

IN THE FAMILY COURT AT BLACKPOOL

Chapel Street
Blackpool

Before HIS HONOUR JUDGE BOOTH

IN THE MATTER OF

V (Applicant)

-v-

V (Respondent)

MR LIAM KELLY, instructed by Advocate, appeared on behalf of the Applicant pro bono

THE RESPONDENT appeared in person

**APPROVED JUDGMENT
19 DECEMBER 2024**

WARNING: This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

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JUDGE BOOTH:

The appeal

1. This is an appeal from a judgment and order of Deputy District Judge Davis (“the Judge”) dated 7 February 2024 in financial remedy proceedings. This appeal raises the difficult challenge where a case is primarily concerned with the needs of the parties and their children but there is not sufficient to meet those needs. The Judge did her best to attempt to meet the needs of both parties but as will be demonstrated below this led her into error.

2. I have anonymized this judgment to protect the children of the family. Given the history, there is a danger in “jigsaw” identification. Care needs to be exercised.

Background

3. Let me set out some of the history. Mrs V is 38 years of age and Mr V is 44 years of age. They began cohabiting in 2007 and married in 2014. They have two children aged 11 years and eight years. When they began to live together Mr V moved into a property owned by Mrs V and a lump sum was paid to her former husband.

4. That was how things remained until 2000 when sadly the husband had an accident at home which rendered him tetraplegic. No one was to blame for his accident, and he received no compensation. An insurance policy paid out £103,000 and that allowed the parties to buy the final home they owned together. That property required adaptation so that it could meet the husband’s needs and that was funded by charitable donations, fundraising by friends and family, and donations from local businesses.

5. Whilst the work on the house was completed the family lived with the husband’s mother in very crowded circumstances. Unfortunately, Mr V suffered a significant bed sore injury which resulted in him spending over a year in hospital by which time the marriage had broken down. On the parties’ separation, Mrs V and the children moved out to live in rented accommodation and Mr V remained in the family home supported by carers.

6. The outcome of the financial remedy proceedings was an order that the family home should be sold with the net proceeds of sale divided as to 55 per cent to Mr V and 45 per cent to Mrs V. The date of the sale was to be two years after the final hearing.

7. Mr V issued an appellant’s notice within time seeking to have the order of the Judge set aside and replaced with an order that allowed him to remain in the adapted house. I granted Mr V permission to appeal and listed the matter before myself.

Representation

8. At this appeal hearing Mr Kelly has represented Mr V, instructed by Advocate, pro bono. Mrs V has represented herself being unable to afford solicitors and still in debt to her solicitors for their representation at the hearing before the Judge.

9. I am grateful to Mrs V for the sensitive and if I may say so insightful way in which she conducted her case. She acknowledged, as is undoubtedly the case, that her husband's accident has been a disaster for him but also his children who have been badly affected and for her.

The applicable law relating to appeals.

10. Family Procedure Rules 2010, rule 30.3 provides that permission to appeal may only be given where the appeal has a real prospect of success or there is some other compelling reason why the appeal should be heard. The test is that there must be a realistic as opposed to fanciful prospect of success. The fact that permission to appeal has been granted does not of course guarantee a successful appeal. Rule 30.12 provides that every appeal will be limited to a review of the decision of the lower court, which is what has happened in this case.

11. The appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. There is no allegation here of a serious procedural or other irregularity, so it all comes down to whether the Judge was wrong. In this regard I must be satisfied that the order made was not one that was available to the Judge in the exercise of her discretion. In other words, it must be an order that no Judge should have made. That test sets the bar fairly high.

The law on financial remedies.

12. The Judge had to apply section 25 of the Matrimonial Causes Act 1973 as amended in deciding what orders to make pursuant to sections 23 and 24. It is the duty of the court:

“... to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of both children ...”.

13. The Judge then had to have particular regard to the matters set out in section 25(2), namely:

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of any benefit which, by reason of the dissolution ... of the marriage, that party will lose the chance of acquiring.

