No second bite

Katherine Dunseath and Joanne Wescott examine the Supreme Court decision in Mills v Mills, *and the approach to variation of periodical payments subsequent to a capital order*

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'Where a capital order has previously been made for housing, an obligation to duplicate that provision is "improbable"'.

In *Mills v Mills* [2018] the Supreme Court allowed the husband's appeal against the Court of Appeal's decision to increase the wife's spousal maintenance payment to include her rent. The judgment highlights three important points:

- in circumstances where a party is awarded capital at the time of the divorce that enables them to purchase a home, but they later exhaust that capital through a series of unwise transactions and develop a need to pay rent, the court is entitled to decline to increase an order for periodical payments as to the funding of any or all of the rental payments, even where the payer could afford payment;

- the unattractiveness of the term 'meal ticket for life', given that even open-ended orders can be brought to an end by a further order; and

- where the Court of Appeal refuses permission to appeal to that court, no appeal to the Supreme Court can be brought against that refusal of permission (per s54(4), Access to Justice Act 1999 (AJA 1999)), and thus in *Mills* the Supreme Court had no jurisdiction to hear a number of grounds that the husband sought to argue after he was refused permission to appeal on those grounds to the Court of Appeal.

Background

The parties were both aged 52 years old, had married in 1987 and separated in 2000. The wife was a qualified beauty therapist and the husband was a surveyor. During the marriage the husband built up two surveying companies which he and the wife owned in equal shares. There was one child of the family, now an adult. In 1996 the wife suffered a late miscarriage which resulted in painful gynaecological difficulties for her, and numerous operations over a long period of time.

At the financial dispute resolution appointment on 7 June 2002, a final order was agreed between the parties providing for:

- child maintenance;

- the sale of the family home, the outcome of the order being that the wife received a lump sum of £230,000 in settlement of all of her capital claims against the husband and the remaining equity was paid to the husband;

- the transfer by the wife of her interest in policies worth £23,000 to the husband;

- the transfer of all of the wife's shares in two surveying companies to the husband (which were not valued); and

- the husband to make periodical payments to the wife at the rate of £13,200 pa (not index linked) on an open-ended basis, namely during their joint lives until her remarriage or further order in the interim.

At the time the order was made in 2002 the wife asserted that she was unable to work on the basis of ill health. She put her and the child's housing need at £350,000. The husband's position was that the wife and the parties' child could rehouse for £230,000 or less.

In late 2002 the wife purchased a property in Weybridge, Surrey for £345,000 using the £230,000 capital received and a mortgage of £125,000. The husband's solicitors, on being informed of the arrangements for the purchase, raised concerns as to the cost and the wife's ability to pay the mortgage. The wife responded that she had not been able to secure reasonably priced accommodation.

In 2006 the wife sold the house in Weybridge at the same price she had purchased it at, but the mortgage had by then increased by £93,000. The wife then purchased a flat in Wimbledon, London for £323,000 with a deposit of £48,000 and a mortgage of £275,000. It was calculated that approximately £62,000 of the proceeds of sale were not used for the purchase of the flat, although money had been spent on refurbishment of the flat.

In 2007 the wife sold the flat for £435,000. The sum owing on the mortgage was by then £277,000. The wife then purchased a flat in Battersea for £520,000 with a deposit of £78,000 and a mortgage of £442,000. Approximately £44,000 of the proceeds of sale had not been used for the purchase of the second flat. In 2009 the wife sold that Battersea flat for £580,000. She received approximately £120,000 net from the sale. Thereafter she was in rented accommodation.

Proceedings

The husband applied for a downwards variation and/or discharge of the order for periodical payments in approximately 2015, and the wife cross-applied for an upwards variation. Both applications were made under s31(1), Matrimonial Causes Act 1973 (MCA 1973). The trial judge refused both applications. The judge also found that the wife had been unwise, but not wanton or profligate. There was also no finding that she was prodigal.

Under the old Civil Procedure Rules 1998 provisions, both parties applied for permission to appeal to the Court of Appeal and both were refused on paper. The husband then applied to have his application for permission dismissed with no order to costs, which was granted. The wife made a renewed application and was granted permission to appeal, the basis of her application being that she was unable to meet her needs (including rent provision) on the basis of her income and that the judge should have increased her periodical payments in order for her to meet her needs.

The husband then applied for permission to re-open the final determination in respect of his appeal, and both matters were listed to be heard together. At the substantive hearing in the Court of Appeal the wife's appeal was allowed and her periodical payments increased by £341 per calendar month, and the husband's application for permission was refused. The Court of Appeal found (*Mills v Mills* [2017]) that the judge at first instance had made an error in principle in deciding that the wife could not meet her needs, and that she would have to adjust her expenditure to reduce those needs. Such conclusion required reasoning which was not in the judgment at first instance, and was not a conclusion open to the judge on the facts as he found, given that the bare minimum need was not being met. The Court of Appeal also relied on the judge's finding that the wife was not profligate or wanton.

The husband then applied for permission to appeal to the Supreme Court, relying on a number of grounds that had been in his application for permission to appeal to the Court of Appeal and on which he had been refused permission by the Court of Appeal. The Supreme Court granted permission to appeal as to the following specific issue:

> Whether, provision having already been made for the respondent's housing costs in the capital settlement, the Court of Appeal erred in taking these into account when raising her periodical payments.

The substantive appeal hearing was heard on 6 June 2018 and judgment handed down on 18 July 2018. The Supreme Court allowed the husband's appeal. It found that the finding by the judge at first instance that the wife had been unwise was sufficient, and declined to distinguish the cases of *Pearce v Pearce* [2003] and *Yates v Yates* [2012].

