Articles

HEY BIG SPENDER! ADD BACKS AND RECKLESS SPENDING

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Harry and Julie have been married for 28 (predominantly) happy years. Harry is a consultant anaesthetist earning £200,000 gross per annum. Julie works as a teacher earning £30,000 gross per annum. Post separation, Harry goes on a spending spree – jewellery for the new girlfriend, changes his previous car to a Lexus and takes a one month cruise around the Caribbean to ease his stress levels. In a period of some 4 months, £85,000 has been spent by Harry from a deposit account in his sole name. The remedies for Julie? The pursuit by her lawyers? Is it conduct? Is it 'one of the circumstances of the case?' Does it matter into which, if any, category it fits?

Back in 1976, post separation spending and the obligations and duties parties were under were considered in *Martin v Martin* [1976] Fam 335. After separation the husband had entered into a number of business ventures with another woman and, without his wife's knowledge or consent, he raised substantial loans using a matrimonial asset, a farm, as security. The court held, 'A spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of what was left as he would have been entitled to if he had behaved reasonably …'.

In *Purba v Purba* [2000] 1 FCR 652 – the parties had been married for 10 years and, following separation, the husband transferred approximately £96,000 to relatives. In the Court of Appeal the court found that the ownership of the money remained the husband's and there was no need for the formality of a set aside order under s 37 of the Matrimonial Causes Act for the judge to make such a finding. Per Thorpe LJ:

> 'Unfortunately, cases in family proceedings in which a respondent husband breaches the duty of full and frank disclosure are all too common. This is a case in which the husband went far beyond that and made every effort to circumvent the court's discretionary adjudication by moving his assets out of immediate reach and by giving false evidence, both by his affidavits and subsequently orally, in an attempt to mislead the judge as to what was available for her consideration.'

In *Norris v Norris* [2002] EWHC 2996 (Fam), [2003] 1 FLR 1142, after a marriage lasting over 23 years, the wife argued that money should be 'added back' given the husband's recent habit of spending more than he earned. The husband's behaviour included:

- £30,000 worth of jewellery to his girlfriend;
- constructing a wall around the swimming pool at his post separation home;
- ordering a Ferrari motor car at a cost of £115,000. The court found that 'the overspend, i.e. expenditure over income of £350,000 in a little over 2 years, at a time when he was about to and then did enter into protracted litigation with the wife can only be classified as reckless.'

In *Vaughan v Vaughan* [2007] EWCA Civ 1085, [2008] 1 FLR 1108, following the breakdown of the marriage the husband suffered a depressive illness and was suspended as a pilot. He had gambled and wasted between the period of separation and the ancillary relief proceedings some

£80,000. The district judge did not reattribute any sum to the husband observing there was 'no legal principles to be applied': a surprising finding in the light of the previous cases. However, the Court of Appeal found it was appropriate to reattribute a sum to husband's schedule of assets in the light of the dissipation.

PRESERVING WEALTH

Does it matter what steps, if any, are taken by the wife – and when – to preserve wealth? The dilemma that presents itself is:

(1) Is an order necessary to preserve wealth; or
(2) Is it more costs proportionate to take no steps and to rely on the above mentioned authorities and s 25 of the Matrimonial Causes Act 1973 'other circumstances of the case' in order to seek to reattribute the assets accordingly? The difficulty with 'inactivity' is that funds may be used at such a pace as to give rise to 'needs based' arguments in the distribution of what remains. In addition, being proactive is often the only means of preserving 'liquidity' in a case. Finally, are there likely to be evidential issues? How long has a spending spree been taking place? Is it likely to be merged in with 'general family expenditure' over a long period of time?

In *McCartney v Mills McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508 the court identified three key factual issues to be determined in making the ancillary relief award, namely:

(1) Was the wife wealthy before the marriage?
(2) When did the parties start to cohabit as this impacted on marital acquest?
(3) Did the husband restrict the wife's career after cohabitation and give rise to a consideration of compensation?

In addition to the above, however, in quantification of the assets available, counsel for the husband submitted that a figure of £1,666,059 should be added back into the wife's assets as representing 'reckless expenditure during the ancillary relief proceedings'. Counsel relied on para [77] of *Norris v Norris* where Bennett J had said:

> 'The overspend, i.e. the expenditure over income of £350,000 in a little over 2 years, at a time when he was about to and then did enter into protracted litigation with the wife, can only be classified as reckless and particularly at a time later on when the dot.com and stock market collapsed . . . Why should the wife be disadvantaged in the split of the assets by the husband's reckless expenditure?'

