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Family Finance Flyer No 60

A 'Needs' Must

A summary of 'Guidance on Financial Needs on Divorce' (June 2016) published by the Family Justice Council Financial Needs Working Group.

The Law Commission when considering their recommendations on '*Matrimonial Property, Needs and Agreements*' (2014) dispatched the obligation of providing a definition of 'needs', which could be adopted universally as an approach by all levels of Family Judges to the Family Justice Council. The result some 2 years later has now been produced from the work of a committee of acknowledged experts in the field under Roberts J.

The published Guidance runs to 63 pages. For the busy practitioner there is a need to get at the basic principles set out, whilst understanding that the finer supporting detail can be found, if required, in making closer reference to the body of the published report.

The content of the report is very important and will now have relevance to most financial remedy cases before the Courts. Indeed, it is likely that, increasingly, this report will be referred to as the definitive one- stop shop for the principles applicable – which, indeed, was the basic intent of the Law Commission in the face of its findings that there was inconsistency in application on such matters throughout the country. In the Table below, the reader will find an attempt to provide a quick reference to the primary principles set out in the report:-

FJC APPROACH TO THE PRINCIPLES ON ‘NEEDS’	Pages
Introduction to this guidance <i>Law Commission Concerns</i> <ul style="list-style-type: none"> • Unacceptable regional disparities • No statutory definition of needs • More litigants in person without lawyers to manage their expectations 	4>7
The overall objective <i>Law Commission objective for financial orders</i> <ul style="list-style-type: none"> • To meet needs to enable a transition to independence to the extent that is possible in the circumstances • Needs may well, and commonly do, provide a justification for a departure from equal sharing 	13>14
The justification for meeting needs through financial remedies <i>Needs generated by the relationship</i> <ul style="list-style-type: none"> • Marriage typically creates a relationship of interdependence • Dependence is commonly created by the presence of children • Potentially long term dependence can be created by decisions for one party to discharge family obligations at the expense of the development of employment potential • It is generally right and fair that relationship generated needs should be met by the other party if resources permit 	15>16
<i>A note on terminology</i> <ul style="list-style-type: none"> • The term “reasonable requirements” to describe needs is now not approved • The term “needs (generously interpreted)” has gained acceptance to assist determination in higher resource cases 	17>18
Measuring Need <ul style="list-style-type: none"> • Need will be measured by assessing available financial resources • The court will strive to stretch finite resources and where resources are modest the children’s needs may predominate • Need will be measured by assessing the standard of living during the relationship, generally the longer the relationship’s duration the more important this factor will be • A party may be expected to suffer some reduction in standard of living having regard to the overall objective of a transition to independence • To measure need, and the ability to meet it, both parties will be expected to present appropriately detailed budgets to the court 	19>22
Assets from which needs may be met <ul style="list-style-type: none"> • Needs may be met from non-matrimonial resources • A court in a needs case should not focus on the marital acquest, but should instead consider all the available assets 	23

<p>The needs of both parties</p> <ul style="list-style-type: none"> • The court will assess the needs of both parties • Before requiring payments to meet need the court will stand back and consider what portion of the payer’s resources should fairly go to the payee • Where resources are modest the children’s need for a home with their primary carer may predominate but, if possible, the court will strive to stretch resources to provide a home for children with each of their parents • The court will consider the detrimental impact of requiring one party to remain on the mortgage of the other’s home for an indefinite period 	<p>23>24</p>
<p>Housing and the use of Mesher orders</p> <ul style="list-style-type: none"> • If the needs of the children require one party to sacrifice an entitlement to capital in favour of the primary carer then the court will consider reimbursement to the sacrificing party through a Mesher order • This may not be appropriate if the capital sacrificed can be generated through anticipated future endeavours by the sacrificing party • The fairness of a Mesher order may also be undermined by the likely effects on the primary carer at the time the trigger events apply 	<p>25>27</p>
<p>Overview</p> <p><i>In G v G (2012) EWHC (Fam) 167 having reviewed the earlier authorities, Charles J opined (in full) as follows:</i></p> <p><i>“What I take from this guidance on the approach to the statutory task is that the objective of achieving a fair result (assessed by reference to the words of the statute and the rationales for their application identified by the House of Lords):</i></p> <ul style="list-style-type: none"> <i>i) is not met by an approach that seeks to achieve a dependence for life (or until re-marriage) for the payee spouse to fund a lifestyle equivalent to that enjoyed during the marriage (or parity if that level is not affordable for two households), but</i> <i>ii) is met by an approach that recognises that the aim is independence and self-sufficiency based on all the financial resources that are available to the parties. From that it follows that:</i> <i>iii) generally, the marital partnership does not survive as a basis for the sharing of future resources (whether earned or unearned). But, and they are important but:</i> <ul style="list-style-type: none"> <i>a) the lifestyle enjoyed during the marriage sets a level or benchmark that is relevant to the assessment of the level of the independent lifestyles to be enjoyed by the parties,</i> <i>b) the length of the marriage is relevant to determining the period for which that level of lifestyle is to be enjoyed by the payee (so long as this is affordable by the payer), and so also, if there is to be a return to a lesser standard of living for the payee, the period over which that transition should take place,</i> 	<p>28>29</p>

