

Reasonable Needs

- What are the golden rules of how to challenge a spouse's monthly budget on the grounds of reasonable need?
- What evidence do you require?
- What will sway the court?
- How do you gain an edge?

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Why needs?

- Is our jurisdiction out of kilter with other common law and civil law systems?
- Other jurisdictions don't have any equitable distribution taking into account needs. Very few have spousal maintenance payable for life
- France – judge orders a 'partition' of property supervised by a notaire. There are 4 regimes for the partition of matrimonial property. Compensatory benefit can be awarded – but usually in form of lump sum. Needs not directly relevant. Spousal maintenance usually on any interim measure.
- USA – California and Texas follow community of property rules when dividing property – just allow for spousal alimony and child maintenance. Most follow some sort of equitable jurisdiction based on circumstances

“Needs” in section 25

- “first consideration to the welfare while a minor of any child of the family”
- Only “financial” needs
- Not “reasonable”
- Not “reasonable requirements”
- Nor needs “generously interpreted”;
- Nor “relationship-generated needs”

What does “needs” mean

There is no statutory definition of ‘needs’ under English law. The issue has been addressed in a number of reported cases. The old language of ‘reasonable requirements’ was largely swept away by White v White because of the judicial tendency to limit awards by reference to that concept. More recent decisions have adopted an approach of ‘generously interpreted needs’ although this has come under attack as an impermissible judicial gloss on the words of the statute.” per Roberts J in Juffali v Juffali [2016] EWHC 1684, [2017] 1 FLR 729 at para 71

*O, reason not the need! Our basest beggars
Are in the poorest thing
superfluous. Allow not nature more than nature needs,
Man's life's as
cheap as beast's. Thou art a lady. If only to go warm
were gorgeous,
Why, nature needs not what thou gorgeous wear'st,
Which scarcely
keeps thee warm.*

King Lear: Act 2 Scene 4 – quoted in *SS v NS (Spousal Maintenance)*
[2014] EWHC 4183 (Fam), [2015] 2 FLR 1124 per Mostyn J at paragraph
40.

“Unbounded discretion”

So far as the “needs” principle is concerned there is an almost unbounded discretion. The main rule is that, save in a situation of real hardship, the “needs” must be causally related to the marriage. Like equity in the old days, the result seems to depend on the length of the judge’s foot. It is worth recalling that Heather Mills-McCartney was awarded over £25m to meet her “needs” (McCartney v McCartney [2008] EWHC 401 (Fam)). Mrs Juffali was awarded £62m to meet her “needs” (Juffali v Juffali [2016] EWHC 1684 (Fam)). In the very recent case of AAZ v BBZ [2016] EWHC 3234 (Fam) the court assessed the applicant-wife’s “needs” in the remarkable sum of £224m. Plainly “needs” does not mean needs. It is a term of art. Obviously, no-one actually needs £25m, or £62m, or £224m for accommodation and sustenance. The main drivers in the discretionary exercise are the scale of the payer’s wealth, the length of the marriage, the applicant’s age and health, and the standard of living, although the latter factor cannot be allowed to dominate the exercise. FF v KF [2017] EWHC 1093 (Fam) at 18 per Mostyn J

Family Justice Council

'Measuring Need'

- 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 relationships 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

(Paragraph 23 Guidance on "Financial Needs" on Divorce; April 2018; 2nd Edition)

The latest word? Waggot

- *The principle of need does not require elaboration. The court has to determine both the level at which and the manner in which the applicant spouse's needs should be met.*
- Waggot v Waggot [2018] EWCA Civ 727 per Moylan LJ, 11 April 2018 (paragraph 99) – with whom the President and McDonald J agreed

Waggot

Meeting needs out of shared capital?