In *McCartney* Mr Justice Bennett also referred to para [14] of Lord Justice Wilson's judgment in *Vaughan* (see above). In *McCartney* the wife had spent in the 15 month period under consideration £3,715,683. Within that figure legal and forensic accountancy fees accounted for £1,003,313 and £675,000 was attributable to property refurbishment. Deducting those two elements, the spending for 15 months was £2,037,376. Husband's counsel submitted a 'reasonable rate' of expenditure would be £620,000 per annum (which included security costs of £150,000). At that level a 15 month spend would account for £775,000. The husband asked for an 'add back'. Mr Justice Bennett concluded:

> 'It must have been absolutely plain to the wife after separation that it was wholly unrealistic to expect to go on living at the rate at which she perceived she was living . . . I am satisfied that the wife has expected, and unreasonably, that such a lifestyle would not only continue but was her entitlement. She did not moderate her spending after separation . . . I decline to add back the full figure put forward by Mr Mostyn. As I have said, financial adjustment consequent on the breakdown of a marriage is difficult even traumatic. Doing the best I can, I consider that I should add back in of the wife's assets a figure of £500,000 to represent completely unreasonable expenditure over the 15 month period.'

The Court of Appeal has observed that judges should be cautious before becoming embroiled in an extensive and expensive enquiry to chart the dissipation of assets or disparity in incomes. In *Brisset v Brisset* [2009] EWCA Civ 679, [2009] 2 FLR 1451 Wilson LJ said at para [19]:

'Application of the sharing principle, as explained by this court in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, at [64] to [67], initially requires identification, and generally also valuation, of the parties' assets as at the time of the substantive hearing. Consideration may well then have to be given to the source of the assets – often of course they represent accumulated income – and to the time when they were acquired, whether prior to the marriage, during the marriage or following the separation. Indeed consideration may also have to be given to assets which one or other party once held but no longer holds at the time of the hearing, including in respect of their source, of the circumstances in which they ceased to be held and of the time when they ceased to be held. An overlapping enquiry is occasionally required when, say, a wife alleges that the husband has wantonly dissipated his resources (which may include income as well as capital) and that they should therefore notionally be reattributed to him: see *Vaughan v Vaughan* [2007] EWCA Civ 1085, [2008] 1 FLR 1108, at [14]. Generally speaking, however, application of the sharing principle does not require the court to conduct the exercise (in which, as District Judge Beck frankly admitted in his judgment, both the parties and also to some extent he himself had, on the first day of the hearing, become "completely bogged down") of charting the disparity of income during the years following separation. Generally speaking, the essential exercise of sharing the currently held assets, whether in equal or in unequal proportions, already neatly caters for such disparity.'

Finally, in *Behzadi v Behzadi* [2008] EWCA Civ 1070, [2009] 2 FLR 649, another Court of Appeal decision, an Iranian couple living in England separated and, at the time of the breakdown of the marriage, the wife purported to transfer one half of the matrimonial home and each of three properties in Iran to the adult children of the marriage. At the trial the wife did not

seek to rely on the transfer of the marital home but did seek to rely on the transfers of the Iranian property. At some expense to the parties, an expert in Iranian law provided evidence as a sole joint expert that as the transfers specified that the wife retained a 'life interest' she had in fact retained 'absolute ownership'. The trial judge was particularly critical of the wife in her conduct. She sought to appeal the judge's order. The Court of Appeal dismissed her appeal as, amongst other things, the judge's finding that the wife still owned the inherited property was of crucial importance.

CONCLUSION

What do practitioners learn from these cases? The principles that emerge include:

- A spouse can spend his or her money as he chooses but it is only fair to add back into that spouse's assets the amount by which he or she recklessly depletes the assets and thus potentially disadvantages the other spouse within the ancillary relief proceedings.
- A modest overspend in the context of a rich person could not be classified as reckless.
- Can a party sensibly answer the question 'Why should your spouse be disadvantaged in the split of assets because of your reckless expenditure?'
- Recklessness has emerged as being a requisite fact – context is important – as recklessness will depend greatly upon the parties' general financial position.
- If the case remains a needs driven case then add-backs have no material effect. It is not money that is available now to meet the party's needs.