital claims compromised in 1997 could not be revisited in 2003. There is simply no power or discretion to embark on further adjustment of capital to reflect the outcome of unwise or unfortunate investment on one side or prudent or lucky investment on the other.'

In *North*, the final consent order on divorce had left the wife in a financially comfortable position in a mortgage free home with an additional income from ground rents and a continuing nominal periodical payments order. However later emigrating to Australia had had disastrous financial consequences for her and her subsequent application to increase the nominal periodical payments order was dealt with by the Court of Appeal by substantially reducing the maintenance capitalised order made below. Again, Thorpe LJ said:

> '32. . . . In any application under section 31 the Applicant's needs are likely to be the dominant or magnetic factor. But it does not follow that the respondent is inevitably responsible financially for any established needs. He is not an insurer against all hazards nor, when fairness is the measure, is he necessarily liable for needs created by the applicant's financial mismanagement, extravagance or irresponsibility ...
>
> 33. Thus in the present case the wife's failure to utilise her earning potential, her subsequent abandonment of the secure financial future provided for her by the husband, her choice of a more hazardous future in Australia, together with her lifestyle choices in Australia, were all productive of needs which she had generated and for which the husband should not as a matter of fairness be held responsible in law.'

In *Yates*, by the final divorce consent order W had received a substantial lump sum on the basis she would use half of it to discharge the mortgage on her home. In fact, she only partly reduced her mortgage investing the other part intended for the discharge in a non-income-bearing bond. When W subsequently had her periodical

payments order capitalised the Court of Appeal removed the mortgage interest element the first instance judge had included in his capitalisation calculation. Thorpe LJ said:

> '12. . . . It seems to me little more than common sense that if a recipient of a lump sum twice the size of the mortgage on the final matrimonial home elects to hold back capital made available for the mortgage discharge in order to invest in a bond that bears no income, she cannot look to the payer thereafter for indemnity or contribution to the continuing mortgage interest payments. That seems to me to be an absolutely self- evident point.'

Lewison LJ said:

> '21. . . . the need to pay the mortgage at all arose from her own choice not to apply . . . the lump sum in discharging the existing mortgage . . . The financial consequences of her investment choice are her responsibility. It is wrong in principle for the husband to have to continue to fund the mortgage.'

Lord Wilson noted that leading counsel for W had submitted that it was sought on behalf of W to distinguish the *Pearce* decision on the basis that in that case it was mortgage instalments which were disallowed and not as in the instant case rent. His Lordship saw no relevant distinction.

Further, it was maintained that whereas in the three reported cases, all had concerned the capitalisation of an entitlement to periodical payments and the court involved had therefore rightly disallowed a sum more reflective of an impermissible second claim for capital provision than of a permissible claim for conversion into capital of an income entitlement. Again, this too was rejected, since as recognised in *Pearce*, the first step in the exercise of capitalisation is a calculation of the amount of periodical payments to which, in the absence of capitalisation, the payee would then have been entitled and in all three earlier cases in making that initial calculation the objectionable elements of the claim were disallowed. His Lordship affirmed that even without such capitalisation, those elements would therefore have been disallowed in quantifying the amount of the ongoing order for periodical payments.

It, therefore, followed that the court was entitled under the wide discretion afforded by s 31(1) and (7) of the MCA 1973 rather than obliged in the circumstances of the present case to decline to require H to fund payment of W's rent. A court would need to give very good reasons for requiring a spouse to fund payment of the other spouse's rent in the circumstances identified. A spouse may well have an obligation to make provision for the other; but an obligation to duplicate it in such circumstances is most improbable. The first instance judge was clearly entitled to decline to vary the periodical payments order so as to require H to pay all of W's rent. The Supreme Court thereby set aside the Court of Appeal's order and restored the order of the first instance judge.

COMMENTARY

There has been much comment since the Supreme Court's decision that despite W's poor management of her finances H was still required to meet 60% of her rent payments in the restored first instance order which would not have been necessary had she used the capital initially afforded to her prudently in securing a mortgage free home at the time. The emphasis in the Court of Appeal's reasoning in requiring H to meet W's current

expenditure shortfall had been, in part, the absence of any finding at first instance of mismanagement or worse by W of her financial affairs as opposed to general financial imprudence. The Court of Appeal, however, had, as the Supreme Court found, simply misread the first instance judgment in which the judge had provided specific reasoning for his determination to leave W with only her 'bare minimal needs' and, therefore, their determination could not stand for that reason.

