Maintenance payments as a gateway to independence (Mills v Mills)

28/02/2017

Family analysis: How did the Court of Appeal approach a cross-application for an upward variation of a joint lives maintenance order taking into account financial decisions made by a divorcing spouse over a 15-year period? Frank Feehan QC, barrister at 1 King's Bench Walk and Katherine Dunseath, barrister at 3 Paper Buildings, discuss the Court of Appeal's judgment in Mills v Mills, which highlights the financial ties afforded by joint lives maintenance payments.

What was the background to this case?

In 2014, the husband applied for a downward variation or discharge of a joint lives maintenance order agreed by consent between the parties at a financial dispute resolution hearing in 2002.

The wife cross-applied for an upward variation of the joint lives maintenance order and/or for capitalisation.

The consent order of 2002 provided for:

- the family home to be sold with £230,000 of the net equity to the wife and £40,000 to the husband
- the two businesses and assets (unvalued) were transferred to the husband
- two family endowment polices were transferred to the husband
- the husband retained a small pension
- the husband to pay the wife £300 per calendar month (pcm) for the benefit of their son until 18 years/end of secondary education
- the husband to pay the wife £1,100pcm on a joint lives basis

The matter was listed for trial in 2015. At this stage the wife was living in rental accommodation. The rental accommodation costs were included in her schedule of needs.

The husband argued that the wife had grossly mismanaged her finances leading to the loss of the capital (£230,000) and that he should not be responsible for it, relying on the case of *North v North* [2007] EWCA Civ 760, [2007] All ER (D) 386 (Jul) per Thorpe LJ, para [32]:

'Once within the territory of discretion, the court's overarching objective is a fair result. There are of course two faces to fairness. The order must be fair both to the Applicant in need and to the Respondent who must pay. In any application under s 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. The prodigal former wife cannot hope to turn to a former husband in pursuit of a legal remedy, whatever may be her hope that he might out of charity come to her rescue.'

The wife denied deliberate financial mismanagement. She asserted that she was unable to rehouse mortgage free in the locality to where their child was in school in 2002 then had a number of health issues in the intervening years requiring operations which had affected her income. She had taken on borrowing which ultimately, given her circumstances, she was unable to repay.

The hearing at first instance lasted for two days and judgment was reserved.

In judgment, the wife was not found to be wanton or profligate. The judge also found that she was unable to meet her basic needs on the basis of her income. Her earning capacity was assessed on the evidence and reasoned in judgment.

On the figures in the judgment the wife still had a shortfall of £341 pcm yet the judge refused to order an upward variation and dismissed both applications.

Both parties then applied for permission to appeal.

What were the key issues at appeal?

The husband applied for permission to appeal the decision not to downwardly vary/discharge the joint lives maintenance order. He invited the court to give leading guidance on this. After his application for permission to appeal was refused on paper he then applied to have his application dismissed with no order to costs.

The wife applied for permission to appeal which was also initially refused on paper. She then renewed her application and was granted permission to appeal limited to the judge's refusal to upwardly vary her maintenance on the figures as set out in the judgment.

After the wife was granted permission to appeal the husband applied for permission to reopen his appeal under rule 52.17 of the Civil Procedure Rules 1998, SI 1998/3132 (CPR) on the basis that he was not aware that Mrs Mills had renewed her application, that his appeal had a real prospect of success and/or inviting the court to give leading guidance on this area.

What did the Court of Appeal decide, and why?

On the application by the husband to reopen his appeal under CPR 52.17 the court was referred to the authorities including the leading case of *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] All ER (D) 28 (Feb).

The court refused the husband's application to reopen his appeal on the facts. The court determined that his appeal did not have a real prospect of success and indicated that based on the facts this was not a case where it was appropriate to give leading guidance.

The court was referred to the numerous authorities on this issue of need and in particular *North v North*, per Thorpe LJ, para [32].

The judge at first instance had not found that the wife was profligate or wanton and there was no finding that she had mismanaged her funds. The judge addressed the issue of need after hearing the evidence of the parties and submissions by their counsel. The judge had found that these were her basic needs only and had assessed her earning capacity on the basis of the evidence giving reasons for the same.

On the basis of the findings in respect of her basic needs and the figures as per the judgment there was a deficit of £341 pcm.

The Court of Appeal allowed the wife's appeal and the rate of the joint lives maintenance order upwardly varied to £1,441 pcm.

What are the potential ramifications of this?

Every case is fact specific. On these facts the wife was not found to have mismanaged her finances and the judge at first instance found that her needs were set at a basic level. The judge also assessed her earning capacity on the evidence and gave reasons for the same. In those circumstances the judge was wrong not to upwardly vary her monthly maintenance.

The way that the media has portrayed this case has been from the stance of her having mismanaged her funds which was not a finding made. This has caused the wife much distress and upset from negative comments and, in the author's opinion, calls into question whether these appeals should be heard in public given that the first instance determination is in private and given the delicate nature of the issues involved.

The Court of Appeal did not think that this was an appropriate case where leading guidance should given, particularly where the joint lives maintenance order was made via consent between the parties.

How does the judgment fit in with developments or trends in this area of law?

The leading Court of Appeal authority remains *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26 at para [45]. More recent guidance has been given at High Court level including that by Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124.

The objective is to enable a party to make a transition to independence where possible (per the Law Commission report, 'Matrimonial Property, Needs and Agreements' (No 343, Feb 2016) and the Family Justice Council's 'Guidance on "Financial Needs" on Divorce' (June 2016).

On the facts here the wife was not able to make a transition to independence on the evidence.

Frank Feehan QC and Katherine Dunseath represented Maria Mills on this appeal.

Interviewed by Kate Beaumont.

This article was first published on Lexis®PSL Family on 28 February 2017. Click for a free trial of Lexis®PSL.

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