<p><i>c) if the marriage is short, this supports the conclusion that the award should be directed to providing a transition over an appropriate period for the payee spouse to either a lower long term standard of living than that enjoyed during the marriage, or to one that is not contributed to by the other spouse,</i></p> <p><i>d) the marriage, and the choices made by the parties during it, may have generated needs or disadvantages in attaining and funding self-sufficient independence that (i) should be compensated, and (ii) make continuing dependence / provision fair,</i></p> <p><i>e) the most common source of a continuing relationship generated need or disadvantage is the birth of children and their care,</i></p> <p><i>f) a continuing relationship generated need is often reflected in a continuing contribution to the day to day care of the children of the relationship, that contribution being recognised by the continuing financial contribution of the paying spouse (which is a continuing contribution to the day to day care of the children),</i></p> <p><i>g) the choices made by the parties as to the care of their children are an important factor in determining how that care should be provided and shared both by reference to day to day care and the funding of the independent households, and</i></p> <p><i>h) the provisions of s. 25A must be taken into account.</i></p>	
<p>The duration of provision for needs and the transition to independence</p> <p>Duration and the transition to independence</p> <ul style="list-style-type: none"> • Most case outcomes tend eventually not towards life-long support but towards independence, but this is not appropriate in all cases • If needs are to be met through a periodical payments order then the court must consider (whether making an initial order or a variation order) whether to make a joint lives order, an extendable term order or a non-extendable term order • In deciding on the duration of any order the court will need to consider the statutory steer towards the termination of obligations at the earliest point which is just and reasonable, but termination should only occur if the payee can adjust to it without undue hardship • Termination of the obligations should not be achieved at the expense of a fair result • Termination of the obligations should be justified by reference to an evidential foundation, not crystal ball gazing or pious exhortation 	30>39
<p>Undue hardship</p> <ul style="list-style-type: none"> • A clean break should not be achieved at the expense of a fair result • There is a distinction between “undue hardship” and “hardship” and a payee might be expected to suffer a degree of hardship - not all reductions in the standard of living amount to undue hardship • In assessing undue hardship the court is likely to draw a distinction between, for example, short childless marriages and marriages which are 	40>41

either long or involve children or both	
<p>Fixed or extendable terms: s.28(1A) MCA 1973</p> <ul style="list-style-type: none"> • Where a term order is made the court must decide whether it is to be extendable • Where a party seeks to extend the term the court must carry out a fresh analysis of need, but the reason for the imposition of the initial term is likely to be a relevant and possibly decisive factor 	42
<p>Step down maintenance orders</p> <ul style="list-style-type: none"> • When making a periodical payments order the court may impose future step ups or step downs of the amount to be paid to anticipate future changes in circumstances, for example an anticipated gain of employment 	43
<p>Factors to be Taken into Account</p> <p>When considering whether to make a ‘joint lives’ or ‘term order’ for (spousal) periodical payments, with or without a ‘section 28(1A) bar’, it is recommended that courts have regard (inter alia) to the following matters:</p> <ul style="list-style-type: none"> • age • health and mobility • relevant qualifications • previous work experience • length of time since last employment • the opportunity to brush up, acquire skills or retrain • cost and availability of retraining • availability of work • child care commitments and the daily routine • age, health and any particular child/children or other dependants • childcare options and cost • realistic level of net remuneration • availability of work related state benefits • net financial gain after paying childcare and work related expenses • the extent to which there has been pension sharing to take account of future needs • compatibility of working with caring for any children • attributing an earning capacity in view of the length of the marriage and the ex-spouse’s net remuneration and ability to pay 	44>45
Annex 1: table of MCA 1973/CPA 2004 provisions	47
Annex 2: annotated worked Examples	48>61

Annex 3: Pensions

“Need” involves in most divorces income in retirement. This will be more acute for parties approaching or past retirement age, but even for younger parties this need will be seen by the courts as being “in the foreseeable future” (s 25(2)(b)). Also by s 25(2)(h) must consider the widow’s pension rights which will be lost on divorce.

The orthodox view, (see *Martin-Dye v Martin-Dye* [2006] 2 FLR 901), is that the need for income in retirement should primarily be achieved by way of a pension sharing order. The orthodox logic has been that pensions (being a sui generis species of future income stream) should be dealt with separately and discretely from other capital assets.

In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the “pension freedoms” introduced by Taxation of Pensions Act 2014, as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme, have blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see *SJ v RA* [2014] EWHC 4054 (Fam) and *JL v SL* [2015] EWHC 555.

In small to medium money cases, however, where needs are very much in issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need. The need to avoid the possibly punitive tax consequences of cashing in a pension may be more important in these cases and the mathematical consequences of making a pension sharing order (for example because of an external transfer from a defined benefit scheme to a defined contribution scheme or the loss of a guaranteed annuity rate) can be unexpected and often justify expert actuarial assistance: see *B v B* [2012] 2 FLR 22. In cases where state pension income is an important component of meeting need, the complicated changes introduced in April 2016 provide additional justification for expert pension evidence.

In cases where (for whatever reason) a court wishes to set off the value of a pension against other assets the methodology to be utilised is uncertain. Where needs are the dominating factor, ensuring that the outcome of any offsetting capital provision is understood, in terms of what the parties will each receive in income terms, will be critical and the court may often be assisted by expert pension evidence.

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