The Supreme Court's emphasis centred instead upon the wide discretion in the first instance judge under s 31(1) and (7) of the MCA 1973 to determine on the facts whether it was fair for H to bear any part of W's imprudent decisions, which had resulted in the loss of an adequate housing fund left to her by the original order and against which her current needs budget included her home rent as part of her regular expenses, which she now sought subsidised by H via variation of her periodical payments order.

The decision of the Supreme Court determined the first instance judge had been fully entitled, as he had specifically explained in his reserved judgment, to reduce W's needs budget to the 'bare minimum' based on fairness in the circumstances. W had not been found to be wanton or reckless, but by equal measure it had been no fault of H's that she had found herself in a position where she had lost her previous capital housing fund and had now to rent premises to live in.

There has been speculation as to whether, absent the statutory bar to a further appeal by H, he would have succeeded in an argument to terminate W's periodical payments order at some future point or have had the same reduced further to extract the rent payment altogether. However, this surely engages the very core of the legislative provision principle of need espoused by Lady Hale in *Radmacher (Formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 2 FLR 1900 whereby W's basic minimum needs are nevertheless to be met under an existing periodical payments order by a former spouse with the financial ability to do so:

> 'Marriage is, of course, a contract, in the sense that each party must agree to enter into it and once entered both are bound by its legal consequences. But it is also a status. This means two things. First, the parties are not entirely free to determine all its legal consequences for themselves. They contract into the package which the law of the land lays down. Secondly, their marriage also has legal consequences for other people and for the state. Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children.' (para [132])

Further, the judge at first instance had been in no doubt that this W could not adjust without undue hardship to the termination of her periodical payments in any event.

The fact that the three earlier reported cases had, when capitalising the maintenance orders in question removed the offending expenses linked to previous loss of secure capital provision for that party, is not contradictory to the above - since in each of those cases such action in the calculation of the capitalisation effected would arguably not, in the light of the finances otherwise available in each of those cases, have reduced the receiving spouse below such a minimum level in the circumstances there considered. However, what is the irreducible minimum level as a departure from needs generously interpreted. Is it the weaker financial party's basic needs, bare minimum needs, real needs or the level at which significant hardship is relieved - each of which have been used in the divorce distribution context hitherto to explain the measure required in individual cases. In W's case the judge at first instance interpreted this level as justifying leaving her in terms of what was described by him as her

basic or very modest expenditure with over £4,000 pa thereof uncovered by either her earnings or the maintenance provision.

Furthermore, is it indeed fair when determining a variation of maintenance case, where the applicant has not been found to have mismanaged his or her finances let alone acted wantonly or recklessly and the respondent has the means to pay, to strip out certain elements which would not have been present had the applicant with the benefit of hindsight been more financially astute. Indeed, H had originally consented to a continuing maintenance provision as part of the final divorce distribution without express caveat as to the use by W of her capital to provide a home. In addition, W had had the impact of extended ill health and a worldwide recession to deal with as a background to her financial management, which had also included making significant profit in the same period under scrutiny when acquiring properties to live in.

Certainly, the rent charges subsequently undertaken by W may have been extraneous to the parties' marital relationship and therefore not causally connected thereto. However, no doubt in every such case there will be other forms of expenditure which a payee under a maintenance order may have subsequently adopted which would also qualify under the same description. Without a finding of fault, the basis for exclusion of one form of expenditure as opposed to another may well invite inconsistency in future judicial decision making.

By equal measure, does the same approach also apply to a paying party seeking on variation to reduce a maintenance rate on the basis that his or her resources have since the order was originally made now diminished. Is a judge to assess whether simply wiser financial/choice-of-employment decision making would with hindsight have resulted in a better financial standing than the applicant now portrays and for that reason dismiss an application for reduction made on that basis - even though no mismanagement is found. Fairness is a two-way street.

Some commentators since this Supreme Court's decision have suggested that whilst the case involved a very narrow appeal point, the outcome is yet consistent with the current trend towards expecting parties to be financially prudent and to stand on their own feet in the long term. With respect, the perception of 'trends' one way of the other in the outcome of financial remedy application should be irrelevant to any judge whilst the achieving of overall fairness on the facts of the particular case remains the measure of the existing statutory provision engaged. There are undoubtedly a spectrum of divorcing parties, usually still women, for whom, as a result of mutual decisions or choices taken often over child care during the relationship, the existence of a continuing maintenance provision post divorce from their former spouse remains a necessity and not a luxury or so called 'meal ticket'.

Once again, the Supreme Court decision highlights the width of discretion provided to the judge at first instance under the s 31 variation process and, as with other areas of the existing financial remedy provision under the MCA 1973, adds to rather than reduces the difficulties for practitioners and their clients of predicting an eventual litigation outcome and of reaching early cost saving compromises.