Supreme Court judgment

Lord Wilson gave the leading judgment and found that the Court of Appeal had erred in saying that the judge had given no reason for declining to increase the order for periodical payments so as to enable the wife to meet all of her basic needs. He set out the first instance judge's reasons as follows:

Although open-ended orders do not specify a fixed term for the life of the order, there is potential for a further order ending such an order at any time.

- the award in 2002 would have enabled the wife to buy a home mortgage free;
- it had been reasonable for her to be ambitious and to secure a mortgage for the purchase of the house in Weybridge, but thereafter she had not managed her finances wisely;
- like others at the time, the wife had committed herself to borrowings that were too high; and
- while it would be wrong to describe the wife's approach to finances as profligate or wanton, her needs had been augmented by reason of the choices she had made.

Lord Wilson also recorded that on the basis of the above findings, the judge at first instance had rejected the husband's submission that the wife's need to pay rent should be entirely eliminated from the total annual need, however it was 'fair that the husband's contribution to the wife's needs should not include a full contribution to her housing costs'.

In answer to the question on which permission to appeal was granted, ie whether the Court of Appeal had erred in taking housing costs into account, the Supreme Court determined that the answer to this was yes. Lord Wilson stated at para 40:

> By its terms that question asks only whether the court would be 'entitled',

> rather than obliged, in the circumstances there identified to decline to require the husband to fund payment of the rent. Its reference to the court's entitlement to do so serves to respect the wide discretion conferred upon it by section 31(1) and (7) [of MCA 1973] in determining an application for variation of an order for periodical payments. But, in the passages quoted above, the Court of Appeal has expressed itself in forceful terms; and 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 by the question. 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.

In summary, where a capital order has previously been made for housing, an obligation to duplicate that provision is 'improbable'. The Supreme Court affirmed that *Pearce*, *North v North* [2007] and *Yates* were correctly decided.

At para 25 of his judgment, Lord Wilson made reference to the term used by some non-lawyers of 'a meal ticket for life', which is both misleading and unattractive, in particular given that although open-ended orders do not specify a fixed term for the life of the order, there is potential for a further order ending such an order at any time.

At para 32 of his judgment, Lord Wilson referred to the husband's notice of appeal to the Supreme Court, which sought to challenge the Court of Appeal's refusal of permission to appeal on a number of grounds by again arguing these grounds in his notice of appeal. The Supreme Court judgment makes it clear that, per s54(4), AJA 1999, the Supreme Court had no jurisdiction to hear those grounds of appeal as this section of the statute sets out that no appeal can be brought against a refusal of permission. On this basis the Supreme Court limited its permission to one ground, although the husband's advisers considered that the limited grant of permission was broad enough to enable them to make submissions on the wider previous grounds as asserted in the Court of Appeal and to effectively challenge the Court of Appeal's refusal to grant permission.

Opinion

In the Supreme Court, the wife sought to argue that the authorities of *Pearce* and *Yates* were distinguishable cases. In those cases the wives had received capital in order to rehouse mortgage free, had spent that capital and on application to vary upwards some years later after the capital was spent, had included their mortgage repayments in their schedule of needs. By including mortgage repayments in the needs schedule in those variation cases, the court was being invited to revisit capital lump sums and vary them, which the court has no power or discretion to do. Under s23(1)(c), MCA 1973 only one lump sum order may be made for a party to a marriage (*Banyard v Banyard* [1984]). Also it would be quite wrong to allow a party who had been granted a capital sum, which they had dissipated, to build another one. The wife's argument was rejected at para 39 of the judgment, and the Supreme Court found that there was no distinction between the mortgage instalments disallowed in *Pearce* and *Yates* and the payment of rent as in *Mills*. The Supreme Court found that the finding of the first instance judge that the wife had been financially unwise was sufficient, even in circumstances where she had not been found to be profligate or wanton.

The Supreme Court found that the finding of the first instance judge that the wife had been financially unwise was sufficient, even in circumstances where she had not been found to be profligate or wanton.

This case makes it clear that, although the ultimate discretion remains with the trial judge, there would have to be very good reasons for a party to be ordered to pay the other's rent on an application to vary following a final order providing them with capital to meet their housing need. The question will therefore be, what is a very good reason? If the threshold is merely a finding of having been unwise, then it may be limited to the most extreme of cases where no adverse findings are made.

The judgment of the Supreme Court in *Mills* was highly fact specific, and the court clearly did not seek to limit the discretion of the trial judge under s31, MCA 1973 on an application to vary. What the judgment does do is to highlight that even where a party may be unable to meet their rental needs on their income, and the other party is able to pay it an amount to meet those needs, that will not be enough. In *Mills* the wife was found to be unwise, having been provided with a capital lump sum in order to rehouse and having spent it. The Supreme Court found that the Court of Appeal was wrong to increase the wife's periodical payments to include her full rental needs, as the judge at first instance had identified in their judgment the reasons for the reduction.

Since promulgation of the judgment, the term 'meal ticket for life' has again been used in the media with reference to this case. As set out in the Supreme Court's judgment, this illustrates a misunderstanding of what an open-ended order is and that such orders can be varied and/or discharged during the life of the order.

Conclusion

The appeal in *Mills* was highly fact-specific. As referred to in the judgment, the husband sought to argue a number of grounds on the issue of joint lives maintenance orders in general, even after he was not granted permission to appeal on those points. These grounds had also been previously raised in the Court of Appeal and permission was not granted to appeal on those points, and as the judgment makes clear, the Supreme Court had no jurisdiction under statute in those circumstances. ■

Banyard v Banyard
[1984] FLR 643
Mills v Mills
[2017] EWCA Civ 129;
[2018] UKSC 38
North v North
[2007] EWCA Civ 760
Pearce v Pearce
[2003] EWCA Civ 1054
Yates v Yates
[2012] EWCA Civ 532