

Bullet Points

- application of ‘big money’ ancillary relief principles to a conventional case
- pensions as part of the matrimonial pot
- relevance of the source of the assets to a long marriage
- ‘factoring back’ profligate dissipation of assets into the matrimonial pot
- clean break as ‘good reason’ for departure from equality
- the nature of ancillary relief appeals
- “relevant” adult children

Ancillary Relief Update

Vaughan v. Vaughan [2007] EWCA Civ 1085 is a welcome and much needed example of the application by the Court of Appeal of “big money” ancillary relief principles to a more conventional divorce (involving a house, pensions and some savings) rather than one of huge assets or “stellar” contributions (no pun intended, Mrs McCartney).

It is trite law that in considering making orders for financial provision, the district judge is, inter alia, charged with an enquiry into the size of the parties’ resources and to identify factors which might justify a departure from equality of division of them (described in **Charman v. Charman [2007] EWCA Civ 503** as the “sharing principle”):

“property should be shared in equal proportions unless there is good reason to depart from such proportions; departure is not from the principle but takes place within the principle.”

This enquiry, when balanced with consideration of the parties’ needs and compensation for ‘relationship generated disadvantage’ provide broad themes to assist the court in determining what is a ‘fair’ result in any given case.

Equality: equality of what?

When seeking to ascertain the parties’ “property” (for the purposes of equal division), the courts routinely distinguish between *capital* assets (houses, savings, policies and the like) available in the here and now, and *pension* transfer values: the former are realisable and have immediate use, whereas the latter are no more than an actuarial calculation, not money in the bank or immediately realisable. It is not normally appropriate to treat them as like for like or trade one off against the other pound for pound. For example, in **Maskell v. Maskell [2003] 1 FLR 1138** the attempt by a judge to equate pensions with capital (the wife retaining equity in the house and capital of similar value to the husband’s pensions) was rejected by the Court of Appeal as “fundamentally flawed”:

“the judge is making the seemingly somewhat elementary mistake of confusing present capital with a right to financial benefits on retirement, only 25% of which maximum could be taken in capital terms, the other 75% being taken as an annuity stream. He simply failed to compare like with like.”

However, in **Vaughan**, whilst apparently acknowledging this difference, the Court of Appeal suggested that “equality” should have been measured against a grand total of *all* of the assets, *including* the parties’ pensions (net of costs), in a single balance sheet, which implicitly treated all forms of assets (pensions and capital) as comparable / interchangeable:

“[para 25] I readily acknowledge the difference in kind between disposable capital and the capital value of pension rights. Nevertheless the latter is often a very significant component of the future economy of each or both parties; unlike any attempted capitalisation of earning capacity, it does not depend on the application of future effort but subject only to market and other vagaries, is in the bag; and its size has usually been increased by the efforts, direct and indirect, of both parties during the marriage. So in my view the convenient practice, which respects the difference in kind to which I have referred, is that underneath the total value of other capital the balance sheet should preset the capital value of pension rights and then arrive at a grand total.”

The court stressed, however, that equality of *division* was different to “greater equality in the *overall outcome*”, the latter being the court’s true goal. Accordingly, if the husband was to retain his superior earning capacity, consequently enhanced standard of living and increased mortgage capacity, free of any future claims from the wife (“*the desirability of a clean break*”), the wife would be entitled to a greater share of the assets as a *quid pro quo*. Put another way, a clean break would provide “good reason” for departure from equality of division (in this case, 57% of the overall net assets / 62% of the present net capital to Mrs Vaughan).

A clean break, however, could only be achieved if it did not involve a *disproportionate* adjustment of capital ([para 50]):

“In my experience it is very difficult for the judge who strives for a clean break to discern the point at which he has reluctantly to accept that such is impracticable in that the minimum appropriate level of capital award on a clean break basis to the spouse with the likely lower income would represent too great a loss of capital for the spouse with the likely higher income ... this is a case in which the clean break ... is just achievable, albeit only on the basis of a relatively modest departure from equality”.

In addition to the above guidance, the Court of Appeal gave the following pointers of broad assistance to practitioners in this field of work:

Appeals

The judge retains a discretion to hold a rehearing, although a *review* (in light of any fresh evidence) is by far the more conventional procedure. The court does not have to start ‘afresh’ when undertaking its review, but can examine the effect of any further evidence on the *totality* of the order, before concluding that the appeal threshold has been crossed [paras 28/43]:

“[para 8] It is sometimes easy to think that an appeal is from a judgement. But it is not; it is from an order. A judgement may have contained an error; and a change

of circumstances may have invalidated some of its important assumptions. But it does not follow that the order should be set aside upon appellate review”.