- *(ii) How should the court assess whether an award determined by application of the sharing principle meets the party's needs? More specifically to the arguments advanced in this case, to what extent is it fair for the wife to be required to use her sharing award to meet her income needs when the husband will meet his needs from earned income? at paragraph 1*
- *As to the specific issue raised in this case, namely whether it is fair for an applicant spouse to be required to use their sharing award to meet their income needs when the other spouse will meet their needs from earned income, the answer is that the latter factor will be relevant to the court's determination of the former issue. (Para 34)*

It depends ...

- *Given the range of options from full amortisation to an assumed rate of return and the range of potential circumstances (including all the section 25 factors) it is difficult to see how a definitive outcome can, in fairness, be mandated for all cases. In some cases it will clearly be fair for that part of the sharing award available to meet income needs to be fully amortised, for example, because neither party has any resources other than those being shared. In other cases, the court might take the view that the applicant should have a greater level of security than that provided by an amortised sum because of the respondent's earnings and apply only an assumed rate of return. To repeat, when determining this issue, the court will need to have regard to all the relevant circumstances, to the clean break principle and, as appropriate, the issue of undue hardship (para 34)*

Standard of Living

- *It is a mistake to regard the marital standard of living as the lodestar*
at SS v NS, para 35

Whilst that observation was made in the context of a case where there were limited resources and where ongoing provision for monthly spousal maintenance was required to meet needs, it is a general principle with which I wholeheartedly agree, as did Moylan J in BD v FD. In that case, his Lordship took the view that in the case of a very long 30-year marriage, where there were ample resources to meet the claim, the longer the length of the marriage and/or the periods over which the applicant spouse would be making ongoing contributions to the welfare of a child or children of the family, the more likely the court will decide that the applicant spouse's needs should be provided for at a level which is similar to the standard of living during the marriage. Juffali para 77

Juffali – principles summarised (para 79)

(i) The first consideration in any assessment of needs must be the welfare of any minor child or children of the family.

(ii) After that, the principal factors which are likely to impact on the court's assessment of needs are:

(i) the length of the marriage;

(ii) the length of the period, following the end of the marriage, during which the applicant spouse will be making contributions to the welfare of the family;

(iii) the standard of living during the marriage;

(iv) the age of the applicant; and

(v) the available resources as defined by s 25(2)(a).

(iii) There is an inter-relationship between the level at which future needs will be assessed and the period during which a court finds those needs should be met by the paying former spouse. The longer that period, the more likely it is that a court will not assess those needs on the basis throughout of a standard of living which replicates that enjoyed during the currency of the marriage.

(iv) In this context, it is entirely principled in terms of approach for the court to assess its award on the basis that needs, both in relation to housing and income, will reduce in future in an appropriate case.

Short Marriages

- *In a short marriage case the discretion when assessing needs is particularly broad and fact-sensitive. Although empirical research shows that in many such cases the quotidian need is determined by an award of a term of years, there is no rule, or even guideline, to this effect. There have been cases where lifelong support has been awarded after a short marriage: see, for example, C v C [1997] 2 FLR 26, where lifelong periodical payments were awarded, Ward LJ at page 43D specifically rejecting the submission that there should be a principle that a short marriage demands a term payment. In Miller v Miller at first instance (M v M [2005] EWHC 528 (Fam)) Singer J assessed the wife's needs after that short marriage at £5m comprising the former matrimonial home valued at £2.3 million and a Duxbury fund of £2.7 million producing for that 36-year-old woman £90,000 spendable for every year for the rest of her life. FF v KF above at paragraph 19*
- See also AB v FC [2016] EWHC 3285; [2018] 1 FLR 965 per Roberts J

“Relationship generated”

- *For my part I find it difficult to see why it is just and reasonable that an ex-husband should have to pay spousal maintenance or enhanced spousal maintenance by reference to factors which are not causally connected to the marriage, unless one is looking at the issue in a macro-economic utilitarian way and deciding that in such circumstances it is better that the ex-husband picks up the cost of the ex-wife's support rather than the hard-pressed taxpayer. This, again, is a matter of social policy. But I would suggest that in such a case spousal maintenance payments should only be awarded to alleviate significant hardship. SS v NS (supra) at paragraph 31*

