

Second thoughts

In the conclusion of his two-part examination of applications to vary, Conrad Adam looks at the case of VB v JP and sets out guidance for practitioners



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In part one of my consideration of the implications of recent decisions concerning applications to vary (published in *FLJ79*) I considered the statutory provisions and the cases of *North v North* [2007] and *Lauder v Lauder* [2007]. In this second part I shall look at the case of *VB v JP* [2008] and pull together the strands from each of the judgments which may form the basis of guidance for family practitioners.

VB v JP

This was a decision of the President of the Family Division, Sir Mark Potter, on 29 January 2008. The facts (very much in brief) were as follows. The original consent order was made in 2001 following a marriage of 11 years. There were two children, at the time of the application to vary aged 11 and 13 and living with the wife. Under the original consent order, the total maintenance payments amounted to £81,000, consisting of £33,000 spousal joint lives maintenance (until remarriage or cohabitation of not less than six months or further order), child periodical payments for each child of £24,000 per annum (until ceasing full-time tertiary education or further order) and school fees on top. At the time of the consent order the husband's net income was £340,000 per annum. As a percentage, including the children's school fees, the husband was then committing 34% of his net income to the maintenance of the wife and children.

It was accepted that the total agreed periodical payments of £81,000 for the wife and children were apportioned arbitrarily between the wife and children, and not based on any calculation of their separate needs. Potter P found that there was clear over-provision in respect of the children at the time, from which the wife was plainly intended to benefit. At the time of the hearing of the application

the husband's income had risen from £340,000 per annum net to £470,000 per annum net.

The application resulted in a judgment for increased spousal periodical payments from £33,000 per annum to £65,000 per annum, not to be capitalised, which meant the husband was to pay 32% of his current income in global support, having been paying 34% of his net income for global support under the terms of the original consent order.

There was significant consideration of the wife's budget and also her earning capacity. Of the 11 issues identified by the President as being before him, some were case/fact-specific including: whether the wife's budget was inflated; her earning capacity; the quantum for periodical payments; whether the husband should maintain life cover; whether the cohabitation clause in the consent order should be deleted; the husband's responsibility for extras on the school fees; and whether there should be a reduction in payment to the children once they started tertiary education. The other issues were of general application: whether certain items of claim represented an illegitimate attempt to reopen the wife's capital claims finally settled at the time of the order; and whether the principle of compensation applies in an application to vary periodical payments.

After considering the wife's budget in detail the President found that some trimming would be appropriate. In this regard the President reminded himself of the words of Lord Nicholls in *Miller v Miller and McFarlane v McFarlane* [2006] and the requirement to consider the principle of fairness as well as that of needs (per s25(2)(b) of the Matrimonial Causes Act (MCA) 1973). At paragraph 12 Lord Nicholls confirmed that in most cases the search for fairness largely begins and

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ends at the stage of need, in that the valuable assets are often insufficient to provide adequately for the needs of two homes. At paragraph 13 however he stated:

Another strand, recognised more explicitly than formerly is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage... The wife suffers a double loss: a diminution in her earning capacity and a loss of a share in her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the

At this point in the judgment the President paused to observe that the principle of compensation, as Lord Nicholls had expounded it, was itself a requirement of fairness. He commented that at paragraph 31 Lord Nicholls made it clear that there is nothing in the statutory and ancillary relief provisions contained in s23 and s25 of the MCA 1973 that restricts the making of periodical payments to the particular purpose of 'maintenance' properly so called.

The President also referred to the judgment of Charles J in *Cornick v Cornick (No 3)* [2001] at para 106 as follows:

In my judgement, just as it is on the first application for orders for financial

claims into separate heads of claims as if they were actions for damages for personal injury. In this jurisdiction there is only one final pot of resources which has to be divided between the two parties fairly by balancing their competing claims by reference to s25...

Coleridge J went on to warn that the artificial division approach is totally misconceived and likely to lead to double-counting. Following this the President found at paragraph 52:

Attempts under the rubric of compensation to isolate and quantify the level of income or earning capacity sacrificed by a wife years after the event for the purpose of calculating a premium element on the award, constitutes a search for precision which is to be discouraged, both on the grounds of policy and practicality and which goes beyond what is required or generally appropriate in the exercise required of the court under s25.

'Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of the marriage because of their traditional role.'

Lord Nicholls in Miller/McFarlane

breakdown of the marriage because of their traditional role as home-maker and child-carer.

Then at paragraph 15:

Compensation of financial needs often overlap in practice so double-counting has to be avoided. But they are distinct concepts and they are far from co-terminous. A claimant wife may be able to earn her own living but she may still be entitled to a measure of compensation.

provision, *White v White* is clear authority on an application for variation (and for an order for a lump sum on a discharge or variation of a periodical payment) for the following points, namely that

- a) the court should not rely on the judicial concept of 'reasonable requirements' as a determinative or limiting factor in cases when a payer has, or acquires, an ability to pay more than the payee's financial needs even when they are interpreted generously and called 'reasonable requirements'; and
- b) the court should exercise discretion by applying the words of the statute [emphasis added].

It is clear therefore from this that the wife's own budget, whether trimmed by the court or not, is not necessarily a limiting factor even in an application to vary maintenance, where fairness dictates that an element for compensation must be considered.

When considering how to assess an element for compensation the President also referred to the decision of Coleridge J in *RP v RP* [2006] at paragraph 60 where he says it is:

... neither possible nor desirable to break up – artificially – these ancillary relief

Then, following a detailed review of the post-*Miller/McFarlane* authorities to which the President referred during the course of the hearing, there emerged in his view the following propositions, elaborating but consistent with the House of Lords' decision:

First, it is at the exit of the marriage and in relation to the division/redistribution of the family assets that the consideration of the element of compensation immediately arises, but as a feature of the concept of fairness rather than as a head of claim in its own right.