14. By section 25A(1) the court is encouraged to achieve a clean break between the parties as soon as it is just and reasonable.

15. The overall requirement in applying section 25 is to achieve fairness. There is to be no discrimination in financial remedy cases between a husband and wife. In the case of *Miller v McFarlane* [2006] UKHL 24, the House of Lords identified three principles that should guide the court in trying to achieve fairness, namely: (a) the sharing of matrimonial property generated by the parties during the marriage; (b) compensation for relationship generated disadvantage; and (c) needs balanced against ability to pay.

16. The issue that arises in this case is whether, having concluded that this was a needs case, the Judge made an order that did indeed provide for the needs of one or both parties and the children.

17. The difficulties presented by cases involving limited assets was considered in *Butler v Butler* [2023] EWHC 2453 (Fam) by Moor J. At paragraph 39 he said this:

“The first point to make is an important one. In some respects, it is the answer to this appeal. The fact that a Judge rightly concludes that a case is a ‘needs’ case does not mean that the Judge must then make an order that satisfies both parties’ needs. In one sense, this is obvious, because there may simply be insufficient assets to satisfy the needs of either party, let alone both ... There will, however, be ... cases where the assets may only be barely sufficient to do so or, potentially, not sufficient. These are the most difficult cases, and this is one of those.”

The findings of the Judge

18. Let me next deal with the findings that the Judge made that are relevant to this appeal. The agreed net value of the family home was £206,000. Both parties were found to have liabilities and loans although these were not identified by amount. In fact, the wife’s debts

are £27,000 and the husband's debts £18,000. Mrs V has no pension and Mr V has only a very small pension. Mrs V has a part-time business which she runs from home. She has ambitions, recorded the Judge, to increase her income. However, she receives Universal Credit which reduces as her earnings increase. The Judge made this finding:

"I find it likely that her overall income will more than likely stay the same for the foreseeable future unless the money earned from her business increases significantly."

19. The Judge revisited this later in the judgment and said:

"The income is more than likely to remain the same, at least for the foreseeable future."

20. Mr V cannot work and is reliant on Universal Credit and PIP. That will not change.

21. The Judge recorded of both parties' evidence that their income did not match their outgoings.

22. The next relevant point is what would happen if the family home were sold, and neither were able to purchase an alternative property? The Judge said this:

"...[T]here is not enough money in the pot for them to buy outright. Therefore, each would have a sum that would most likely impact heavily on their right to benefits. I find that would not be in the interests of anyone."

23. The next findings were in relation to the adapted property occupied by the husband. The Judge made two findings: (a) that the current size of the property was not necessary for him; and (b) that it would be preferable for the husband to stay in the house but that that was not the same as being "necessary". On that basis, she decided to order a sale. It is not clear to me where the test she applied came from or why she thought it appropriate.

24. The postponing of the sale for a period of two years arose in this way and is explained in paragraph 43 of the Judge's judgment:

"I do accept that it will take some time to find a suitable property but also, as already mentioned, neither party is in a position to obtain a mortgage at this stage and evidence has been given that this could take around two years. Therefore, I order that the property is not sold for two years which will enable both parties to clear their debts, identify suitable properties, have adaptations made if necessary, and to obtain mortgages."

25. An analysis of this conclusion against the findings reveals the fatal flaw in the Judge's reasoning. Both parties have insufficient income to meet their current needs so neither can pay down their debts either now or during the next 2 years, (a period within the "foreseeable future"). The Judge found that neither will have any real increase in their income for the foreseeable future. Neither can obtain a mortgage until their debts are paid. They could only pay their debts from the proceeds of sale of the house. Neither would have sufficient left to buy anywhere else. And the scheme run by the relevant local authority to assist with adaptations to a home only applies to a home that is already owned or occupied by a party. In other words, the adaptations cannot take place until after the replacement house has been purchased, for which there is insufficient money.