Danger 1:

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 entirely accept that when a marriage breaks down, the maelstrom of a broken relationship may well envelop both spouses and make it very difficult for them to re-order their lives, particularly financial. But I have no doubt that in the wife's mindset, there was an element that she was going to spend (in the 15-month period) in order thereby to hope to prove that a budget in excess of £3m pa put forward in her Form E in September 2006 was justifiable. McCartney v Mills McCartney [2008] EWHC 401 (Fam) - [2008] 1 FLR 1508 per Bennett J at 173

These items in her budget which I have touched upon above, illustrate generally speaking, how unreasonable (even generously interpreted) are the claimed needs of the wife. In the absence of any sensible proposal by the wife as to her income needs I must do the best I can on the material I have. If the wife feels aggrieved about what I propose she only has herself to blame. If, as she has done, a litigant flagrantly over-eggs the pudding and thus deprives the court of any sensible assistance, then he or she is likely to find that the court takes a robust view and drastically prunes the proposed budget.

Mills: Para 230

Danger 2:

- *When approaching the wife's budget, the judge was entitled to take account, as he did, of the parties' high standard of living during the marriage. The wife had taken the trouble to itemise her budget, which the judge considered critically, deciding that she could reasonably be expected to trim it a little more, but no further. The husband had provided no budgetary information at all, leaving the judge to do the best he could to forecast what his needs might be and to ensure that his order would leave the husband with sufficient for them. Rapp v Sarre [2016] EWCA 93; [2017] 1 FLR 782 per Black LJ. Husband was arguing that respective needs equal.*

Budgetary advice

- Sound evidential basis
- Historical resonance – so hobbies (say jam making or keeping horses) and holiday homes allowed if there in past; domestic support;
- If capital poor, income rich– may even get future housing needs (mortgage illustrations and forecasts) and replacement cars (not referable to “maintenance” like CMEC/CSA)
- ‘Stockpiling’ – save up for the clean break (see SS v NS above and AB v FC above)
- But beware capital expenditure and double accounting
- Consistent periods – weekly, fortnightly, monthly, quarterly, annually
- Checking with local authorities and utilities etc with future estimates
- Payer can/should prepare their own budget too!
- Avoid “own goals”!

Distinguish fixed and discretionary expenditure?

The proper approach would be for the district judge to calculate a total figure for maintenance which covers what he finds to be her ordinary expenditure together with such sum as would provide for what as Moylan J described in AR v AR, at para [71] as 'additional, discretionary, items which will vary from year to year and which are not reflected in her annual budget'. Having carried out this exercise the court will then make a monthly order to be paid for from salary at whatever rate the district judge feels to be fair, and the balance to be expressed as a percentage, of the net bonus up to a stated maximum each year. H v W [2013] EWHC 4105; [2015] 1 FLR 75

“Stand Back”

- *But the essential task of the judge is not to go through these budgets item by item by stand back and ask, what is the appropriate proportion of the husband’s available income that should go to the support of the wife? Purba v Purba [1999] EWCA Civ 1730; [2000] 1 FLR 444 CA per Thorpe LJ at page 449*
- *The essential task of the judge is not merely to examine the individual items in the claimant’s income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent’s available income that should go to the support of the claimant. SS v NS at para 46*

The Blue pencil

This is not a case where it would be proportionate or appropriate for me to take a proverbial blue pencil to each item or category of expenditure in W's budget for herself and A. I agree with [counsel for H's] approach that there is inevitably an instinctive figure which is likely to emerge from the totality of the evidence which has been put before the court. W accepted in her evidence that, at the end of the day, she will work within the budget which the court considers appropriate. However, judicial instinct, shaped and honed as it is by experience of many previous similar cases, has nevertheless to be anchored to some basis or rationale. AB v FC at paragraph 102