The fact that the true value of the matrimonial home (upon sale) was significantly higher than that predicted by the valuers at trial, the District Judge’s failure to factor back into the pot Mr Vaughan’s profligate expenditure (below), and subsequent improvements in his health post-trial (see below), were all capable of being proper grounds of appeal.

“Relevant Children”

Mr and Mrs Vaughan had two children, 19 and 17, both who intended to go into further education and who were likely to be dependant upon Mrs Vaughan for a home (even whilst at university) for the foreseeable future. There is a tendency for some judges to regard children over the age of 18 but still at home as no longer ‘relevant’, notwithstanding the modern trend for children to remain at home well into their twenties. Section 25(1) of the Matrimonial Causes Act 1973 provides:

“It shall be the duty of the court in deciding whether to exercise its powers under section 23, 24, 24A or 24B above and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen.”

Although only the younger child in **Vaughan** was the court’s ‘first consideration’ (being just under the age of 18), the Court of Appeal strongly disapproved of the District Judge’s description of him as the “only *relevant* child”:

“[para 10] Such was a piece of shorthand which I myself would not have used ...it by no means follows that the interests of adult children undergoing further education are irrelevant to enquiries of this sort ... it would be reasonable for the wife to buy a house with three bedrooms ... even if they were unlikely to live there full-time”.

The Source of the Assets

In practice, there is a tendency for judges to attach diminishing significance to who brought what into the marriage, the longer the marriage subsists. Justification for this approach can be derived from the reported decisions, such as **Miller and McFarlane [2006] UKHL 24** at para 152:

“The source of the assets may be taken into account but its importance will diminish over time. Put the other way round, the court is expressly required to take into account the duration of the marriage”

Some have even suggested that **Miller and McFarlane** goes as far as saying that the matrimonial home automatically falls to be divided equally, wherever it has come from, however long or short the marriage and whoever’s name it may be in, relying on the following passage of the judgement:

“22. The parties’ matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.”

That analysis must be treated with extreme caution: in **Vaughan**, the Court of Appeal considered the fact that Mr Vaughan had brought the matrimonial home into the marriage was still of significance, and had been given insufficient weight in the lower courts ([para 49]), notwithstanding that this was a long (19 year) marriage, the property was the parties’ matrimonial home, and it was held in their joint names (all of which factors ought conventionally to have leant heavily towards equal division).

“Factoring Back”

Mr Vaughan had disposed of something between £100,000 and £175,000 of savings through gambling and improvidence. This behaviour had been described at first instance as *“bizarre and inexplicable and objectively profoundly irresponsible”*. Mrs Vaughan contended that all of that money (£175,000) should be ‘factored back’ into the pot of assets and treated as still available for distribution, with any doubt as to the appropriate sum falling at the husband’s door (he had spent the money, after all, and could give no sufficient account as to what had become of it). Mr Vaughan, on the other hand, contended that he had been suffering from a depressive illness at the time and that his behaviour was not *“morally culpable”*: factoring back the money would be to discriminate against him as a person with a disability.

Whilst Mr Vaughan’s argument succeeded at first instance, the Court of Appeal had little truck with it, approving earlier guidance from **Martin v. Martin [1976] Fam 335** and **Norris v. Norris [2003] 1 FLR 1142**: *clear* evidence of *wanton* dissipation of assets should result in factoring back of the relevant monies into the matrimonial ‘pot’. However the court should be “very cautious” in so doing: any doubt as the amount concerned should weigh in favour of the dissipater. Although mental incapacity might render such re-attribution unfair in an appropriate case, Mr Vaughan’s problems were not of sufficient severity to excuse his conduct [para 28]. The lower figure of £100,000 was therefore treated as being still within the pot of assets for distribution and already to have been received by Mr Vaughan.

Interpretation of Medical Evidence

Finally, the medical evidence in relation to Mr Vaughan (a commercial pilot) was that “his health has substantially improved and there is *every prospect* of a full recovery and recertification by August 2007”. One might interpret that prognosis as meaning it was highly likely that he would return to flying. On the contrary, the Court of Appeal interpreted this evidence as meaning that his return to flying was “only a strong *possibility* and *something short of a probability*” (which doesn’t even sound like ‘more likely than not’); even when, by the time of the appeal, the husband had returned to ground duties (an intermediate return to flying, it was contended), a return to flying was still only described by the Court of Appeal as “*a probability, albeit it a weak one*”. Practitioners may therefore have more room than might first be apparent

to argue that a favourable medical opinion should be treated with considerable caution when determining the parties' future prospects and a fair division of the assets.

**Nicholas E. Starks, a barrister specialising in financial provision on divorce
St Ive's Chambers, Birmingham**