Second, on the exit from the marriage the partnership ends and in ordinary circumstances a wife has no right or expectation of continuing economic parity ('sharing') unless and to the extent that consideration of her needs, or compensation for relationship-generated disadvantage so require. A clean break is to be encouraged wherever possible.

Third, in big-money cases, where the matrimonial assets are sufficient for a clean break to be achieved, a wife with ordinary career prospects is likely to have been compensated by an equal division of the assets and consideration of how the wife's career might have progressed is unnecessary and should be avoided. Where, however, that is not the case and the parties accept or the court decides that fairness can only be achieved by an award of continuing periodical payments in

Cornick v Cornick (No 3)
[2001] 2 FLR 1240
Duxbury v Duxbury
[1990] 2 All ER 77
Lauder v Lauder
[2007] EWHC 1227 (Fam)
Miller v Miller and McFarlane v McFarlane
[2006] UKHL 24
North v North
[2007] EWCA Civ 760
RP v RP
[2006] EWHC 3409 (Fam)
VB v JP
[2008] EWHC 112 (Fam)
Watchel v Watchel
[1973] 1 All ER 829

respect of a wife's maintenance, then the matter of compensation in respect of relationship-generated disadvantage requires consideration, again as a strand or element of fairness.

Fourth, in cases other than big-money cases, where a continuing award of periodical payments is necessary and the wife has plainly sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision. Where it is necessary to provide ongoing periodical payments for the wife after the division of capital assets insufficient to cover her future maintenance needs, any element of compensation is best dealt with by a generous assessment of her continuing needs unrestricted by purely budgetary considerations, in the light of the contribution of the wife to the marriage and the broad effect of the sacrifice of her own earning capacity upon her ability to provide for her own needs following the end of the matrimonial partnership. These considerations are of course inherent in s25(a), (b), (d) and (f) of the 1973 Act.

Potter P also went on to consider submissions by the wife and the husband that various parts of the original agreed order should also be varied, including whether six months cohabitation should continue as a trigger for

cessation, whether periodical payments should reduce when the children had finished secondary as opposed to tertiary education, whether the original and unusually complex RPI indexing clause should remain as drafted, and whether extras over school fees should be paid at the same levels as previously agreed.

the court being seemingly satisfied where (unless the payee is considered as undeserving, as in *North*) the outcome of the application to vary given changed circumstances based on an increase in the payer's income, results in an award that is similar in proportion to that of the original order. This of course cannot in

In relation to budgets, the court should not rely on the judicial concept of 'reasonable requirements' as a determinative or limiting factor.

The President found that those items should remain as originally agreed with the consent order and was at pains to emphasise that an important element in relation to each was the very fact that they had been agreed between the parties as part and parcel of the original order.

Summary and conclusions

The three recent authorities I have reviewed in these two articles are very different in terms of their facts and each of the judgments is detailed, taking in a review of the existing authorities. Despite the widely differing circumstances involved, certain themes do evolve, notably in terms of the treatment of the element of compensation as an aspect of fairness, and also in terms of

any way be taken as any overall guide, or certainly nor as any principle, as the courts are always at pains to emphasise that each case is fact-specific. However, a detailed reading of the judgments leaves this writer with the clear impression that in each instance the courts are very satisfied when the outcome arrived at is very close proportionally to that of the original order.

Set out in the box below are some suggested points of general application, some of which are more abstract or generic in nature, others that are of a more practical or specific quality. This area is, as with all areas of family law, developing, but it seems clear that at least for the time being the issue of compensation is very much alive in the area of applications to vary maintenance. ■

Points for general application

- Compensation/relationship-generated disadvantage can constitute an element of the award on an application to vary, notwithstanding that the original order, likely to be pre-*Miller/McFarlane*, did not.
- Where there will not be a capitalised clean break it is not always necessary to consider the compensation element as a separate head from the element of the payee's needs as generously interpreted, which can include an element for compensation.
- In relation to budgets, the court should not rely on the judicial concept of 'reasonable requirements' as a determinative or limiting factor. The award on variation may in some cases be beyond the wife's budget, as assessed by the court.
- For compensation to apply the wife does not necessarily need to be the paradigm 'Mrs McFarlane'.
- Precise quantification and valuation as to the capital position of the husband is not determinative.
- The percentage of income originally ordered by way of maintenance might be a guide to outcome.
- It is unlikely to be easy to have other elements of any agreed original order varied, for example extras for school fees, cohabitation as a trigger for cessation, or RPI indexing.
- Consider using a *Duxbury v Duxbury* [1990] formulation as a check, as opposed to being determinative when assessing any capitalised figure.
- If acting for the payer on original orders, consider seeking declarations and agreements from payees that might restrict the circumstances under which, or limit the extent to which, variation can be made, given the courts' apparent emphasis on the weight to be attached to agreements reached by the parties forming part of the original substantive order, or as contained in the preamble.
- Approach the case as a full fact find, as you would any ancillary relief claim, on the basis that the proper approach of the court is to apply the precise terms of the statute, ie to consider all section 25 criteria, then to apply those in light of the recent House of Lords authorities.
- Do the cases of *Lauder* and *VB v JP* hint at the operation of a one-third approach (still) being adopted? Is *Wachtel v Wachtel* [1973] lurking in the wings even now?