26. The next issue that led the Judge into error appears in paragraph 44 where she said this:

"I find that although in principle there should be an equal division, the husband's housing needs will require more assets than the wife's."

27. The Judge said this in the context of considering a fair split, looking at section 25, and the welfare of the children, and the husband's increased housing needs due to his disability. Meeting needs should come first. A cross check against equality adds little value in cases of very limited assets.

28. What the Judge did not grapple with was this fundamental issue: in some cases, there is insufficient to meet the needs of both parties. The court must make a choice. Here, the choice was between the husband's disability generated needs and the interests of the children. Previously decided cases involving serious disability

29. The court was referred to the decided cases where a party was disabled by an accident and the court was dividing up compensation received because of the accident where marriages have broken down, namely *Wagstaff v Wagstaff* [1992] 1 FLR 333, *C v C (Financial Provision: Personal Damages)* [1995] 2 FLR 171, and *Mansfield v Mansfield* [2012] 1 FLR 117. Although the issues in all those cases were inevitably different to the issues facing the Judge, one consistent point is made throughout those cases, namely that the disability where it is of the nature of tetraplegia, as here, will invariably take precedence over the welfare needs of the children when it is not possible to adequately meet both.

30. In relation to the decisions I have referred to, Mr Kelly put it this way:

"Pulling the threads together it is submitted the following principles can be distilled: (a) the court need not make an order that satisfies both parties' needs; (b) the needs of a disabled spouse have priority, including meeting their housing needs; (c) where there is

capital available from other assets other than the disabled spouse's home, the court may use such to make an order for such lump sum as the court deems fair in all the circumstances of the case; (d) where a lump sum for capital is made which is above and beyond a non-disabled spouse's long-term needs, there shall be a reversion by way of *Mesher* order at a suitable time."

31. Mr Kelly is wrong to describe those as principles. They are examples of the way in which the court has exercised its discretion on the particular facts of each case, and each case will have its own unique facts.

32. Here, what the Judge needed to grapple with, and I will have to grapple with, is to balance the needs of Mr V consequent upon his tetraplegia and his need to be cared for in a home adapted to meet his needs even if the home is not perfect in its adaptations, and to balance that against the needs of the children who were inevitably adversely affected by what befell their father and where the whole family has struggled to come to terms with the loss of the life that they had anticipated.

33. On the facts of this case, it seems to me that the disability of Mr V is so significant, such that the need for him to be in a home where his needs can be adequately met is the need that dominates. Once that is established, that requires him to have the use of the adapted house albeit it is the only capital asset available to the family. His occupation will be to the exclusion of Mrs V and the children. That means that their future is likely to be in rented accommodation.

What are the consequences of that choice?

34. The house is in the joint names of Mr and Mrs V. They are each equally entitled to share in the proceeds of sale. In order to provide for Mr V, it should be transferred into his sole name.

35. When should there be a sale? There may come a point where Mr V no longer needs the use of the family home, either because he has died, or his condition had deteriorated so that he required some form of institutional care on a permanent basis. That would be the point at which the house should be sold. That postponement of the sale would be pursuant to a *Mesher* order - *Mesher v Mesher* (1973) (Note) [1980] 1 All ER 126. The circumstances I have described would act as a trigger for a sale. An application could be made to the court for an earlier sale if circumstances arose that justified a sale, but which cannot be envisaged at this stage with a provision providing for a sale on a further order of the court.

36. Should the distribution remain at half each? Mrs V may be kept out of her share for many years to come. That of itself would be justification for her having an enhanced share.

Mr V may still have debts and should have some entitlement to make his own provision for his children on his death or on a sale.

37. In my assessment, a distribution of 75% to Mrs V and 25% to Mr V achieves a fair outcome.

Conclusion

38. I therefore allow the appeal and set aside the order for sale and the property adjustment order and transfer the house to the husband subject to a beneficial holding and the trigger events as set out above.
